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A JEFFERSONIAN REPUBLIC BY HAMILTONIAN MEANS: VALUES, CONSTRAINTS, AND FINANCE IN THE DESIGN OF A COMPREHENSIVE AND CONTEMPORARY AMERICAN "OWNERSHIP SOCIETY"

ROBERT HOCKETT*

I. INTRODUCTION: FROM "PROGRAMS" TO "SOCIETY"

Use of the phrase "ownership society" to designate an end state toward which one believes that American policy should strive entails certain commitments. The usage cannot mean merely that public policy ought to seek to bring about a society in which some people own some things; we have lived in that society, without interruption, since the first days of our republic. Nor can use of the phrase contemplate merely a society whose law recognizes, vindicates, and protects property rights; again, that has been a central feature of our polity since its first days under our present constitution. To what, then, can the notion of an "ownership society" refer? It must refer to a society whose members are publicly conscious of the individual and the societal value of ownership, and who work systematically to propagate that value among themselves. The "ownership society" ("OS"), that is, not only recognizes, preserves, and protects ownership, but also it celebrates, fosters it, and spreads it. It is, in

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HeinOnline -- 79 S. Cal. L. Rev. 45 2005-2006

short, a latter-day rendition of that venerable American ideal, the Jeffersonian "yeoman republic."[1]

But making a society-shaping and enduring public commitment to ownership promotion raises several antecedent practical tasks that must be addressed both sensibly and sensitively if the project is to put down roots, flourish, and endure. First, the project must be conceived, articulated, and implemented in a manner consistent with the core values and political self-understandings of those who comprise the society that wills to be an OS. Where the society has featured multiple such valuational and political traditions over time, this task further requires that some synthesis of, or overlapping consensus among, these traditions be derived and articulated: an ideologically neutral yet nonetheless value-expressive language must be wrought.

Second, the project of developing an OS must be designed and pursued in a manner that makes optimal accommodation with, even optimal employment of, the facts of ownership psychology and fundamental law as we currently find them, however fixed or malleable they might be over time. If citizens tend, either consciously or unconsciously, to be more favorably disposed to the channeling of perceivedly "new" resources or opportunities toward hardworking nonowners than to redistributing portions of their own current holdings toward those same nonowners, an OS-in-the-making does well to take heed. And if longstanding legal distinctions between property rules and liability rules,[2] for example, are such that the perceived public value of ownership is more fully realized in and vindicated by the former than by the latter, then an OS-in-the-making with that legal heritage ought again to take heed.

Finally, a society devoted to becoming or remaining an OS should be mindful of, and learn from, its own programmatic past. It should find lessons in its earlier and contemporary attempts—however successful or unsuccessful, modest or ambitious, self-conscious or inchoate these attempts have been—at fostering and broadening autonomy-conferring and responsibility-rewarding ownership among its citizens. This task is synoptic and synthetic like the first task, and strategic like the second task. Indeed, its pursuit reveals the deep interconnectedness of the first two

1. Much has been written on the Jeffersonian "yeoman republic." For contemporary accounts of this ideological tradition, see, for example, LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980).

2. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). *See also infra* Part III.

HeinOnline -- 79 S. Cal. L. Rev. 46 2005-2006

tasks. For the effort to understand, interpret, and explain past and present OS-redolent programs and proposals, their political and implementary successes and shortcomings, is in effect an effort to draw explicit conceptual and programmatic syntheses from the thus far implicit and fragmented would-be OS's ideological, psychological, legal, and policy expressions as thus far incompletely realized.

The present Article is the next step in a sequence begun by a predecessor article devoted to the first two aforementioned tasks,[3] and is intended to discharge what I have here enumerated as the consummating and more complex third task. It is meant to conduct the aforementioned work of programmatic synthesis, in a manner that does justice to and makes effective use of the antecedent work of valuational, psychological, and legal synthesis. While the first article developed a unified American self-understanding and vocabulary from three dominant strands of American ideological tradition, then translated that self-understanding into a systematic, normative vision of ownership and ownership-spreading consonant with American endowment psychology and legal tradition, this Article develops a comprehensive national project of ownership-spreading from a constructive interpretation of America's fragmentary and programmatic history as an OS-in-the-making. Interpreting this history in light of the political, psychological, and legal theory developed in the previous article yields at least two critical benefits to those of us who wish to build an authentically American OS.

First, this Article empirically corroborates the theory of the predecessor article. It demonstrates the latter's overlapping ideological consensus and its charted psychological and legal constraints actually at work in both the politics and programmatics of past and present ownership promotion policies.

Second, this Article uncovers an underlying—and largely generalizable—financial form at work in the most successful and enduring American OS policies and programs tried to date. That form gives the fullest, most direct expression to the political, psychological, and legal constraints mapped in the predecessor article. It also suggests the lines that can "connect the dots" of our past, more piecemeal programs in a manner that will lend coherence, completeness, and a full project consciousness to our future efforts. That is in part to say that it offers further means of giving

3. *See* Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005) [hereinafter Hockett, *Whose Ownership?*]. The series is completed with a sequel to the present Article assessing the prospects of a "global" OS.

HeinOnline -- 79 S. Cal. L. Rev. 47 2005-2006

full articulation to a detailed, comprehensive, national plan to foster an OS that is true to our fundamental values, endowment sensibilities, and legal traditions. This plan can be described as broadly "Hamiltonian" in spirit both in its emphasis on financial engineering as a preferred means and in its recognition, in respect of ends, that a contemporary American OS will offer the private and public benefits of individual freedom, civic responsibility, and productive activity through ownership of more kinds of assets than arable land alone.[4]

In Parts II and III, the Article first quickly reprises the political, psychological, and legal synthesis developed in the predecessor article. Part II briefly lays out the basic contours of American self-understanding, where an OS consonant with fundamental American values is conceived in its basic structure as an "efficient equal-opportunity republic" ("EEOR"). The EEOR emerges as a polity in which core exogenous opportunity and risk endowments are spread widely, and endogenous benefit and burden holdings are allocated by complete and neutral markets that honor and remunerate productive, responsible effort. Part III briefly summarizes the translation of the EEOR into American legal and endowment-psychological terms. This part shows how most opportunity and resource endowments—even many of those traditionally conferred or protected by affirmative legislation or by traditional contract or tort doctrine—are best vindicated through property or quasi-property rules rather than liability rules. Further, it shows that exogenous endowments are best spread by financial engineering techniques that (a) spread perceivedly "new" opportunities and "undeserved" risks, and (b) channel opportunities and risks in ways that transparently encourage and reward responsible and productive effort.

Part IV sketches the general financial form of opportunity- and risk-spreading programs suggested by the syntheses summarized in Parts II and III. That form boils down to the American OS's direct provision of, or "jump-starting" of the private provision of, credit insurance, reinsurance, debt securitization, and "complete" risk-trading markets as preferred means of spreading ownership and risk in a manner consistent with the American EEOR's fundamental values, endowment heuristics, and legal traditions. Schematizing this general form prior to the interpretive programmatic history of Part V helps bring conceptual coherence to the latter, hence to

4. This Article works toward a reconciliation of that great divide—the Jeffersonian and Hamiltonian clash over how best to ensure an enduring and more perfect union—that split our country in its earliest days and continues, in significant measure, to divide us today. For further discussion on that divide, see, for example, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 257–450 (1993); FORREST MCDONALD, ALEXANDER HAMILTON 255–325 (1979).

HeinOnline -- 79 S. Cal. L. Rev. 48 2005-2006

our patchwork OS history itself. More importantly, it allows us to locate and close gaps in that fragmented history, enabling us to unify our efforts and undertake the programmatic task of building a full and authentically American OS—a "Jeffersonian republic by Hamiltonian means."

Part VI derives specific recommendations from the Part IV finance-informed historical interpretation of Part V, and finally, Part VII concludes with a reflection on the historic significance of what we shall have achieved in bringing about a truly comprehensive American OS.

II. VALUES REVIVED: THE AMERICAN OWNERSHIP SOCIETY AS AN EFFICIENT EQUAL-OPPORTUNITY REPUBLIC

An implementable and enduring American OS must cohere with, and ideally will deeply resonate with, our most cherished and culture-constituting values. Those foundational values find expression in three dominant strands of ideological or valuational tradition that recur throughout American political and constitutional history. The three traditions and their constitutive values converge upon a basic structure that I call the "efficient equal-opportunity republic," or "EEOR."[5] The EEOR is a schematic ideal; the closer that a society comes to approximating it in its basic outlines, the more fully that society conforms to or resonates with the core American values.

A. THREE POLITICAL TRADITIONS: CIVIC REPUBLICAN, CLASSICAL LIBERAL, AND PRAGMATIC CONSEQUENTIALIST

The first strand of American political tradition is the Civic Republican ("CR"), which has prized collective self-government by civically engaged, productively responsible, and materially independent—though, outside of deliberative community, potentially hyper-acquisitive or overreaching—citizens.[6] The aforementioned traits are underwritten by roughly equitable allocations of certain basic resources—material "stakes"—that afford citizens satisfaction only insofar as they use them prudently and productively. But differential luck—in particular, luck in the genetic lottery—enjoyed by republican citizens can threaten these "roughly equitable allocations" over time, giving rise to tendencies toward plutocracy, and ultimately, societal dysfunction and political instability. Yet some means of redressing those long-term disequilibria can

5. For a more detailed treatment of the subjects in this part, see Hockett, *Whose Ownership?*, *supra* note 3, at Parts II, III.

6. *See id.* at Part II.A.

HeinOnline -- 79 S. Cal. L. Rev. 49 2005-2006

superficially appear to threaten some republicans' cherished resource-rooted independence. Thus, there has historically been some ambivalence over the proper "balance" to be struck between "liberty" and "equality" in the CR tradition.[7]

Prototypic images of the ideal polity that have appealed to CR thinkers over time include the preimperial Roman Republic as idealized by some of its historians,[8] the northern Italian city-states of the early Renaissance as idealized by their historians,[9] the northern European republics of the early modern period as idealized by their apologists,[10] and of course, Jefferson's fabled "yeoman republic" as envisaged not only by Jefferson but also by many of the American founders.[11] CR thinking, idealized images, and

7. The EEOR addresses and aids in resolving this ambivalence. *See infra* Part II.B.2.

8. *See, e.g.*, POLYBIUS, THE HISTORIES (W.R. Paton ed. & trans., William Heinemann 1960) (n.d.); TACITUS, AGRICOLA, GERMANIA, AND DIALOGUS (R.M. Ogilvie et al. eds. & trans., rev. ed., Harvard Univ. Press 1980) (n.d.); VIRGIL, ECLOGUES, GEORGICS, AND AENEID (G.P. Goold ed., H. Rushton Fairclough trans., rev. ed., Harvard Univ. Press 1999) (n.d.).

9. *See, e.g.*, FRANCESCO GUICCIARDINI, DIALOGUE ON THE GOVERNMENT OF FLORENCE (Alison Brown ed. & trans., Cambridge Univ. Press 1994) (n.d.); FRANCESCO GUICCIARDINI, THE HISTORY OF ITALY (Sidney Alexander ed. & trans., Princeton Univ. Press 1969) (1561); NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chicago Press 1996) (n.d.); NICCOLÒ MACHIAVELLI, FLORENTINE HISTORIES (Laura F. Banfield & Harvey C. Mansfield, Jr. trans., Princeton Univ. Press 1988) (n.d.). *See also* MACHIAVELLI AND REPUBLICANISM (Gisela Bock et al. eds., 1990); HARVEY C. MANSFIELD, MACHIAVELLI'S VIRTUE (1996); J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 80–147 (1971); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975) [hereinafter POCOCK, MOMENT]; J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY (1985).

10. *See, e.g.*, VISCOUNT BOLINGBROKE, POLITICAL WRITINGS (David Armitage ed., Cambridge Univ. Press 1997) (n.d.); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1700). For accounts from popularizers of these thinkers, see JOSEPH ADDISON, CATO (1996); ALGERNON SIDNEY, COURT MAXIMS (Hans W. Blom et al. eds., Cambridge Univ. Press 1996) (n.d.); JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS (Ronald Hamowy ed., Liberty Fund 1995) (1755). *See also* JOYCE OLDHAM APPLEBY, ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1978); J.C.D. CLARK, ENGLISH SOCIETY 1660–1832 (2d ed. 2000); ISAAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE (1968); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998). *See generally* POCOCK, MOMENT, *supra* note 9, at 333–505.

11. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1–54 (enlarged ed. 1992); BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS (1970); ELKINS & MCKITRICK, *supra* note 4; POCOCK, MOMENT, *supra* note 9, at 506–52; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 1–124, 391–467 (1969); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 95–225 (1991). *See also* DOUGLASS G. ADAIR, THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER (Lexington Books 2000) (1964); APPLEBY, *supra* note 10; JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S

HeinOnline -- 79 S. Cal. L. Rev. 50 2005-2006

values have continued to figure prominently in American public policy, and to a somewhat lesser extent in American legal tradition since the founding.[12] They are particularly conspicuous in Americans' undiminished commitment to the core values of civic engagement and personal responsibility, as manifested rhetorically in celebrations of patriotism, hard work, small business, and "the family farm."[13] This is demonstrated at length in the predecessor article, and is further borne out in Part V of this Article.

The second strand of American political tradition is the Classical Liberal ("CL"). It has prized constitutionally bounded democratic decisionmaking as to properly "public" matters by mutually respectful, though again potentially overreaching, autonomous citizens who in turn bear exclusive sovereignty over essentially "private" matters.[14] Private matters are matters directly involving citizens' valuational decisions as to what constitutes "the good life."[15] Public matters are matters that properly

(1984); JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992) [hereinafter APPLEBY, LIBERALISM AND REPUBLICANISM].

12. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part II.A. *See also infra* Part V. CR has enjoyed a revival in academia over the past fifteen years. *See, e.g.*, Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). For recent philosophic work with a republican cast, see PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997); PHILIP PETTIT, THE COMMON MIND: AN ESSAY ON PSYCHOLOGY, SOCIETY, AND POLITICS (1993); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1994). Academic work reflecting the CR commitment to "deliberative democracy," its self- and society-constitutive roles, and its political virtues and vices has also grown prodigiously in recent years. *See, e.g.*, DEBATING DELIBERATIVE DEMOCRACY (James S. Fishkin & Peter Laslett eds., 2003); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); CARLOS SANTAIGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996). For a proposal aimed at bringing a greater degree of reasoned, CR-redolent deliberation back to American electoral politics, see BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004); ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004). Probably the most influential contributor to the revived interest in deliberative politics and rationality is Jürgen Habermas. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) (1981); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., Beacon Press 1987) (1981).

13. *See* Hockett, *Whose Ownership?*, *supra* note 3.

14. *See id.* at Part II.B.

15. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 19–20, 29–40 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; JOHN RAWLS, A THEORY OF JUSTICE 358–65 (rev. ed., 1999) (hereinafter RAWLS, THEORY].

HeinOnline -- 79 S. Cal. L. Rev. 51 2005-2006

concern all citizens in the shared project of cooperatively maximizing—subject to some rough equalizing—the volume of that sphere of private autonomy available to each citizen in pursuit of the good life as each sees it.[16] Just as the familial estates or households that make up the CR polity require allocations of basic resources to retain their responsible independence, so the individuals who make up the CL polity require basic formal and material opportunities to operationalize and retain their autonomy, that is, to conceive and pursue their visions of the good life.[17] And just as CR accordingly features tensions between the ideal of independence and the means of retaining rough equity in the allocation of basic resources, CL features superficial tensions between "liberty" and "equality."[18]

CL draws upon a smaller repertoire of ideal images than does CR, perhaps because CL thinking attained prominence only after the mythological views of past "golden ages" had become more widely suspect—roughly, during the late eighteenth and early nineteenth centuries—than it was during the salad days of CR. But attractive images are nonetheless available, for example, Rousseau's Geneva, Hume's Edinburgh and London, and Rawls's "social union of social unions." And many contemporary democracies with constitutionally guaranteed bills of civil (that is, individual autonomy) rights approximate ideal liberal polities.[19] Like CR thinking, CL thinking has been prominent in American public policy since the time of the Declaration of Independence and the Bill of Rights, and is even more prominent in recent decades in American

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16. *See, e.g.*, RAWLS, POLITICAL LIBERALISM, *supra* note 15; RAWLS, THEORY, *supra* note 15. The class of public matters roughly coincides with what economists—many of them inheritors of the CL tradition—classify as public goods. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Parts II.B, II.C, III.

17. Rawls famously labels these "primary goods." RAWLS, THEORY, *supra* note 15, at 54–55, 78–81, 348, 358–65. Ronald Dworkin calls them "resources." Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) [hereinafter Dworkin, *What Is Equality? Part 2*]. Amartya Sen calls them "capabilities." Amartya Sen, *Equality of What?*, *in* EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307, 327–28 (Stephen Darwall ed., 1995). Richard Arneson refers to them as "opportunit[ies] for welfare." Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 85–88 (1989); Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. 158 (1990). G.A. Cohen calls them an "access to advantage." G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 907 (1989). *See generally* Robert Hockett, *The Deep Grammar of Distribution: A Meta-theory of Justice*, 26 CARDOZO L. REV. 1179 (2005).

18. *See, e.g.*, RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 4–5. This Article addresses and works toward resolving these tensions. *See infra* Part II.B.

19. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part II.B.

HeinOnline -- 79 S. Cal. L. Rev. 52 2005-2006

public law.[20] It has been particularly conspicuous in Americans' undiminished commitment to individual liberty (or privacy or personal autonomy) and the "pursuit of happiness," though this commitment sometimes is viewed, by both CR and CL lights, as having led to backsliding on the commitment to "life."[21] Again, this commitment to autonomy and the "pursuit of happiness" is demonstrated in this Article's prequel and further borne out in Part V.

The third strand of American political tradition is what I call the Pragmatic Consequentialist ("PC"), which has tended to evaluate policies less with a view to their resonance with idealized conceptions of the human person and appropriate political structure than with a view to either or both of two stripped-down evaluative focal points.[22] The first focal point is aggregated wealth or welfare: all else equal, PC views as best that policy which maximizes gross domestic product ("GDP") or somehow-aggregated satisfactions.[23] The second focal point, which in practice has tended

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20. *Id. See also* APPLEBY, LIBERALISM AND REPUBLICANISM, *supra* note 11; JOHN PATRICK DIGGINS, THE LOST SOUL OF AMERICAN POLITICS (1984); STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION (1990); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); KRAMNICK, *supra* note 10. For contemporary academic argument with a liberal cast, see, for example, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000) [hereinafter DWORKIN, SOVEREIGN VIRTUE]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]; CHARLES FRIED, RIGHT AND WRONG (1978); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); RAWLS, POLITICAL LIBERALISM, *supra* note 15; RAWLS, THEORY, *supra* note 15; JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); JEREMY WALDRON, LIBERAL RIGHTS (1993).

21. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (1996); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1992). The quoted language in the text alludes to the foundational statement of American political values, CR Jefferson's CL Declaration of Independence, which reads as a virtual abstract of the foundational work of modern CL, John Locke's Second Treatise on Government. *See* THOMAS JEFFERSON, *A Declaration by the Representatives of the United States of America, in General Congress Assembled* (1776), *reprinted in* WRITINGS 19 (Merrill D. Peterson ed., 1984); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

22. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part II.C.

23. *See id. See also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), *reprinted in* JOHN STUART MILL & JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS 65, 86–89 (Alan Ryan ed., Penguin Books 1987) [hereinafter UTILITARIANISM] (describing welfare as "utility" or "happiness"); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939) [hereinafter Hicks, *Foundations*] (describing wealth as "compensation"); J.R. Hicks, *The Valuation of Social Income*, 7 ECONOMICA 105 (1940) [hereinafter Hicks, *Valuation*] (same); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*,

HeinOnline -- 79 S. Cal. L. Rev. 53 2005-2006

sometimes to play second fiddle to the first, is that of fairness. All else being equal—and in particular, all else equally conducing to maximal GDP—PC favors that policy which conduces to the fairest distribution of some politically salient benefit or burden, for example, opportunity or risk.[24]

PC thinking traffics less in ideal imagery than does CL thinking, and even less so than does CR thinking. Insofar as pictures do figure into the thinking of PC advocates, images of the United States during boom periods—for example, the earlier nineteenth century and post-Civil War years, and more recently the 1950s and 1990s—probably are those that are most often viewed as replication-worthy.[25] PC thinking figures prominently in much contemporary policy discourse throughout the industrialized and "post-industrial" worlds, at least as prominently as do CR and CL thinking.[26] Certainly it is conspicuous in American political life, as evidenced by such slogans as "equal pay for equal work" and "it's the economy, stupid." Nonetheless, CR and CL images and ideals continue to exert a strong allure in, among other places, contemporary "social issues" and "culture wars" debates.

It will prove helpful in charting a range of fundamental consensus among the three traditions that PC can instructively be viewed as a "stripped-down" or "streamlined" version of CL, which in turn can be viewed as a streamlined version of CR.[27] The PC maximization focal point probably derives from the respective CR and CL values of responsibility

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49 ECON. J. 549 (1939) (same); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979) [hereinafter Posner, *Utilitarianism*] (same); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter Posner, *Efficiency Norm*] (acknowledging that "wealth-maximization" is policy made pursuant to the Kaldor-Hicks criterion).

24. Hockett, *Whose Ownership?*, *supra* note 3, at Part II.C. It has at times been argued that, in view of the postulate of diminishing marginal utility of income, utility-maximization is not only consistent with, but also is indeed best wrought by "fairness" conceived as income-equalization. *See, e.g.*, R.M. HARE, FREEDOM AND REASON 112–36 (1963); ABBA P. LERNER, THE ECONOMICS OF CONTROL (1944); JOHN STUART MILL, UTILITARIANISM (1861), *reprinted in* UTILITARIANISM, *supra* note 23, at 272, 335–36; A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1962); HENRY SIDGWICK, THE METHODS OF ETHICS 388–427 (London, MacMillan 1874); J.A. Mirrlees, *The Theory of Optimal Taxation*, *in* 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1187 (Kenneth J. Arrow & Michael D. Intriligator eds., 1986); J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971). This claim is to be distinguished from the argument offered in Part II.B.3 that equal opportunity is consistent with ethically cognizable efficiency, just as fairness is to be distinguished from income equalization. *See infra* Part II.B.3.

25. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part II.C.

26. *Id.*

27. For a fuller discussion of the claims made in the next several paragraphs, see *id.* at Parts II, III.

HeinOnline -- 79 S. Cal. L. Rev. 54 2005-2006

(conceived as productivity) and pursuit of the good life (conceived as wealth or welfare).[28] The fairness focal point likely derives from the CR and CL values of rough equality in exogenous endowments, with "fair" equating to equal distribution of that for which one is not responsible, another aspect of CR responsibility and CL autonomy.[29] And the ambivalent relations between the focal points reflects PC's inheritance of CR's and CL's quandaries over the superficial liberty/equality conundrum.[30]

As noted above, the gradual morphing of CR into CL, and of CL into PC, have not resulted in abandonment of CR or CL as systems of social valuation, notwithstanding PC's prominence in economic policy discourse.[31] Nor have they ultimately solved the perennial (though again, as we shall see, superficial) conundra of liberty and equality endemic to CR and CL, or the associated measurement difficulty endemic to CL. But the morphological history does, happily, afford assistance to those who seek to reconcile the traditions in an effort to design an OS that is consonant with American values and seek to solve or sidestep the dilemmas contained or concealed in the three American valuational traditions. This is what we effect in schematizing the EEOR, which serves as the most broadly appealing ideological template for an American OS.

B. THE JOINT PRODUCT OF OUR THREE TRADITIONS: AN EFFICIENT EQUAL-OPPORTUNITY REPUBLIC

The unified national self-understanding to which the three American valuational traditions converge amounts to a vision of what I call an EEOR.[32] The EEOR, like the three traditions that it synthesizes, gives expression to an integrated cluster of ethical, political, and economic ideals. Those ideals incorporate a view of the human person (or citizen), a coordinate view of the proper role of social organization, and thus a view about appropriate political, economic, and legal arrangements.

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28. *See infra* Part II.B.1.

29. *See infra* Part II.B.2.

30. *See infra* Parts II.B.2, II.B.3 (proposing means of defusing this conundrum).

31. One can witness the prominence of "values," "social issues," and "culture war" concerns in contemporary political controversy.

32. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part III.

1. Owner-citizens as Responsible Agents

All three American political traditions effectively construe citizens as ethically autonomous, boundedly responsible agents.[33] Responsible agents substantially affect their own well-being by explicitly or implicitly formulating and pursuing individual conceptions of the good life. But they also are affected and constrained in doing so by features of the environments into which they are born. Their inherited social and familial relations, capacities, and resources permit agents wide, but nonetheless limited, latitude in altering or exiting their environments.

It is critical to note in this connection, however, that respect for others' agency entails more than respect for their freedom to choose and to act. It also entails a right to demand that they respect others as they themselves expect to be respected. And it entails respect for their living with many of the consequences of their choices and actions. It entails, that is, our holding others—again, boundedly—responsible for their actions and to one another. To let others too often "off of the hook," for example, with the observation that "she could not help it" or "he was simply looking out for his interests," would be to view them and their fellows not as equally respect-worthy agents—active and mutually respectful forgers of fate—but as rightful tyrants or chattels, patients or addicts, or passive objects of fate and of others.[34] We would be viewing them more as our pets or our betters than as our peers.

The appreciation of boundedly responsible agency ultimately underwrites the CR view of citizens as independent and resource-using, but, outside of community, as nonetheless corruptible, potentially hyper-acquisitive beings. These citizens' corruptibility and hyper-acquisitiveness are modulated, in the CR view, precisely as they respond, and are thus

33. *See* JAMES E. BLOCK, A NATION OF AGENTS: THE AMERICAN PATH TO A MODERN SELF AND SOCIETY (2002). *See also* Hockett, *supra* note 17, at 1216–19 (describing the construal of "distribuees" as agents as the modern trend in theories of distributive justice). The CL tradition tends to emphasize agency while sometimes attending less carefully to responsibility, while the CR tradition tends to reverse that order of emphasis. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Parts II, III; Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299 (1992). This Article aims to restore an equal emphasis on both aspects of the ethically viewed person. That symmetry of emphasis is conceptually more consistent than is emphasis placed only on one aspect of the essential unity that is responsible agency. Further, restoring equality of emphasis is practically more consistent with the American valuational tradition and the aim of building an "ownership society" true to that tradition.

34. *See* Hockett, *supra* note 17. *See also* DWORKIN, SOVEREIGN VIRTUE, *supra* note 20, at 285–303; Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion*, 36 METAPHIL. 93 (2005); Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291 (2003).

HeinOnline -- 79 S. Cal. L. Rev. 56 2005-2006

rendered responsible to others who are their rough equals in dignity, capacity, and vulnerability. The appreciation of boundedly responsible agency also underlies the CL view of citizens as autonomous but potentially overreaching persons who at times attempt illegitimately to externalize costs by taking more than their legitimate shares of benefits or otherwise ignoring the interests of others—persons who must therefore be held publicly to account. Responsible agency does not, on the other hand, figure prominently into the PC tradition. But nor is there anything in that ad hoc and minimalist tradition that need contradict agency.[35] Indeed, we shall see that the PC values of "fairness" and "efficiency" are best understood by reference to responsible agency.

2. Responsible Agency as Equal Opportunity

The consensus view of citizens as boundedly responsible agents suggests a view of ethically and politically salient assets—what we shall see in Part III constitute the stuff of ownership—as resources or opportunities that citizens themselves autonomously value. Assets are what citizen-agents deploy in seeking their self-formulated ends, in "pursuing happiness." Salient liabilities, in turn, are the converse—resource deficits, handicaps, and risks. Resources or opportunities, then, are the material correlates of agency itself; they are the stuff of which worthwhile lives, as conceived by agents themselves, are made. They are accordingly that in which ownership rights should inhere.[36]

It is critical in this connection that just as the autonomy that we value in responsible agents is responsible autonomy, so are the resources or opportunities that we view as appropriately held by responsible agents appropriately allocated resources or opportunities. Opportunity-equality is the material correlate of agents' mutual responsibility, as opportunity shorn of equitable allocation is liberty shorn of responsibility—libertinism.[37] One is not responsive to the agency of others, one does not think or act responsibly toward them, insofar as one explicitly or implicitly demands

35. Utilitarianism, on the other hand, at least in its nonveiled form, would contradict it by treating citizens as patients or addicts. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 20, at 303; Hockett, *supra* note 17, at 1265–68, 1272–74. PC, however, merely borrows a maximizing imperative from Utilitarianism; it is not coextensive with it. This Article returns to this matter in considering CR, CL, and PC views on property rules versus liability rules. *See infra* Part III.

36. Part III is devoted to the more precise legal contours and psychological significance of ownership in the EEOR or American OS.

37. "Libertarianism," as articulated without regard to the pattern of exogenous endowments by thinkers such as Richard Epstein and Robert Nozick, is irresponsible liberalism—attending to *agency* while disregarding *responsible* agency. *See* EPSTEIN, TAKINGS, *supra* note 20; NOZICK, *supra* note 20.

greater exogenously given opportunity than they. Call this the "equal opportunity principle" ("EOP").

As abstract propositions, these claims, like the construal of citizens as boundedly responsible agents, all are consonant with the constitutive valuations of the CR, CL, and PC traditions, hence of the American tradition. CR projects an equilibrium of roughly equally empowered persons who would take all that they could were they not constrained by others' equal graspingness and a consequent political settlement. CL in turn extols an equilibrium of equal freedoms—practical, not merely theoretic freedoms—held by equally respect-worthy and thus mutually respectful agents. And PC settles on the focal points of fairness and efficiency in its assessments of public policies that effect allocations of benefit and burden; while fairness and efficiency, in turn, are best construed as properties of allocations that reflect equality of opportunity and differential results of differential responsible choice. In theory, then, if not always articulately, all three American political self-understandings effectively commit themselves to equal "real" or "material," not just formal, opportunity.

3. Practically Reconciling and Realizing Responsible Agency and Equal Opportunity

It might be thought that there cannot exist a consensus view among CR, CL, and PC on the matter of responsible liberty's entailing equal material opportunity. For Part II.A itself took note of "ambivalence" even within CR, CL, and PC over material equality. The appearance, however, of disagreement within these traditions is misleading; it is the product of insufficient attention to two related factors.

The first factor is a semantic ambiguity. "Resource" or "opportunity" can be taken to denote anything that enters into a "production function," irrespective of the circumstances under which the producer has acquired that "input." The terms can also be taken to denote only such inputs for the possession of which the producer is not actually responsible.[38] When the terms are employed in the first sense, the claim that resources (or, less frequently, opportunities) should be "equalized" can appear to do injustice to the American EEOR value of responsibility.

In order to eliminate the semantic ambiguity and thus one source of the apparent ambivalence over equal opportunity, I employ the modifier "ethically endogenous" to designate resources and opportunities for the

38. We tend generally to understand "opportunity" in the latter sense and "resource" in the former sense, though both may be understood in either sense.

HeinOnline -- 79 S. Cal. L. Rev. 58 2005-2006

enjoyment or holding of which agents can reasonably be held responsible.[39] I employ "ethically exogenous" to designate those for which they cannot.[40] Ethically exogenous opportunities or resources are "windfalls"; deficits therein are "hard luck." Ethically endogenous opportunities, resources, or deficits therein have been "earned" or are "deserved."

The second factor responsible for apparent ambivalence within traditions over the matter of equal opportunity as a material correlate of boundedly responsible agency is implicit in the endogeneity/exogeneity divide noted above. It is also implicit in the characterization of agency itself as "bounded." It is the problem, at least at the margins, of drawing the boundary. I call this the "tracing" problem—the problem of tracing portions of one's holdings separately back to ethically endogenous choice and ethically exogenous circumstance. Where the problem gives rise to disagreement, I shall sometimes call it the "boundary dispute,"—borrowing the suggestive language of the American homesteading era discussed below in Part V.

The tracing problem bears both conceptual and empirical aspects, though both aspects intermeld. The conceptual aspect of the problem comes in part with our uncertainty in "borderline" cases over what is appropriate to hold people responsible for. First, there is uncertainty over whether responsibility should be understood by reference to choice or by reference to what might be called "ratification."[41] Second, there is uncertainty over

39. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part III.

40. *Id.*

41. I adopt the term "ratification" here from the law of contract for what I think will be obvious reasons. The choice-versus-ratification controversy is rooted in the perceived disrespect of agency entailed by not holding one responsible for such conditions as one might not have chosen, but with which one nonetheless identifies. Forcing an equal distribution upon an ascetically minded cripple, for example, notwithstanding that cripple's belief in the virtue of a life of self-denial, is thought by some to be disrespectful of the ascetic cripple's agency, even if the cripple did not choose the handicap, and even if the cripple's belief in the virtue of self-denial is in the nature of a "virtue made of necessity"—a convenient rationalization or endogenous preference. Ronald Dworkin and T.M. Scanlon probably are the best known adherents to what I am calling the ratification view. *See, e.g.*, DWORKIN, SOVEREIGN VIRTUE, *supra* note 20, at 285–303; T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655 (1975); T.M. Scanlon, Jr., *The Significance of Choice*, *in* 8 THE TANNER LECTURES ON HUMAN VALUES 149 (Sterling M. McMurrin ed., 1988). For an antiratification perspective, see AMARTYA SEN, THE STANDARD OF LIVING 11 (1987) (aruing that fulfillment of desires of the "slave" or "tamed housewife" cannot be treated in the same way as fulfillment of desires of the better placed); Cohen, *supra* note 17. We need not resolve the ehoice-versus-ratification dispute to continue with the EEOR. For one thing, the problem is restricted in scope. For another, it seems fair enough simply to regard ratification in most circumstances as itself a choice, a choice of attitude. Certainly, that would seem to be the view most in harmony with the conception of citizens as agents, though we might make allowances in marginal cases similar to those we make for addiction. For more on endogenous preferences, see GARY S. BECKER, ACCOUNTING FOR TASTES (1996); JON ELSTER, SOUR GRAPES (1983); JON ELSTER, ULYSSES AND THE

HeinOnline -- 79 S. Cal. L. Rev. 59 2005-2006

what choices actually are "freely" made. Insofar as choice is the touchstone of the analysis, the conceptual aspect of the tracing problem mingles with the empirical aspect. The problem is that there appear to be differing degrees of true freedom, hence of agency, inhering in differing choices. One is not simply free or unfree; one is more free or less free in making one's choices. The concept of responsibility is thus subject to problems in its application familiar to students of the "logic of vagueness" since the time of the Sorites paradox.[42]

Compounding the Sorites side of the empirical aspect of the tracing problem is the fact that most resources or opportunities that one holds or faces are the product of many concatenated occurrences involving both chance and choice. Thus, even were it easy, in a binary manner, to describe any one choice simply as either freely made or somehow forced, it nonetheless would be daunting to parse out (a) some fractional subset f of one's holdings attributable solely to one's responsible choices, and (b) a complement $1\text{-}f$ of that subset attributable simply to fortune. This must be added to the concern that it might be difficult or even impossible, owing to interpersonal utility comparability and interitem commensurability difficulties of the sort elaborated in Part II.B.2, to attach a specific monetary value to such portions for purposes of determining adequate compensation for the exogenously underendowed. It is unsurprising then that there is at least some degree of surface disagreement not just in the *American* political traditions, but in most political traditions over criteria for assessing who should ideally be entitled to what.

Such difficulties should not, however, obscure the fact that there is broad agreement within and among the American political traditions over the basic principles here stated. Our disagreements are primarily over the application of these principles in particular circumstances, that is, over the empirics of what is actually earned and what is the mere product of good or ill fortune.[43] We can exploit that fact on behalf of an American OS in two

SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979); ROBERT H. FRANK, LUXURY FEVER: MONEY AND HAPPINESS IN AN ERA OF EXCESS (1999); DAVID GEORGE, PREFERENCE POLLUTION: HOW MARKETS CREATE THE DESIRES WE DISLIKE (2001); Hockett, *supra* note 17.

42. The Sorites problem is the well-known conundrum concerning how many grains of sand it takes to constitute a beach, how few hairs Socrates must have had on his head before he would have been considered bald, etc. Logicians have by now developed sophisticated techniques for handling predicates with vague contours, including "fuzzy logics," which now are proving fruitful in artificial intelligence and other cybernetic fields. For more on the usability of such nonstandard logics for purposes of welfare economics and normative legal and political theory, see Robert Hockett, *Primary Goods, Interpersonal Comparisons and Nonstandard Logics*, ECON. & PHIL. (forthcoming 2006).

43. There is significant empirical corroboration of this claim itself. *See, e.g.*, NORMAN FROHLICH & JOE A. OPPENHEIMER, CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY

HeinOnline -- 79 S. Cal. L. Rev. 60 2005-2006

ways. First, we specify some classes of holdings that we all broadly agree to be both measurable and ethically exogenous in the holding, then rest EEOR ownership prescriptions in part on that range.[44] Second, we design a Walrasian market mechanism,[45] set in motion within that range of agreement, which honors citizens as boundedly responsible agents and the EOP as allocation principle. In doing so, the mechanism yields another benefit: it mitigates the measurement difficulties noted in Part II.A that were there seen to be partly responsible for the magnitude of the tracing problem.

a. Core Opportunity Endowments

We begin the process of sidestepping the boundary dispute by briefly characterizing four classes of basic opportunity endowment that nearly all Americans, whether adherents primarily of the CR, CL, or PC traditions, will agree are ethically exogenous in the holding.

The first such class comprises opportunities for early education. Boundedly responsible agent-citizens begin their lives as children. The younger a child, the less responsible that child is for opportunities to learn, to develop capacities to learn and do more, and to develop a sense of control over and responsibility for that child's own educational future. As a matter of unadulterated principle, such opportunity should be enjoyed by all children as equitably as possible. That is a core American value.[46]

The second class of exogenous opportunity endowment comprises genetic determinants, insofar as we are able to determine them, of successful life-planning, wealth-making, and happiness-pursuit. Such determinants include all—but only—such aspects of basic human health

(1992); PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS (Barbara A. Mellers & Jonathan Baron eds., 1993); TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997); ROBERT WRIGHT, THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY (1994); Kjell Törnblom, *The Social Psychology of Distributive Justice*, *in* JUSTICE: INTERDISCIPLINARY PERSPECTIVES 177 (Klaus R. Scherer ed., 1992).

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

45. The significance of the market's being "Walrasian" is elaborated later in this Article. *See also* Hockett, *supra* note 34, at 100.

46. If *San Antonio Independent School District v. Rodriguez* was correctly decided as a matter of law, then the "law" applied there is not in keeping with American values. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that inequalities in school financing traceable to wealth disparities among municipalities, hence to differential wealth of the families domiciled in different school districts, did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

HeinOnline -- 79 S. Cal. L. Rev. 61 2005-2006

and functioning as are not attributable to decisions for which we reasonably hold ourselves and others accountable. Birth with a handicap or predisposition to debilitating illness warrants community effort to mitigate the debilitating effects of the same.[47] Debilitation wrought by substance abuse, reckless driving, etc., does not require a similar response—though of course it may reasonably elicit voluntary charitable assistance. Health, basic functional capacity, and education can be regarded as elements of "human capital."[48] Equalizing early educational and basic health endowments equalizes access to ethically exogenous human capital.

The third class of ethically exogenous opportunity endowment can be characterized as access to nonhuman capital. We can think of the right to equal access to such capital as the equal right to capitalize on one's own diligence, an equal right to wealth-creating opportunity.[49] An equal right to wealth-creating opportunity—to work diligently in satisfying others' wants and to profit thereby—is a right to productive capital. Human capital is of course productive in the requisite sense; that is, the sense in which it is "capital." But it is doubtful that individually held human capital constitutes the principal portion of capital that individual agents use for the purposes of production and profit.[50] Access to ownership of or participation in firms and other wealth-creating consortia or networks surely is at least as important.[51]

47. This value bears a venerable pedigree in the American self-understanding, as expressed, for example, in the image of westward travelers allowing the old, very young, and infirm to ride in wagons while the able-bodied walked beside them. This Article leaves open the question of how we should determine how much compensation is owed. The best theoretical and practical answer thus far seems to be the Arrovian-spirited one offered by Dworkin. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 20, at 307–19. *See also* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963); Ronald Dworkin, Sovereign Virtue *Revisited*, 113 ETHICS 106 (2002). *See infra* Part II.B.3.b (noting ways in which we can incrementally improve upon that answer).

48. For a wide-ranging study of the importance of educational capital to an agent's long-term earning prospects, see GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1994).

49. "Wealth" in this context is characterized somewhat narrowly: the right to wealth-making opportunity would be the right to produce to satisfy others' wants and be remunerated and profit therefrom. "Wealth" could also be understood more broadly, such that a right to equal wealth-creating opportunity would be an equal right not only to produce remunerably for others, but also to produce the happiness in one's self that results from the exercise of one's capacities—a very "Greek" form of happiness. *See generally* JULIA ANNAS, THE MORALITY OF HAPPINESS (1993). Here, the remuneration understanding of wealth is emphasized pursuant to Part II's aim to identify an overlapping consensus among the three traditions of American political self-understanding.

50. This statement assumes that such apportionment, or measurement, is possible. *See infra* Part II.B.3.b.

51. There is no need to resolve disputes between followers of the heterodox "economists," Julian Simon on the one hand and Louis Kelso and Mortimer Adler on the other, as to whether "knowledge capital" or "machine capital" represents the "larger" portion of the value created through productive

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It is potentially more difficult to trace out the ethically exogenous and ethically endogenous elements of nonhuman capital than of human capital holdings. Unlike genetic endowments and early education, most nonhuman capital holdings are held by adults, and adults have lived and acted long enough for both responsible choice and nonresponsible circumstance to concatenate and intermingle over time. Nevertheless, there are some elements of nonhuman capital holding that all can agree to be attributable to fortune, not effort. Large nonhuman capital inheritances or bequests are an obvious example. They are nonhuman capital counterparts to genetic endowments. To recognize that many such large holdings of nonhuman capital are attributable to luck in the birth lottery need not commit us to attitudes of envy or even to plans of confiscation, moreover.[52] We can view the recognition instead as minimally committing us to channeling newly discovered, opened, or potential pools of capital toward those who have not been born into large holdings already. Examples here would include newly usable segments of the electromagnetic spectrum, minerals found on the seabed or under public or private lands, new resources eventually found through publicly financed space exploration, and new cost-saving and wealth-creating opportunities opened by the public facilitation of new forms of insurance against risks that antecedently impede enterprise and wealth development.[53]

The fourth and final class of ethically exogenous opportunity endowment is the opportunity to shed or share ethically exogenous risk through trade or collective action. The idea here is that some misfortunes which strike after birth and that are not reasonably foreseeable during adulthood are misfortunes for which the victims are not responsible. Such misfortunes are regarded, under the EOP, as joint misfortunes, at least unless and until there is opportunity for equally exogenously endowed agents to trade voluntarily their shares of such misfortunes in keeping with their differential valuations, ex ante, of compensation claims contingent upon their occurrence. The intuition finds expression in the venerable

organization. *See* LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO 36 (1958) (arguing that "technological improvements shift the burden of production from workers to capital instruments"); JULIAN L. SIMON, THE ULTIMATE RESOURCE 2 (rev. ed. 1996) (arguing that "human imagination" is the "principal" productive factor). This Article takes the perspective that both are critical, and what matters most is access on equal terms—"equal" understood by reference to ethically exogenous endowments.

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

53. Such opportunities are counterparts to the "new" resources distributed widely and equitably to the previously less resourced by, for example, the Homestead Act and the National Housing Act. *See infra* Part V (providing detailed treatment of these and other financially cognate programs).

American tradition, before the widespread availability of farmers' insurance, of "barn-raising" for a neighboring farm struck by lightning

Insofar as we work to equalize core endowments, we advance the cause of that EEOR which is the joint product of our fundamental values and is the template of our American OS. We also facilitate the creation and operation of that complete and neutral market described immediately below. This market constitutes an ideal EEOR resource-allocation mechanism which further diminishes the tracing problem and enables our opportunity-equalizing efforts to yield a "multiplier effect" in realizing the EEOR and advancing the cause of responsible agency.

b. Market, Measurement, and Distribution Mechanism

The next step in sidestepping the boundary dispute and fully realizing the EEOR is to specify the structure of an asset- and risk-allocation mechanism that does justice to (a) the EEOR's understanding of citizens as boundedly responsible agents, (b) opportunities and risks as the material correlates of agency, and (c) the EOP as the appropriate allocation principle. It happens that the best such mechanism also neutralizes the measurement conundra that historically have exacerbated the tracing problem.

Here, in abbreviated and idealized form, is the mechanism elaborated in the more theoretically oriented first article.[54] Assume first a substantially "complete" market, a forum in which all and only desired, voluntary trading occurs.[55] Assume that trading is in, first, all goods and services that can practically be made available and that anyone values; hence, that are politically cognizable as ethically interesting distribuenda. Assume that the trading is in, second, contingent claims to compensation upon the occurrence of any eventuality that anyone *dis*values, payable by anyone

54. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part III.C.

55. Market "completeness" in this sense of all and only desired trading includes trading in contingent claims. For the classic sources on the role of contingent claims in completing markets, see GERARD DEBREU, THEORY OF VALUE (1959); J.R. HICKS, VALUE AND CAPITAL (2d ed. 1946); Maurice Allais, *Généralisation des Théories de L'Equilibre Economique Général et du Rendement Social au Cas du Risque [A Generalization of Theories of General Equilibrium and Optimality in the Presence of Risk]*, 11 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 81 (1953); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières par la Répartition la Meilleure des Risques [The Role of Securities in the Optimal Allocation of Risk-bearing]*, 11 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 41 (1953). For fuller treatment on market completeness, see MICHAEL MAGILL & MARTINE QUINZII, 1 THEORY OF INCOMPLETE MARKETS (1996); Robert Hockett, *Just Insurance Through Global Macro-hedging: Information, Distributive Equity, Efficiency, and New Markets for Systemic-Income-Risk-Pricing and Systemic-Income-Risk-Trading in a "New Economy,"* 25 U. PA. J. INT'L ECON. L. 107 (2004).

HeinOnline -- 79 S. Cal. L. Rev. 64 2005-2006

willing to take the opposite sides of these, what amount to cautious "bets" on the disvalued contingencies.

Assume further that this market is "neutral" in an ethically rich sense. It is neutral, first, in that each participant enters it with an initial endowment of ethically exogenous desired assets equal to that with which everyone else enters it. It is neutral, second, in that regulatory norms effectively prevent such collusively, strategically, or expropriatively opportunistic behaviors as would effectively result in some participants coming to possess greater or lesser holdings or "price-affecting effective demand powers" than would be traceable to such ethically exogenous initial endowments and their ethically endogenous transaction histories alone.[56] This mechanism straightforwardly instantiates in broad outline the ownership-allocation regime prescribed by our synthesized American EEOR tradition.

The mechanism honors citizen-participants as responsible agents. They transact voluntarily pursuant to their own, autonomous relative valuations of items and contingencies that they prefer and do not prefer in keeping with their pursuit of happiness. The mechanism, via the neutrality imposed upon it at the outset and retained throughout, also equalizes what is ethically exogenous—or that which is not traceable in the holding directly to a responsible choice—while nonetheless allowing holdings to vary over time with ethically endogenous responsible transactional decisions. Holdings at time T_n, that is to say, are traceable to equalized holdings at T_0 and voluntary choices thereafter, including labor-expending decisions.

c. Ethically Intelligible Second-Bests

The "complete" and "neutral" market schematized above constitutes a stylized, ideal asset-allocation mechanism in the EEOR that is the template for an OS consonant with core American values. Three challenges, however, might appear to stand in the way of its realization, and thus ultimately of both its capacity to enable us to sidestep the boundary dispute and its suitability as a workable basic structure for the American OS. We can, however, dispel these challenges.

56. This Article notes an ethically more satisfactory justification for much of current contract doctrine, antitrust norms, and other forms of market regulation. *See infra* Part III. This Article also sets aside, for the moment, the question of the means by which the first aspect of market-neutralization—endowment equalization—is effected, and the "problem of future generations." We turn to those matters later in the Article. *See infra* Parts III–V.

The first challenge is the matter of equalizing the aforementioned "core endowments" to afford some degree of market-neutrality. If we have to equalize those holdings, then it might be thought, since they are heterogeneous, that we have to commensurate them. But how are we to do that prior to the operation of the equal-endowment grounded market mechanism? It is after all that mechanism itself which affords ethically satisfactory commensuration—that is, social valuation/indexing pursuant to a process in which each citizen bears an "equal vote" by dint of each individual's entering that market with an equal initial endowment. Market neutrality might, with the help of regulatory norms, be rendered self-perpetuating once attained. But how is it to be attained when the market itself affords the measure of market-antecedent neutrality?

Were we able to start all over, of course, this problem would be substantially diminished, if not indeed eliminated by simply giving each citizen an equal allotment of coupons with which to bid on unowned resources.[57] But even short of starting over, which it seems we likely cannot do, there is a plausible second-best solution. First, note that the core endowment types discussed above are limited in number, relatively easily quantified, and equitably distributed by type, and thus in minimal, if any, need of commensuration. If we distinguish between "beneficial" and "burdensome" core assets, we see that this is particularly so of the beneficial ones, early education and inherited nonhuman capital. The burdensome ones, by way of some contrast, are a bit more difficult since they include physically inalienable "internal resources." The hardest one is genetically poor health or handicap. But many such deficiencies can themselves be valued by reference to current prices affixed to their mitigation—prostheses, medicines, etc. There seems no harm in beginning to address such deficits with compensation equal to the going rates. Other such deficits are not so readily mitigated. There the best that we can do is probably to estimate the compensation that would be afforded by insurance policies that typically are or would be purchased against such contingencies by average persons of average means if such policies were available.[58] Clearly there is more guesswork here, but it need not be a shot in the dark.

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57. Such is envisaged in Dworkin's "clamshell" auction. *See* Dworkin, *What Is Equality? Part 2*, *supra* note 17, at 283–90.

58. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 20, at 307–50; Hockett, *supra* note 17, at 1318–22. For articles proposing "real" rather than "hypothetical" such insurance, see Hockett, *supra* note 55; Alexander Tabarrok, *Trumping the Genetic Tarot Card*, 9 CONTINGENCIES 20 (1997). *See also* John H. Cochrane, *Time-Consistent Health Insurance*, 103 J. POL. ECON. 445 (1995) (discussing the costs of health insurance for long-term illnesses).

HeinOnline -- 79 S. Cal. L. Rev. 66 2005-2006

While the first challenge is rooted in "neutrality," the second challenge is rooted in "completeness": Is it reasonable to require that "all and only desired trading" occur? Is that possible, and would we even want it? Wouldn't we have to abandon our market-inalienability norms and "commodify" everything?[59] And if not, can the mechanism do what it has been charged to do?

This challenge is more easily addressed than the challenge directed to neutrality. We begin with its desirability side and again look first to the core opportunity endowments of Part II.B.2.a. All of these are subject, in principle, to unobjectionable market-valuability already. Next, we consider what else might be traded—"all that enters into agents' happiness-pursuit." It is easy enough simply to bracket out of market transactions such things as we should not wish to see commodified—babies or organs, for example.[60] We need not worry here over disputes at these margins of commodifiability. The mechanism does its work quite well through trade of the many more goods and services that all of us agree ought to be tradable. That concludes the desirability side of this challenge.

The feasibility side of the challenge comes in the transaction and information cost barriers to market-completion in the technical sense. Is it reasonable to suppose that all parcelings of ownable and tradable goods and payment-claims defined in terms of all specifiable contingencies, can be tradable?[61] Here the short answer is that the problem has no real purchase in the present context. The answer to the third challenge, discussed below, shows that more complete and more neutral markets are always more consistent with the EEOR's constitutive values than are less complete and less neutral markets. There is, that is, an ordered set of second-bests that is ordinally equivalent to the sets of more complete and more neutral markets. So all we have to do is to move farther—as far as we are able—in the right direction to become the best that we can be.

59. The classic contemporary objection to "commodification" is found in Margaret Jane Radin, *Market-inalienability*, 100 HARV. L. REV. 1849 (1987). *See also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). Contemporary protests of commodification revive objections raised repeatedly in the past, including two classic Victorian-era objections. THOMAS CARLYLE, PAST AND PRESENT (Richard D. Altick ed., N.Y. Univ. Press 1977) (1843); JOHN RUSKIN, UNTO THIS LAST AND OTHER WRITINGS 155–228 (Clive Wilmer ed., Penguin Classics 1985) (1862).

60. The allusion is to Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). The Landes and Posner article, among others, prompted the objection in Radin, *supra* note 59.

61. *See infra* Part III.A. This question reemerges in connection with the discussion of the legal dimensions of owning.

HeinOnline -- 79 S. Cal. L. Rev. 67 2005-2006

The third challenge, just anticipated, is this: if you cannot achieve full completeness and neutrality of the sort that characterizes the mechanism that assists in realizing the EEOR, might it be that seeking more completeness and more neutrality than you presently have could, ironically, take you farther from that ideal goal? After all, isn't one feature of the EEOR its putative "efficiency," and hasn't Oliver Hart, in this connection, proved that movement in the direction of market completeness falling short of full completeness can constitute movement toward Pareto-inferior end-states?[62] We can reply intuitively here, reserving technical treatment for another venue.[63] The intuitive reply is that the claim that there might be no second-best here trades crucially upon an ethically uninteresting conception of efficiency; the "best" to which it makes appeal, that is to say, is simply not cognizable even as "good," let alone as best. The only politically cognizable conception of optimality, by contrast, is one in respect of which it happens that any forward movement on the completeness or neutrality fronts results in forward movement on the only ethically intelligible efficiency front. We complete the argument below, for it is best made in connection with a fuller treatment of the last remaining value we have noted to be constitutive of our EEOR: efficiency.

4. Equal Opportunity as Politically Cognizable Efficiency

The final step in deriving a unified political understanding from the three constitutive American traditions is to show that PC fairness and efficiency, despite much misleading or misinterpreted discourse upon the point,[64] are not at odds but fully complementary. Showing this resolves superficial ambivalences not only within the PC tradition, but also within the CR and CL traditions. For PC fairness properly construed is a rule of thumb to which CR and CL themselves are committed by dint of their commitment to the EOP; and efficiency properly understood, in turn, is a material entailment of success in the pursuit of fairness properly understood. One upshot, then, is that CR, CL, and PC readily reduce to one political understanding—our EEOR—at least where ownership is concerned; for efficiency is the last remaining subject upon which we have not yet shown the traditions to be reconciled. Another upshot is that ordered sets of variably complete and neutral markets, and the ordered set

62. *See generally* Oliver D. Hart, *On the Optimality of Equilibrium when the Market Structure Is Incomplete*, 11 J. ECON. THEORY 418 (1975).

63. *See* Robert Hockett, On the Ordinal Equivalence of Market-completeness, Market-neutrality and Ethically Cognizable Efficiency (2005) (unpublished manuscript, on file with author).

64. *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS 24–31 (1970); ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF (1975).

HeinOnline -- 79 S. Cal. L. Rev. 68 2005-2006

of variably efficient markets, are ordinally equivalent—meaning that our concern about the realizability of a satisfactory second-best rendition of that ideal market, which is the EEOR's preferred asset-allocation mechanism, is also laid to rest.

The first step of the argument is to show that CR and CL are committed to PC fairness. "Fairness," both in its everyday connotation and in its denotation of the salient attributes of "fairness-promoting" PC legislation and adjudication, means impartiality or even-handedness. To render circumstances fair is to "level the playing field"—to remove barriers or burdens that people face or suffer through no fault of their own. Common synonyms of "fair" in this sense are "equitable" and "just."[65] But "fairness" in this sense, then, means nothing more or less than conformity with the EOP. To treat parties impartially is to treat them as equals for purposes of the treatment—that is, to eliminate inequities that are exogenous to the purposes of the treatment. To be evenhanded with people is to treat them impartially.

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

"Efficiency," in the everyday sense of the word, connotes the maximization of output given a stipulated input, or the minimization of input given a stipulated output. It means, roughly, "more" for "less."[66] The more technical understandings of "efficiency" familiar to welfare economists are reducible to variations on that theme. Pareto-efficient distributions of goods or ills to persons are best understood, intuitively, as distributive "input" vectors the aggregate "utility" scalars deriving from which cannot be raised without lowering the individual utility of at least one person.[67] Pareto efficiency accordingly is understood implicitly as the

65. BLACK'S LAW DICTIONARY 633 (8th ed. 2004).

66. More strictly, but in less satisfactory sloganeering, it means: either "more" for "the same or less," or "the same or more" for "less."

67. *See* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 103–80 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Pubs. 1971) (1927); VILFREDO PARETO, THE MIND AND SOCIETY: A TREATISE ON GENERAL SOCIOLOGY, VOL. 4: THE GENERAL FORM OF SOCIETY 1459–74 (Arthur Livingston ed., Andrew Bongiorno, Arthur Livingston & James Harvey Rogers trans., Dover Publications 1963) (1935). Of course, the Pareto principle is intended to afford technical means of sidestepping interpersonal utility comparison and with it, the standard argument runs, aggregation. But leaving aside for present purposes that the standard argument runs aggregation

HeinOnline -- 79 S. Cal. L. Rev. 69 2005-2006

maximization of (somehow, and covertly) aggregated utility, as constrained by, and thus consistent with, the "veto" power wielded by anyone who stands to suffer a utility loss in the event of some departure from some status quo. It is this intuition, at any rate, that renders the Pareto criterion ethically salient to those who make normative appeal to it; for why, otherwise, should "we," self-interested utility-maximizers that we are in the world of classical choice theorists, be interested in the heightened utility of one who is not "us"?[68]

Kaldor-Hicks efficiency is yet closer to the workaday understanding of "efficiency." Distributions are efficient in the Kaldor-Hicks sense if there is no departure from them that would render some parties' forthrightly aggregated gains—"wealth"—greater than other parties' aggregated losses.[69] The guiding intuition again is that the welfare output of a given distributive input is, given the welfare-production functions that we have to work with, the "highest" that it can be.[70]

Now note that efficiency on any of these understandings is normatively vacuous unless it is understood by irreducible reference to fairness. This is absolutely crucial, yet surprisingly often ignored. The point can be made from both negative and positive directions. First, from the negative direction, it is well established—though still, mysteriously,

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and comparison together, the Pareto criterion trades for its ethical salience on an intuition which implicitly imports aggregation. There is no reason for "society" to be interested in a Pareto-efficient social choice rule dictating increases in the utilities of some so long as no one else's utilities are diminished thereby, unless society itself is seen as thereby benefiting in some sense. That is the only sense in which the principle can be ethically interesting, and it is of course an aggregative sense, as the terms "society" and "social choice" indicate. For a fuller discussion on the analytic distinction between interpersonal comparison and aggregation, see Hockett, *supra* note 17, at 1222–33. *See also* JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 16–50 (1996); AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); Claude d'Aspremont, *Axioms for Social Welfare Orderings*, *in* SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER, 19, 19–76 (Leonid Hurwicz, David Schmeidler & Hugo Sonnenschein eds., 1985); Amartya Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 ECONONOMETRICA 1539 (1977).

68. *See, e.g.*, KENNETH J. ARROW & F.H. HAHN, GENERAL COMPETITIVE ANALYSIS 5–6 (1971) (discussing Edgeworth's and Pareto's settlement upon what now is known as the "Pareto criterion" as a satisfactory conception of intelligible optimality).

69. For further discussion on Kaldor-Hicks efficiency, see Hicks, *Foundations*, *supra* note 23; Hicks, *Valuation*, *supra* note 23; Kaldor, *supra* note 23; Posner, *Efficiency Norm*, *supra* note 23; Posner, *Utilitarianism*, *supra* note 23. The aggregation and assumed interpersonal comparability imported with it enters via the "compensation principle." One compensates by affording utility equal to that which is lost in the change for which compensees are compensated. Note the common root "com," that is, "with," that is shared by both "comparison" and "compensation."

70. One "produces" welfare, in the Pareto and the Kaldor-Hicks senses, by distribution operations. Those are the variable inputs, so to speak, while peoples' utility functions are the fixed inputs.

insufficiently observed—that mere maximization of an aggregate, be it of welfare or of wealth, shorn of attention paid the fairness of the means by which that aggregate is maximized is simply fetishism.[71] It is the pointless pursuit of a valueless substance. It is critical to understand that the claim here is not that maximization shorn of fairness is not good enough. It is that it is not good at all; it is not so much as cognizable as "good," not intelligible as something that "we" should collectively seek or "trade" for. To hold otherwise is ethically on all fours with an argument that all public policy should be framed with a view to maximizing the amount of blue-colored surface space in the universe. It just is not "good," in any sense to enlarge something that is altogether severed from and thus has nothing to do with anybody's equal moral agency. Yet that "something" is precisely what "utility" and "wealth" are when treated as social ends in themselves, detached from the ethical status of the modes of their production—in this case, from their conformity with the EOP.[72] Wealth and welfare, then, must be understood by reference to principles of fair opportunity on the part of responsible agents to engage in wealth- or welfare-creation before they can be intelligible as values at all. They are "wealth" or "welfare," as distinguished from a large endorphin count, or low C-fiber count, or from a vast blue-colored surface space—a lifeless, insipid material substance—only in so far as such is the case.

Now from the positive side, recall that the EOP requires not only that ethically exogenous holdings of that from which satisfactions are derived—material opportunities—be equalized, but also that ethically endogenous such holdings be permitted to vary with responsible effort. But this means that "satisfaction," "welfare," or "wealth" will be "maximized" in the only ethically intelligible sense of those words—precisely insofar as the inputs of "satisfaction-functions" are distributed in accordance with the EOP. Agent-citizens are permitted to, and face all incentive to "produce" and indeed "maximize" their own satisfactions under the EOP, which requires that they be permitted to retain what they produce by their own efforts out of exogenously given, fairly allocated resources. So "aggregate" satisfaction will be "maximized" in the only sense in which satisfaction-

71. *See* Hockett, *supra* note 17, at 1260–65, 1269–83. For a classic articulation of the argument, see Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191 (1980); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980). *See also* Sen, *supra* note 17.

72. A cognate, though distinct, insight is operative in Douglas Kysar's criticism of the tenuous process/product distinction relied upon by advocates of sundry ethically problematic positions in regard to a variety of legal-cum-policy disputes. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

HeinOnline -- 79 S. Cal. L. Rev. 71 2005-2006

maximization is ethically noteworthy. *Every* agent's satisfaction will be the highest that it can be, consistent with the EOP. That, of course, states an efficiency condition—a happiness-productive efficiency condition—that bears ethical significance. And it appears to state the only such condition.

Once this is established, we see that there is no need to fret over the theoretic coherence of the concept of a second-best where market-completeness and neutrality are concerned. Greater completeness and neutrality mean greater honoring of productive, responsible agency and equal opportunity as valued by the American EEOR. And they also mean, therefore, greater efficiency in the only sense in which "efficiency" names a core American EEOR value. So our EEOR will seek to render markets more complete and neutral, both by fostering the spread of markets in more goods and services—including risk-bearing services—and by seeking to spread ever more widely the holding of more ethically exogenous, wealth-productive material opportunities, beginning with the "core endowments" characterized above.

C. OPERATIONALIZING THE EEOR: ONWARD TOWARD OWNERSHIP

It is, then, at least roughly apparent that the EEOR, which is our shared American political self-understanding, is, in effect, some kind of OS, at least insofar as ownership is understood by reference to control over the disposition of certain basic resources. Boundedly responsible citizens, as agents whose autonomy in fashioning their own lives and pursuing happiness with ethically exogenous material opportunities is to be honored, are owners. They own their own lives, so to speak, in that they hold exclusive rights to control and develop those lives, as consistent with the equal self-owning rights of others.[73] And those agents must be recognized to own—rightfully to control the disposition of, the material correlates of—the opportunities and resources that go into building those lives as well. The fruits of those resource and opportunity inputs—what we have called the ethically endogenous element—also properly belong to agents and also must be owned. Such are what our agent-citizens autonomously and rightfully bring to, and take from, that idealized market which allocates goods and services in the EEOR, as sketched above. All of these are analytic entailments of the construal of citizens as boundedly responsible agents whose holdings can be ethically assessed in keeping with the EOP.

73. The equal rights qualifier spares the thesis of self-ownership from such objections as Cohen raises against Nozick. *See* G.A. Cohen, *Self-ownership, World-ownership, and Equality*, *in* JUSTICE AND EQUALITY HERE AND NOW 108 (Frank S. Lucash ed., 1986); G.A. Cohen, *Self-ownership, World-ownership, and Equality: Part II*, 3 SOC. PHIL. & POL'Y 77 (1986).

HeinOnline -- 79 S. Cal. L. Rev. 72 2005-2006

But this is, of course, only to begin to explicate the sense in which the EEOR is an OS. Ownership is more than holding and controlling. It is psychologically experienced, and legally secured, holding and controlling. And there are differing forms and gradations of such experienced and legally secured holding and controlling in American law and psychology. Putting flesh on the bare bones of ownership in an American OS, then, requires more than simply saying that ownership and what is owned are to be understood by reference to the American political values of boundedly responsible agency, ethically intelligible efficiency, and equal opportunity. Those are the broad political-valuational features of a recognizably American ownership society. Filling in the more specific legal, psychological, and therefore ultimately programmatic details requires that we take into account both the more detailed material realizations of the constitutive American ideals and the "path-dependent" features of American possessory sensibility and law themselves.

III. CONSTRAINTS RECONSIDERED: ASSETS, OPTIONS, AND ENDOWMENTS IN THE EFFICIENT EQUAL-OPPORTUNITY REPUBLIC

An enduring American OS, then, must cohere with more than the core American political values. It should also make optimal accommodation with, even outright use of, the defining features of ownership psychology and ownership-contouring law found in contemporary America. It is of course possible that those features evolve, or are affirmatively malleable by concerted effort, over time. But there also is reason to doubt this, in light of the facts that (a) endowment psychology and law, as is borne out below, are bound up with ideological tradition, which changes only quite gradually when at all; (b) substantial empirical evidence suggests that some aspects of possessive psychology might even be "hard-wired"; and (c) ownership-defining law, which appears to be symbiotically related to ownership ideology and psychology, generally evolves slowly in a common law system. So in building an American OS we will do well to treat American endowment psychology and law, like the American political traditions, as givens, working with, rather than against them. That general strategy recommends a number of ownership promotion strategies that are likely to work most effectively in the project of constructing an American OS. Those strategies in turn are broadly divisible into strategy families responsive to ownership's links with EEOR-defined bounded agency on the one hand and its links with EEOR-defined responsibility on the other.

HeinOnline -- 79 S. Cal. L. Rev. 73 2005-2006

A. LEGAL OWNERSHIP, AGENCY, AND ENDOWMENT PSYCHOLOGY

As observed in Part II, the American EEOR construes citizens as boundedly responsible agents who develop themselves and build worthwhile lives out of "inputs" of a certain kind—raw materials or basic resources. Those materials or resources are best viewed as "real options" or "material opportunities"—the outward correlates of agency itself.

1. Owned "Assets"

The notion of a resource, option, or material opportunity in ideological terms translates into that of an "asset" in more specific legal or financial terms.[74] A deficit relative to some baseline endowment of such assets is, symmetrically, a liability, as the negative correlate to an opportunity is a risk. Resources are agency-enhancing, hence "asset-like," in degrees. Those degrees are situated along several metrics or dimensions, all of which are intelligible by reference to an ordinally equivalent scale of degrees of agent autonomy.

A resource is more "asset-like," more autonomy-conferring, as it becomes more generative, yielding further resources. These further resources allow more choices to be made and the consequent realization of greater autonomy. Land, machine tools, and other capital goods that appreciate in value over time are prime examples.

Cognate with, but analytically distinct from an asset's capacity to generate more resources, is its liquidity—the rate at which it can be exchanged for or converted into other assets, money in particular.[75] Liquidity thus rides on the preferences and valuations of others. Greater liquidity, like greater generativity, translates into a greater sphere of choice-making autonomy.

Similarly, an asset becomes more "asset-like" with its amenability to parceling—to spatial and temporal subdividing. If you cannot only sell your house outright but also rent it to others, in part or in whole, again your

74. A deficit relative to some baseline endowment of such assets is, symmetrically, a liability, as the negative correlate to an opportunity is a risk. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part IV.A.1.

75. *See, e.g.*, MARTIN SHUBIK, 1 THE THEORY OF MONEY AND FINANCIAL INSTITUTIONS 399–427 (1999). *See also* JAMES TOBIN, MONEY, CREDIT, AND CAPITAL 12–14 (1998) (emphasizing, however, only the temporal rate at which the asset can be converted to cash).

HeinOnline -- 79 S. Cal. L. Rev. 74 2005-2006

sphere of choice—hence autonomy—is widened; hence again, your asset is more "asset-like."[76]

Cognate with, but again distinct from its amenability to parceling, is an asset's capacity to be detached or abstracted from objects and specified in terms of performance. Call this the "abstraction effect." The abstraction effect is well underway in contemporary accounting and finance, wherein, for example, accounts payable and other rights to future performance are counted as assets. This Article will note below, however, that the law has not quite kept up.

Resources also are more asset-like insofar as they are more durable,[77] reliable, or secure in either a physical or legal sense. Rapid erosion, uninsurability against loss, or inadequate legal protection, for example, results in a diminution of the autonomy realized through holding an asset, hence a diminution of that asset's "asset-likeness."

Finally, and again relatedly, for reasons that appear to be rooted in law, psychology, or both, as we shall see below, resources appear to function more as assets according to the extent to which they are "hard" and already accumulated, in a rough and ready physical or temporal sense that perhaps regrettably eludes orthodox financial intelligibility. Stocks, that is, appear to our psychology and law to be more "asset-like" than do flows.[78] We shall return to this puzzling distinction below.

76. James Tobin also singles out what he terms an asset's "divisibility" as a fundamental attribute. He limits his discussion, however, to fractional unit sizes along the single dimension of simple quantity. *See* TOBIN, *supra* note 75, at 15.

The ability to parcel and abstract is, in part, a function of the legal system's regime of property and contract, though it is also a function of the information and related transaction costs of complex estate- or entitlement-delineation. For discussion of the significance of parcelability for the property regime, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000); Henry E. Smith, *Exclusion Versus Governance: Two Strategies of Property Rights*, 31 J. LEG. STUD. 453 (2002); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). For discussion on information costs and their import for the property regime, see Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

77. Durability is related to, but nonetheless distinct from, Tobin's "predictability." *See* TOBIN, *supra* note 75, at 16–20, 23–26. "Predictability" refers to the degree to which an asset's cash value at future dates can be accurately anticipated. *Id.*

78. Pursuant to the endowment effect and cognate heuristics documented by experimental economists, wealth that one holds appears to be "worth" more than wealth that one might or will hold in the future. This Article does not distinguish among endowment effects, loss-aversion, or willingness-to-accept and willingness-to-pay gaps. Nor does it distinguish between these and the more conceptually distinct, though nonetheless empirically entangled, phenomena of status quo bias, commission/omission disparity, or disposition effects. There is, of course, a vast and growing literature on these and cognate subjects. *See, e.g.*, Colin F. Camerer, *Individual Decision Making*, *in* THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 665–70 (John H. Kagel & Alvin E. Roth eds., 1995); Daniel

HeinOnline -- 79 S. Cal. L. Rev. 75 2005-2006

2. Assets as Property

As observed above, assets conduce to EEOR agents' autonomy—to the freedom of agents in realizing their *own* visions of the good life—only to the degree that agents may control or rely upon the disposition of those assets.[79] And as the mention of legal security above suggests, such control or reliability is guaranteed—not subject to challenge, or to violent expropriation, or violation by other agents with competing claims—only by a system of individual rights to resource control, recognized and enforced by agents jointly. Thus, an OS in essence is an assembly of mutually cooperating agents operating under a mutually agreed system of legal entitlements to resource disposition. Ownership, therefore, is not mere possession; it is legal, and legally vindicated, possession.

Legal possession, however, is more than mere legal entitlement, as thus abstractly stated, in American law and endowment psychology. For both the law and citizen owners distinguish between different kinds and degrees of entitlement and possession, such that some kinds or degrees contribute more fully to agent autonomy than others.

Legally speaking, the most salient distinction between kinds of entitlement probably is that between entitlements protected by property rules on the one hand and liability rules—generally contract and tort—on the other.[80] The former, by requiring the actual or would-be taker or violator of another's entitlement to pay a price set by the original holder of the entitlement, in theory affords the original holder a greater sphere of choice, including the choice not to be dispossessed or disentitled at all. Such rules accordingly delimit a greater degree of autonomy in the disposition of resources on the part of the resource holder.

Liability rules, by contrast, in reserving the determination of appropriate compensation to agents of the citizenry's legal system itself, in effect hold back an increment of resource-dispositional autonomy from

Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Richard H. Thaler, *Mental Accounting Matters*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 75 (Colin F. Camerer, George Lowenstein & Matthew Rabin eds., 2004). *See also* ADVANCES IN BEHAVIORAL FINANCE (Richard H. Thaler ed., 1993); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991). For a popular, audience-targeted treatment of these phenomena, see RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992).

79. On the connection between autonomy and control over assets, see TOBIN, *supra* note 75; *supra* notes 75–77 and accompanying text.

80. *See* Calabresi & Melamed, *supra* note 2.

HeinOnline -- 79 S. Cal. L. Rev. 76 2005-2006

entitlement-holders. Indeed, they go so far as to permit involuntary disentitlement for a legally determined price. Insofar as a would-be American OS aims to promote the autonomy value of the American EEOR through legal asset-ownership, then, it will generally seek to foster, to the degree practicable, the spread of entitlement to resources vindicated by property rules over and above liability rules. We require a bit more nuance than this, however.

At the level of implementation, as suggested by the "to the degree practicable" qualifier, American law traditionally has limited the kinds of asset vindicable by property right, as distinguished from contract right or tort immunity. Roughly, it is rights as to the control or disposition of physical objects, substances, or locations, for varying temporal durations, that have been vindicable by property rules. Rights to or immunities from the actions—specific performances—of other agents, by contrast, have largely been vindicable only by liability rules—contract and tort, respectively.

There is some tension between this legal tradition and the American EEOR's value of boundedly responsible agency as expressed in ownership, resource-control. This is so at least in the contemporary socioeconomic context, in which assets as material opportunities or real options can comprise more than physical spaces, objects, or substances. For many of the assets that agents hold in contemporary commercial societies, involving many complex transactions and plans made with a view to managing or controlling an uncertain future, are expectancies.[81] And limiting the right to own—to make property of—expectancies, as, for example, contract law does in disfavoring specific performance and liquidated damages remedies, accordingly limits EEOR agency's expression in ownership.

Unless there is some compelling EEOR-cognizable reason for this limitation on expectancies as property, then, a would-be American OS seeking maximally to vindicate autonomy (as consistent with responsibility, discussed below) should respond in either or both of two ways. First, it should seek particularly to spread the ownership of assets traditionally protected by common law property rights: "hard," accumulated material objects or spaces. Second, it should seek, by statute if need be, incrementally to extend property rule protection into the

81. Financial contracts drafted with a view to managing risk or responding to other future contingencies—derivatives—are a salient case in point. And, as is clear from the discussion of that ideal complete and neutral market which is the EEOR's preferred asset-allocation mechanism, *supra* Part II, such contracts are a critical means of endowing agent-citizens in keeping with their life-planning agency.

traditional realms of contract (for example, in the case of stipulated damages provisions) and even tort (for example, in cases of conversion and nuisance) by adjusting available remedies for breach of entitlement.[82] The desirability of working toward both of these ends is reinforced by empirically documented features of endowment psychology, to which we turn next.

3. Property's Psychology

It is not only American law that pushes us toward specific operationalizations of EEOR agency as particular forms of entitlement to material opportunity enjoying particular forms of protection. The psychology of ownership also speaks to the matter. For it turns out that a substantial body of empirical research supports the long-articulated American intuition that asset-owning vindicated by property rules conduces to the richest forms of actually lived and experienced responsible agency.[83] The empirical indicia of lived agency, that is, are more closely correlated with legally secure, accumulated assets or stocks—the stuff of full-bore property rule protection—than with merely statutorily or contractually entitled income or flows.

The more specific findings include the fact that accumulated asset-holding induces an orientation toward the future, including attitudes of control thereover that tend to be self-fulfilling. Those lacking in such assets are more present-oriented. Accumulated, propertized assets thus conduce both to the enhancement of agency over time and to a "stakeholding" mentality that encourages the taking of responsibility. These findings are robust when controlling for differential incomes and propensities to save.[84]

82. This strategy of course requires considerably more argumentation on its behalf than I can give here, in view of the vast literatures devoted to defending liability rules in such contexts. Suffice it here to note that those defended trade on a conception of efficiency repudiated in Part II, *supra*. And for fuller argument, please see the predecessor article, Hockett, *supra* note 3, at 74–78.

83. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part IV.A.2.

84. The causality, one might expect, should run both ways. An "investment mentality" seems more likely to result in asset-accumulation than a profligate, "live for the moment" mentality. Studies controlling for the bidirectional causal effect have found, nonetheless, that asset-holding itself fosters investment attitudes that lead to more asset-holding. *See* Sondra G. Beverly, Amanda Moore McBride & Mark Schreiner, *A Framework of Asset-accumulation Stages and Strategies*, 24 J. FAM. & ECON. ISSUES 143 (2003); Gautam N. Yadama & Michael Sherraden, *Effects of Assets on Attitudes and Behaviors: Advance Test of a Social Policy Proposal*, 20 SOC. WORK RES. 3 (1996); Amanda Moore McBride, Margaret S. Sherraden & Suzanne Pritzker, *Civic Engagement Among Low-income and Low-wealth Families: In Their Words* (Ctr. for Soc. Dev., Working Paper No. 04-14, 2004) [hereinafter McBride et al., *Civic Engagement*]; Amanda Moore McBride, Margaret Lombe & Sondra G. Beverly, *The Effects of Individual Development Account Programs: Perceptions of Participants* (Ctr. for Soc.

HeinOnline -- 79 S. Cal. L. Rev. 78 2005-2006

Relatedly, accumulated asset-holding also correlates to wider ranges of actual choice-making, to actual perceptions of option-breadth, and, apparently in consequence, to attitudes of independence.[85] It also, and again relatedly, correlates to higher degrees of civic engagement, and political participation, as well as to self-perceptions of social and political efficacy. The same holds true of familial engagement and consequent cohesion, and again the results are robust when controlling for differential income flows.

Going more micro still, accumulated asset-holding correlates to superior physical health, cognitive function, academic performance, initiative, creativity, adaptability, flexibility, and emotional adjustment in children.[86] Yet again the results are robust when controlling for income, and intriguingly, all of these results have been at least partly replicated outside of the United States, at least in European jurisdictions.

When attempting to conjecture as to the causal mechanism that explains these correlations, it is, of course, difficult to disentangle attributability to the mere fact of actual physical possession of what is accumulated on the one hand, and attributability to the greater degree of legal and societal security attaching to accumulated assets when—they are treated as "property" rather than as contractual or government-conferred entitlement to future flows—on the other. But for present purposes, we need not fret over that difficulty, for the real point is that (a) the EEOR value of responsible agency recommends ownership, (b) property rules maximally confer ownership, and (c) empirical evidence indicates that the principal indicia of the greatest degree of actually lived and experienced agency maximally correlate with maximal—property-rule-protected—legal ownership.

Dev., Working Paper No. 03-06, 2003); Margaret S. Sherraden et al., *Overcoming Poverty: Supported Saving as a Household Development Strategy* (Ctr. for Soc. Dev., Working Paper No. 04-13, 2004).

85. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004); James H. Stock & David A. Wise, *The Pension Inducement to Retire: An Option Value Analysis* (Nat'l Bureau of Econ. Research, Working Paper No. 2660, 1988).

86. *See* AMANDA MOORE MCBRIDE ET AL., CTR. FOR SOC. DEV., ASSET BUILDING: INCREASING CAPACITY FOR PERFORMANCE: MEASUREMENT AND EFFECTS (2004); McBride et al., *Civic Engagement*, *supra* note 84; Deborah Page-Adams & Edward Scanlon, *Assets, Health, and Well Being: Neighborhoods, Families, Children and Youth* (Ctr. for Soc. Dev., Working Paper No. 01-09, 2001); Trina R. Williams, *The Impacts of Household Wealth on Childhood Development* (Ctr. for Soc. Dev., Working Paper No. 04-07, 2004).

HeinOnline -- 79 S. Cal. L. Rev. 79 2005-2006

B. LEGAL OWNERSHIP, RESPONSIBILITY, AND ENDOWMENT HEURISTICS

The qualifier "responsible" prefixed to "agency" is what occasions most challenge to fortifying agency by delimiting, vindicating, and promoting legally recognized asset-ownership. The challenge arises between vindicating and promoting, and finds expression in delimiting. For in a world of scarcity, some efforts at promoting ownership among nonowners can superficially appear to threaten—hence to violate the vindication of—the entitlements of current owners.

In theory, the problem is readily dissipated; that was one upshot of Part II.B.1's elaboration of responsible agency as entailing equal opportunity. And even practically, the problem is largely soluble; that was one upshot of the core-endowment-bracketing and market-making strategy of Part II.B.2. But again, certain features of American law and endowment psychology recommend some strategies of endowment-spreading and market-making as likely to occasion cause less friction than others.

1. Endowment Heuristics Again

Qualifying such nouns as "agency," "autonomy," and "ownership" with the adjective "responsible" finds policy and legal expression in two practically related but distinct sides of the owned-asset allocation process. Call them the "endowing" (or "giving") and the "delimiting" (or "taking") sides. Insofar as we circumscribe the prerogatives of legal ownership in keeping with the equal agency or equal opportunity principle, we work from the "delimiting" side, and might superficially appear to be impeding agency or objectionably "confiscating" what is already owned. Insofar as we act collectively to promote wider ownership of ethically exogenous assets by more agent-citizens in keeping with the EOP, we work from the "endowing" side and might superficially appear to be interfering with responsibility, simply giving unearned "handouts," so to speak. When the misleadingly labeled "unearned handouts"[87] appear to be subsidized by the (superficially) perceived "takings," dangers to the perceived legitimacy of concerted ownership-promoting action are at their most pronounced.

87. They are misleadingly labeled because ethically exogenous endowments are not expected to be, nor by definition could they be, "earned." Rather, they are deserved—entailed by our commitment to the American value of equal opportunity itself. Rich indolent children's inheritances are unearned handouts, and insofar as they exceed the child's legitimate share of the ethically exogenous endowment as determined by the EOP, they are literally undeserved in a way that endowment-equalizing compensations paid to poor children are not.

HeinOnline -- 79 S. Cal. L. Rev. 80 2005-2006

Public delimitation and promoting of ownership in keeping with the EOP will do well, then, as a strategic matter to take account of ownership psychology in defining and fostering responsible ownership, just as we noted in Part III.A that it should do in defining that which is owned. This is simply a matter of prudence, of avoidable-cost avoidance. Law and policy that accommodate owner psychology are law and policy that are likely to enjoy the widest possible and longest enduring public support.

The principal feature of ownership-psychology that operates here has already been encountered. It is the endowment effect just seen in Part III.A to result in a perceived difference between "hard," "accumulated" wealth on the one hand, and "soft," "merely entitled," or liability-rule-protected future "income" on the other.[88] Moreover, when attention turns from ownership to responsible ownership, the endowment effect appears to interact in "feedback" fashion with the Part III.A abstraction effect as well. Limitations on the use and enjoyment or alienability of what one already owns, that is, removing sticks from the bundle, as the favored simile would have it, is itself seen as a "taking" of the endowment, even when current possession as such is not threatened.

The practical and strategic consequence of the endowment heuristic, both standing alone and in infusing the abstraction effect, is two-fold. And again it operates at both the "taking" and the "endowing" sides of the opportunity-allocation process. From the "taking" side, limitations on future growth in or parceling of asset-holdings by those who are currently surplus-endowed by EOP lights are likely to face less opposition than "confiscations" of what already is held. From the "endowing" side, endowment that takes the form of "refraining from (perceived) taking," or of conferring more abstraction (parceling) rights, is likely to face less opposition—appear less like a "handout" or "giveaway"—than will endowment that looks on the surface more like an outright grant. The policy-optimal strategy, then, in view of owner-psychology, will be the opposite of that earlier-noted least optimal—the "taking and giving." It will be the "channeling of (apparently) new (and apparently *exogenous*) wealth" to, and the "refraining from taking or restricting of wealth" *from*, those who by EOP standards are presently opportunity underendowed.

A classic case of "refraining" in recent years is the earned income tax credit ("EITC")[89] a program that has enjoyed widespread support even among "conservatives." Its success stands in instructive contrast to the

88. *See supra* Part III.A.

89. *See* 26 U.S.C. § 32 (2000).

unpopularity of "negative income tax" ("NIT") proposals of the past, surprisingly proposed by other "conservatives" of a Friedmanite cast, which were perceived more as "givings" than is EITC notwithstanding their orthodox finance-theoretic equivalence.[90] Suggested cases of the "channeling of the new," for their part, were noted in Part II.B. More such programs are elaborated in fuller detail in Part V below. For now, it suffices simply to flag these two strategies. To some extent, they already find expression, from time to time, both in law and in policy, although there is much more room here for policy design, a fact upon which Part V will capitalize.

Two other strategies are more incremental in nature than the "rechannelling" and "refraining" strategies. Again they fall one each on the "endowing" and "delimiting" sides of asset-allocation. On the endowing side, the strategy is to condition collective endowment of the underendowed upon recipients' acting in some manner easily characterized either as "earning" the perceived "handouts" or as being otherwise deserving of them on some ground explicitly tied to the endowed item's ethical exogeneity. Requiring some manner of service—for example, military or community service—as consideration for receipt then, or requiring that recipients use endowed funds only for such "meritorious" purposes as education, medicine, or productive investment, is a strategy that both should be and increasingly already can be seen at work. We find it, for example, in tax-favored Individual Retirement Accounts ("IRAs"), Individual Development Accounts, proposed tax-favored "private health accounts," "education accounts," and other programs that might be called "Piecemeal Asset-Accumulation Programs." In essence, the endowment itself is delimited in these cases in a manner that is commensurate with the delimitation of the prerogatives of the already-endowed by that aforementioned "responsible"—hence, equal exogeneity, unequal endogeneity—qualifier.

On the "taking" side, the incremental approach is simply to refrain from "confiscating" all of the attributes of the overage held by the overendowed, and to skim what *is* skimmed from the overage off the less tactile—hence, seemingly less "hard" or accumulated—"sticks" in that "bundle" of rights which is property ownership. Hence, one does not confiscate the property, but restricts or taxes its use or alienability, or guaranties others some rights or easements in its use. Familiar examples are

90. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 161–76 (1962); James Tobin, Joseph A. Pechman & Peter M. Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

HeinOnline -- 79 S. Cal. L. Rev. 82 2005-2006

the estate tax, the imposition of public access rights to the electromagnetic spectrum, and community reinvestment requirements placed upon depository institutions. This line of strategy takes us more squarely to the other, nonpsychological parameters within which ownership facilitation must operate: the legal ones.

2. The *Legal* Endowment

As with "asset"-defining, ownership-delimiting subjects policy to some of the path-dependent features of American law. As it happens, however, path-dependence here proves rather helpful for purposes of ownership promotion in vindication of the EOP. For the law appears to incorporate within its constitutional and property doctrines many of the same heuristics, rational or irrational, that characterize the psychology of ownership. That means that the law permits precisely those strategies of ownership delimitation in keeping with responsible agency that were just observed to be prudent in Part III.B.

The standard forms that ownership delimitation takes in American law are, of course, essentially of three types—restrictions on use and enjoyment, restrictions on alienability, and limited expropriation, the latter generally in the form of licensing fees or taxes.[91] Courts and legislatures generally impose few if any limitations upon the legislatures' powers to employ these methods.

Restrictions on use and enjoyment are widely accepted, with some limited exceptions to be noted below. And few citizens seem to regard them as threatening the United States' status as an ownership-protecting polity. That acceptance probably reflects implicit acceptance of the responsible ownership principle, which we saw above to entail a commitment to the EOP.

Restrictions upon alienability similarly appear to be widely upheld by the courts and accepted by the public, though there is sometimes more controversy here. Prohibitions on vote-selling, self-indenture, prostitution, organ-sale, and child-sale are familiar—and scarcely controversial—cases

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

HeinOnline -- 79 S. Cal. L. Rev. 83 2005-2006

in point. Few seem to regard them as serious threats to the United States' status as an ownership-protective polity.[92]

One long-standing form of restriction upon asset-alienability in the United States dovetails with the other principal form of ownership delimitation, taxation: the taxation of one form of wealth-alienation itself. Like other forms of limited and incremental expropriation, for example, property-, income-, and sales taxation, estate and gift taxation has not tended to be seen as threatening the United States' status as an agency- and ownership-protecting polity, although there are, of course, some fringe elements who continue to argue that the income tax, since its 1913 inception,[93] has been "unconstitutional". Indeed, estate taxation and progressive income taxation have widely been viewed and justified precisely as means of vindicating real EEOR responsible agency itself.[94] In CL terms, they have been viewed as means of partly rectifying perceived inequities in the distribution of ethically exogenous endowments. In CR terms, they have been viewed as means of preserving the long-term health of the republic by preventing republic-threatening, unearned plutocratic aggregations of financial and political power. Such arguments are still regarded as mainstream. Taxation also has, of course, long enjoyed a special degree of deference by courts.[95] So long as recently proposed and partly adopted radical aberrations in the venerable American tradition of inheritance taxation and externality-recouping regulation are quickly reversed, then, American legal tradition will actually serve to facilitate concerted ownership promotion policies.[96]

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92. Milton Friedman noted long ago that the ability to sell "shares" in one's self or one's future earnings would facilitate borrowing for education, as a sort of human capital expansion project. *See* FRIEDMAN, *supra* note 90, at 85–107. But fewer people appear to have taken that suggestion to heart even than have supported the proposal of Landes and Posner, *supra* note 60.

93. Michael J. Graetz, THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE 3 (1999).

94. *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

95. The classic decision holding that the Legislature's taxing authority is plenary is *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

96. *See* Hockett, *Whose Ownership?*, *supra* note 3, at Part IV (discussing recent aberrations). *See also* EPSTEIN, TAKINGS, *supra* note 20, at 99–104, 263–305 (advocating for one of the aberrations). *But see* WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES (2002) (arguing for conclusions contrary to Epstien's); MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005) (same); STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS:

HeinOnline -- 79 S. Cal. L. Rev. 84 2005-2006

C. FROM CONSTRAINTS TO STRATEGIES: PROGRAMMATIC ENTAILMENTS

The constraints just elaborated do not block or prevent our realizing the core EEOR values discussed in Part II. They simply counsel that some means of operationalizing our EEOR are likely both more fully to operationalize it, and to occasion less friction, than others. They recommend, then, some broad classes of implementation strategy over others. They tell us that to realize the EEOR fully we should indeed act to make of ourselves an OS—a polity in which core material opportunity endowments of the kind elaborated in Part II are both widely spread and vindicated by property rules. And in order to effect that spread, the constraints tell us to work, so far as possible and in exchange for perceivedly "deserving" behavior, to channel perceivedly "new" resources to, while refraining from perceived "taking" from, our underendowed, "rather than" perceivedly "taking" already accumulated resources from our already fulsomely endowed.

When we have we publicly held vast accumulated material resources, such as land, the aforementioned strategy has been easily employed. We simply have offered up the vast public tracts, in smaller but adequately independence-conferring-sized tracts, to such underendowed citizens as have been prepared to work hard to render the tracts productive. Such, of course, was the method of the nineteenth and early twentieth century Homestead Acts, which we shall discuss in Part V. Alternatively or additionally, we have dedicated land in larger tracts to endow institutions that spread other core endowments over the citizenry. Such was the method of the nineteenth and early twentieth century Land Grant Acts, contemporaneous and programmatically associated with the Homestead Acts, which funded open-access higher education institutions nationwide; we shall discuss these too in Part V. Where, on the other hand, we are lacking in such an already accumulated asset as land, the method of nineteenth and early twentieth century style "homesteading" and "schoolsteading" is not available to us. The "new" resource which we must channel then is not already accumulated, left over from the past, but is to be accumulated, reasonably expected to come to fruition in future in significant part through the diligent efforts of our beneficiaries themselves. In such case the method of past homesteading and "schoolsteading" gives way to the method of future financial engineering; for finance is the act of

WHY LIBERTY DEPENDS ON TAXES (1999) (same); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002) (same).

HeinOnline -- 79 S. Cal. L. Rev. 85 2005-2006

facilitating future accumulation. Our constraints, then, recommend for the foreseeable future a strategy of financially engineering our OS into being.

IV. FINANCE REDIRECTED: CREDIT INSURANCE, DEBT SECURITIZATION, AND TAX POLICY AS THE PREFERRED MEANS OF OWNERSHIP SPREADING

The core American values elaborated in Part II suggest a broad spread of ethically exogenous material opportunity and risk over the boundedly responsible agents who constitute our citizenry. They also counsel that ethically endogenous resource holdings be left to fall where they may so long as complete and neutral markets constitute the mechanism by which they are allocated. For such markets appropriately commensurate agent-valued goods and services, and thus appropriately honor the responsible efforts whose fruits are valued by other agents.

The constraints elaborated in Part III, for their part, counsel that some strategies we might employ in seeking to realize the core values of Part II are likely to prove more effective than others. For endowment psychology, along with our "legal endowment," is such that the core values—in particular, that of agent autonomy—are more fully realized by some forms of legal entitlement than by others, while some means of vindicating core rights, in turn, are experienced as more legitimate or less unobjectionable than others.

In this part we begin the process of translating values and constraints into programs. For reasons that will be clear by the end of this part, the preferred such process, which I shall call generically "the Method," makes use of financial engineering techniques that would not have been necessary, and probably would not have been feasible, prior to the early to mid-twentieth century.

It is helpful in this context to remind ourselves that the constraints only constrain us; they do not block our path. For it happens that in spreading ethically exogenous resources widely we *can* conform to those aspects of endowment psychology and the legal endowment that define the treadable path of least resistance. And we can do so without fundamentally compromising our core constitutive ideals. The key is in finance, the means by which macroeconomies always have grown. By rethinking the aims and methods of finance in a way that treats our infinitely valued individual citizens as microcosms, in a sense, of macroeconomies, we can spread ethically exogenous material opportunity widely through financial engineering techniques that make optimal accommodation with—indeed,

HeinOnline -- 79 S. Cal. L. Rev. 86 2005-2006

even employment of—our psychological and legal endowments themselves. Financial engineering of a particular sort can give programmatic expression both to our constitutive EEOR ideals and to our laws and pretheoretic proprietary sensibilities.

A. FROM STRATEGY TO FINANCE: THE METHOD OF FINANCIAL ENGINEERING

"Finance," both in popular usage and for our present purposes, broadly denotes the class of means by which something presently desired, but not yet obtained, may be paid for, even when it cannot be purchased outright.[97] It therefore often can connote, more particularly, the act of borrowing as one such means.[98] In this respect, the word also connotes, from a more theoretical point of view, an intertemporal shifting of asset use:[99] one, in effect, trades future assets (call them A_f) for present ones (A_p)—"borrows against the future"—typically on the understanding that use of the borrowed asset (A_b) at present will yield more, in the long run,[100] than will deferment of use or acquisition of the to-be-acquired, presently desired asset A_p. Often the future yield is what affords the means of paying for the present use of the borrowed asset A_b itself. When that is the case, the project (or "investment") which yields the future return, and which is rendered possible by borrowing itself, is sometimes popularly, though potentially misleadingly, said to be "self-amortizing," "self-financing," or "self-liquidating."[101] The investment in such case has, at a minimum, "broken even," hence is financially rational to have undertaken; one has not lost in the temporal aggregate through the intertemporal shift.

97. BLACK'S LAW DICTIONARY 630 (6th ed. 1990) ("As a verb, to supply with funds through the payment of cash or issuance of stocks, bonds, notes, or mortgages; to provide with capital or loan money as needed to carry on business.").

98. *See id.*

99. *See, e.g.*, ZVI BODIE & ROBERT C. MERTON, FINANCE 2 (2000) ("Finance is the study of how people allocate scarce resources *over time*."). This is, of course, the way in which finance is treated in most theoretical finance texts, as well as in most standard microeconomics texts that devote attention to the subject. *See, e.g.*, ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 732–81 (1995).

100. Typically, the "long run" is defined, in orthodox theory, as the individual agent's full life span, and that which is "yielded" and maximized by the intertemporal shift of assets is "utility." This is the operating template of the "permanent income" or "life-cycle" hypothesis that figures into most financial theory. *See, e.g.*, BODIE & MERTON, *supra* note 99, at 146; Truman Bewley, *The Permanent Income Hypothesis: A Theoretical Formulation*, 16 J. ECON. THEORY 252 (1977); F.P. Ramsey, *A Mathematical Theory of Saving*, 38 ECON. J. 543 (1928).

101. *See* JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 628 (6th ed. 2003) (defining "self-amortizing mortgage").

HeinOnline -- 79 S. Cal. L. Rev. 87 2005-2006

The best investments are, of course, those that yield the highest returns—those that do more than break even or simply "pay for themselves." They yield more than what has been sunken into them, even after costing interest and discounting returns by the prevailing market rate over the course of the project's completion. Their net present values are not merely positive; they also are positively high.[102] From this point of view, postsecondary education, housing, and even many possible securities portfolios that one might finance by borrowing are good investments. If, for example, the U.S. Census Bureau is correct in estimating that a college degree now adds an average of about $1 million to one's lifetime income, and if the average amount paid out of future income for such a degree, including interest charges but excluding room and board (which would have to be paid anyway), is $50,000,[103] then, assuming an employment life of forty-five years, the discount rate would have to be about 7%—rather higher than the 4%–5% that has prevailed for many years now—for the "project" to fall short of breaking even.[104] And that is, of course, entirely to ignore the incalculable nonpecuniary benefits of a postsecondary education.

Parallel observations hold true for homeownership and, indeed, for the holding of a substantial, appreciating, and dividend- and interest-yielding portfolio of securities—ownership shares in firms and in firm debt. Homes typically appreciate in value over the long run at a significantly higher rate than the discount rate.[105] So, of course, does the value of a broad market-indexed stock portfolio.[106] Homes and stock portfolios accordingly would constitute good pecuniary investments in the long run, even if one had to borrow to finance their acquisition, provided that the borrowing rate were

102. "Discounting" is the process of converting future values to present values in view of the rate at which investing a present amount that yields interest grows toward that future value. The barebones formalization is: $FV = PV (1 + r)^n$, where r is the interest rate and n is the number of periods over which interest is calculated. *See* BODIE & MERTON, *supra* note 99, at 102–18.

103. *See* U.S. CENSUS BUREAU, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS (2002), http://www.census.gov/prod/2002pubs/p23-210.pdf; Federal Student Loan Programs, Loan Facts, http://www.studentloanfacts.org/loanfacts/benefits/students/ (last visited Nov. 20, 2005).

104. The seven percent discount rate was found by using the discounting formula: $\$1M \cong \$.05M (1 + .07)^{45}$. *See supra* note 102 and accompanying text. I have, of course, left out income that would have been forgone over the course of the education, and have abstracted from the compounding rate by assuming interest to accrue only once per year, but the essential result is not thereby significantly changed.

105. That, of course, is one reason for the popularity of real estate investment trusts ("REITs") as investment vehicles. *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 283–84, 306 (rev. & updated 8th ed. 2004).

106. *See id.* at 124. The now classic source is JEREMY J. SIEGEL, STOCKS FOR THE LONG RUN 49–52 (2d ed. 1998).

HeinOnline -- 79 S. Cal. L. Rev. 88 2005-2006

not inordinately high. And the security and independence—or at the very least the "cushion" thereby conferred, both in actual fact and as a matter of "wealth effect"-inflected perception—probably are priceless for most people. It would, then, constitute a great advantage were those lacking in such assets able to finance their acquisition, by borrowing to purchase them. Their ownership would yield sufficient long-run income as to amortize the debt well before the death of the typical purchaser or before the asset's depreciation to the vanishing point. And that ownership would yield incalculably more to the holders and to the society of which they were members.

Why, then, does the United States not constitute an "ownership society" already, with everybody owning a home, a substantial stock portfolio, and at least a four-year postsecondary degree? The answer is tripartite: First, significant portions of the adult population *do* hold the first and last of these three basic, responsible, agency-enhancing assets, while far fewer owned homes before the 1940s and far fewer had completed higher education before the 1970s.[107] Second, we have not yet worked publicly to spread substantial owning of the second asset type, securities, and it shows: hard capital is the last remaining of the three chief assets—homes, business capital, and human capital—that confer the kind of productive, life-building autonomy prized both by and in the agent-citizens who jointly constitute the EEOR that is not yet widely held directly.[108] And third, absent public action of this sort, things are more than likely to remain this way, just as would have been the case with homes and higher education absent our concerted efforts from the 1940s and the 1970s forward.

But why is that? What is the "concerted effort" to which I refer, and why would it be necessary to the facilitation of the spread of ownership of those three "fundamental assets"? The answer is, again, finance. In order for investments such as those in homes, educations, or stocks to make pecuniary sense, again, their discounted long-run yields must exceed the costs, including opportunity costs, of their financing. The rate that one pays for the use of money one invests in them—the interest rate—must accordingly be low enough. But in order for the rate to be low enough, and indeed, even for it to be less than "infinitely" high—for lendable funds to be forthcoming at all—those who have the funds to lend must not perceive the loans to be too risky. The lender's calculus, that is, largely mirrors the

107. *See infra* Parts V.A, V.C.

108. *See infra* Part V.B. A partial, though rather limited, exception here is the ESOP, on which more is presented in Part V.B.

HeinOnline -- 79 S. Cal. L. Rev. 89 2005-2006

borrower's, though it is even more severe. The lender will discount the returns on the loans—the interest that they yield—by the returns the lender could earn on alternative investments of the funds that bear similar risk features to those attaching to the contemplated loan.[109] And unlike the borrower, the lender will not allow the nonpecuniary benefits derived (by the borrower) from the credit-purchased asset to compensate for added increments of cost. The lower the risk attaching to the would-be asset-purchaser's loan, then, of course, the more attractive that investment to the lender.

Typically, a lender will mitigate or lessen risk by taking a security interest in some asset already owned by the borrower, or by requiring a guaranty from some well-resourced associate of the borrower. Here then is one source of the venerable adage that "it takes money to make money." Financing is typically available to those who, in a sense, have least need of it—those with direct or indirect access to already-accumulated, collateralizable assets.[110] In effect, finance performs as little more than a temporary liquidation service in such cases—a means by which temporarily to transform hard, accumulated assets into immediately usable cash. The financier acts as a large-scale, noncustodial pawnbroker.

But here lies also a key to the means of breaking what some have called this "tyranny of collateral and connection" or "closed circuit of finance."[111] For collateral is not the only means of mitigating lender risk. Indeed, it is an exceedingly crude such means. It can be likened to a one hundred percent reserve requirement imposed upon a depository institution—little economic growth would ever occur under such

109. This is simply a trivial entailment of the risk-reward trade-off familiar to portfolio theory. Portfolio efficiency consists in maximizing returns given a specific risk profile or minimizing risk given a specific returns profile. *See* Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952). *See also* HARRY M. MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS (1959).

110. Of course those with accumulated assets have need of financing too. The point here is simply that those without already accumulated assets often have even more need of financing—in order to accumulate in the first place.

111. *See, e.g.*, Raghuram G. Rajan & Luigi Zingales, *Financial Dependence and Growth*, 88 AM. ECON. REV. 559 (1998); Raghuram G. Rajan, *Insiders and Outsiders: The Choice Between Informed and Arm's Length Debt*, 47 J. FIN. 1367 (1992); Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5 (2003); Luigi Zingales, *Survival of the Fittest or the Fattest? Exit and Financing in the Trucking Industry*, 53 J. FIN. 905 (1998). *See also* RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY 30–33 (2003).

HeinOnline -- 79 S. Cal. L. Rev. 90 2005-2006

circumstances.[112] If measures can be taken to weed out projects that are unlikely to succeed, and at the same time likely failure rates over a broad swathe of investments can be statistically determined, then we can both minimize and pool default risk, and provide against the latter with less than one hundred percent collateralization. We can require borrowers simply to cover pro rata shares of aggregated, pooled default risk—that is, we can move from collateralization to default insurance.

We can then enhance the boost thereby given the pool of loanable funds by taking another step. Closely associated with perceptions of and aversions to risk are the desire and demand for liquidity[113]—the capacity to withdraw from an investment as readily as one enters into it. If, then, not only default risk, but also debt obligations themselves (that is, rights to repayment) can be pooled, and shares in the pool then sold as resaleable securities, we shall in effect have "completed" the market for OS-valued capital financing debt by "securitizing" it and allowing such risk as attaches to the securities to flow toward its most willing and efficient bearers; we shall thereby have optimized the volume of such financing available.[114]

Such measures constitute precisely the means by which we have, as a society, spread the ownership of homes and postsecondary degrees so much

112. Regulatory authorities impose fractional reserve requirements upon depository institutions in order to ensure the availability of sufficient cash to cover depositor withdrawal needs and avoid destructive "bank runs." It happens that very low rates are required to effect that task, thereby freeing up the remaining deposits to lend and thus fueling economic growth. The development of "reserve systems" that facilitate interbank lending and pooling the risk of inadequate reserves at any one institution has of course freed up even more deposited funds for credit extension.

The Federal Reserve's reserve requirements are promulgated as Regulation D, 12 C.F.R. pt. 204 (2005), issued under the authority of 12 U.S.C. § 461(b)(1)–(4) (2000). For more on the mechanics of reserve requirements, see ROSS CRANSTON, PRINCIPLES OF BANKING LAW 127–29 (1997). For an overview of the troubled history of fractional reserves until the modern era—specifically, the difficulty of finding the golden mean between growth-stiflingly excessive reserves and systemic risk-incurring inadequate reserves, prior to the advent of sophisticated statistical predictive methods as means of calculating fractional reserve needs—see MONEY: A HISTORY 162–92 (Jonathan Williams ed., 1997); SHUBIK, *supra* note 75, at 259–79.

113. *See* James Tobin, *Liquidity Preference as Behavior Towards Risk*, 25 REV. ECON. STUD. 65 (1958). The insight is derived from JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY (1936).

114. "Securitization" has grown rapidly in the last decade and has given rise to some of the largest and fastest growing securities markets. *See* FRANK J. FABOZZI ET AL., FOUNDATIONS OF FINANCIAL MARKETS AND INSTITUTIONS 435–97 (3d ed. 2002). It is often overlooked that all of this began with, and continues to be largely driven by, the activities of erstwhile "government sponsored enterprises" ("GSEs") like Fannie Mae. *See infra* Part V. *See also* Leland C. Brendsel, *Securitization's Role in Housing Finance: The Special Contributions of the Government-Sponsored Enterprises*, *in* A PRIMER ON SECURITIZATION 17, 17–29 (Leon T. Kendall & Michael J. Fishman eds., 1996); Lewis S. Ranieri, *The Origins of Securitization, Sources of Its Growth, and Its Future Potential*, *in* A PRIMER ON SECURITIZATION, *supra*, at 31, 31–43.

HeinOnline -- 79 S. Cal. L. Rev. 91 2005-2006

more broadly than they were spread prior to the late twentieth century. And they are means that we have yet, thus far, to attempt in the spreading of that one form of asset rivaling homes and human capital in importance to agent-citizens of an efficient EEOR—business capital. Call this set of means "the Method."

Here, then, is the Method's basic schema, which we shall find recurring in the most significant, albeit fragmentary, modern American OS programs and proposals thus far pursued or advocated. First, society, acting collectively through its elected government, acts to optimize the amount of capital available for lending to those lacking in assets by those possessed of assets, by itself directly affording the security typically afforded by security interests in collateral. We, in effect, insure lenders against borrower default, either directly, by actually administering the insurance program, or indirectly, by serving as guarantor, reinsurer, or guarantor-insurer for nonpublic or quasi-public agencies that serve as first lines of lender assurance. (The initial lenders themselves are, of course, financial intermediaries—primarily depository institutions which have offered federal deposit insurance since the 1930s and have pooled liquidity- and consequent solvency-risk via the Federal Reserve System since 1913.)[115]

In order to ensure the financial solvency of our efforts, we impose basic quality standards upon both our borrower-beneficiaries and the projects that they wish to finance through their debt. We require that borrowers earn reliable incomes in the case of housing, or that they make satisfactory academic progress in the case of education, and we require that all receive financial counseling. We also insist that the homes and educational institutions meet basic quality standards tending to maximize the likelihood that the investments will indeed bear positive net present values. We also, of course, might exact a small premium of our borrowers in order to cover the (now minimized) costs of administration and maintenance of the insurance fund. Or we can cover the cost collectively in the case of the least advantaged among us.

Where we have employed these strategies thus far, we shall see in the next part, we actually have begun by affording the insurance directly, then gradually have receded into the background as secondary guarantor or

115. For a discussion of the creation of the Federal Reserve System as a congressional response to the financial downturn of 1907 and the birth of federal deposit insurance as a response to the bank panic of the early 1930s, see ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, VOLUME 1: 1913–1951 (2003). *See also* HOWELL E. JACKSON & EDWARD L. SYMONS, REGULATION OF FINANCIAL INSTITUTIONS 27–45 (1999); JONATHAN R. MACEY, GEOFFREY P. MILLER & RICHARD SCOTT CARNELL, BANKING LAW AND REGULATION 11–27 (3d ed. 2001).

HeinOnline -- 79 S. Cal. L. Rev. 92 2005-2006

reinsurer while private insurers or quasi-public guarantors, upon observing the successes of the government-run insurance programs, have stepped into the newly created market that previously had been unimagined or thought infeasible.[116] The ultimate full faith and credit of our society's organ of collective action—our reliable and enduring bond-issuing and bond-honoring government—proves to be enough; the administering can devolve to others.

Second, we "jump start" the development of a secondary market in the consequently burgeoning number of low-risk debt obligations that follow on the success of the first set of initiatives. That is, once many lenders step in to assist in financing the acquisition of basic EEOR-valued assets in response to our public initiative to eliminate their risk, we commence the pooling and securitizing of the consequently proliferating debt obligations. We are aided in so doing by success in the first initiative itself. For one thing, the growth in debt obligations following on the provision of insurance or guaranty results in enough debt to pool efficiently. For another, the fact that so large a portion of the total pool of debt is associated with the insurance or guaranty program itself, coupled with our imposition of quality standards as a condition on enjoyment of the benefit of the program, results in the development of a standard debt contract or promissory note form, and that homogeneity of form itself facilitates efficient bundling and securitizing.

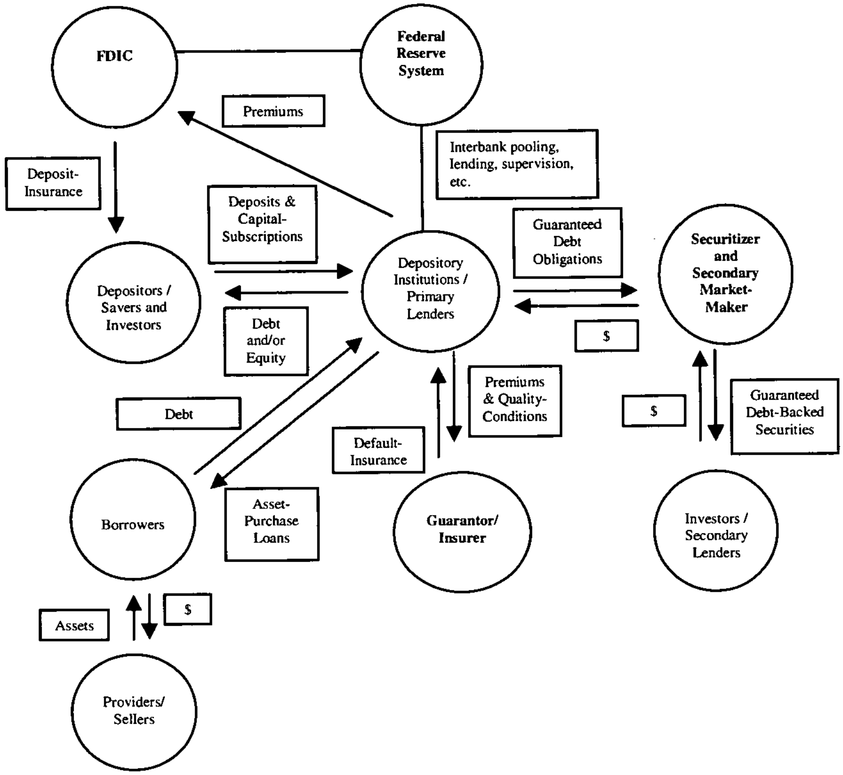
Third, we might—though we need not—publicly subsidize, directly or indirectly, the interest payments made by program beneficiaries on the debt. We can do so either by paying the interest directly, or by rendering such payments tax deductible. That latter, we will see, has proved to be the preferred means in our American OS-in-the-making, particularly for the middle class, while direct subsidy often has figured into such programs as these that operate for the poor. And this, we shall see further, probably owes to the same endowment heuristics that render this "financial engineering" mode of asset-spreading the tried and true contemporary method in our society thus far.

Before turning to the specific ways in which this method meshes with those endowment heuristics and other constraints, it might be well to schematize the Method pictorially.[117] Figure 1 does so:

116. This Article later demonstrates that this was precisely the case with respect to mortgage insurance. *See infra* Part V.A. This Article will also show that the huge trend toward securitization that is currently underway began with the federally created secondary mortgage market-maker, or securitizer, Fannie Mae. *See* Brendsel, *supra* note 114; Ranieri, *supra* note 114.

117. *See infra* Part V (adding more to this abstract schema when we focus on specific programs).

FIGURE 1. General form of credit insurance- and debt securitization-based ownership-spreading programs[118]



As we soon shall see, minor variations on precisely this picture figure into the most successful—though thus far only fragmentary (that is, single asset-spreading)—contemporary American OS programs thus far implemented. They also figure into the most interesting looking such programs that have not yet been tried. It is worth asking why this might be so.

B. THE METHOD, OUR VALUES, AND OUR CONSTRAINTS

The fundamental reason for the Method's success, I suggest, is that it gives elegant and comprehensive programmatic expression to the values

118. In the figure, Guarantor and Securitizer begin as public or quasi-public entities, then subsequently privatize.

HeinOnline -- 79 S. Cal. L. Rev. 94 2005-2006

and constraints elaborated in Parts II and III. Recall, first, those values and constraints: They are that an enduring American OS should, first, work to foster the broadly equitable spread of ethically exogenous assets—material opportunities—while allowing ethically endogenous assets to remain with their producers. Second, the American OS should seek so far as possible to favor the spread of assets that are maximally vindicable by property rules—rules that afford maximal space to agent autonomy, as consistent with the equal ethically exogenous autonomy of others. Third, the American OS acts most prudently by (insofar as equalizing ethically exogenous asset-owning involves special solicitude for the exogenously underendowed): (a) channeling perceivedly "new" resources to the underendowed rather than overtly "taking" already existing resources from the already fully endowed; (b) conditioning that channeling of perceivedly new resources to the underendowed upon the latter's exercise of responsible, productively virtuous effort—in effect ethically endogenizing the "new" resources; and (c) so far as possible, refraining from perceived "taking" rather than engaging in outright "giving."

Now note how the Method meets precisely these criteria. First, decent homes and educations—those assets which have been spread thus far by means of the Method—are perceived by American EEOR sensibilities as basic minima. They are "core endowments," per Part II, to which all young Americans just starting out in life are believed to deserve access—at least provided that such persons as lack such assets lack them owing to luck rather than through any fault of their own.[119] The same, as noted in Part II.B.3, can be said of access to productive nonhuman capital, but as yet we have not worked to foster its spread, save in piecemeal fashion.[120]

Second, homes are as property-like as assets get in American law; they are fully protected by property rules.[121] Education, for its part, is in effect property-rule-protected. For not only can it not be taken, once had, from its possessor at a price below what the rightful possessor demands, it cannot be taken from the possessor at all; but can only be rented, at a

119. This "no fault" proviso presumably accounts for our willingness, for example, to disqualify convicted drug offenders from access to federally assisted higher education finance. *See* 20 U.S.C. § 1091(r) (2000). This Article does not purport to endorse or condemn that policy, only to root it ultimately in the view that people can become ethically responsible for their lack of education as they grow older.

120. *See infra* Parts V.B, V.D.

121. Which is not to say that property rule protection here does not sometimes give way to the state's power of eminent domain. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655 (2005). The great controversy and bipartisan outrage occasioned by the latest decision, however, suggest that it is indeed more exceptional than "the rule."

HeinOnline -- 79 S. Cal. L. Rev. 95 2005-2006

reservation price set by the possessor.[122] Securities portfolios, too, are property-rule-protected, even if for most of us a security, being fungible, is just its market value.[123]

Third, the financial engineering schema—the Method—channels perceivedly "new" resources to the underendowed. To begin with, housing and education are not taken from some and given to others. But more to the point, the credit extended for purchase of homes and higher education is not, pursuant to endowment psychology, perceived as taking and redistributing, even if in orthodox finance-theoretic terms all credit that flows in one direction does so at the opportunity cost of other directions. It just is not perceived in the same way that outright taxing and redistributing would be.

Moreover, the channeling of the credit is conditioned upon the recipients' responsibly diligent behavior; recipients must work to amortize their debts, in addition to working to maintain the value of the home or complete the education. In the case of the one successful business capital-spreading program to make (partial) use of the Method—the Employee Stock Ownership Plan ("ESOP")—the same is true of the employee beneficiaries, who must labor for the firm that sponsors the plan.

Finally, insofar as interest on the loans facilitated by the Method is subsidized, it typically is subsidized by tax deduction rather than direct

122. David Ellerman argues in effect that education, or at any rate human capital, can actually be taken—that it is in effect partial slavery when one works for hire, alienating a portion of one's self and one's education. *See* DAVID P. ELLERMAN, PROPERTY AND CONTRACT IN ECONOMICS: THE CASE FOR ECONOMIC DEMOCRACY (1992). *See also* DAVID P. ELLERMAN, THE DEMOCRATIC WORKER-OWNED FIRM (1990) [hereinafter ELLERMAN, WORKER-OWNED FIRM]; JAROSLAV VANEK, THE GENERAL THEORY OF LABOR-MANAGED MARKET ECONOMIES (1970). This Article does not address that argument here, but notes that, at least in theory, in the absence of chattel slavery, the hirer must still pay the reservation price of the laborer; hence the human capital is property-rule-protected. That is not to deny that the reservation price will be EEOR-objectionably low in a substantially nonneutral market, for example, a market in which some participants lack equal access to ethically exogenous endowments, including business capital and productive networks. But that problem of entry nonneutrality afflicts the reservation price charged for parting with *any* property held by the desperately underendowed, not just labor. If Essau had as much right to eat from the family porridge pot as Jacob, and paid Jacob his birthright for lunch because he was desperately hungry after laboring for the family while Jacob illegitimately controlled access to the family larder, then the price he charged for parting with the birthright was EEOR-illegitimately low. The contract between him and his brother would not be enforceable in our courts.

123. If an individual chooses, a security can always remain property-rule-protected. For example, before United Parcel Service ("UPS") went public, if an individual had been attached to UPS stock for sentimental or familial reasons—say, because generations of that individual's family had worked for UPS and received stock therein pursuant to the company's egalitarian ESOP plan—the individual no doubt could have insisted upon replacement of the stock itself by one who had tortiously converted it, rather than settling for estimated market value.

HeinOnline -- 79 S. Cal. L. Rev. 96 2005-2006

payment. It is a refraining from "taking," "rather than" a "giving." The one exception here only confirms the rule. Direct subsidy of interest payments often figures into use of the Method in financing asset-acquisition by the (means-tested) least advantaged members of society, those who are perceived under EEOR values as warranting special solicitude.[124]

C. WHY THE METHOD IS MODERN: OUR VALUES, OUR CONSTRAINTS, AND OUR RESOURCES—PAST, PRESENT, AND FUTURE

Before we move on to our programmatic history, it is worth briefly considering why what I am calling "the Method" characterizes only modern American OS programs and proposals. After all, haven't there been ownership-spreading programs in the past as well? Why would they not have employed the same methods, if those methods purport to give the fullest financial expression to the Part III constraints? There appear to be two answers, one having to do with feasibility, the other with necessity.

The feasibility answer is that it is much easier to make use of the financial system now, and to securitize and create secondary markets now, than it would have been until comparatively recently. Indeed, there was no centrally managed or regulated system of depository institutions until 1913, nor was there deposit insurance until 1932.[125] The deepening of the securities markets to the point of rendering large-scale securitization of retail debt obligations feasible, in turn, has been critically facilitated by the development of advanced computing and communications technologies since the 1970s.

The necessity answer probably is the more important one: until the early twentieth century there already was a "new," quite material resource, abundant and both legally and perceivedly publicly owned, that could be channeled especially toward the underendowed without running afoul of endowment heuristics. That resource was federal land. It was precisely this land that was distributed by the federal government to the benefit of underendowed Americans up through the first twenty years of the twentieth century. Such distributions were both direct, in the case of the Homestead Acts, which afforded a broad distribution of the principal material resource out of which many Americans of the time built prosperous lives; and indirect, pursuant to the Land-Grant Acts, which endowed institutions of

124. *See infra* Part V (corroborating this claim). Federal ownership facilitation programs employing the Method allow the better-off to deduct interest payments for tax calculation purposes, while directly supplying interest payments on behalf of the apparently faultless working poor.

125. *See supra* note 115 and accompanying text.

higher education with land.[126] These "land grant" colleges and universities were open to all in order to supply the human capital that could optimally be conjoined to land capital in the building of productive lives.

It was, significantly, after the land ran out that the Method, the financial engineering method, was hit upon by fits and starts. And it was, happily, precisely over this period that national markets grew sufficiently integrated, and technologies sufficiently sophisticated, as to render the Method fully feasible. A critical purpose of the present Article accordingly, is to show the generalizability of the Method—particularly now as our markets grow yet more integrated and our technologies yet more sophisticated—in order to complete the modern American OS anticipated by the land grant programs of the nineteenth and early twentieth centuries, and begun in earnest by our now well-established and continuing federal home and higher education finance programs. The point, that is, is to show how we might finally become that Jeffersonian republic that we were on our way to becoming before the land ran out.

V. PARTIAL INTIMATIONS OF THE COMING WHOLE: FRAGMENTS OF AN AMERICAN "OWNERSHIP SOCIETY" PAST AND PRESENT

We are now equipped to interpret our own programmatic history as an OS-in-the-making. This part accordingly surveys, under the aspects of the core value and constraint understandings summarized in Parts II and III, as well as the finance-schema laid out in Part IV, past and recent OS program-fragments and proposals. The benefits of doing so are two-fold: First, our survey corroborates the political, psychological, legal, and financial syntheses of Parts II through IV, by demonstrating how past OS program-fragments and proposals resonate with or instantiate its counsels and ideals. And second, it equips us to meld the fragments together so as to draw additional implementary lessons for the OS to come.

Because the ultimate aim is to bring programmatic coherence and endurability to our future ownership-facilitative policies, we will do well to be more brief in the treatment of policies that do not seem replicable than in treatment of policies that do. We will consider the former principally with a view to how they show both that we have long been attempting to become an OS, and that our efforts to that end have in all cases given expression to Part II values and Part III constraints. It will also be useful to

126. *See id.*

HeinOnline -- 79 S. Cal. L. Rev. 98 2005-2006

group our surveyed programs and proposals under three broad headings, which I will call "homesteading," "capital homesteading," and "human-capital homesteading." We will see that these three families of programs jointly constitute what might be called the "three-legged stool" of a complete, comprehensive, and contemporary American OS.

A. "HOMESTEADING"

The first form of asset with whose ownership the American polity came to be pervasively concerned was real estate. Real property continues to constitute a substantial strand in latter-day American ownership policy as well, but for reasons that we shall highlight, it no longer can reasonably be expected to enjoy the pride of place that it once held. Its principal significance now is as one leg of the aforementioned "three-legged stool," and as that asset in the spread of which "the Method" of Part IV was first pioneered.

1. Early Land Law

There has not been a more durable or property-rule-protected asset in the American tradition than real property. And no asset has resonated more powerfully with the CR strand of American political self-understanding. Land was thought to be the very source of political power by early republican thinkers,[127] its wide dispersal accordingly a requisite to preventing power's unhealthy concentration. As a highly generative asset, moreover, land was thought to be the basis of a household's self-sufficiency and, thus, republic-reinforcing independence, too.[128] Free government required freeholders. CL and PC advocates, as well, could view real property as one of the more crucial assets during the early days of the American republic. For land was still central to economic development and to that autonomy and self-determination that sprang of economic independence.

As discussed in this Article's prequel, British closure of the West to colonial migration was indeed one point of contention ultimately leading to the American Revolutionary War itself. And English primogeniture and fee tail had both prompted much of the migration to North America in the first

127. Of course, not only republicans thought this. It is no accident that the first act of William I upon conquering England was to distribute large parcels of land to his loyal nobles. It is also no accident that those parcels which he carved out were not contiguous—this in order to prevent the concentration of power among any dukes who might later have opposed him. *See, e.g.*, Edward L. Glaeser & Andrei Shleifer, Legal Origins (Feb. 22, 2001) (unpublished manuscript, on file with author).

128. *See supra* Part II.A.

HeinOnline -- 79 S. Cal. L. Rev. 99 2005-2006

instance and inspired, by negative example, early changes to the common law of real property by North Americans.[129] After the Revolution, the Northwest Ordinance[130] quickly opened up the new nation's western lands to settlement and cultivation by the growing masses of "shiftless," town-dwelling unemployed—long thought a source of decadence and civil instability by CR thinkers.[131] Sale to the public of federal lands, themselves ceded to the national government by the newly independent states, was agreed to constitute a suitable means of paying down the new republic's war debt.[132] There was disagreement, however, over what tract-sizes and prices the government should impose, as well as over who should be permitted to purchase and whether credit should be permitted in the purchasing. Policy oscillated between victories by those early economic growth-concerned PC advocates who sought to keep a sizeable laboring population back east to man the workhouses of infant U.S. manufacturing industries, and the CR advocates who sought to foster a more widespread yeoman citizenry.[133]

The Land Act of 1796,[134] which both doubled the minimum price that the government could accept per hectare, and restricted purchases on credit, represented a victory for the manufactures-favoring, "Hamiltonian" camp.[135] The Harrison Land Act of 1800,[136] which (a) provided for smaller unit sales and liberalized credit, and (b) afforded preemptive rights to purchase at minimum price to squatters who already had begun to develop parcels before 1800, was a victory for "Jeffersonians."[137] Agricultural depression, which ended a period of rapid expansion following the War of

129. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 228–58 (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1788–1860, at 31–62 (1977); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); Hockett, *Whose Ownership?*, *supra* note 3, at Part I.A.

130. Northwest Territory Ordinance of 1787, 1 Stat. 51.

131. *See* MCCOY, *supra* note 1, at 185–208. *See generally* BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (Univ. of Wisconsin Press 1965) (1924).

132. *See* ALAN F. ZUNDEL, DECLARATIONS OF DEPENDENCY: THE CIVIC REPUBLICAN TRADITION IN U.S. POVERTY POLICY 30 (2000).

133. *Id.* at 30–32. Hence, incidentallv, Hamilton's favoring of restrictions upon westward migration, though his concern also was with consolidating federal unity and avoiding the perceived threat of national entropy. *See* ELKINS & MCKITRICK, *supra* note 4, at 257–300.

134. Land Act of 1796, ch. 29, 1 Stat. 464.

135. ZUNDEL, *supra* note 132, at 30–32.

136. *Id.* at 32.

137. *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 100 2005-2006

1812, brought yet another Land Act in 1820,[138] this one restoring cash-only sales of government land.[139]

In debates surrounding all of these enactments, CR advocates of low prices, small parcels, and easy credit spoke directly to the individual virtues and political stability-enhancing lifeways of the hardworking small farmer—"backbone of the nation"—contrasting these to the greed, corruption, and republic-threatening habits of the "speculators" and "aristocrats" who sought and advocated sales, in cash only, of larger tracts that humbler citizens could not afford.[140] Opponents, as had Hamilton before them, spoke to the CL and PC virtues that concentrated urban populations would bring.[141]

It is hardly surprising that land policy should have represented so central, frequent, and contentious a matter for debate in the early days of the American colonies and republic. Land was, in those early days, as "asset-like" as assets could get. It afforded the greatest material opportunity, and accordingly conferred the greatest degree of autonomy, available in the socio-economy of the time. The state of markets, tastes, and technological development until the mid- to late nineteenth century was such that virtually any needs, wants, or life plans that the typical American could conceive were well furnished through land-ownership. One could either grow upon or extract from land what was required, or trade what was extracted for something else required, or sell interests of various kinds in the land itself.[142] Moreover, land was plentiful, and could be optimally productive only if widely allocated, for the technologies of agricultural extraction at the time were such that holders of very large tracts, unless they were slave-holders growing cotton, could not produce as much in aggregate as could smaller holders. CR, CL, and PC interests alike, accordingly, could be argued to be at least partly vindicated through promotion of a broad dispersal of land-ownership.[143] Positions among the three traditions on the land-dispersal question diverged only at the margins (how much should farming be encouraged relative to industrialization) until those conditions changed. The change occurred first, when the nation's

138. *Id.* at 33.

139. *Id.*

140. *See id.* at 32–33.

141. *See id.* at 30–32.

142. *See generally* CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846 (1994).

143. *See id.* For a recent account of the continuing importance of broadly dispersed landownership to economic development in preindustrialized agrarian economies, see DIANE E. DAVIS, DISCIPLINE AND DEVELOPMENT: MIDDLE CLASSES AND PROSPERITY IN EAST ASIA AND LATIN AMERICA (2004).

HeinOnline -- 79 S. Cal. L. Rev. 101 2005-2006

initial western border began to be reached; second, when territory was filled in all the way to its final western border; and finally, when technological change rendered large tracts, of the sort that have come to be associated with so-called corporate farms and agricultural conglomerates, more productive than smaller "family farms."

2. The Nineteenth and Early Twentieth Century Homestead Acts

The financial panics and ensuing economic downturns of 1837 and 1857 fell particularly hard on the suddenly developing manufacturing industries located in eastern American cities as the mid-nineteenth century unfolded.[144] Pundits and labor leaders began to advocate the parceling of public lands into small plots, to be made available to settlers at nominal prices. By the early 1850s, the U.S. House of Representatives had passed several "homestead" bills, each of which had subsequently stalled in the Senate. As in the case of the earlier land policy debates, a mix of arguments—including the needs to depopulate crowded cities, to better the conditions of laborers, and to develop fallow federal lands—was made on behalf of homesteading. But also as with those earlier debates, the themes and vision of a stable republic of virtuous yeoman freeholders and autonomous citizens figured prominently.[145]

Despite Jefferson's, Jackson's, and other southerners' opposition to Hamiltonian industrialism and their advocacy of cheap land policies, the principal obstacle to the homestead bills of the 1850s was, ironically, southern resistance. The movement to populate the west with "free laborers" was seen both as an ideological challenge to the by then well-developed plantation system in the South and as an effort to block the expansion of slavery.[146] Abraham Lincoln's victory in the presidential

144. *See* JOHN STEELE GORDON: AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER 142–86 (2004). *See generally* SELLERS, *supra* note 142.

145. "Then, who is it that should not support this measure of Homes for All? Look at its wooing incentives to industry, frugality, temperance, independence, love of country, virtue, and adoration of the beneficent donor—the Father of all." CONG. GLOBE, 32nd Cong., 1st Sess. App. 298 (1852) (statement of Rep. Cable). "Let each man have a home, and when your elections come around he is a freeman, he is an independent man; he goes to the ballot-box and votes his own vote, and not the vote of his landlord or his master." CONG. GLOBE, 36th Cong., 1st Sess. 1653 (1860) (statement of Sen. Johnson). That peroration is typical.

146. *See* PAUL K. CONKIN, PROPHETS OF PROSPERITY: AMERICA'S FIRST POLITICAL ECONOMISTS 136–255 (1980); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970) [hereinafter FONER, FREE SOIL]; ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR (1980) [hereinafter FONER, POLITICS AND IDEOLOGY].

HeinOnline -- 79 S. Cal. L. Rev. 102 2005-2006

election of 1860, quickly followed by southern secession, at last brought full enactment and presidential signature to the Homestead Act of 1862.[147]

The original Homestead Act and its progeny[148] constitute one of but a few federal programs—apart, perhaps, from some of those associated with the New Deal—which have attained a near mythic status as virtually unqualified successes.[149] In exchange for a nominal fee and a promise to work the land for a minimum of five years in order to render it productive, ordinary citizens aged twenty-one or older were promised 160 acres of land each to call their own. The original legislation sparked the celebrated "Oklahoma Land Rush," an enduring symbol of American westward expansion.[150] Altogether, the federal government transferred over 270 million acres of public lands, or about ten percent of the land area of the United States, to private ownership pursuant to the Homestead Act and associated legislation.[151]

The self-contained, self-financing nature of the Homestead program was particularly elegant, and quite in keeping both with the EEOR ideals sketched in Part II and the law- and psychology-grounded constraints and strategies recommended in Part III. (It also, thanks to its use of an *already* accumulated "new" resource, had no need of resort to "the Method" of Part IV, which functions as a Part II ideals- and Part III constraints-respecting surrogate for "new" accumulated asset-spreading.) Government effectively distributed an autonomy-facilitative, productivity-enhancing, property-rule-protected asset broadly and equitably to a large population of persons not already endowed with substantial material assets beyond their (unskilled) human capital. It did so without directly confiscating holdings already held by others who were members of the same society.[152] And it rendered the distribution contingent upon the exercise of responsible effort. In return,

147. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

148. The Act of 1862 remained in effect until it was repealed in 1976, with a provision for continued homesteading in Alaska until 1986. The last of the major grants under the homesteading legislation came with the Homestead Act of 1916. The Taylor Grazing Act of 1934 effectively drew the homesteading era (outside of Alaska) to a close. *See* Taylor Grazing Act, 43 U.S.C. §§ 315, 315(a)–(o) (2000). It is intriguing, in this connection, that "the Method" of financially engineered home-spreading began at precisely this time as we shall see in the next subpart.

149. *But see* Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 506–13 (2002) (polemically decrying the Act's rent-dissipating effects in a generalized antigovernment lamentation).

150. It also gave Oklahomans the nickname, "Sooners." The term refers to those who managed to slip into the Oklahoma territory to stake claims ahead of, or "sooner" than, the rush.

151. National Park Service, The Homestead Act, http://www.nps.gov/home/homestead_act.html (last visited Nov. 19, 2005).

152. *See* ZUNDEL *supra* note 132, at 37–38. I perhaps ignore here, of course, the land's original inhabitants.

HeinOnline -- 79 S. Cal. L. Rev. 103 2005-2006

Americans would see not only a reduction in the number of dependent, "shiftless" city-dwelling unemployed and a growth in the number of "virtuous citizens," but also would see the transformation of idle resources, both human and geographical, to productive employment—a development which could be justified on grounds of developing national wealth as well as responsibly independent citizenship.

There were, of course, some shortcomings of the Homestead program. Not all homesteaders were prepared or ultimately able to render 160 acres of land productive, and not all parcels were as promising or ultimately as productive as others. Hucksters and speculators endeavored to assemble larger tracts at bargain-basement prices by purchasing on the cheap the tracts of those who failed.[153] Had the government or private sector been prepared to counsel or assist would-be homesteaders in connection with the difficulties of beginning farms from scratch, and had fulsome regulation and the policing of fraud been feasible to the same extent it is today, the program doubtless would have been even more successful.

It also bears noting that land was becoming less paradigmatic as a CR-, CL-, or PC-conceived asset as the twentieth century commenced. More wants were coming to be conceived, and satisfied, that could not be directly satisfied by land or by what farmed land could generate. As railroads, manufacturing, and eventually the modern industrial corporation developed and proliferated, new forms of asset began to rival, then surpass land in their value, variety, and apparent fecundity. Consequent urbanization gradually accelerated that process of movement away from land-based agrarian agency. The American economy, society, and population were decisively leaving their earlier land-rooted natures and for this reason, CR and especially CL and aggregative PC ideals increasingly would come to be best advanced through the development and dispersal of new kinds of assets, including new kinds of real estate, urban and suburban homes. The dispersal of real estate would remain a significant, if less congruous, means of advancing portions of the three agendas.

3. Contemporary Home Finance

It was in the twentieth century that more or less comprehensive federal facilitation of real estate acquisition for nearly all citizens began—

153. The law actually restricted such eventualities, but it was inadequately enforced. *See id.* A similar fate, though more extreme, recently befell the privatization of Soviet state-owned industries. *See* MAXIM BOYCKO, ANDREI SHLEIFER & ROBERT VISHNY, PRIVATIZING RUSSIA (1995); Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 53 STAN. L. REV. 1731 (2000).

HeinOnline -- 79 S. Cal. L. Rev. 104 2005-2006

ironically, shortly after real estate had precipitously diminished in importance as a CR-, CL-, and PC-advancing asset. And as with so much else in twentieth century American public policy, the Great Depression of the 1930s catalyzed real innovation in this realm.

Among the many markets that "crashed" and entered into protracted slump during the Depression was the housing market. Early in the twentieth century, as now, most who purchased housing did so partly on credit.[154] What was different was that fewer, for that reason, purchased housing at all. Until the early 1930s, housing credit markets were fragmented—by state and even by substate region within states—and mortgages in consequence were comparatively illiquid, highly risk-prone investments for would-be lenders. Individual savers still constituted the largest single group of mortgage holders in the 1920s. And in significant part for this very reason home loans were extended for brief terms in comparison to today—generally for two to three years—at the end of which they "ballooned" to coming due in full. Loan-to-value ratios, for their part, were quite low by modern standards.[155] As little as fifty percent was considered very high, and was altogether rare. The short-term nature of mortgages reflected lenders' needs for liquidity, while low loan-to-value ratios reflected both their risk-aversions and indeed their actual risks. Financing on such terms fell far short of typical would-be home buyers' capacities and needs; and so second mortgages, junior liens, and rollover refinancings—all at the higher interest rates required to compensate lenders for incurring additional risk—were common. The real estate boom of the 1920s facilitated and indeed was indispensable to this "layered" mortgage system's functioning.

When real estate prices leveled off, then began to fall in 1928, short-term mortgages no longer could be refinanced in full. Resultant forced sales and foreclosures, which reached the rate of over one thousand per day once some fifty percent of all home mortgages in the country had gone into default, brought prices even lower, pulling the real estate market into a classic "downward spiral."[156] Lending institutions were faced with the Hobson's choice of carrying mortgages in amounts greater than one

154. *See* D. BARLOW BURKE, JR., LAW OF FEDERAL MORTGAGE DOCUMENTS 2–25 (1989); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203–18 (1985).

155. BURKE, *supra* note 154, at 3–4.

156. Milton P. Semer et al., *Evolution of Federal Legislative Policy in Housing: Housing Credits*, *in* FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT 69, 73 (J. Paul Mitchell ed., 1985).

HeinOnline -- 79 S. Cal. L. Rev. 105 2005-2006

hundred percent of then-current home market price or taking less than full repayments on their loans. Depositors' funds were threatened either way.

As depression in other sectors of the economy disemployed more and more laborers, small deposits in such institutions dwindled while the unemployed dissaved. A liquidity crisis among lending institutions—including the mutual savings banks ("MSBs," or "thrifts") that financed most home loans—ensued, forcing all such intermediaries to cease lending to home buyers. Once home-financing dried up, so did the construction industry. And because construction was a labor-intensive industry, its slump naturally augmented the national unemployment problem significantly. Prospective facilitation of resumed growth in homeownership rates, and prospective boosting of the national employment rate, then, became both urgent and complementary goals in the early 1930s.

The legislation that ultimately passed to realize these aims—commencing with the last year of the Hoover administration, then ballooning in its extent over the early Roosevelt years—can hardly fail to impress the newcomer to this field with its financial elegance and comprehensiveness. In essence, federal policy did what Part III noted national government arguably to do best: mediate and ultimately lessen risk by using its full faith and credit to facilitate and insure a market truly national in scope, and using its police power to regulate that market to avoid having to operate the market-making and market-insuring apparatuses on other than "market" principles.

The process began with the Federal Home Loan Bank Act ("FHLBA") of 1932,[157] which authorized establishment of a system of regional federal home loan banks roughly parallel to that of the Federal Reserve's system of regional Federal Reserve banks.[158] A Federal Home Loan Bank Board ("FHLBB") was established to act in a capacity analogous to that of the Board of Governors of the Federal Reserve. Member institutions were capitalized by invested federal funds—first appropriated, later converted into capital subscriptions of the Reconstruction Finance Corporation—the federal capital to be retired ultimately by investments made by member institutions, MSBs, that joined the system. The regional banks, again, like regional Federal Reserve banks, provided standards and supervision to member institutions, and in return supplied them an added line of credit by advancing funds on the security of mortgage loans they held. The advanceable funds derived, not only from member institutions'

157. Federal Home Loan Bank Act, 12 U.S.C. §§ 1421–1449 (2000).

158. Semer et al., *supra* note 156, at 70.

HeinOnline -- 79 S. Cal. L. Rev. 106 2005-2006

subscriptions, but also through issuance of debentures in the private capital market, each of these the joint and several obligations of all banks in the system.

Member institutions in the federal home loan bank system were sharply distinguished from ordinary commercial banks in several fundamental ways. First, individuals' funds invested in the institutions were not designated or treated as deposits in the custodial sense, but as "shares." Depositors accordingly were "shareholders," and their earnings were characterized not as "interest" but as "dividends." There was, accordingly, no right of immediate withdrawal or redemption. Rather, one had to seek a "repurchase" of one's shares, and the institutions had the power to impose waiting periods before granting such requests. Likewise, checking privileges and other general banking services were not permitted to the institutions, which were limited, rather, to making first mortgage loans.[159] In essence, then, the system was quite limited but elegantly self-contained: the federal government facilitated the pooling of risk on a national scale for a system of specialized financial intermediaries in which small investors could save for purposes of accumulating sufficient funds to make down payments on new homes, and from which they could borrow once prepared to assume mortgage debts of their own.

The new Congress that took office in 1933 built substantially upon Hoover's humble but well designed initiative. Realizing that the FHLBA did nothing for the thousands of mortgagors whose loans already had defaulted, Congress passed a Home Owners' Loan Act ("HOLA") in 1933,[160] establishing a Home Owners' Loan Corporation ("HOLC")—headed by a board of directors comprising members of Hoover's FHLBB—to refinance mortgages in default or in process of foreclosure, and to enable owners whose homes already had been lost through foreclosure or forced sale to recover those homes.[161] Using funds borrowed in the private capital market through issuance of federally guaranteed bonds, HOLC made loans of more than $3 billion by 1936 for the refinance of mortgages, payment of delinquent taxes, and making of essential home repairs and improvements.[162] When the program was later liquidated pursuant to the

159. *Id.* at 71–72.

160. Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461–1468 (2000).

161. Semer et al., *supra* note 156, at 73.

162. *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 107 2005-2006

terms of the temporary legislation, the investment was fully recovered both for the Treasury and for all private borrowers.[163]

While this success in ending panic and restoring confidence in mortgage lending is certainly noteworthy in its own right, what is yet more significant is the number of innovations, persistent to this day, that HOLC introduced to the private mortgage industry in carrying out what was at the time an emergency mission. Chief among these was today's familiar, yet then quite novel, long-term, amortized mortgage, which both made possible and demonstrated the possibility of extending homeownership, at no confiscatory public cost, to people of moderate means when that ownership was financed through reasonably low monthly charges related to income and credit rating. The long-term result, buttressed by further legislation would be a complete restructuring of the practices of American home mortgage financing.

In enacting the HOLA, Congress also acted affirmatively to supplement the system of regional home loan banks established in 1932 with additional, fully private institutions. In effect, there would now be nationally chartered MSBs, in addition to state-chartered MSBs, just as there had been both nationally and state-chartered commercial banks since passage of the National Bank Act of 1863.[164] The FHLBB itself would charter the new institutions in order directly to "provide local mutual thrift institutions in which people [could] invest their funds . . . for the financing of homes."[165] In granting charters, the board of directors was to give "primary consideration to the best practices of [already existent] mutual thrift and home-financing institutions in the United States."[166] Each newly created institution would, upon incorporation, become a member of the appropriate regional home loan bank. Preexisting state-chartered member institutions were authorized under the 1863 Act to convert to federal status upon request (again as with the commercial banking industry). Through the 1933 Act, then, the board of directors, created by the 1932 Act originally to oversee a new reserve banking system for existing (state-chartered) home lending institutions, now became the overseeing entity for the new, emergency-managing HOLC. It also became the implementing agency for

163. *Id.* The contrast with the aftermath of the "S&L" debacle of the 1980s to early 1990s is striking.

164. National Bank Act of 1863, 12 Stat. 665–82.

165. *Id.*

166. *Id.* at 73–74.

HeinOnline -- 79 S. Cal. L. Rev. 108 2005-2006

the creation of a more complete national system of local mortgage lending institutions acting pursuant to best practices.[167]

Having in effect moved toward more fully "completing" the national primary mortgage market,[168] the next step for Congress was to insure directly investor deposits in these institutions. Whether such insurance would have been necessary atop the risk-modulation offered by the Federal Reserve-reminiscent federal home loan bank system itself absent competing institutions,[169] such insurance was surely necessary in view of the new system of federal deposit insurance that had proved to be necessary to restore confidence in commercial banks.[170] Besides the obvious analogy to the national commercial banking system, the new national MSB system faced the prospect of being unable to compete with the newly insured commercial banking system for savers' funds absent a similar insurance scheme.

Accordingly, Congress in the National Housing Act ("NHA") of 1934[171] established an analogue to the commercial banking system's Federal Deposit Insurance Corporation ("FDIC")—a Federal Savings and Loan Insurance Corporation ("FSLIC"). The board of directors of the FSLIC would comprise members of the FHLBB. Initial capitalization was provided by the HOLC. The Act required that national thrifts be insured by FSLIC (just as Federal Reserve member banks were insured by FDIC). It also permitted state-chartered system-member institutions to acquire such insurance provided that their operating, lending, and reserve practices met standards established by the FSLIC (again, rather as state-chartered commercial banks could seek FDIC insurance).[172] The premium charged was .25% of accounts of insured members, plus creditor obligations.[173] If an insured institution ever were to be liquidated, the FSLIC would be appointed conservator or receiver for federally chartered thrifts, and was

167. *Id.* at 74. In short order the new federally chartered institutions, though constituting but a third of all system-member institutions, held well over half of system assets.

168. *See supra* Part II.C (discussing market-completeness).

169. But note that the Federal Reserve System itself, notwithstanding its pooling and lender of last resort functions, had not proved able to prevent the post-October 1929 bank runs that prompted President Roosevelt to call a "Bank Holiday" upon taking office. *See* MELTZER, *supra* note 115, at 271–414.

170. The deposit insurance system was inaugurated with the Federal Deposit Insurance Act of 1933, 12 U.S.C. §§ 1811–1831 (2000).

171. National Housing Act of 1934, ch. 847, 48 Stat. 1246 (codified as amended in scattered sections of 12 U.S.C.).

172. Semer et al., *supra* note 156, at 74–75.

173. *Id.* at 75.

HeinOnline -- 79 S. Cal. L. Rev. 109 2005-2006

authorized to serve in the same capacity for state-chartered insured institutions.[174]

Up until the "S&L (Savings and Loan) Crisis" of the late 1980s and early 1990s, the deposit insurance system proved sound enough to be extended, with liberalized terms, over time. Coverage increased in successive increments[175] and premiums concurrently were reduced.[176] Restrictions on the investment powers of thrifts gradually receded, including as to maximum mortgage amounts, loan-to-value ratios, geographical coverage, and types of investment permitted. New investments, other than first mortgages, were permitted, and by the mid-1980s, thrifts could act as trustees for some kinds of investment trust, a banking service clearly not among the original, nonbank functions to which the thrifts were conceived originally to be necessarily limited.[177]

Having insured depositors directly against the liquidation of mortgage lending institutions, Congress next insured the institutions themselves against defaulting mortgagors. Section 203 of the Act provided for a nationwide mutual mortgage insurance system through which the newly created Federal Housing Administration ("FHA") could insure first mortgage loans. These loans could be made for the construction, purchase, or refinancing of one- to-four bedroom family homes which would not exceed twenty years' duration, or either $16,000 or eighty percent of the appraised value of real property.[178] In order to be FHA-insured, mortgage loans were required to be made by responsible lenders who were able to service the debts.[179] Interest rates could not exceed five percent per annum, or up to six percent under certain exceptional circumstances, and the required periodic payments could not be "in excess of [borrowers'] reasonable abilit[ies] to pay."[180] FHA also was required to formulate and impose requirements as to insurance, repairs, reserves, foreclosure, and other matters upon federally insurable mortgages.[181] FHA insurance

174. *Id.*

175. *Id.* at 75–76.

176. *Id.* at 76.

177. *Id.* It is widely believed to be for this very reason—the growth of the S&L system beyond its original purposeful bounds—that the "crisis" of the late 1980s and early 1990s, precipitated by speculation in the nonresidential real estate bubble of the 1980s and other opportunistic behavior, was able to reach the depths that it did. Intriguingly, the institutions that fared best in the crisis were those that remained closest in their functions and practices to the original, "unliberated" S&Ls. *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 265–86 (1996).

178. Semer et al., *supra* note 156, at 78.

179. *Id.*

180. *Id.* at 78.

181. *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 110 2005-2006

provided lenders, in the event of foreclosure—and conveyance of the relevant property and associated claims to FHA—the right to (a) U.S.-guaranteed debentures which (i) were equal in value to the unpaid principal of the loan and certain additional allowances, and (ii) matured within three years of the maturity of the original mortgage; and (b) a certificate of claim equal to the unpaid interest on the loan plus foreclosure costs, payable to the extent that FHA realized proceeds from its handling of the property.[182]

FHA's financing was particularly elegant in its conception and design. The Act required the Administration to charge premiums of not less than .5% and not more than 1% per annum of the outstanding balance of each insured mortgage loan, that charge being passable to the borrower atop the interest on her loan.[183] FHA was required to classify insured mortgages into separate risk pools "in accordance with sound actuarial practices and risk characteristics," then to maintain separate accounts for each pool.[184] When all mortgages in a particular pool account had been paid, FHA was required to distribute the remaining balance in that account to its relevant homeowners.[185] This, of course, gave real content to the term "*mutual* mortgage insurance."[186]

The FHA insurance scheme appears to be one of the most comprehensively and financially innovative federal programs ever to have been implemented. It effectively altered, in fundamental ways, the entire regime of home-financing in the United States. For this reason, as well as for the insight that it will yield into the prospects of analogous federal initiatives in other, nonhousing industries, it will be well here briefly to catalogue in detail the basic changes in home-financing that FHA wrought.

First, FHA effectively extended HOLC's innovations in long-term mortgage financing and amortization to virtually *all* first time mortgages. It effectively replaced traditional collateralization requirements with national default-risk-pooling and thereby extended homeownership to a much larger portion of the rapidly growing U.S. population than ever before.[187] Second, the essential uniformity of FHA mortgage requirements effectively brought

182. *Id.* at 79.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id. See also* HANSMANN, *supra* note 177, at 246–64. It should be noted in passing that Section 207 of the Act extended FHA insurance structured as described above to certain regulated rental projects, while Section 2 did the same for substantial repair loans. Semer et al., *supra* note 156, at 79–80.

187. *Id.* at 101. *See also supra* note 112 and accompanying text (discussing the stultifying effects of collateralization requirements).

into being a standardized home mortgage instrument that was recognized and thus marketable throughout the country on a grand scale.[188] It effectively opened the door to securitization—with all of its attendant liquidity and risk-spreading benefits—of home loans.[189] Previously, owing to real property's status as a creature of state law, credit had not flowed freely or efficiently across state lines from where it was most available to where it was most needed: the market was fragmented.[190] Insurance itself had the same integrative effect as lenders nationwide could rely upon this single form of security, rather than having to investigate the vagaries of differing state jurisdictions' laws of secured real property transactions.

Third, the requirements of (a) actuarial soundness, (b) risk classifying and separate pooling, and (c) mutuality—return of surpluses to fully amortized pools—ensured that the system simulated the efficiency of a private market. The requirements prevented losses to the Treasury and assured borrowers that their premiums were no higher than necessary.[191] Finally, various housing quality preconditions that FHA was statutorily required to place upon the availability of its insurance, along with the warranties, appraisals, and inspections utilized to enforce those conditions, not only protected the finances of the system and the living standards of its beneficiaries, but also raised the quality of new housing countrywide.[192]

In view of its innovations, it is perhaps not surprising that the FHA system proved both a programmatic and a fiscal success.[193] Perhaps the greatest measure of success in FHA's case is the degree to which Congress found it fiscally feasible both to extend the system and progressively liberalize its attendant conditions. Over time, for example, Congress raised the maximum loan-to-value ratio of eligible mortgages, which permitted progressively lower down payments to be made by purchasers or sponsors.[194] In time, Congress also lengthened the maximum loan period for eligible mortgages, effectively permitting smaller monthly amortization

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188. *See* BURKE, *supra* note 154, at 6 (noting "the need for standardized mortgage and note documents"). *See id.* at 10–25 (discussing the subsequent evolution of standardized mortgage documents and the secondary market therein).

189. *See supra* Part IV (discussing securitization and its benefits).

190. Semer et al., *supra* note 156, at 100–03.

191. *Id.* at 81–82.

192. *Id.* at 83–84.

193. According to one authoritative commentator, "[T]he FHA mortgage insurance system was a viable program from the beginning. . . . The program got underway with surprising swiftness, considering the novelty of the system and the enormous number of institutions and agencies throughout the United States which were involved." *Id.* at 91–92.

194. *Id.* at 94–97.

HeinOnline -- 79 S. Cal. L. Rev. 112 2005-2006

payments.[195] Finally, Congress gradually increased the maximum dollar ceilings of individual mortgages.[196] Naturally, all of these developments not only vastly increased rates of homeownership throughout the United States, but also stimulated productive savings rates, the construction and associated industries, and, therefore, employment rates.[197]

Although the NHA represented a manner of "quantum leap" beyond the innovative immediate predecessors upon which it quickly built, it did not represent the last of the New Deal era's great innovations in the facilitation of homeownership. A fundamental feature both of the FHLBA of 1932, the HOLA of 1933, and the NHA of 1934 was to facilitate national integration of diffuse local home credit markets. The FHLBA did so by providing a national financial infrastructure of regional clearing institutions for the mobilization and channeling of cash reserves. The HOLA did so by adding "flesh" to the skeletal FHLB structure through the direct charter of additional, federally supervised local thrift institutions. And the NHA, via FHA, did so by effectively creating a standardized mortgage instrument backed by a federal form of security not subject to the vagaries of differing state laws of real property and lending.

Although those developments were critical to the development of a truly national primary mortgage market, what remained absent was a secondary market that would render savers' investments in home mortgages optimally liquid, thus attracting yet more capital for mortgage lending by savers with greater risk-aversions and consequent liquidity preferences. Congress supplied this secondary market in 1938 in the form of "Fannie Mae," the Federal National Mortgage Association, which provided a national market for the trading of FHA-insured mortgages themselves, that is, full securitization.[198] While originally aimed at supporting a secondary market in mortgages for publicly subsidized housing, in time, Fannie Mae's scope broadened to the purchasing of mortgage loans in the *unsubsidized* mortgage market. Fannie Mae was later supplemented by the Government National Mortgage Association ("Ginnie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac")

195. *Id.*

196. *Id.*

197. *Id.* at 100–03.

198. *See* Richard W. Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 NW. U. L. REV. 1, 16–29 (1971); Patrick H. Hendershott & Kevin E. Villani, *Direct Intervention in the Mortgage Market*, *in* FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT, *supra* note 156, at 123, 123–41. *See also* MARTIN MAYER, THE BUILDERS 66–382 (1978).

HeinOnline -- 79 S. Cal. L. Rev. 113 2005-2006

in other, more specialized mortgage markets.[199] In effect, Fannie Mae and its progeny closed the proverbial circle, fully completing the market for housing credit and housing credit-risk-bearing, thereby maximizing the availability of such credit and in turn minimizing that credit's cost to home buyers in the manner described in Part IV.

Following is a diagrammed summary of the full set of (public and private) institutions and inter-relations that now jointly constitute the current structure of home finance in the United States.

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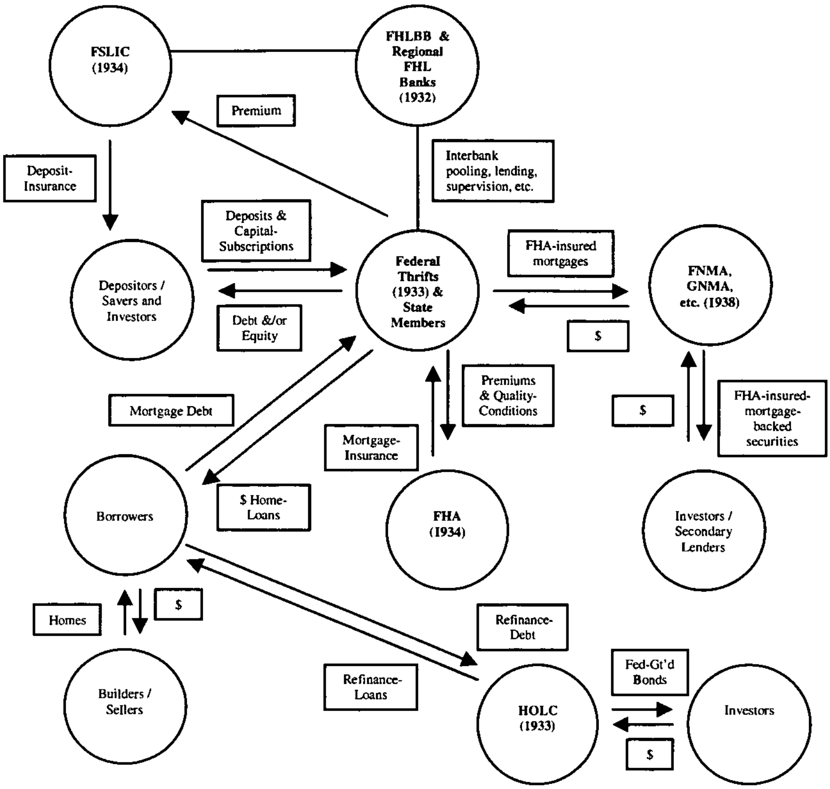
199. *See generally* Brant K. Maller, *The Collateralized Mortgage Obligation: The Latest Phase in the Evolution of Mortgage-Backed Securities*, 13 REAL EST. L.J. 299 (1985).

HeinOnline -- 79 S. Cal. L. Rev. 114 2005-2006

FIGURE 2. Home-financing structure since federal homeownership legislation of the 1930s[200]



It should be pointed out that Congress has supplemented this system of housing credit with tax policy, again as foreshadowed in Part IV above. Given that the mechanics of "incentivizing" through tax policy are by and large familiar, I will simply note that Congress facilitated the growth of the thrift institutions envisaged by the 1933 Act through exempting thrift

200. Note that HOLC, whose board comprised FHLBB board members, was by terms of its implementing legislation a temporary measure, phased-out in 1936. FHLBB, FHA, and FSLIC have since been merged into or brought under the aegis of the Federal Housing Finance Board, the Department of Housing and Urban Development, and FDIC, respectively; but the home finance structure mapped here itself remains intact.

depositor interest earnings from taxation,[201] and allowing tax deductions for mortgage interest payments up to specified ceilings and local property tax payments.[202] Although prompted by a depressed housing industry, the encouragement of homeownership alone is the principal policy reason for the system's continuance today.

In all events, a few numbers and statistics are quite telling as to the system's overall effectiveness: Production of homes by 1933 had dropped to 93,000 units, less than one-tenth the number built in 1925.[203] Onsite construction employment had dropped to 150,000 persons from more than twice that number by the same point.[204] Employment in the associated materials and equipment industries had dropped by the same amount.[205] By the early 1970s, in contrast, over two million housing starts were being reported annually, excluding mobile home shipments, and of these one-fourth were assisted by FHA insurance.[206] FHA-insured repair and rehabilitation loans were near $1 billion annually.[207] By 1980, over thirty million such loans, totaling over $20 billion, had been insured.[208] By the same point, FHA had helped generate credit for mortgages and other loans totaling $164 billion—including over $119 billion in home mortgages—compared to a total national investment in home mortgages of $18 billion in 1934.[209] About twenty percent of all nonfarm starts in housing construction had been FHA-insured.[210] Eleven million families had benefited from FHA operations.[211]

In the immediate post-Second World War years, FHA is thought to have stimulated 375,000–500,000 housing units per year, about $4–$5.5 billion worth.[212] In 1930, only forty-six percent of American families owned their own homes.[213] By 1970—notwithstanding a much larger national population—the figure had risen to sixty-three percent.[214] Prior to

201. *See* Richard E. Slitor, *Rationale of the Present Tax Benefits for Homeowners*, *in* FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT, *supra* note 156, at 163, 163–84.

202. *See id.* at 163–84.

203. Semer et al., *supra* note 156, at 77.

204. *Id.*

205. *Id.*

206. *Id.* at 99.

207. *Id.*

208. *Id.* at 103.

209. *Id.* at 101.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 102.

214. *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 116 2005-2006

1934, mortgage banks handled only a minuscule portion of the mortgage business. Mortgage banks now service FHA mortgages amounting to over $50 billion, according to the Mortgage Bankers' Association.[215] Large scale home builders came into existence only with the growth of a truly national housing market made possible by a national mortgage banking industry and credit market.[216]

In view of the considerable importance of federal housing policy as a coherent set of asset-building, market-completing, and industry-stimulating programs, it is well worth locating it among any cluster of ownership-facilitative EEOR policies. All that remains is to draw out the ways in which homeownership programs for the middle class realize the values of the American OS laid out in Part II in a manner consistent with the constraints, laid out in Part III, placed upon ownership facilitation by American legal precedent and ownership psychology.

Housing is readily mapped onto the American OS's understanding of an ownable asset. For those with relatively stable incomes and employment, housing in today's market—a remarkably "thick" and "complete" market owing to federal home finance policy itself—significantly enhances responsible agency and civic attachment while diminishing dependency. It is physically and financially durable (value-retentive), and rendered yet more so by FHA-buttressed quality standards. It is legally perhaps the most secure of goods protected by property rules and due process. Because the typical home buyer has recovered initial transaction costs and begun to accumulate durable equity, relative to what the person would have done in paying similar rental costs within two to three years of closing on the person's house,[217] and because of the increasing availability of second mortgages, housing also is a much more liquid asset than it used to be.[218]

Though it is not clear whether there have been extensive population-wide studies correlating homeownership with actual psychological attitudes and practices of agency, responsibility, and civic attachment in the manner discussed in Part III, there have been interesting studies carried out among

215. *Id.*

216. *Id.* at 102–03.

217. *See* MALKIEL, *supra* note 105, at 57.

218. Indeed, perhaps too liquid. Robert Shiller notes that the current housing market bubble might account, in part, for the low national savings rate, which is dangerous in view of the facts that (a) the housing market is indeed a bubble, and thus is more than likely to burst; and (b) homes function as more than savings vehicles, such that the loss of a home in the event of a crash after over-mortgaging will be more than the loss of finances. *See* Amy Feldman, *Interview with Robert Shiller: Nobody Knows when a Bubble Will End*, MONEY, Feb. 25, 2005, at 74.

HeinOnline -- 79 S. Cal. L. Rev. 117 2005-2006

particular segments of the United States and other populations—wage laborers and African-Americans in the United States and rural women in China, for example[219]—which confirm the predictions suggested in Part III. There is substantial evidence that homeowners take better care of and preserve and enhance the values of their properties,[220] and that they participate more and exercise more leadership in their communities.[221]

Although, in view of the foregoing observations, housing looks to be as paradigmatically asset-like, in the terms of Part III, as real estate has always been in the American tradition—and indeed even more so in light of its greater liquidity now than in the past—there are some respects in which much of today's real property is less asset-like than that of times past. First, housing is not polymorphically "generative" in the way that homestead land was in the eighteenth, nineteenth, and early twentieth centuries. One cannot extract a host of ever-growing, indefinitely available further assets from it. At best, housing will be generative only in the sense that it tends to appreciate in value over time in normal markets; it yields "returns" in Tobin's sense.[222] More valuable than housing in this respect is the land itself, which, if Malthus or Ricardo are to be believed, will tend to grow in value indefinitely over the long run; one need only live for long enough.[223] But it is nonetheless less likely that one's "homestead" today will confer upon a homeowner the manner of autarky or autonomy that it would have done in the past. One can live in it, but not on it or off of it, so to speak. It is surely necessary for many or most, but only sufficient for a few, for the purpose of building a life.

Housing also is, of course, less liquid than a simple bank account or mutual fund portfolio. While the growth of "second mortgaging," as well as appreciating housing markets' enhancement of salability enhance the scope of uses to which one may put both paid-down and "sweat" equity in a

219. *See* Deborah Page-Adams & Michael Sherraden, *Asset Building as a Community Revitalization Strategy*, 42 SOC. WORK 423, 423–34 (1997); Edward Scanlon, *Low-income Homeownership Policy as a Community Development Strategy*, 5 J. COMMUNITY PRAC. 137, 137–54 (1998); Deborah Page-Adams & Nancy Vosler, *Homeownership and Well-being Among Blue-collar Workers* (Ctr. for Soc. Dev., Working Paper No. 97-5, 1997); Edward Scanlon, *The Impact of Homeownership on the Life Satisfaction of African-Americans* (Ctr. for Soc. Dev., Working Paper No. 99-4, 1999); Min Zhan & Michael Sherraden, *Landholding and Household Development: What Do We Know?* (Ctr. for Soc. Dev., Working Paper No. 98-2, 1998).

220. *See supra* note 219.

221. *See supra* Part III.A.

222. *See* TOBIN, *supra* note 75, at 21.

223. *See* T.R. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (Donald Winch ed., Cambridge Univ. Press 1992) (1803); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Everyman's Library 1962) (1817).

HeinOnline -- 79 S. Cal. L. Rev. 118 2005-2006

home, transaction costs and initial investment recovery-lags inevitably reduce the velocity at which this can be done. Moreover, while such mortgaging practices might render real property more liquid now than it typically was in the past, the fact is that yet more liquid alternatives are available now than in the past.[224] Again, then, one's "homestead" is relatively less autonomy-conferring today than it was in the past, meaning that a contemporary American OS must seek to facilitate ownership of more assets than homes even if it wishes to do no more than keep up with the American OS of the nineteenth and early twentieth centuries.

If housing is a less fully agency-supportive asset today than were homesteads in earlier centuries, federal housing policy, at least, appears to be as savvy about American legal tradition and ownership psychology as were early American land policy and the Homestead Acts. Indeed, the home finance programs manifest all of the optimal law- and psychology-respecting strategies reviewed in Part III. Recall first, pursuant to Part III.A, that the American OS does well to (a) foster ownership of the greatest variety of choice-enhancing assets as possible, (b) use and facilitate the spread of markets in such assets, and (c) foster the ownership of "durable," "accumulated," and maximally legally secure, property-rule-protected assets. Recall next, pursuant to Part III.B, that such "facilitation" is likely to fare best, as a political matter, where it (d) channels perceivedly "new" ownership opportunities to, or refrains from "taking from," the less endowed, and (e) conditions such channeled benefits upon the exercise of responsible diligence by those beneficiaries. Federal home finance policy for the middle class scores satisfactorily or better in respect of all five of these general criteria.

With respect to (a), the home finance programs at least fostered the spread of one incontestably choice-enhancing asset, even if, as noted just above, a comprehensive OS today must foster the spread of more assets than homes. As to (b), the home finance programs made extensive use of existing markets in homes, thrift deposits and securities, and government-issued bonds. More importantly, home finance policy actually "jump-started" the creation of *new* markets—in particular, markets in an altogether new form of financial security: the FHA-insured mortgage-backed security. That, in conjunction with federal mortgage insurance, had the salutary effect of broadening, integrating, rationalizing, and more efficiently distributing risk across the home credit market, which in turn

224. One exception includes "land banks" and thus a kind of securitization of land in the eighteenth and nineteenth centuries; except few people then were able to participate. *See generally* FRIEDMAN, *supra* note 129, at 243–97.

HeinOnline -- 79 S. Cal. L. Rev. 119 2005-2006

extended the pool of credit *available* for home finance. The degree to which these government activities all were in keeping with market principles is perhaps best evidenced by the fact that Ginnie Mae and its ilk, and even FHA itself since 1997, have converted entirely over to private entity status even after having begun as public or mixed public-private entities. As to (c), we have observed that real estate is as durable, accumulated, and legally protected as an asset can be in the American tradition.

With respect to (d), the federal home finance programs did not, on the surface, "take" assets from some for "redistribution" to others, but rather simply channeled a perceivedly "new resource"—the credit-availability gains to be gleaned by integrating and completing the default-risk market—to those (and only those) who up to that point had not been sufficiently well resourced with available collateral to purchase their first homes on credit. Insofar as tax policy played a role in the programs, it took the form of "refraining" rather than "taking"; mortgage payments made by home buyers could be deducted from taxable income. Finally, as to (e), the programs essentially benefited only those who purchased or repaired homes meeting stipulated quality standards, while laboring diligently over the years in the economy earning the moneys used to pay down their mortgages. The programs were of no assistance to "idlers" or to those who already owned homes. We will see below that other successful ownership-facilitating programs have manifested these five characteristics and we will project additional programs on this basis.

B. "CAPITAL HOMESTEADING"

While housing might seem the natural latterday successor to the eighteenth, nineteenth, and early twentieth century yeoman "homestead" in its durability, value-retentivity, legal security, and "stake"-like nature—the home both as one's "castle" and as one's nexus to the community—in other respects something quite other than residential real property would seem more modernly to fill the bill. The traditional farm was a generative source of sustenance and income—of productive and remunerative autonomy—as well as of shelter, domicile, and nexus to the community. It amounted to a form of capital as well as to a form of residence. It would be only natural, then, to expect CR thinking, if not indeed the thinking of all three constitutive American political traditions, in modern times to have fixed attention not only upon homeownership, but also upon business or productive capital-ownership as contemporary successor to the pre-twenty-first-century "homestead." Nineteenth century agricultural homesteading,

HeinOnline -- 79 S. Cal. L. Rev. 120 2005-2006

that is, might have been expected to give rise not only to twentieth century "house-steading," but also to what we might call "capital homesteading." Remarkably, however, widespread attention has not flowed in the predictable direction. It is as though federal housing policy along with federal aid to the dwindling number of American "family farmers" came to occupy all of the policy space once occupied by federal land policy. But there have been some limited exceptions, and these are worth exhuming and examining here pursuant to the prospect of designing and realizing a comprehensive American OS. As with "homesteading," we will first provide a bit of context with a brief look at "capital homesteading" policy in its earlier and more modest formulations, then turn to more comprehensive proposals making extensive use, like twentieth century federal homeownership policy, of the Part IV "Method" of financial engineering.

1. Nineteenth and Early Twentieth Century Labor and Its Tools

Chords similar to those sounded by nineteenth century land policy continued to resonate, until early in the twentieth century, in labor and industrial policy debate. While it is by now a commonplace to associate labor with wage income in near Pavlovian fashion, that association was hotly contested through most of the nineteenth and much of the early twentieth centuries.[225] The dominant agenda of the labor movement up until the 1890s did not concern itself directly with raising wages, shortening the work week, or improving the health and safety features of working environments. Rather, that agenda aimed at attaining those perceivedly secondary ends by means of attaining the more intrinsically important end of abolishing the wage system altogether and replacing it with a system of worker ownership and consumer-producer cooperatives—early prototypes of today's ESOPs.[226] This was the articulated platform, for example, of the Knights of Labor, by far the largest and most influential of American labor organizations until the 1890s; and it remained the goal of continuingly influential labor movements up until the dawning of the 1920s.[227] The displacement of artisanal and craft production by highly centralized, bureaucratically organized modes was seen, and constantly

225. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 168–249 (1996).

226. *See id.* For more on how the ideology of the cooperative movement finds expression in enterprise-organizational form, see HANSMANN, *supra* note 177, at 66–226. For contemporary defenses and further economic analyses of cooperative and worker-owned firms, see ELLERMAN, WORKER-OWNED FIRM, *supra* note 122; VANEK, *supra* note 122.

227. *See* FONER, FREE SOIL, *supra* note 146; FONER, POLITICS AND IDEOLOGY, *supra* note 146.

HeinOnline -- 79 S. Cal. L. Rev. 121 2005-2006

described, as a threat to the dignity of work and the independence of the citizenry—hence, to the enduring of republican self-government itself.[228] The hope, accordingly, was to carry some analogue of the Jeffersonian yeoman ideal over to the realm of nonagrarian industry. In view of the tight conceptual link between labor's economic dependency upon hirers and the lack of individual laborers' autonomy, this would have constituted a classic CL concern as well.

Though it seems to be forgotten now, today's Republican Party during its early years in the late 1850s—as well as, again, its first successful U.S. presidential candidate, Abraham Lincoln—were as opposed to "wage slavery" in the North as they were to chattel slavery in the South.[229] Lincoln and his party envisaged an America populated by independent, self-reliant artisans and laborers as well as farmers, a land where all faced equal opportunity to build, by diligent effort applied to individually or cooperatively owned land, business and human capital, productive, worthwhile lives.[230]

The early history of American antitrust policy featured arguments along the same lines, even to the point of permitting or encouraging some forms of business integration—resale price maintenance arrangements, for example—which resulted in higher consumer prices. The reason was that such arrangements, notwithstanding their effects on prices, facilitated republican freedom by ensuring a larger number of independently owned and operated retail establishments.[231] That broad independence was thought worth the price of higher prices. Consumer interests, including lower prices, of course ultimately became the sole touchstone of antitrust policy.[232] But "producer" interests—or at any rate, shop-owner interests—

228. *See* FONER, FREE SOIL, *supra* note 146; FONER, POLITICS AND IDEOLOGY, *supra* note 146.

229. *See* ABRAHAM LINCOLN, Address at Cooper Institute, New York City (Feb. 27, 1860), *in* SPEECHES AND WRITINGS 1859–1865, at 111 (Don E. Fehrenbacher ed., 1989). Some southern political economists, in an irony attributable to the strange bedfellow-making wrought by political disputation, found common cause with northern advocates of free labor in their defenses of the life conditions of southern chattel slaves as compared to those of northern wage laborers. It is perhaps partly for this very reason that more purist northern abolitionists, anxious to broaden northern opposition to chattel slavery, sought to decouple chattel slavery from "wage slavery" as a national issue. *See* ERIC L. MCKITRICK, SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 12–19 (1963).

230. *See* LINCOLN, *supra* note 229.

231. *See id.*

232. *See, e.g.*, PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 3–38, 42 (5th ed. 1997) (placing the policy emphasis on control of "market power" in the interest of consumer welfare, which is now typical in leading textbooks).

HeinOnline -- 79 S. Cal. L. Rev. 122 2005-2006

for decades figured prominently, both in legislative argument and in court decisions, again for explicitly articulated, CR- and CL-grounded reasons.[233]

One might wonder why consumer interests ultimately came to prevail over the interest in widespread productive autonomy. The answer seems to involve three related reasons, all traceable ultimately to a failure up until now, to have thought through what a comprehensive effort at spreading productive ownership would require. First, the progress of the modern industrial corporation in realizing productive and distributive economies of scale rendered the artisanal and small shopkeeper ideals obsolete as appropriate pictures of the broad spreading of business capital ownership. Wide ownership of business capital required wide ownership of business shares, not just individual businesses.

Second, the failure to pursue wide ownership of the latter sort—of business shares—arguably facilitated the failure of effective consumer demand to keep pace, without lag, with the growth of business productivity during the aforementioned corporate revolution in American industry, a revolution that brought about the rapid rationalization and automation of productive activity. That failure in turn appears to have played a key role in the protracted economic depression of the 1930s, which in turn led to the third factor explaining the triumph of consumer interest over the interest of productive autonomy in economic policymaking: a fixation, in theoretical economic, government, and policy circles, on *centralized* "Keynesian" demand-maintenance as the means of avoiding recessionary slump. From a "producer republic," the United States became a "consumer democracy," more concerned with the now (post-1940s) tried and true method of

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233. As one Senator remarked:

> Do we want an America where . . . all we have is catalog houses? . . . Or do we want an America where there are thousands upon thousands of small entrepreneurs, independent businessmen, and landholders who can stand on their own feet and talk back to their Government or to anyone else, in case they feel that they are being unjustly treated. . . . [The small enterprise] produces good citizens, and good citizens are the only hope of freedom and democracy. So we pay a price for it. I am willing to pay that price.

98 CONG. REC. 7, 8741, 8823 (1952) (statement of Sen. Humphrey). Furthermore, as Justice Douglas noted in *United States v. Falstaff Brewing Corp.*,

> Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. . . . A nation of clerks is anathema to the American antitrust dream.

United States v. Falstaff Brewing Corp., 410 U.S. 526, 541–43 (1973) (Douglas, J., concurring). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress'[s] desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.").

centralized demand management, via macro-oriented fiscal, tax, and monetary policy, than with other more micro- and ownership-oriented means of calibrating demand-growth to productivity-growth, which arguably would have been more aligned with our EEOR ideals.

Such other means did lie to hand, however. Indeed, they were being pioneered by the federal homeownership-spreading programs themselves. Could those means be generalized to spreading business-share-ownership?

2. Contemporary Citizens and Stock?

As noted above, the artisanal ideal that animated the first phase of "capital homesteading" advocacy ultimately died out, in all likelihood, because large-scale mass production seemed to render that ideal obsolete. Economies of scale and scope rendered capital-intensive enterprise—and "therefore," it was thought, wage-earning labor power as the principal income-realizing asset held by most Americans—too opportunity-costly to forgo.[234] But if that trajectory alone explains the ultimate abandonment of attention paid value-productive—as distinguished from merely value-retentive—capital as successor to the pre-twenty-first-century "homestead," then we seem to have fallen prey to a particularly harmful form of aphasia. For one can own productive capital in more forms than that of a tool belt, pharmacy, or laptop. One might own the larger forms of business enterprise themselves, even if they are *very* large, jointly with others. That is what the ownership of shares in heavily capitalized business enterprises is, after all. And it takes little imagination to appreciate that one might come to own such shares by financial engineering means analogous to those that we employ collectively through government levers, in cooperation with private entities and markets, to facilitate homeownership. Why, then, has this prospect not been carefully explored? The best explanation appears to be an object lesson in imprudent packaging and politicking.

The suggested FHA-like "capital-diffusion" prospect was in fact once advocated, with some vigor, by a man now alternately described as genius, saint, visionary, and benevolent crank, a man who managed at various

234. *See, e.g.*, RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900 (2000); ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM (1990); ALFRED D. CHANDLER, JR., STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE (1962); WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA (1997). There nonetheless continue to be calls from some quarters for something like the nineteenth century republican-artisanal, or at any rate an "industrial-democratic," ideal. *See* ELLERMAN, WORKER-OWNED FIRM, *supra* note 122; VANEK, *supra* note 122.

HeinOnline -- 79 S. Cal. L. Rev. 124 2005-2006

points to capture the attentions of power-brokers and agenda-setters as diverse as Presidents Nixon, Carter, and Reagan, Senator Russell Long, Representative Gerald R. Ford, and CBS television's "60 Minutes" news program. The man is Louis Kelso, inventor of the now-familiar ESOP. But while the latter innovation is commonplace today, few seem aware that it was originally envisaged as the spearhead of a much more ambitious, economy- and society-transformative program of publicly facilitated capital-ownership-spreading.[235]

Lore has it that Kelso, a law student at the time of the Great Depression, was genuinely mystified and distressed by the specter of a highly productive and technologically advanced economy seemingly brought to a standstill by the untrammeled workings of its own characteristic processes.[236] While serving in the army during the 1940s and stationed at a quiet base in Panama, therefore, Kelso accordingly set about studying and teaching himself economics with a view to solving this great riddle. The upshot of his effort was a manuscript, modestly titled "Capitalism," in which he attempted to address his own questions. In essence, the "theoretical" answer at which Kelso arrived was rooted in what he took for the basic truth embedded in the much-storied "Say's Law"—that in long-run equilibrium, the incomes accruing to the factors of production in an economy were necessarily sufficient to enable that which was produced to clear the market.[237] Kelso believed that "Say's Law" had in a peculiar sense been "violated" in modern capitalist economies.[238]

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235. This Article discusses Kelso's proposals at length, because he was the leading designer and advocate of publicly facilitated capital ownership spreading programs. Authors who made proposals along Kelsonian lines before Kelso include the founders of the distributivist movement associated with Catholic social thought of the 1920s. *See* HILAIRE BELLOC, THE SERVILE STATE (Henry Holt & Co. 1946) (1912); G.K. CHESTERTON, THE OUTLINE OF SANITY (1926). For works by latterday Kelsonians, see CURING WORLD POVERTY: THE NEW ROLE OF PROPERTY (John H. Miller ed., 1994); EQUITABLE CAPITALISM: PROMOTING ECONOMIC OPPORTUNITY THROUGH BROADER CAPITAL OWNERSHIP (Stuart M. Speiser ed., 1991); JEFF GATES, DEMOCRACY AT RISK: RESCUING MAIN STREET FROM WALL STREET (2000); JEFFREY R. GATES, THE OWNERSHIP SOLUTION (1998); WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1997); WILLIAM GREIDER, THE SOUL OF CAPITALISM (2003); MAINSTREET CAPITALISM: ESSAYS ON BROADENING SHARE OWNERSHIP IN AMERICA AND BRITAIN (Stuart M. Speiser ed., 1988); Robert Ashford, *Louis Kelso's Binary Economy*, 25 J. SOCIO-ECON. 1 (1996); Robert H.A. Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 RUTGERS L.J. 3 (1990); Jerry N. Gauche, *Binary Economic Modes for the Privatization of Public Assets*, 27 J. SOCIO-ECON. 445 (1998).

236. *See* STUART M. SPEISER, A PIECE OF THE ACTION: A PLAN TO PROVIDE EVERY FAMILY WITH A $100,000 STAKE IN THE ECONOMY 127–274 (1977).

237. Say's Law has suffered many alternative formulations—even by Say himself. In its most familiar articulation, the "law" states that "supply creates its own demand." Keynes famously observed that Say's Law actually bears at least two interpretations: The first is a "mechanistic" one captured by the "demand-creation" maxim. The other interpretation, better labeled "Say's Identity," has it that

The violative mechanism, as Kelso saw it, was what we might describe as the modern capitalist economy's failure to calibrate the composition of most consumers' income-sources proportionally to the gradually growing nonhuman capital intensity of the productive process itself.[239] While nonhuman ("hard," or "machine") capital had come over time to play an ever-greater productive role in the manufacture of goods and the provision of services, prospective consumers of these goods and services continued by and large to derive their incomes from their human capital alone.[240] In an economy whose constitutive legal system and substantive law permitted or even facilitated the development and exacerbation of this growing "imbalance," the inevitable consequence was that consumer purchasing power often would tend to grow at a lower rate—or at any rate in more "fits and starts" fashion—than did the macroeconomy's level of productivity.[241] The result was that goods

because all productive inputs are factor payments, supply-side investment by definition gives rise to equivalent potential demand. *See* KEYNES, *supra* note 113, at 18, 26, 313–64.

238. Keynes, of course, argued that the proper question was not whether Say's Law had been "violated," but how it was that supply-payment's conceptually entailed potential demand could fail to materialize as effectual or actual demand. *See* KEYNES, *supra* note 113, *passim*. The real question has to do with the transmission mechanism—and potential lags embedded therein—from factor-payment to product-demand.

239. *See also* JOSEPH RAPHAEL BLASI, EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF? 27–28 (1988). Here and in what follows I use a good bit of my own descriptive vocabulary in an effort charitably to interpret what oftentimes can read as a highly Baroque and eccentric Kelsonian rhetoric. (I hope, of course, that my own idiom is less so.) I interpret Kelso as a sort of "automatic Keynesian." If Keynesianism saw the source of crisis in the fact that the means of mass production could in the short term grow more rapidly than those of mass consumption, given that the latter was composed not only of factor-payments, but also of differing distributions of such payments over persons with differing marginal propensities to spend, and thus justified government spending as a means of nudging aggregate demand more quickly into line with aggregate supply-capacity, then Kelso saw the same source of crisis, but recommended a more "direct" link between improvements in productive capacity and absorptive capacity—by putting the returns to productive capacity (that is, to "hard," nonhuman capital) immediately into the hands of would-be consumers themselves, hence by putting *ownership*, and the consequent legal right to such returns, directly into their hands.

240. Kelso appears implicitly to have believed that tying the two compositions directly together would automatically calibrate the macroeconomy's aggregate supply of goods and effective demand therefor.

241. Consumption may "lag" behind for periods, and then catch up later. This would constitute a "Keynesian" reading of Kelso, whereby "sticky" prices slowed the market's passing-on of productivity gains to consumer-laborers. Kelso appears not to have countenanced periodic "violations" of "Say's Law" corrected in the long run, but his writings do not rule out reconciliation with the standard Keynesian explanation of liquidity traps. Indeed, one is tempted to conjecture that had Kelso taken the time to understand Keynesian theory rather than simply the American versions of Keynesian policy-prescription, he might have come to see his own writings as essentially Keynesian in terms of basic diagnosis and "improved-Keynesian" in terms of chosen supply-demand calibration mechanism. Kelsoism is ham-fisted Keynesian theorizing plus subtler-than-American "Keynesian" cure-prescribing, proposing in place of regularly adjusted income-confiscations and redistributions a manner of

HeinOnline -- 79 S. Cal. L. Rev. 126 2005-2006

periodically failed to clear markets, inventories grew, frightened employers disemployed laborers and held back from investing (which contracted effective demand yet further) and the familiar "downward spiral" to persistent macroeconomic contraction ensued.

As Kelso saw things, there were but two ways to prevent or reverse these periodic spirals to protracted slump. The first was for government to confiscate income from the wealthier, marginally less disposed to consume into whose hands it tended to flow, then to spend the takings itself or channel them to potentially more consumer-demanding but under-consuming laborers with a view to "leap-frogging" or "jumpstarting" consumption back into balance with increased productivity. This familiar "Keynesian" solution, Kelso noted, was that (a) upon which the U.S. government had lit in the 1930s, early to mid-way into the New Deal; (b) to which the United States subsequently committed itself explicitly into the indefinite future with the Employment Act of 1946;[242] and (c) which it had continued to employ ever after.[243] Government sanction and support of (a) collectively bargaining employee cartels—labor unions, which according to Kelso were able to strongarm employer concessions that a "fair" and "free" market would never have afforded; (b) tax-financed and ultimately only minimally productive military expenditure during the Second World War and thereafter; and (c) similarly financed welfare transfers from the Roosevelt era onwards. In Kelso's view, all were instances of government's attempt forcibly to restore Say's balance rapidly back to the macroeconomy by coercive means through the exercise of police and taxation powers.

Although Kelso willingly acknowledged the apparent necessity of such measures, he also appeared to be troubled by what he viewed as balance-through-confiscation-and-redistribution, which he described variously as "socialistic," "unjust," and ultimately corrosive of respect for property, of "productiveness," and even of liberty itself.[244] Apparently as a

"automatic" demand-supply calibration put into place by government-facilitated spreading of the ownership of later-manufactured productive capacity.

242. Employment Act of 1946, 15 U.S.C. §§ 1021–1024 (2000).

243. Incidentally, it was precisely during this period that antitrust policy swung decisively in the direction of demand-side concern from supply-side (ownership-broadening) concern. *See supra* Part V.B.1.

244. *See, e.g.*, KELSO & ADLER, *supra* note 51, at 121–29. Note that Kelso's views lead us back to that ambivalencc in the CR, CL, and PC traditions over the relation between political liberty and rough material equality. The conception of "justice" to which Kelso implicitly appealed appears to have been to be one under which all prices and incomes were determined by freely competitive, factor- and goods-valuing markets and cbanneled to the owners of value-adding productive factors in proportion to those factors' contributions to value. *Id.* at 77–82. While at times his statements to this effect appear to render

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result, Kelso came to advocate the second possible solution he saw to the modern capitalist economy's macroeconomic imbalance which "violated" Say's Law. Rather than continuously confiscating and redistributing existing or already flowing income in order to stimulate effective aggregate demand sufficient to clear markets *à la* Keynes, why not facilitate the outright acquisition by capitally disenfranchised wage-laborers and others of new generative sources of income, that is, of hard capital assets themselves?

If incomes in the absence of government intervention would tend to flow in greater proportion to the owners of nonhuman than to those of merely human capital assets—because freely operating markets simply valued that increment which the latter such sources added to goods more highly than they valued that which the former did—and if capital, in Kelso's misleading idiom, "paid for itself" as seemed to him to be accepted by the very logic of corporate finance itself,[245] might society not somehow finance broadened capital ownership out of the forthcoming income-flows to new, future capital rather than from the flows of already-owned, existent capital? And if so, would this not present a seemingly nonconfiscatory, nonredistributive—in a word, more (Kelsonianly) "just," or "nonsocialist"—means of capital (and hence opportunity) diffusion?[246] And if so, once again, would this not then constitute a less objectionable means of bringing the demand side of the economy's relative proportions of human and nonhuman capital in production, as sources of income for consumption, to the supply side's relative proportions of the same? That is, to put the matter in decidedly non-Kelsonian terms, would it not constitute

him indifferent to the distributive justice of original factor-endowments, the fact is that in other places Kelso argues quite forcefully for a fundamental "right of participation" or "right to be productive." *Id.* *See also* LOUIS O. KELSO & PATRICIA HETTER, HOW TO TURN EIGHTY MILLION WORKERS INTO CAPITALISTS ON BORROWED MONEY 9–11 (1967) (suggesting that his conception of justice as distribution according to value-added is actually contingent upon, or meant to be taken always in tandem with, a just distribution of ex ante opportunity to add value).

245. It is of course misleading to claim, in Kelsonian fashion, that capital "pays for itself." In the language of contemporary finance, we do better to describe Kelso's observation simply as the commonplace that only projects with positive discounted net present values are rationally undertaken. Capital "pays for itself" only in the sense that investment in some capital acquisitions yields (discounted) income streams that exceed, in aggregate, their (discounted, if paid over time) acquisition costs. *See supra* Part IV.B.

246. The answer from an orthodox, abstract theoretical finance point of view is, of course, "no." Certainly not if we think in terms of possible opportunity costs (incurred by those who do not benefit) and the dilution of the value of present holdings (effectively a rental value) wrought by preferentially subsidizing certain persons' future holdings. But Kelso, as we shall see, was more financial engineer than financial theorist. And of course there are, as we saw in Part II, good EEOR values-grounded reasons for exploiting the very Part III blind-spot—that is, endowment heuristic—to which Kelso himself, as a matter of financial theory, fell prey.

HeinOnline -- 79 S. Cal. L. Rev. 128 2005-2006

a better calibrated sort of "automatic Keynesianism" operating much more gracefully than then-current federal policy's more fitful, coarse-grained, ad hoc form?

It is here that both the currents of legal scholarship prominent at the time of Kelso's legal education, and Kelso's practical experience as an investment banker and corporate finance lawyer appear to have come into play. Like many legal and economic progressives of the early twentieth century—Veblen, Ely, Commons, Hale, and other early "institutionalists" and "legal realists" among them[247]—Kelso recognized that an economy comprises more than roads, bridges, banks, and factories; workers, managers, and investors—what we might call its "hardware." As Kelso saw it, every economy operated according to what we might now call a "software" as well—that is, what Kelso termed an "invisible infrastructure" constituted not only by antecedently assigned rights and obligations, but also by usages, practices, and customs.[248] Some of these were rational and efficient, while others were mere holdovers and habits that had long outlived their usefulness or rationality. Among the latter, in Kelso's view, was the "crude," "primitive," relic of insistence upon preexisting, preaccumulated collateral as a means of securing debt.[249] This Kelso saw as the principal source of inertia responsible for capital's persistent concentration in the hands of relatively few participants in modern capitalist economies.[250] While the maxim that "it takes money to make money" might be true as a customary or a present-day legal matter, Kelso

247. On these thinkers and the period generally, see, for example, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998).

248. *See* KELSO & HETTER, *supra* note 244, at 48–52; LOUIS O. KELSO & PATRICIA HETTER KELSO, DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION 45–47 (1986).

249. Raghuram Rajan and Luigi Zingales have recently renewed this charge, connecting "collateral and connections" to an inherent conservatism embedded in the institutional structure of the present economy. *See* RAJAN & ZINGALES, *supra* note 111.

250. *See id.* Rajan and Zingales have also renewed this charge. They also cite, in this connection, the growing proportion of new project finance represented by retained earnings. *See id.* at 95–107. This, too, concerned Kelso, who advocated legally requiring that all surplus be paid out to shareholders in the form of dividends, which he viewed as critical to a more property-respecting form of corporate governance regime. *See, e.g.*, KELSO & ADLER, *supra* note 51, at 191, 207–13. In this respect, we might view Kelso as a Berle-Meansian. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 97–99 (1933). It is of course a cornerstone of modern financial theory that, given tax neutrality, symmetric information, strong market efficiency, and zero agency and transaction costs, investors should be indifferent between divided payouts and capital gains attributable to retained earnings finance. *See* Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. BUS. 411 (1961); Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958). But Rajan and Zingales, presumably like Kelso, would deny that those "givens" are present.

argued, it was flatly false as a matter of productive logic, financial logic, risk logic or, therefore, economic necessity.

Kelso argued that debt could more efficiently, productively, and ultimately more "democratically" be secured by a combination of informed project-evaluative sobriety and insurance.[251] In order to borrow from lending institutions so as to finance plant-expansion plans, for example, Kelso noted that firms typically had to submit detailed plans and plausible resultant income projections to the scrutiny of careful would-be lenders. While some such plans did nonetheless fail in the end to produce what they projected, thus failing to "liquidate themselves," the fact was that in aggregate only a relatively small percentage actually did so fail. Security needs for debt of this sort in the aggregate therefore were far less than the universal requirement of collateral appeared to imply.[252] As Kelso saw things, therefore, even parties lacking in collateral should be able to acquire ownership of new productive capital, so long as risks of project failure could be quantified in aggregate, minimized, and pooled insurance funds, which would then be channeled to those comparatively few lenders who did lose on their investments.

In this light, Kelso sketched a basic "capital credit" and "insurance" schema operating for the benefit of nonwealthy, capitally disenfranchised persons—rather as had the federal housing legislation of the 1930s for nonwealthy, nonhomeowning persons. Variations on the basic pattern were envisaged according to persons' relations to the firms whose financed capital expansion plans were contemplated. The first prototype appears to have been the ESOP, which Kelso conceived in the late 1950s as a means of assisting the employees of a then soon-to-be-sold Palo Alto newspaper publisher to purchase their own firm.[253] The prior owners of the firm, apparently solicitous of their employees' futures but financially unable any longer to retain the business, requested that a consortium of investment bankers, lawyers, and other financiers design a plan by which the employees could purchase the firm. Using conventional financing methods, the group was unable to design a transaction whereby the employees could purchase even a substantial part of the business without drastically cutting

251. Kelso's proposal is similar to the Method discussed in Part IV, and FHA mortgage-finance methods, as discussed in Part V.A.3. The analogies, which do not appear to be accidental, are further explored and elaborated *infra*.

252. In effect, there was a collective-action problem, owing to a missing market—a market that pooled default risk—with the result that everybody was left having to put up "temporary" insurance premiums of one hundred percent.

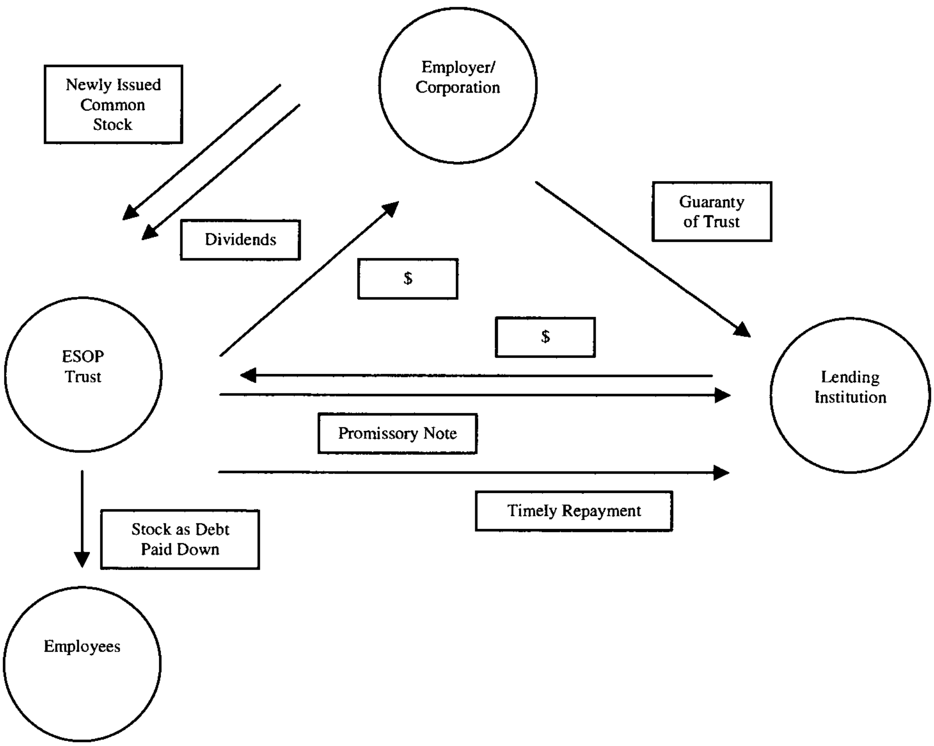
253. KELSO & KELSO, *supra* note 248, at 52–53.

HeinOnline -- 79 S. Cal. L. Rev. 130 2005-2006

their wages and committing their earlier-accumulated personal savings. At this point, the story goes, Kelso stepped in and conceived the ESOP.[254]

The structure of Kelso's plan was as follows: "Kelso & Co." established a trust whose beneficiaries were the newspaper's employees. The trust obtained a loan from a lending institution to purchase the newspaper, and the newspaper pledged to the lender to issue regular dividend-yielding stock to the trust.[255] The trust, then, per the terms of the note that it provided the lender in exchange for the loan, pledged the stock itself as security, and undertook to pay down the loan with the dividends earned on the stock. As the loan was paid down, stock gradually was released by the trust to the separate accounts of the employees.

FIGURE 3. Institutional/financial structure of an ESOP arrangement



254. *Id.*

255. For Kelso, the dividend-yield is critical as the means of amortizing the "capital mortgage." *But see supra* note 250.

According to Kelso, within several years the debt had been paid, and the employees went on to become well-to-do shareholders, many retiring in their fifties for lack of need to continue laboring.[256]

It is not clear (a) why the lender in Kelso's first ESOP transaction was willing to bear the risk of default by the capital-purchasing employee trust; (b) why, if the risk was low, the institution would not simply have purchased the stock for itself;[257] or (c) whether in fact the loan was secured by some "traditional" means additional to the use of the firm's stock itself as collateral. Perhaps the newspaper was well enough established and regarded that its going concern value was substantial. Or perhaps the well-intentioned original employer sold the business at below value, cosigned the loan, or was friendly with the lender. In the absence of such circumstances—or of similar circumstance such as government loan guarantees, insistence upon dividend-yielding stock and prohibition of the already capitally enfranchised (including lending institutions) from purchasing the stock themselves—it would seem doubtful that ESOP transactions, let alone similar such transactions made for the benefit of *non*employees, would ever have proliferated unaided. For Kelso's default-risk-mitigating "capital credit insurance," never got off of the ground.

Before explaining how and why ESOPs, unlike Kelso's other proposals, did come to proliferate throughout the American economy, we will do well briefly to describe some of Kelso's variations on the original ESOP scheme. For these constitute a rich catalog from which to draw in envisaging future "capital homesteading" programs as a sort of "third leg" of what we might think of as the "three-legged stool"—embracing homes, human capital, and productive nonhuman capital—that any American OS, in order to be meaningfully complete, will surely have to strive to construct.

About the same time that the newspaper transaction was taking place, Kelso worked up a similarly structured financing arrangement whereby the consumer patrons of a failing utility, Valley Nitrogen Producers, Inc., of Fresno, were enabled to purchase that firm.[258] The arrangement differed from that of the newspaper ESOP only in that the constituents of the purchasing trust now were consumers rather than producers of the firm's

256. KELSO & KELSO, *supra* note 248, at 53.

257. If the institution were a commercial bank or thrift then the answer is obvious. Familiar portfolio-shaping rules would have restricted the portion of depository institutions' capital able to be invested in equity securities. But Kelso does not name or characterize the institution other than as a "lender."

258. KELSO & KELSO, *supra* note 248, at 67–73.

HeinOnline -- 79 S. Cal. L. Rev. 132 2005-2006

product. Thus was born the "CSOP," or "consumer stock ownership plan."[259] According to Kelso, Valley Nitrogen Producers, Inc., like the newspaper publisher, was a financial success, but in the end was done-in by resentful, less efficient competitors who procured legislation from Congress banning the CSOP.[260]

In addition to ESOPs and CSOPs, Kelso envisaged a full menu of further "SOPs" (stock ownership plans) and "COPs" (cooperative ownership plans), including GSOPs (government employee stock ownership plans), RECOPS (real estate cooperative ownership plans), and ultimately the most simplified of all—ISOPs (individual stock ownership plans) and USOPs (universal stock ownership plans)—for those not fortunate enough to bear salient and continuous patronage relations with firms. All of these bore by and large the same financial structure as that of the ESOP. Indeed, given his later hope that something which we might call "second-order SOPs" be formed to enable the constituents of first-order SOPs to diversify their ownership portfolios, and given the growth of the mutual fund industry over the course of the 1980s and 1990s, one might imagine that had Kelso lived to the present he would by now have come principally to advocate but one, fully generalized form of all of his proposed SOPs.[261]

Pursuant to such a full-bodied Kelsonian vision, we might picture a scheme whereby (1) firms or firm-consortia and allied investment companies provide lenders with business-expansion plans when firms wish to acquire investment funding for further growth, (2) lenders in turn evaluate and assess the soundness of those plans and extend loans to investment companies allied with the firms whose plans are approved, (3) the investment companies then purchase dividend-yielding stock from their allied firms with the proceeds of the loans and hold the stock in trust for their member-investors, and ultimately (4) the investment companies release the stock to their member-investors' accounts as the loans are paid down.[262] Public, private, or mixed public-private insurers might render

259. It is an instructive exercise to map the variety of Kelsonian stock ownership plans onto the sundry ownership forms assayed by Henry Hansmann. *See* HANSMANN, *supra* note 177. If the governance difficulties so well explored by Hansmann are mitigated—say, by the delegation of broad discretion to management or a board—Kelso's choices of owner for various firm types largely track the logic of efficient ownership by primary patron laid out by Hansmann.

260. KELSO & KELSO, *supra* note 248, at 67.

261. *Id.* at 70.

262. This would presumably require changes in the laws bounding corporate finance and governance, for example, perhaps limiting the financing of expansion with retained earnings, a practice which many have come to regard as socially inefficient in any event and which certainly tends to

HeinOnline -- 79 S. Cal. L. Rev. 133 2005-2006

collateral unnecessary in these transactions by (5) insuring qualifying loans—evaluated according to sound actuarial practice and sober business expansion plan evaluation—against default, like FHA mortgage insurance policies. We might also (6) monetize the "capital mortgages" through the Federal Reserve Act's section 13 "Discount Window";[263] (7) securitize them for sale on a secondary market; and perhaps (8) reinsure the "capital mortgage" insurers themselves, all in the manner of Fannie Mae, Ginnie Mae, and Freddie Mac.

perpetuate and indeed aggravate concentrated ownership. *See* RAJAN & ZINGALES, *supra* note 111, at 77–82. *But see supra* note 250. It would also, presumably, require prohibiting the already heavily capitalized from participating, or conferring special advantages on the undercapitalized, as the Homestead Acts of the nineteenth and early twentieth centuries did.

263. *See infra* note 265.

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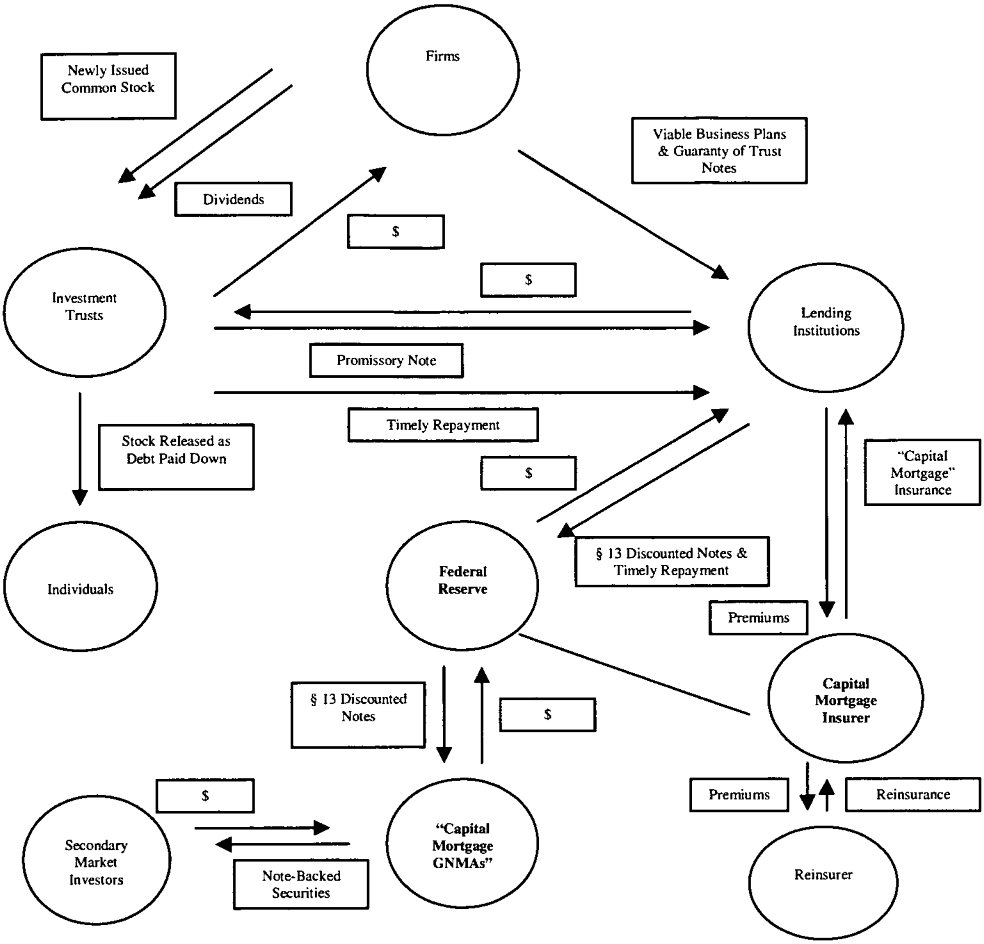
FIGURE 4. General form of ISOP arrangement with "capital mortgage" insurance



It will not have gone unnoticed how strikingly the basic Kelsonian schema, along with the above-proposed further elaborated variation upon it, mirrors the financial structure of the federal homeownership-facilitative programs discussed in Part V.A and diagrammed at Figure 2. Kelso admittedly did not advocate the creation of a new system of "capital diffusion" banks paralleling the nationally chartered MSBs established for home-financing—presumably he considered the existing investment and commercial banking industries, along with the Federal Reserve System, adequate to his projected tasks. And he did not project any Fannie Mae-like public or private firms to securitize "capital mortgages" for a secondary market. But Kelso's "capital mortgage" and "capital mortgage insurance" schema nevertheless appears a near structural replica of standardized HOLC mortgages and FHA mortgage insurance. For in Kelso's scheme, eligible business expansion plans would have to meet sound investment criteria just as do mortgage loans and home building plans in the federal home-finance programs, and insurers would then pool residual risk on generally "self-amortizing" loans just as does FHA.[264] Kelso even suggested, at later points in his career, bringing the Federal Reserve into the capital diffusion act, conferring upon it a role functionally reminiscent of that of home mortgage securitizers in facilitating a national secondary mortgage market, by advocating that the Federal Reserve allow lending institutions to monetize their lender-held capital credit promissory notes through the Federal Reserve Act's section 13 "discount window."[265]

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264. Of course, a business will tend to lack the virtually guaranteed appreciative, Ricardian "rental" tendency that real estate in a polity with a growing population and that occupies a bounded territory tends to have. A good evaluation, however, will most likely minimize the risk of depreciation or non-value-productivity and there is more upside potential in a productive enterprise than in a merely retentive piece of real property.

265. Federal Reserve Act of 1913, ch. 6, § 13, 38 Stat. 251, 263–64 (codified as amended in scattered sections of 12 U.S.C.). Section 13 of the Federal Reserve Act provides for the "discount window" through which the Federal Reserve may "monetize" payables (primarily commercial paper, referred to as "eligible" paper in the Act) of participating depository institutions (technically, the latter serve as collateral for Federal Reserve lending to participating institutions), in effect trading liquidity for assets in a manner analogous to secondary markets' "securitizing" payment obligations. Although the section 13 discount window was originally envisaged for that purpose—in effect, to facilitate and incentivize small business lending by local banks by offering the latter quick means of monetizing the resultant debts owed them—it has seldom been so used. Instead, it is primarily government (generally U.S. government, though in some cases other government) debt that is monetized by discounting. The principal nongovernmental debt-monetizing uses have been pursuant to large "bailout" packages assembled or proposed for institutions—generally banking institutions, but occasionally nonbank institutions—thought to be "too big to [allow] to fail." *See, e.g.*, Frederick S. Carns, *A Two-window System for Banking Reform*, FDIC BANKING REV., June 1995, at n.37, http://www.fdic.gov/bank/analytical/banking/1995sprg/rbr1a1ft.html#2; David Fettig, *Lender of* More *than Last Resort*, REGION, Dec. 2002, http://woodrow.mpls.frb.fed.us/pubs/region/02-12/lender.cfm; A&M-Commerce Department of Economics and Finance, Course 572 Dale Funderburk, http://www.tamucommerce.edu/ecofin/courses/funderburk/572/yesf.txt (last visited Dec. 26, 2005). The explanation seems to be that the First World War and consequent rapid national debt growth and national industrialization quickly preempted what was originally envisaged as the window's more localized business debt-monetizing purpose. *See, e.g.*, STAFF OF H. SUBCOMM. ON DOMESTIC FINANCE OF THE COMM. ON BANKING AND CURRENCY, 88TH CONG., A PRIMER ON MONEY 42–43, 69–71 (Subcomm. Print 1964); G. EDWARD GRIFFIN, THE CREATURE FROM JEKYLL ISLAND: A SECOND LOOK AT THE FEDERAL RESERVE (3d ed. 1998); Norman G. Kurland, The Federal Reserve Discount Window, Center for Economic and Social Justice, http://www.cesj.org/homestead/reforms/moneycredit/discountwindow.html (last visited Nov. 21, 2005).

HeinOnline -- 79 S. Cal. L. Rev. 136 2005-2006

The principal difference between the two cases was that, whereas FHA insurance facilitated the purchase and thereby the supply of a relatively nongenerative, merely appreciating asset—housing—and therefore might also have been expected to place inflationary pressures upon these assets' prices,[266] "capital credit insurance" would facilitate the purchase and thereby the supply of an asset directly tied to counterinflationary, productivity-enhancing business investment in plant and equipment.[267] We might add for our own part that capital credit insurance might have been expected to introduce other advantages that FHA did—for example, a standardized instrument tradable nationally (thereby facilitating the development of secondary markets in privately securitized capital mortgage debt and perhaps in turn thereby obviating or diminishing the need of Federal Reserve discounting), a quality-standardized form of business investment in productivity-improvements, and a broadly recognized, familiar method of capitally enfranchising citizens previously blocked from the market for want of prior-accumulated substantial savings or personal connections to wealth.[268]

As noted, however, Kelso's principal innovation, "capital credit insurance" patterned after originally federal mortgage insurance, never quite got off the ground as the latter did.[269] The great majority of Kelso's "SOPs" apart from ESOPs fared no better.[270] One reason, I think, is that Kelso did not emphasize the financial linkages between his proposals and

266. This Article demonstrates that this is the case in education finance, as well. *See infra* Part V.C.

267. Kelso also suggested that, if necessary to combat inflation, the Federal Reserve could always raise the discount rate with respect to credit not extended to broaden capital ownership. Current followers of Kelso now openly advocate a "two-tiered interest rate." *See, e.g.*, Kurland, *supra* note 265. Kelso also argued that the Federal Reserve could curtail its open market operations and monetize less government debt, in effect substituting "productive credit" (that advanced ultimately to firms) for "unproductive credit" (that advanced for the sake of government transfer payments and "sterile" military spending). *See, e.g.*, KELSO & KELSO, *supra* note 248, at 85–103. Indeed, were the law to limit firms' rights to retain *earnings* for purposes of financing business expansion or improvement, thus encouraging firms to resort to "capital-mortgaged" investment by current nonowners, counterinflationary productivity-enhancement and productive ownership-spreading would be mutually reinforcing. While Kelso did not play up this distinction between "capital mortgages" and home mortgages, later followers did. *See, e.g.*, Center for Economic and Social Justice, The Capital Homestead Act Summary, http://www.cesj.org/homestead/summary-cha.html (last visited Nov. 20, 2005).

268. This assumes that, like the Homestead Act, any "Capital Homestead Act" would be carefully designed and overseen to favor those not already possessed of huge capital holdings or other political advantage.

269. It seems, however, that it nearly did—in Puerto Rico in the mid-1970s, and in Alaska in the early 1980s, as we shall see. *See* KELSO & KELSO, *supra* note 248, at 76–83.

270. SPEISER, *supra* note 236, at 132–34.

the federal home finance programs. Even less, then, did he attempt to justify them by reference to the values described in Part II, the constraints described in Part III, and the financial "Method" described in Part IV. Instead, he purported to have "discovered" a "new economics," which latter was so idiosyncratic in its articulation that it discredited him in the eyes of orthodox economists and the policy makers whom they influence. Kelso's "new theory," in effect, simply elevated to the status of financial theory itself what we noted in Part III to be puzzling features of endowment psychology. The proper treatment of those features, I think, is to take them as constraints—that is, to choose methods of ownership spreading that accommodate them. This is the virtue of the Method, of the federal home finance programs that employ it, and thus of the Kelsonian "capital homesteading" programs that would have employed it. Had Kelso advocated those programs in this way, I think, he would have come across more as politically savvy than as economically cranky. Because he did not, his political successes, such as they were, were both very limited and late in coming.

Kelso's principal political success came with ESOP legislation in 1974. At a social gathering in 1973, Kelso caught the ear of Senator Russell Long of Louisiana, Chairman of the powerful Senate Finance Committee.[271] Long, son of the celebrated populist governor whose unapologetically confiscatory and redistributive "Share Our Wealth" campaign[272] and growing popularity had so worried President Roosevelt in the run-up to the 1936 national elections, [273] found himself fascinated by the Kelsonian vision's promise of broadly distributed productive ownership and consequent economic growth achieved seemingly without physically confiscating or directly taxing existing holdings.[274] When comprehensive federal pension legislation—itself precipitated by the Studebaker debacle of the decade before[275]—neared completion in 1974, Long saw an

271. *Id.* at 193–95.

272. Governor Huey P. Long advocated a $5000 "homestead" for every American family, to be financed by a wealth tax. *See* HUEY P. LONG, EVERY MAN A KING: THE AUTOBIOGRAPHY OF HUEY P. LONG (Da Capo Press 1996) (1933); T. HARRY WILLIAMS, HUEY LONG (First Vintage Books 1981) (1969).

273. *See* CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 326, 344–45 (2003); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 146 (1990); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 96–100 (1963); WILLIAMS, *supra* note 272, at 201–25.

274. We must, of course, distinguish here between "physically confiscating" and diluting. *See supra* notes 245–46.

275. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 68–84 (3d ed. 2000). Those familiar with recent bankruptcies in the airline industry will be tempted to say *plus ça change*.

HeinOnline -- 79 S. Cal. L. Rev. 138 2005-2006

opportunity to spearhead Kelso's program by securing the ESOP's formal recognition as a federally favored employee benefit plan. Thus the ESOP entered federal law with ERISA, the Employee Retirement Income Security Act.[276]

Under ERISA and the Internal Revenue Code, ESOPs came simultaneously to enjoy the favorable taxation advantages conferred upon employee retirement pensions,[277] and exemption from a number of the strict fiduciary requirements—notably those respecting portfolio-diversification and leveraged transactions in employer securities.[278] Subsequent years saw further favors progressively bestowed upon the ESOP, until at length the form in several variations proliferated across the economy, embracing over twelve million laborers in over ten thousand companies, among them at one time or another such well-known firms as Avis, the Chicago Tribune, Delta, Federal Express, General Motors, Maytag, Polaroid, Proctor & Gamble, Quaker Oats, United Airlines and Xerox.[279] While Kelso and his followers celebrated these developments as proof of the ESOP's—and, more broadly, the basic Kelsonian schema's—superiority over traditional corporate financing and ownership regimes, others point to the distortions of the ESOP-favoring tax code and to ERISA's rendering the ESOP a particularly effective antitakeover device as the real explanation for the form's proliferation.[280]

The fact is that we likely will not know the whole truth here until experiment is tried with capital credit risk-pooling. For what seems to have been Kelso's real innovation—the promise of "capital credit insurance" as a substitute for traditional collateral and plutocratic connection, by analogy to FHA mortgage insurance employed to the same end—simply never has been tried. The closest we have thus far come is in the form of (a) calls by two commissions, one appointed by President Ford and the other by President Carter, for serious econometric modeling and testing of

276. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

277. *See* 26 U.S.C. § 409 (2000).

278. *See* 29 U.S.C. §§ 1104(a)(2), 1108(b)(3), 1108(e) (2000).

279. *See, e.g.*, HANSMANN, *supra* note 177, *passim*. *See generally* THE EXPANDING ROLE OF ESOPS IN PUBLIC COMPANIES (Karen M. Young ed., 1990); UNDERSTANDING EMPLOYEE OWNERSHIP (Corey Rosen & Karen M. Young eds., 1991). ESOP-like structures have made significant headway in non-U.S. jurisdictions, as well. *See* THE EXPANDING ROLE OF ESOPS IN PUBLIC COMPANIES, *supra*; UNDERSTANDING EMPLOYEE OWNERSHIP, *supra*.

280. *See, e.g.*, HANSMANN, *supra* note 177; Richard L. Doernberg & Jonathan R. Macey, *ESOPs and Economic Distortion*, 23 HARV. J. ON LEGIS. 103 (1986); Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363 (1990).

HeinOnline -- 79 S. Cal. L. Rev. 139 2005-2006

Kelsonian hypotheses;[281] and (b) a plan authorized by Congress, but only seconded by the designated state legislature in substantially modified form, to implement a USOP benefiting all Alaskans in connection with the Trans-Alaska Oil Pipeline in the early 1980s.[282] Would it be worthwhile to experiment in serious, if nonetheless preliminarily piecemeal, fashion with "capital homesteading"? Given that this form of "homesteading," like Homesteading proper, would be aimed at fostering the spread of assets bearing Part III.A attributes, by means consistent with Part III.B constraints, it would seem so.

To begin with the obvious, business capital in today's economy is surely the autonomy-conferring asset par excellence. In many ways it is more "asset-like" today even than land itself was in the past. Industrial capital is highly generative, it being well established that historic average annual returns on equity cluster around 6.6%–7.2%.[283] It is highly liquid, particularly in "Anglo-Saxon" countries like the United States, with their "deep" and "efficient" securities markets.[284] Industrial capital also is quite legally secure, arguably more secure than even land, in that it is not generally subject to specific use or alienability restrictions, or to eminent domain.

Corporate capital also, owing to its greater disposability and flexibility than real estate, could induce greater attitudes and practices of autonomy than housing. And the holder of such assets, if thereby enabled to consume more of the products turned out by productively financed manufacturers, might also be expected to stimulate economic growth to a degree quite dwarfing that provided by mere tax-financed redistribution. It thus might appear that the CR-sounding Kelso, ironically, is simultaneously more CL than many modern "liberals" and more GDP-maximizing in his promises than are many PC advocates. Perhaps here, however, lies also another key to Kelso's failure thus far to catch on.

One potential pitfall that afflicts the more general form of Kelsonian SOP-finance is its seeming violation of one of the ownership-psychology-

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281. The closest we have come thus far is in the form of (a) calls by two commissions, one appointed by President Ford and the other by President Carter, for serious econometric modeling and testing of Kelsonian hypotheses; and (b) a plan authorized by Congress, but only seconded by the designated state legislature in substantially modified form, to implement a "USOP" benefiting all Alaskans in connection with the Trans-Alaska Oil Pipeline in the early 1980s. *See* KELSO & KELSO, *supra* note 248, at 76–83; SPEISER, *supra* note 236, at 153–56, 230–31.

282. KELSO & KELSO, *supra* note 248, at 76–83.

283. SIEGEL, *supra* note 106, at 11.

284. *See, e.g.*, FRANKLIN ALLEN & DOUGLAS GALE, COMPARING FINANCIAL SYSTEMS 1–45 (2000).

HeinOnline -- 79 S. Cal. L. Rev. 140 2005-2006

grounded constraints discussed in Part III.B. On the one hand, "capital homesteading" fares well on four of the five scales on which we observed homesteading to fare well: much like homesteading, it (a) fosters the spread of a great variety of choice-enhancing assets, including contingent claims; (b) makes liberal use of and fosters the fuller development of markets in such assets; (c) fosters joint ownership of durable, accumulated, and legally secure assets in particular; and (d) channels perceivedly "new" ownership opportunities to the less-endowed rather than confiscating "already accumulated" assets from the well-to-do. Capital homesteading also partly conditions benefits channeled to the underendowed upon the provision of viable business plans to lenders by the firms that would be capitalized through "capital mortgaging."

The problem, however, is that the general ISOP form does *not* condition the benefits offered the ultimate individual capital-holders upon any particular manner of diligent, productively virtuous, "socially useful" behavior. It, as surely as an $80,000 outright grant,[285] can look much like a "giving," a "mere government handout." Kelso works to get around the problem by varying SOP arrangements according to the patronage relationships that beneficiaries bear to the firms that they would own—as employees, as customers, etc. And no doubt the intuitive attraction that laboring for a firm bears as a basis for acquiring ownership shares in the firm is one reason that the ESOP has been the only politically successful form of SOP. But the ultimate futility of tying SOP forms to patronage forms stems from the fact that there appear to be antecedent "political" reasons internal to firms for the prevalence of ownership among particular kinds of patrons in particular industries.[286] The Kelsonian SOP forms bear no relation to those. Indeed, where it is—in keeping with the costs and benefits of ownership versus contracting—efficient for one kind of patron to own the firm, such patrons are typically already the owners.[287] The only way in which Kelsonian finance can bring ownership where it is not already found, then, is by in effect channeling wealth to persons lacking in wealth.[288] It is, that is to say, notwithstanding Kelsonians' protestations to the contrary, financially a form of redistribution.[289]

285. *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999) (proposing such an outright grant).

286. *See* HANSMANN, *supra* note 177. This is one general thrust of Hansmann's remarkable studies.

287. *See id.* This too is a critical lesson emerging from Hansmann.

288. This is not to say that we could not channel wealth to, say, current or potential customers lacking in wealth in the form of ownership of customer-owned firms, cooperatives, etc. There might—indeed, presumably will—be good reason to conform SOP arrangements to patronage-based ownership

What has to be done, then, in order to lessen objection to what will be the inevitable appreciation by some that Kelsonian finance does make choices as between potentially competing claimants upon "newly created" wealth, is somehow to condition the channeling of "new" wealth to the ethically exogenously underendowed upon some manner of perceivedly deserving action on the part of beneficiaries.[290] We require some analogue to the literal homesteader's hard work at the plow, or the ESOP-beneficiary laborer's work at the printing press, so to speak. I will propose possible such analogues in Part VI, pursuant to a plan of experimental testing of Kelsonian programs.

Key here will be, first, to tie the benefits of such experimental programs to the perceived desert—specific need and/or productively virtuous behavior—in keeping with the constraints discussed in Part III, and, second, to abandon Kelso's oddball economic theorizing and jargon, which, pace Kelso's own convictions to the contrary, do not add anything worthwhile to the discipline or pinpoint any fundamental errors in the same.[291]

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forms from industry to industry. The point here is simply that many, perhaps most, of those to whom we will wish to channel ownership are people who do not antecedently bear such patronage relations to the firms that Kelso would have us bring them to own. In addition, it is not immediately apparent how we are antecedently to condition their acquiring such ownership on such patronage relations to the firms that we shall facilitate their coming to own.

289. It is possible to pretend that it is not only in thanks to the endowment heuristic discussed at Part III—the perception that future income is somehow "less real" than accumulated income, and that "new" wealth accordingly cannot be redistributed, only distributed. This is not, of course, to condemn it. It is only to say that it can run afoul to some of the heuristics considered in Part III or respectable theory in general when described in a manner apparently meant to conceal the redistribution rather than to put endowment psychology to good use. *See supra* Part III.

290. It must be emphasized that this is simply a political concession. By virtue of the EEOR ideals sketched in Part II, the ethically exogenously underendowed already, by definition, are deserving of more favorable treatment calculated to bring their ethically exogenous endowments up to par, so to speak. But as noted in Part III, in view of owner-psychology, as well as in view of the "tracing problem" and "boundary dispute" concerning the endogeneity/exogeneity divide discussed in Part II, some endowment-enhancement strategies will fare better politically than others. *See supra* Parts II, III.

291. As noted earlier, Kelso's proposals only suggest a more directly implementing form of linkage between productive capacity growth and effective consumptive capacity growth—a more "automatic" sort of Keynesianism. Not only are Kelso's eccentric jargon and fly-by-night theorizing counterproductive, but they are also altogether unnecessary, as, after all, the federal home finance legislation of the 1930s did not require a comprehensive new theory of "home finance economics" in order either to be viewed as worth trying or indeed to work. Indeed, the economic rationales offered here were distinctly Keynesian in flavor. For example, as Secretary of Labor Perkins commented:

> [T]his bill seems to me top be of very great importance at this time because of the results which it will have in providing employment for building-trade mechanics who have long been out of work and who are themselves a basic part of our market, our purchasing power in this country.

CONG. GLOBE, 75th Cong., 1st Sess. 10,289 (1934) (statement of Sec. of Labor Perkins).

HeinOnline -- 79 S. Cal. L. Rev. 142 2005-2006

C. "HUMAN CAPITAL HOMESTEADING"

While the innovative federal home finance structure developed over the 1930s and 1940s has not as yet been adapted, *à la* Kelso, to "hard capital" ownership-spreading (apart from the minimal case of the ESOP), it has been substantially replicated, with success rivaling that of the home finance programs themselves, in the case of "soft" or "human" capital spreading. The basic historical and financial patterns, along with the cluster of CR, CL, and PC ringing justifications proffered by the programs' advocates, will by now ring familiar. We can therefore be brief in our treatment.

1. Publicly Provided Primary and Secondary Education

The direct public provision of childhood education is a triumphant, if thus far still incomplete, realization of American EEOR values.[292] It spreads a critically important, ethically exogenous material opportunity broadly over citizen-agents-in-the-making who will ultimately be (boundedly) responsible, for building their own lives through productive effort.[293] The steps that have led to this triumph have from the very start been justified in familiar CR, CL, and PC terms.[294] Current fallings short of these actuating ideals—in particular, in respect of the gross disparities in funding wrought by the system of local financing of K–12 education[295]—accordingly must be regarded both as intolerable failures in the fair allocation of a critical core endowment, as discussed in Part II, and, therefore, as failures thus far to live up fully to our own core EEOR values.

292. One aspect of brevity here will be a relative neglect, however regrettable, of childhood; that is K–12, education. Considerations of (a) the limited amount of space available for a single article; (b) the sheer amount of additional space that would have to go into a comprehensive survey of public education; (c) the fact that K–12 education is regarded, for better or worse, more as a state and local than as a federal concern in the United States; and (d) the relative familiarity, to most Americans, of publicly afforded K–12 education, its successes and present challenges, afford some solace in connection with this lacuna. Nonetheless, what we know about public K–12 education should be, in effect, incorporated by rcference into this Article; for it is a critical piece of that complete and coherent American OS in whose service this Article is written.

293. And the steps that led to this triumph began surprisingly early in our history—much earlier, in fact, than did comparable steps taken in the histories of other economically developed societies. *See* JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 9–21 (2003); SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION 15–37 (Sarah Mondale & Sarah B. Patton eds., 2001).

294. It is not insignificant, in this connection, that the first well-known advocate of public education in America was none other than Thomas Jefferson himself. *See* HOCHSCHILD & SCOVRONICK, *supra* note 293, at 17.

295. *See supra* note 46 and accompanying text.

HeinOnline -- 79 S. Cal. L. Rev. 143 2005-2006

When we begin actually blueprinting a comprehensive American OS, we shall have to address and correct those failures.

For the present, I confine myself to the principal means by which the American OS-in-the-making has worked to compensate for the imperfect spread of human capital by state and local public education provision. As in the case of real estate, those means began with the direct provision of, and have since evolved into critical assistance with the self-amortizing finance of postsecondary education.

2. Nineteenth and Early Twentieth Century Higher Education Provision

It is in respect of postsecondary education, that national policy has been most innovative in spreading ownership of human capital over a broader and broader swathe of the American population. The foundations of human capital spreading, however, intriguingly were laid earlier, in federal land and homeownership policy. Indeed, the first federal forays into higher education promotion followed the model of, and in fact were programmatically conjoined with, the Homestead Acts of the nineteenth century. And the financial foundations of the more innovative federal student loan programs begun in the later twentieth century were laid by, and to a degree also programmatically connected to, the federal home finance programs begun in the 1930s and 1940s. We begin with the earlier programs, then proceed to the present.

The first large scale federal involvement with higher education came, appropriately enough, immediately on the heels of the first Homestead Act. And like the latter, it took the form of outright land donation. The Morrill Land Act of 1862, popularly known as the "Land Grant Act," afforded to each state thirty thousand acres of federal public land for each senator and representative of that state under congressional apportionment based on the 1860 U.S. Census.[296] The land was to be used—typically, sold—by the states to fund perpetual endowments for colleges or universities of "agricultural and mechanical arts"—that is, for higher education in agriculture and engineering. Those schools, in turn, were to be open to all citizens domiciled in the respective states.[297] Other acts, which followed,

296. Morrill Land Act, ch. 130, 12 Stat. 503 (1862).

297. *Id. See also* Ezra Cornell: The Cornell University, http://rmc.library.cornell.edu/Ezra-exhitit/EC-life/EC-life-11.html (last visited Nov. 20, 2005). Ezra Cornell articulated his guiding ideal in founding Cornell University in 1865, New York's "land grant university": "Finally, I trust we have laid the foundation of an [sic] University—an institution where any person can find instruction in any study." *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 144 2005-2006

brought further federal assistance to the land grant educational institutions.[298]

The actuating ideals behind the Land Grant Acts and their progeny were, not surprisingly by this point, cognate with those that animated the Homestead Acts and their progeny. The land grant colleges and universities and related programs were designed to spread over the population skills bearing directly upon the production of material goods—products of agricultural and industrial engineering. The point, then, was to widen the form of human capital that could usefully be conjoined with a then-dominant form of nonhuman productive input—land—by diligent agent-citizens acting industriously to better their lives, agents who in so doing would render land more productive and society more wealthy.

While the United States remained largely an agrarian economy up to the Second World War, the tremendous industrialization and urbanization accelerated first by the First World War effort and then by the Second World War effort rendered clear that things would not long remain so. Accordingly, as the First and Second Wars wound down, Congress and Presidents Wilson, then Roosevelt, took fundamental new steps in the realm of federal assistance for higher education and cognate resource spreading, culminating in 1944 with the Serviceman's Readjustment Act, better known as the "GI Bill."[299]

The GI Bill is widely viewed, particularly in respect of its higher education provisions, as a great American achievement—visionary and

298. A "Second Morrill Land Act" ("Morrill II"), passed and signed into law in 1890, brought additional moneys, generated by the sale of federal lands, to the so-called land grant colleges and universities founded as a result of the first Morrill Act. Morrill Land Act II, ch. 841, 26 Stat. 417 (1890). Morrill II also vested the then-named Office of Education—predecessor to today's cabinet-level Department of Education, established in 1867 to assist the states in collecting information on best educational practices nationwide—with responsibility for administering federal support for the land grant colleges and universities. Subsequent legislation built upon the Morrill foundations. Such legislation included the Hatch Act of 1887, ch. 314, 24 Stat. 440 (enacting agricultural extension programs); the Smith-Lever Act, ch. 79, 38 Stat. 372 (1914); the Bankhead-Jones Act, ch. 338, 49 Stat. 436 (1935) (enacting the same, for territories); and the National Sea Grant College and Program Act of 1966, Pub. L. No. 89-454, 80 Stat. 998 (enacting a land-grant analogue for education that would aid in development of "coastal resources" in states with oceanic or Great Lakes coastlines).

299. Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284. Veterans had, of course, enjoyed a long history of federal assistance prior to the GI Bill, including some with education. Pensions and disability benefits for veterans had dated back to the Massachusetts Bay colony itself, and have been available in one form or another to American veterans ever since. The Homestead Acts for their part had been anticipated by federal land grant programs for U.S. veterans begun in the 1850s. But it was the Rehabilitation Act of 1919 that, for the first time, specifically conferred education allowances upon disabled veterans—in this case, of the First World War. *See* History of GI Bill, http://www.gibill.va.gov/education/GI_Bill.htm (last visited Dec. 26, 2005) [hereinafter GI Bill].

HeinOnline -- 79 S. Cal. L. Rev. 145 2005-2006

forward-looking while prudent, individually and socially transformative, and ultimately prosperity-promoting.[300] It notably, for the first time, recognized and brought together in one program both loan guaranty as a strategy and education as an asset. Many believe that in fostering these developments, the GI Bill not only modulated the move back into the workforce by demobilized service members—thus preventing a renewal of the massive unemployment that had preceded the Second World War—but also that developing and spreading high-end human capital over a large swathe of the working population laid critical foundations for the economic boom of the later 1940s and 1950s.[301]

3. Contemporary Higher Education Finance

Direct provision of higher education resources is, of course, analogous to direct provision of land and other productive resources. In a world of scarcity—for example, a world in which there are no longer millions of acres of newly conquered land to allocate—such direct provision requires outright redistribution from the heavily endowed to the underendowed. This must be done in a manner that might, absent some salient and dramatic public obligation such as that owed veterans, run afoul of one or more of the endowment heuristics discussed in Part III. Accordingly, once scarcity is encountered, prudent asset-spreading makes use of financial innovations that either are or appear to be less redistributive or less "unearned," innovations such as those schematized in Part IV as "the Method," and seen in action in Parts V.A.3 and V.B.2 above. It is therefore not surprising that real innovation in the spreading of higher education opportunity appears on the American scene shortly after the GI Bill had run its course—that is, after the obvious debt owed to World War II veterans had been discharged.

Once again, nonetheless, a perceived crisis acts as impetus. In the case of the federal home finance programs, we saw, crisis took the form of a crash in the housing market at the end of the 1920s. In the case of "capital homesteading," we also saw, crisis took the form of a protracted labor market contraction. In the case of higher education finance, crisis took the form of a satellite launch in the late 1950s—specifically, the successful Soviet launch of Sputnik in 1957.[302] Nearly fifty years later it is easy to

300. *See* GI Bill, *supra* note 299.

301. *See id.*

302. *See* PAUL DICKSON, SPUTNIK: THE SHOCK OF THE CENTURY (2001). *See also* The New York Times Looks Back: Sputnik, http://www.nytimes.com/partners/aol/special/sputnik/ (last visited Nov. 20, 2005).

HeinOnline -- 79 S. Cal. L. Rev. 146 2005-2006

forget, or simply never to have known, how traumatic the successful launch of Sputnik, the perceived "winning" of the first stage of the "space race," by America's principal global competitor, was to American public consciousness. But the fact is that public perceptions of national security and public confidence that "we [were] number one" were badly shaken; and the national conversation, in response, turned immediately to the question of wbo or what was to blame.[303]

One principal culprit, as determined by Congress and President Eisenhower, turned out to be substandard science and technical education.[304] Congress accordingly acted swiftly in passing the National Defense Education Act ("NDEA") of 1958.[305] At the heart of NDEA was the National Defense Student Loan ("NDSL") program, which for the first time offered federally provided long-term, low-interest loans to Americans—now including nonveterans—seeking postsecondary education. The NDSL program continues to the present day, having been renamed the National Direct Student Loan (still "NDSL") program in 1972 and the now-familiar Perkins Loan program in 1987. It has, however, been superseded, in terms of dollars lent and numbers of participants, by additional federally sponsored education finance programs to which we turn presently.

As the 1950s gave way to the early 1960s, federal involvement with higher education assistance began to be described not simply in national defense, but in "great society" terms. The first noteworthy step taken after 1958 came with the Economic Opportunity Act ("EOA") of 1964,[306] whereby Congress among other things established the Federal Work-Study Program ("FWSP"). FWSP provided federal funds to institutions of higher learning in order to assist them in providing employment to needy students working toward postsecondary degrees. The linking of education aid to work appears significant in light of the endowment heuristics discussed in Part III. In the absence of a perceived external exigency such as the one that the launching of Sputnik had appeared to raise in 1957, or of a large social debt such as that owed World War II veterans in the late 1940s, the first tentative step in the direction of education aid advocated simply in social welfare terms came with strings attached—recipients had to work for the aid.

303. *See supra* note 302.

304. *See* DICKSON, *supra* note 302.

305. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580.

306. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

The EOA was but a beginning, however. The first real milestone, which stands to contemporary higher education finance rather as the 1934 NHA stands to contemporary home finance, came one year later with the Higher Education Act ("HEA") of 1965.[307] The HEA forms the basis of all current federal financial assistance programs for seekers of higher education. Pursuant to the Act's Title IV, all such programs now are administered by the Department of Education. And in addition to bringing all then-existent federal higher education assistance programs—including the NDSL, now Perkins program, and the FWSP—under the Title IV umbrella, the HEA established two new such programs that persist to the present and reach far more students than do Perkins or Work Study.

The first of these, the Educational Opportunity Grant Program, which over time evolved into the "Basic Opportunity Grant Program," then the now-familiar Pell Grant Program, ushered in two norms that have characterized federal higher education assistance policy ever since. The first norm is that of a basic education-financial minimum to which all are held to be entitled. Whether they fall short of that minimum in their personal resources is determined by means-testing; but if they do, they are entitled to federal grant support. The second norm is that of portability, meaning those who qualify for grant aid may use it, on the same terms, to finance an education at any qualified institution of higher learning that they choose.

The second new program established by the HEA was of much broader significance, having come now to overshadow all others in terms of dollar amounts afforded and number of recipients served. It also, significantly, from the start partly replicated, and has since come fully to replicate in its structure and functions the home finance programs discussed in Part V.A.3 and "capital homesteading" as discussed in Part V.B.2. It also instantiates the financial engineering strategy, the Method, schematized in Part IV. That program is the federal Guaranteed Student Loan ("GSL") Program, now known as the familiar Stafford Loan Program.

As originally designed, the GSL Program offered two principal benefits. The first was simply a federal guaranty of the debts incurred by those financing their postsecondary educations by borrowing. The guaranty, of course, operated much as did federal mortgage insurance after the passage of the NHA in 1934 as discussed above in Part V.A.3. It removed lender risk, hence made loanable funds more readily available on

307. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

HeinOnline -- 79 S. Cal. L. Rev. 148 2005-2006

cheaper terms. While the guaranty system has since evolved into a two-tiered structure, whereby state-established nonprofit firms act as first-line guarantors while the federal government acts as secondary or "back-up" guarantor, the operating principles and ultimate loan availability-enhancing effects remain the same.

The second GSL benefit was a direct federal subsidy afforded to borrowers for the interest that accrued on their debt. (The indirect subsidy of tax-deductibility has been present from the start.)[308] The same basic distinction, as between guaranteed loans with indirect subsidy—interest-based tax-deductibility—on the one hand, guaranteed loans with direct interest-subsidization on the other, persists to the present day in the distinction between so-called subsidized and unsubsidized Federal Stafford Loans. That distinction, of course, mirrors the one described in Part V between home finance assistance for the poor and home finance assistance for the nonpoor.

Another noteworthy aspect of the HEA was its built-in regime of regular revisitation, under the rubric of reauthorization, by Congress. Pursuant to section 12 of the Act, Congress was to reconsider appropriations for purposes of furthering the Act's aims at least every five years. The periodic reappropriations have brought continued innovation to and augmentation of HEA programs, rather as the 1930s and 1940s brought continual augmentation of the federal home finance programs.

A particularly important innovation came with the 1972 Higher Education Amendments.[309] That year Congress established the Student Loan Marketing Corporation, better known as "Sallie Mae," as a government-sponsored enterprise ("GSE") bearing distinct family resemblances to the earlier-established GSEs that we encountered earlier in Part V.A.3—Fannie Mae of 1938 and its progeny, Ginnie Mae and Freddie Mac. As Sallie Mae's full name suggests, the corporation was formed with the express purpose of pooling outstanding student loan obligations and marketing shares in the pool. That is, Sallie Mae was formed to securitize student debt and foster the creation of secondary markets, just as Fannie Mae, Ginnie Mae, and Freddie Mac had been formed before it to securitize

308. The direct subsidy was originally a means-tested benefit, limited to lower-income Americans. A Middle Income Student Assistance Act, passed in 1978, extended the subsidy to middle-income Americans, which was subsequently scaled back by the Omnibus Budget Reconciliation Act of 1981. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.); Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978).

309. Higher Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

HeinOnline -- 79 S. Cal. L. Rev. 149 2005-2006

and jump start the creation of secondary markets in mortgage obligations. In addition, Sallie Mae was authorized to extend consolidation loans pursuant to a new Federal Consolidation Loan Program to graduates who had borrowed from multiple lenders and wished to refinance and simplify their repayment obligations after graduation. The loan refinancing program can, of course, be likened in part to the home mortgage refinancing program instituted with HOLC in 1933.

Sallie Mae bore another important resemblance to Fannie Mae and the other mortgage-securitizing GSEs: it only began as a GSE. As with the secondary mortgage market-makers, once the federal government had established the existence and shown the long-term independent viability of the requisite secondary student loan market, it gradually withdrew: Sallie Mae began the process of privatization in 1997 and completed it last year, in December of 2004, upon termination of its GSE charter.[310]

Federal mortgage program-reminiscent innovation in the realm of higher education finance did not end with the establishment of Sallie Mae. Additional critical steps came about twenty years later, with the Higher Education Amendments of 1992.[311] The 1992 Amendments, among other things, brought all federal higher education loan programs under the now familiar rubric of the Federal Family Education Loan Program, or "FFELP." They also, intriguingly, mandated that home equity be excluded as a factor in needs-testing of students for education finance assistance—in effect recognizing human capital as an asset to be spread in addition to, not as a substitute for, homes. But perhaps the most important innovations wrought by the 1992 Amendments were those that resulted in various forms of standardization.

First, the Amendments mandated sole use, by institutions indirectly benefiting from federal higher education finance assistance, of a single, freely available application form for students seeking Title IV assistance. That form is the now familiar Free Application for Federal Student Aid, or "FAFSA" form. Second, the 1992 Amendments mandated use of a single, uniform need analysis methodology—the so-called "Federal Need Analysis"—by higher education institutions indirectly benefiting from federal higher education finance assistance. This form of standardization can be seen as a further step in the direction established by the earlier-noted instituting of portability by the Education Opportunity Act of 1964.

310. Sallie Mae, About Us, http://www2.salliemae.com/about (last visited Nov. 20, 2005).

311. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (codified in scattered sections of 20 U.S.C.).

HeinOnline -- 79 S. Cal. L. Rev. 150 2005-2006

Finally, the 1992 Amendments mandated development of a common loan application and promissory note form for use by the private lenders whose funds were to be lent to the students who were the beneficiaries of federal loan guarantees. It also mandated other standardized lender and guarantor forms and procedures for use by those private lenders, and by the private guarantors whom the government had encouraged from the late 1970s onward to interpose themselves between borrowers and the government itself, which had come to function more and more as a secondary (or "back-up") guarantor or reinsurer. For our purposes, this third form of standardization is perhaps most significant of all: it is, of course, an analogue to the standard mortgage instrument that developed out of the FHA mortgage insurance programs of the 1930s, which standardization was crucial in the development of the secondary mortgage market by Fannie Mae and its progeny.[312] The establishment of a standard loan agreement and promissory note form, not surprisingly, yielded parallel benefits to Sallie Mae in its making of a deep secondary student loan market.

Yet this does not exhaust the FHA-replicating measures taken by the 1992 Amendments. A further such measure was those Amendments' instituting of the Title IV Institutional Quality Assurance Program, ("IQAP"),[313] designed to ensure that postsecondary schools whose enrollees received federal assistance in borrowing were indeed helping the beneficiaries to develop human capital—the kind of capital which borrowers would be able to use to amortize their debts over time after graduation. In this respect, the IQAP is an analogue to the housing quality standards required as a condition of receiving federal mortgage insurance, as well as the Kelsonian business plan evaluation as a condition of receiving "capital mortgage" financing.[314] Low quality homes—homes that did not retain or indeed appreciate in value—of course would not generally have constituted investments rationally worth financing; the same, presumably, might be thought to hold in the case of an education not conducing to the development of productive, responsible agency by the citizen-beneficiary of federal education-financing assistance.

In view of the many structural similarities catalogued above between federal higher education financing assistance on the one hand, and federal home financing assistance (as well as Kelsonian capital mortgage financing

312. *See supra* Part V.A.3.

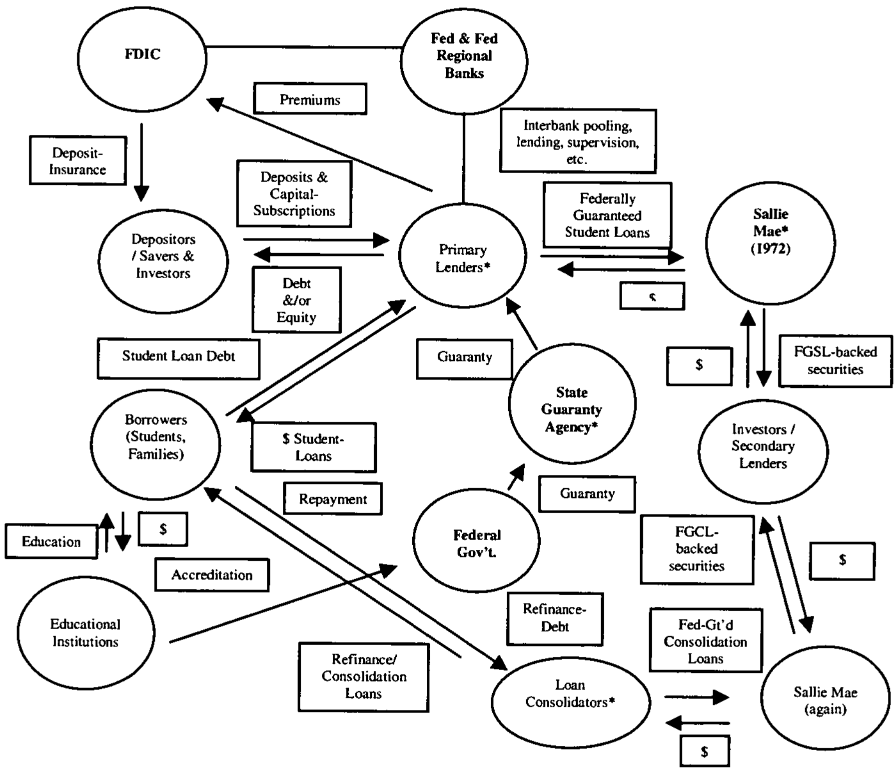
313. Information for Financial Aid Professionals, http://www.ifap.ed.gov (last visited Sept. 2, 2005).

314. *See supra* Part V.A.3.

HeinOnline -- 79 S. Cal. L. Rev. 151 2005-2006

assistance) on the other, it is perhaps worth diagramming the current FFELP programs in order to demonstrate how strikingly similar these programs are in their financial structures.

FIGURE 5. Higher education financing structure since federal higher education finance legislation of the 1960s, '70s, and '90s[315]



The federal higher education finance programs are probably the only American ownership-spreading programs that rival federal home financing assistance in their success. As in the case of the latter in Part V.A.3, a few statistics on these education finance programs are particularly telling.

315. Note that Sallie Mae, originally a GSE, privatized in 2004. "Loan Consolidators" can be primary lenders or other education finance companies like Sallie Mae. They can even be state guaranty agencies, which bear mixed public-private status and vary from state to state. There is, then, considerable functional and, indeed, public/private status overlap among asterisked entities.

HeinOnline -- 79 S. Cal. L. Rev. 152 2005-2006

In the 2003–04 academic year, about half of all American undergraduates financed their educations with loan assistance through FFELPs[316] and approximately $39 billion in FFELP loans were awarded to over 5.4 million students or their parents.[317] Yet in fiscal year 2004, less than $900 million in tax revenue went to support the $245 billion in by-then accumulated outstanding FFELP loans—a subsidization rate of less than 0.4%.[318] And in fiscal year 2003 there was no net cost to the public fisc in support of the $213 billion then outstanding in FFELP loans.[319] Turning from costs to benefits, interest rates on student loans have dropped steadily since the 1970s, owing in part to the low risk that attaches to those loans with the backdrop of federal guaranty, and in part to the success of Sallie Mae in making a deep secondary market.[320]

The federal higher education finance assistance programs can be counted as a classic American OS success story on the same order of magnitude as the federal home finance assistance programs. They represent virtually costless forms of collective action, taking the forms of collateral-substitution and market-making in the interest of broadly spreading a core EEOR endowment—human capital. That spread, through its breadth, vindicates Part II's "EOP," or equal opportunity principle. And it supplies the holders of the right to equal material opportunity with an essential resource that they can diligently employ to better their own lives, realize and enhance their autonomy and independence, and enhance the wealth of the nation considcred as a whole.

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316. *See* Federal Student Loan Programs, The Federal Family Education Loan Program Overview, http://www.studentloanfacts.org/loanfacts/overview/ (last visited Nov. 20, 2005) [hereinafter FFELP Overview]; U.S. Department of Education, Financial Aid, http://www.ed.gov/finaid/landing.jhtml?src=rt (last visited Nov. 20, 2005).

317. FFELP Overview, *supra* note 316.

318. *Id.*

319. Federal Student Loan Programs, Loan Facts, http://www.studentloanfacts.org/loanfacts/fastfacts/nonetcost.htm (last visited Nov. 30, 2005).

320. FFELP Overview, *supra* note 316. The Department of Education estimates that a typical 1982 college graduate with $8000 in debt would have looked forward to paying a total of $4200 in interest over the course of loan-repayment. Today's college graduate, by contrast, would have to accrue $18,000 in debt, over twice as much, before facing the same accumulated interest costs. Students using FFELP loans graduate at a substantially higher rate than do students not using such loans—over fifty percent as compared to about thirty-two percent—and on average a college degree is estimated to add over $1 million to the graduate's lifetime earnings; so FFELP can be credited with greatly enhancing the life prospects of its beneficiaries. *Id. See also supra* note 103 and accompanying text.

HeinOnline -- 79 S. Cal. L. Rev. 153 2005-2006

VI. COMPLETING THE PICTURE: THE AMERICAN OWNERSHIP SOCIETY AS "THREE-LEGGED STOOL"

We are now positioned to revisit the question with which we began our inquiry—the question as to what an "ownership society" might be—and answer it in some preliminary detail. The answer in broad outline is, first, per Parts II and III, that a recognizably American OS will be a society that (a) works to facilitate the spread of ethically exogenous material opportunities while (b) honoring complete and neutral markets' allocations of ethically endogenous goods and services per our core American EEOR values, (c) which goods and services and opportunities are vindicated so far as possible by property rules per the traditions of American law, all in a manner (d) comporting with American endowment psychology.

Absent new material resources such as public lands, the American OS effects its constraint-consistent ownership spreading by the Method of financial engineering which pools and spreads ethically exogenous default risk in order to facilitate credit's flowing to the underendowed, as explicated in Part IV. Not only is that the preferred course for the future, but it has also effectively, though inchoately and incompletely, been our course in two of three critical endowment domains—home ownership and human capital ownership—since approximately midway through the twentieth century. Such was the lesson of Part V.

What remains, then, to complete the OS that we have been unconsciously becoming, is consciously and fully to draw out that rough blueprint which has been latent in our programmatic history up to now, with a view specifically to filling such gaps as that blueprint reveals to be yet remaining in our OS-in-the-making. As most such gaps, I think, are attributable principally to a single "macrogap," and as this is a "big picture" article rather than a detailed outline, it will be best for now first to single out that principal lacuna, then to sketch broad means of filling it, then to anticipate the principal challenges that will face that filling effort, and finally to sketch the means by which to face those challenges. Further sequels then can handle further microdetails.

A. FROM HOMES AND SKILLS TO SECURITY AND SECURITIES

Part V shows us that the Part IV "Method" has worked very well in spreading the ownership of homes and human capital broadly over boundedly responsible, hardworking agent-citizens. Those homes and basic educations, in turn, are core opportunity endowments per Part II—basic

HeinOnline -- 79 S. Cal. L. Rev. 154 2005-2006

resources that can fairly be regarded as ethically exogenous in the holding, at least early in one's life.

But Part II also told us that access to nonhuman capital, to productive networks, is a core opportunity endowment, as is access to means by which to pool or trade off ethically exogenous risk—the "negative" counterpart to opportunity. And these are two core endowments that we have not, thus far, systematically endeavored to spread widely. I have argued in a predecessor article for means of spreading risk in a manner consistent with our fundamental, EEOR values.[321] Here, accordingly, I will emphasize the need to think more seriously about the opportunity-spreading picture.

Human capital- and home finance, it bears emphasizing, often are of little use absent access to productive networks that enable one to capitalize upon one's own diligence—that is, access to employment or ownership stakes in firms. For as we saw throughout Part V, the Part IV "Method" of publicly facilitated home and higher education finance typically works only in conjunction with the beneficiary's earning income so as to pay down the individual's publicly facilitated mortgage debt. Yet in a world where productivity growth wrought by rapid technological advance and "globalization" often occurs more rapidly than does (lagging) demand for high-skilled labor, and in which ownership of, as full or partial substitute for employment by, firms itself requires nonhuman capital, such access is apt regularly to fall into short supply.[322]

The only solution to *that* problem, consistent with American OS values and constraints, appears to be to facilitate the spread of such nonhuman capital itself by the Method. A completed American OS, accordingly, in effect will bring home skill and implement (nonhuman capital) together as they were in the nineteenth and early twentieth century "homestead," where one's diligent effort and painstakingly acquired skills themselves, as applied through the (rudimentary) equipment that one had to the agrarian resource to which one was afforded property-rule-vindicated access, were sufficient to confer economic independence. The cluster of

321. *See* Robert Hockett, *From "Mission Creep" to Gestalt-switch: Justice, Finance, the IFIs, and Globalization's Intended Beneficiaries*, 37 GEO. WASH. INT'L L. REV. 167, 192–201 (2005); Hockett, *supra* note 55, at 203–57.

322. *See* Hockett, *supra* note 55, at 107–12, 174–82. *See also* EDMUND S. PHELPS, STRUCTURAL SLUMPS: THE MODERN EQUILIBRIUM THEORY OF UNEMPLOYMENT, INTEREST, AND ASSETS (1994); *supra* Part V.B.2. Note, incidentally, that the very productivity improvements that render periodic underemployment by the well-skilled likely—technological development and "outsourcing" to poorer regions where even highly skilled labor is desperate enough to work for bargain basement wages—would redound immediately to the benefit of American workers to the degree that they were business share owners.

HeinOnline -- 79 S. Cal. L. Rev. 155 2005-2006

assets whose acquisition our contemporary OS will facilitate will constitute, as did that nineteenth and early twentieth century homestead itself, a manner of "three-legged stool" upon which free and independent agent-citizens can stand securely while responsibly building productive and worthwhile lives. We must seriously model and test, then, the real prospects for completing our OS by applying the Part IV "Method" to the realm of nonhuman capital spreading as we have done so successfully to now, since midway through the last century, in the realms of home ownership and human capital spreading.

B. FROM SECURITIES TO CREDITS, SURETIES, AND SECURITIZATION

Employing the "Method" in the realm of nonhuman capital will, of course, mean fostering and facilitating the extension of credit for the purchase of ownership shares in firms. In effect, credit and credit-risk-pooling—hence, reasonably expected future capital—will stand in for already accumulated capital, such that those faultlessly lacking in nonhuman capital will be enabled, by exercising reasonable diligence, to acquire it. That is the means of spreading this core EEOR endowment consistently with the Part III constraints—as, again, we have seen through Part V, in connection with homes and with human capital.

But this is only the beginning of applying the Method to nonhuman capital spreading. Presumably, as in home and higher education finance, we will wish to allow credit to originate from already existing, privately (shareholder-) owned depository institutions, confining ourselves as a society simply to enhancing that credit's availability by (a) guarantying it or "jump-starting" private markets in default insurance which effectively guaranty it and (b) "jump-starting" secondary markets in the resultant debt instruments with a Fannie Mae / Sallie Mae analogue. But even allowing for private lenders and markets to take that lead role, we shall have to contend with some challenges that arise in connection with "capital homesteading" which do not arise in the cases of "homesteading" or "human capital homesteading."

One such challenge is that, in order to ensure the actuarial soundness of any "capital homesteading" ("CH") program, we shall have to impose quality conditions upon the underlying assets (or the suppliers thereof) whose acquisition we are facilitating. That, as we saw in Part V, is a key feature of the Method as applied to housing and education finance, and appears to be a critical factor in those programs' successes. But imposing such standards in the case of CH might, of course, smack of government's

HeinOnline -- 79 S. Cal. L. Rev. 156 2005-2006

favoring some firms, or kinds of firms, or kinds of investments, over others. And that kind of perceived "favoritism," "distortion," or "inappropriate intermingling of politics and investment" is of the kind that we traditionally have sought to disavow, at least rhetorically.[323]

This challenge can be met, of course, so long as it is first acknowledged. The first thing to note is that virtually all government interventions in the economy, whether they be packaged as facilitative or regulatory, of course favor or disadvantage some firms or industries differently than others. The home finance programs of course afforded stimulus to the housing industry and thereby "distorted" the macroeconomy—they did not, for example, stimulate the rental market; quite the contrary. The education finance programs did the same with respect to higher education and the macroeconomy—they did not, for example, stimulate the market for apprenticeships. Contract law "distorts" persons' capacities to breach agreements, tort law their capacities to work what we consider to be unjust injury to others, property law their capacities to engage in what we consider to be illegitimate taking from others. And laws against murder "distort" the contract killing market, etc. The question, then, is not whether the government should "distort" what would have been the workings of "markets" absent government—indeed, it would of course be absurd to suggest that "markets" as we define and celebrate them could so much as *exist* absent government facilitation via bodies of law such as those just mentioned[324]—it is rather how, in what forms and to what degrees it should or should not affect them.

The second thing to note, by way of answering what one suspects would be most people's answer to that last question, is that we would not have to evaluate individual businesses or business plans in any

323. This was a key factor, for example, in Federal Reserve Chairman Alan Greenspan's and other opposition to President Clinton's proposals, in 1999 and 2000, to invest government surpluses in the stock market for the benefit of Social Security solvency. *See, e.g.*, Amy Goldstein & Steven Mufson, *Greenspan Wary of Stock Plan*, WASH. POST, Jan. 21, 1999, at A1; Carolyn Lochhead, *Skepticism over Plan for Social Security: Greenspan, Analysts Fear Clinton Proposal Won't Do Job*, S.F. CHRON., Jan. 21, 1999, at A1; Fred E. Foldvary, *Keep Government Out of the Stock Market*, PROGRESS REP., 1999, http://www.progress.org/fold75.htm.

324. This has been a truism at least since the time of David Hume and Adam Smith. *See* DAVID HUME, 2 A TREATISE OF HUMAN NATURE 526 (L.A. Selby-Bigge ed., Oxford Univ. Press 1958) (1888) (noting three "fundamental laws" requisite not only to the preservation of markets, but also of society itself—"that of the stability of possession, of its transference by consent, and of the performance of promises"). ADAM SMITH, THE WEALTH OF NATIONS 213–338 (Edwin Cannan ed., Modern Library 1994) (1776) (stating that public maintenance of institutions providing for the common defense, dispensation of justice (law), commercial marketplaces, and general education of society is necessary to attain opulence, or indeed even to endure as a society at all).

HeinOnline -- 79 S. Cal. L. Rev. 157 2005-2006

micromanagerial sense in requiring that ownership shares acquired by citizens through public credit facilitation meet certain minimum quality standards. Rather, the requirement can simply be that the shares be "investment grade" per existing bank portfolio-shaping regulations and as determined by respected intermediaries such as Moody's or Standard & Poor's. Alternatively, facilitated investments could be required, *in toto* per person as whole portfolios, to yield returns subject to no more than some stipulated variance.[325] Or facilitated investments could be required to be made partly or fully in broad market index funds, such that *all* (or at any rate all listed) firms would benefit from new investment in proportion as they already have grown, while the investments in turn would be no more risky than the market as a whole. In all such cases, "quality" of the sort that concerns us will have been reasonably assured, while any "distortion" of the sort that might reasonably concern anyone would be minimized if not indeed virtually eliminated.[326]

It might be objected, of course, that federal credit facilitation involving the aforementioned forms of quality assurance will tend, nonetheless, disproportionately to benefit well-established, even stodgy firms seeking finance over smaller, more innovative, high growth (and high-risk) firms, endowing the program with an inherently conservative bias. But this is hardly a problem. First, we of course want to be conservative about the durability of OS-spread endowments, including ownership shares in firms. We want those stakes, ideally, to be as durable and reliable as are homes and good educations themselves. But second, there is no reason to think that this will dry up the financing of smaller, high-end, more risky and innovative ventures. Such ventures generally seek, and receive, their financing from institutions and markets quite apart from depository institutions, even apart from the established stock exchanges.[327] And their financiers are, of course, more risk-preferring than the typical stock market participant. Credit for new ownership share acquisition by the currently capital-disenfranchised would be expected to come from the more risk-averse—those not expecting to receive extravagant returns from their investments (the loans they extend), but willing to accept lower returns in exchange for the preferred safety of direct

325. In other words, investments that are not too risky. *See* MARKOWITZ, *supra* note 109; Tobin, *supra* note 113.

326. *See* MARKOWITZ, *supra* note 109; Tobin, *supra* note 113. *See also* MALKIEL, *supra* note 105.

327. *See, e.g.*, HENRY ENGLER & JAMES ESSINGER, THE FUTURE OF BANKING 3–71 (2000); HENDRIK S. HOUTHAKKER & PETER J. WILLIAMSON, THE ECONOMICS OF FINANCIAL MARKETS 48–109 (1996).

HeinOnline -- 79 S. Cal. L. Rev. 158 2005-2006

or indirect public guaranty. It would not, then, be likely to cut significantly into the financing of innovative new firms.

A second general challenge that CH will face is the avoidance of publicly facilitating mere "speculation." Though the line between that and bona fide "investment" can of course be notoriously difficult to draw at the margin, we would nevertheless not wish simply to be subsidizing or otherwise facilitating unambiguously "casino-like" behavior of the sort widely believed to have been a precipitating cause of the 1929 stock market crash and ensuing depression.[328] But is that not, some might protest, what facilitating the leveraged purchase of ownership shares would be?

This does not appear to be a particularly difficult challenge to meet. For one thing, the imposition of quality standards per the preceding paragraphs will itself significantly dampen any lottery-ticket-like nature of qualifying credit-facilitated investment. For another, even were that, improbably, to fail to suffice, it would seem easy enough simply to place direct limitations, pursuant to the conditions that we attach to the benefit of public credit facilitation, upon the velocity at which the purchased shares can be turned over. This would be analogous, of course, to the tax penalties incurred by early withdrawal of funds from an IRA. We might, for example, facilitate the extension of less credit at some time t_n to any beneficiary who buys and sells at too rapid a rate at time t_n-1. Or we might impose transaction excises—"Tobin taxes"—upon such behavior, with all proceeds to return to the public fisc.[329] Again, there are many options here to ensure the investment-like as distinguished from the "merely speculative" nature of that true business ownership that we facilitate.

A challenge that is cognate both with the quality-standard and with the speculation-dampening challenges is that of how best to ensure that credit-purchased ownership shares do indeed yield discounted long-run returns in excess of their financing *costs*. In the case of homes and higher education,

328. No one ever has seriously doubted that a large securities portfolio can yield income substantially complementary or even supplementary of labor income, nor has anyone doubted that such a portfolio would, over the long run, yield more than the interest costs of its leveraged acquisition. All that would be doubted would be the prudence of such leveraged acquisition if effected for short-term, "speculative" purposes. Such, of course, is commonly believed to have been one important source of the stock bubble leading up to the crash of 1929, as well, of course, as to the disaster that befell the borrowers once that crash occurred. *See, e.g.*, JOHN KENNETH GALBRAITH, THE GREAT CRASH 1–92 (3d ed. 1972); CHARLES P. KINDLEBERGER, THE WORLD IN DEPRESSION, 1929–1939, at 95–116 (rev'd & enlarged ed., 1986). *But see* BEN S. BERNANKE, ESSAYS ON THE GREAT DEPRESSION (2000) (proposing new explanations of the Crash of 1929 and the ensuing depression).

329. *See* James Tobin, *A Proposal for International Monetary Reform*, 4 E. ECON. J. 153 (1978). *See generally* THE TOBIN TAX: COPING WITH FINANCIAL VOLATILITY (Mahbub ul Haq, Inge Kaul & Isabelle Grunberg eds., 1996).

such yield is empirically well established, and there is no reason to expect that to change in the foreseeable future.[330] Would it be the same for stocks?

The answer, at least over the long run, appears to be "yes." For one thing, the equities market as a whole has tended toward about an 8%–11% rate since records have been kept, while lending rates have been substantially lower than that over time.[331] But for another thing, we can certainly consider, as a corollary to our quality standards, a stipulation that, say, only dividend-yielding stock will qualify for CH facilitation.[332] We might indeed consider going yet further, prohibiting, say, the financing of new projects, by all publicly listed firms that benefit by CH-financing, with retained earnings.[333] That would both free up funds for dividends—presumably enhancing real incomes and discouraging excessive speculation in shares[334]—and render management more reliant upon and thus accountable to outside finance—hence upon and to a broader swathe of our citizenry once finance begins to come from the newly CH-capitally-enfranchised—than in recent decades has been the case. Requiring dividend-payments as a matter of federal law would of course constitute a marked change in the current corporate governance regime, a realm that is commonly claimed to be left, primarily and quite properly, to the states.[335] But we need not advocate anything of this sort at present, only know that it is on the table as an option. And in any event, most such firms as might be affected—the well established firms, per the quality concerns discussed above—already are federally regulated as to many formerly state-regulated governance matters by dint of the federal securities laws, under whose jurisdiction most of them fall by virtue of being publicly listed.[336]

The fourth and perhaps most important challenge faced by CH comes through the Part III constraint having to do with perceived "earning" or "deservingness." In the case of higher education finance, beneficiaries of the Method must diligently labor in order to enjoy the benefit; they must study, learn, and earn their degrees. In the case of home finance,

330. *See supra* Parts V.A.3, V.C.3.

331. *See* SIEGEL, *supra* note 106.

332. In the absence of taxation effects, transaction and agency costs, and asymmetric information, of course, it is well established that dividends are finance-theoretically irrelevant. *See supra* note 250. But of course, those conditions do not always hold, and we might wish to require that firms benefiting through CH financing have regular recourse to the CH-supplemented capital market in any event.

333. Rajan and Zingales advocate a rule similar to this, in the spirit of Berle and Means, simply as a matter of federal corporate governance law more generally. *See* RAJAN & ZINGALES, *supra* note 111.

334. A principal source of income deriving from ownership shares then would be profit shares, dividends, rather than exclusively capital gains realized only through share-sale.

335. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1–31 (1993).

336. *Id.*

HeinOnline -- 79 S. Cal. L. Rev. 160 2005-2006

beneficiaries of the Method must generally labor with firms and make timely mortgage payments from their wages or salaries. Is there a counterpart in the case of nonhuman capital?

The answer, again, is "yes," but it is not a simple "yes." To begin with, "capital mortgages" can be expected in most instances to be like home mortgages; beneficiaries of federally facilitated "capital mortgage" insurance and securitization will, presumably, work to pay their "capital mortgage" debt as surely as they do to pay their home mortgage debt.[337] While it might prove—and indeed is hoped—to be the case that their doing so will, gradually, in effect reduce their needs to work at all—as dividends or capital gains accruing to their stock ownership gradually supplement, then perhaps partly supplant, labor income—there is no reason to anticipate that people will simply cease working or otherwise diligently acting altogether, particularly over the time that is pertinent to Part III constraints—the time during which they must pay down their "capital mortgages." For one thing, consumer demand tends to grow with income and wealth, and thus the perceived need to work continues, particularly in a world that does not allow for shortened working hours.[338] For another thing, even were consumer demand not to rise in response to rises in income and wealth wrought by CH, those latter rises, in so far as they are, after all, partly offset by interest payments that must be made pursuant to the "capital mortgages," are unlikely to render employment unnecessary during one's youth and middle age.[339] Finally, even to the degree that rising wealth would allow for less need of employment, it could be expected to encourage more people simply to start their own businesses rather than to cease being productive, a trend seen among the few early retirees we find today.[340] So it seems highly doubtful that CH would have to offend our endowment heuristics by appearing to be unearned or rewarding of indolence.

337. Insofar, that is, as the unemployment rate remains relatively low, the long-term rate from individual to individual remains yet lower, and earnings will not stagnate or drop more precipitously than they have been doing for the past three decades. *See* Paul Krugman, *The Dropout Puzzle*, N.Y. TIMES, July 18, 2005, at A19, *available at* 2005 WLNR 11228703.

338. *See* JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1991). Particularly relevant is Schor's discussion of the correlation between the number of hours worked and the "employment rent"—the value of a job to the worker. *Id.* at 60–66. *See also* JULIET B. SCHOR, THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER (1998).

339. Kelso's newspaper employees, for example, retired early, but not before reaching their fifties, and certainly not before the credit extended to their ESOP trust had been paid. *See* KELSO & KELSO, *supra* note 248, at 124.

340. *See generally* DANIEL H. PINK, FREE AGENT NATION (2001).

HeinOnline -- 79 S. Cal. L. Rev. 161 2005-2006

Second, in the case of "capital mortgages" benefiting the chronically un- or underemployed, at least where that state is attributable to obvious ethically exogenous disadvantage such as physical or mental handicap or poor social circumstances, we are as a society more open to more direct subsidy in any event, presumably owing to our deep-seated EEOR values as adumbrated in Part II. That is how we find things in the home- and education-spreading realms, at any rate, where interest is directly subsidized rather than indirectly lowered (through default insurance or guaranty) and tax-deductible.[341] Furthermore, there is nothing to prevent our substituting other opportunities to act diligently in place of missing employment, as a condition attaching to the subsidy. We might, then, establish a public service corps for which otherwise unemployed beneficiaries of "capital mortgage" assistance must work to the best of their apparent abilities, or require that they work for already existent corps such as Vista or Americorps. Such corps would serve as useful domestic analogues to military service, which we saw in Part V currently to constitute the primary mode of public service that qualifies otherwise unemployed citizens to receive much in the way of home finance, education finance, and health care assistance.

Again, there are many possibilities here, and this Article can do little more than speak broadly. But the time, nevertheless, is much more than ripe for beginning seriously to sketch in broad outline our preliminary designs.

C. FROM SOCIAL ENGINEERING TO FINANCIAL ENGINEERING AND MARKET-MAKING

That, then, is where we will leave things for now. More detailed designs will await further sequels. It nevertheless bears noting here, however, that what we are talking about is potentially society-transformative action that is primarily nonetheless privately driven. Individuals, firms, and financial institutions will, in a comprehensive American OS, be doing the driving. Markets will be the primary allocators—as they are now and as any EEOR prescribes that they ought to be. What "society" does as a whole, what "we" do collectively, then, is simply to do what we always have done best when we have acted collectively: to pool and guaranty against risks for the eventuation of which nobody is individually responsible, and to jump-start markets—those most venerable of public goods—that individuals alone, owing to rational

341. *See supra* Parts V.A.3, V.C.3.

HeinOnline -- 79 S. Cal. L. Rev. 162 2005-2006

calculation or reasonable risk-aversion, dare not or cannot create single-handedly.

If, then, we can collectively insure against default, "mortgages" for the purchase of business capital, as well as the housing capital and human capital that we help thus to spread now, and if we can then jump-start the creation of secondary markets in the resultant "mortgage" debt, we shall have completed our American OS and afforded to everyone who works diligently a complete and contemporary "homestead" that is full counterpart to the full independence-conferring homestead of earlier times. And we shall have thus allowed private parties financially to engineer what other societies have failed thus far socially to engineer.

VII. CONCLUSION: AT LAST A JEFFERSONIAN REPUBLIC, BY HAMILTONIAN MEANS

We have covered much ground here, perhaps too much to summarize effectively. We have synthesized a set of core American values from three dominant American political traditions. We have derived from those core values a rough sketch of that polity upon which our traditions converge—an "efficient equal-opportunity republic." We have mapped the legal and psychological constraints that bound the set of practicable operationalizations of that republic. We have translated those constraints into a financial engineering "Method" by which optimally to spread property-rule-protected ownership stakes in material opportunities, as is counseled by the core American values. We have surveyed our own programmatic history as an ownership-society-in-the-making, finding the values, the constraints, and the "Method" all operative therein. And we have found, in that survey, what remains to be done if our ownership society is to pass from being merely "in-the-making" to being "made."

The devil, of course, is in the details. Much remains to be done, in filling the gaps, by way of careful programmatic design, modeling, and testing with a view to the consequences likely to follow upon alternative courses of action. That will, of course, have to await further sequels to this Article—as well, no doubt, as the surer steps of others.

Perhaps by way of additional motivation for those more painstaking steps, however, it is worth pausing briefly to appreciate what we shall have done once we succeed. We shall have realized the noblest dream of our most celebrated founders—the dream of a republic of independent, self-

HeinOnline -- 79 S. Cal. L. Rev. 163 2005-2006

sufficient, civically responsible, and productive owners.[342] And we shall have done so in respect of assets foreseen by others of our most celebrated founders as more promising than mere land, through means recognized by those other founders to be capable of working near-miracles—the means of finance, of credit as *credere*, of faith in the future so long as it is wrought by industrious citizens.[343] To have done that will be not just extraordinary, it will be nationally reconciling. For the first set of founders just mentioned, along with their progeny, alas, have been at odds with the other set of founders just mentioned, along with their progeny, since the dawn of our independence as a nation.[344] In effecting a real ownership society, then, we shall have effected both a great republic of owners and a long-awaited national unity. We shall have effected, at long last, a Jeffersonian republic by Hamiltonian means.

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342. *See, e.g.*, THOMAS JEFFERSON, *Notes on the State of Virginia, Queries XVIII and XIX*, *in* WRITINGS, *supra* note 21, at 288; THOMAS JEFFERSON, *Letter from Thomas Jefferson to James Madison, Oct. 28, 1785*, *in* WRITINGS, *supra* note 21, at 840; THOMAS JEFFERSON, *Letter from Thomas Jefferson to Jean Nicolas Démeunier, Apr. 29, 1795*, *in* WRITINGS, *supra* note 21, at 1027. *See also* LINCOLN, *supra* note 229. Lincoln, incidentally, was simultaneously Jeffersonian and Hamiltonian. One of the great "what ifs" in our history is how much more fully we might have moved in the direction advocated in the present Article had Lincoln lived out his second term. *See generally* RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877 (1990); DAVID HERBERT DONALD, LINCOLN (1995).

343. *See, e.g.*, ALEXANDER HAMILTON, *Report on Public Credit*, *in* WRITINGS 531 (Joanne B. Freeman ed., 2001); ALEXANDER HAMILTON, *Report on a National Bank*, *in* WRITINGS, *supra*, at 575; ALEXANDER HAMILTON, *Report on the Subject of Manufactures*, *in* WRITINGS, *supra*, at 647.

344. *See supra* note 4 and accompanying text.

HeinOnline -- 79 S. Cal. L. Rev. 164 2005-2006