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PRELIBERAL AUTONOMY AND POSTLIBERAL FINANCE

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I
INTRODUCTION

Even American "founders" whose ambitions for their new nation's future were in large measure mutually antithetical seem to have shared certain salient values in common where financial and economic relations, and their connections in turn with political relations, are concerned.[1] Take the two mutual nemeses Jefferson and Hamilton, for example. Notwithstanding their deep differences, these self-described "republican"[2] statesmen appear to have shared a view of the place of remunerative individual endeavor and productive autonomy in an enduring republic and of the place of finance in assuring that both remain always available to productive-republican citizens.[3] This is a view

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1. *See* Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society*," 79 S. CAL. L. REV. 45 (2006). *See also* Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs, and "Ownership Societies"*, 92 CORNELL L. REV. 865 (2007); Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005).

2. See Hockett, *Jeffersonian Republic*, *supra* note 1 and Hockett, *Whose Ownership*, *supra* note 1 for more on the significance of "republican" in the present context.

3. For Hamilton's view of the essentially public nature of even nominally "private" banking institutions, see, for example, Alexander Hamilton, *Report on a National Bank, December 13, 1790*, *in* ALEXANDER HAMILTON: WRITINGS 575, 599 (Joanne B. Freeman ed., 2001) ("[A] Bank is not a mere matter of private property, but a political machine of the greatest importance to the State.") *See also id.* at 585. ("[B]anks … enable honest and industrious men, of small or perhaps of no capital[,] to undertake and prosecute business, with advantage to themselves and to the community."). For Jefferson's complementary view on the essentially public nature of even nominally "private" bank credit-money issuance, see, for example, Thomas Jefferson, *Letter to John Wayles Eppes, September 11, 1813*, in PAPERS OF THOMAS JEFFERSON: RS, 6:494; alt The Papers of Thomas Jefferson Digital Edition (Barbara B. Oberg and J. Jefferson Looney, eds., 2008–2014), *available at* http://rotunda.upress.virginia.edu/founders/default.xqy?keys=TSJN-search-5-3&expandNote=on#match ("Bank-paper must be suppressed, and the circulating medium must be restored to the nation to whom it belongs.").

of finance and of enterprise that I call "productive-republican," as distinguished from "liberal," in what follows.[4] Pursuant to this vision, financial and other forms of market activity are instrumentally, rather than intrinsically, good—and for that very reason are of interest to the public qua public rather than to the public qua aggregate of "private" individuals. Citizens are best left free to engage in financial and other market activities, per this understanding, only insofar as these are consistent with sustainable collective republic-making. And the republic—the res publica, or "thing of the public"—for its part devotes many of its energies to the task of fostering and maintaining a materially independent republican citizenry. State and citizen are thus mutually constituting and mutually supporting, per this vision, and finance is important primarily in its capacity to nurture the symbiosis.

This "productive-republican" view of the appropriate role of financial and other markets in a well-ordered polity can be illuminatingly contrasted with another view of more recent vintage, which I have just called "liberal." The liberal view takes market activity to be intrinsically good, if not indeed a matter of inherent political-cum-moral right. Markets on this view are, as it were, natural social outgrowths of and analogues to inherently "free" individual choices—choices that everyone, in both their individual and collective capacities, are ethically bound to respect insofar as these choices do not impose illegitimate costs upon others.[5] So-called "public" interventions in "private" markets are accordingly fit subjects of suspicion and scrutiny per the liberal view.[6] They are presumptively problematic unless and until proven otherwise, whereas proof otherwise for its part typically takes the form of proof that the intervention protects putatively prepolitical freedom itself.

I argue in this article that American financial law and economic law more generally were once highly productive-republican in character, and that many financial, economic and, in consequence, political dysfunctions that have become familiar in recent decades stem from those laws having become steadily more liberal in character over time. I also argue that a number of important essays, articles, and monographs published over the last twenty years or so under the rubrics of "banking the poor," "alternative banking," or "democratized finance" are, in effect, if not self-conscious intention, attempts at partial recovery of the productive-republican tradition—at least in the realm of finance. They are in this sense preliberal—or, if you like, postliberal—in sensibility, if not quite in self-conscious aim. Their project can accordingly be aided, I argue, by affording them a form of reflective project-consciousness of

4. More on this critical distinction and its implications, of course, follows below.

5. "Illegitimate" costs are those that liberal economists have tended to call "externalities." How, precisely, to demarcate the boundary between internality and externality accordingly constitutes what is likely the most poignant of liberal problematics. For more on the question, see sources cited *supra* note 1; Robert Hockett, *The Egalitarian Welfare State*, 56 CHALLENGE 100 (2013).

6. For a glimpse at the programmatic opportunities that an alternative view opens up, see, for example, Robert C. Hockett & Saule T. Omarova, *"Private" Means to "Public" Ends: Governments as Market-Actors*, 15 THEORETICAL INQUIRIES L. 53 (2014).

the sort I aim here to supply.

The works to which I allude do their salutary work of thus far inarticulate republican recovery via the compelling but inherently self-limiting medium of elegy. They are largely nostalgic accounts of the finance-institutional consequences of society's having lost sight of its once-dominant, preliberal, productive-republican view of the role of finance in the polity.[7] Yet for this very reason, I believe, these works are also effectively in part about how society has lost sight of both meaningful work and of productive autonomy's centrality to effective economy- and polity-preserving. The problem these works suffer, however, lies in that word "effectively," for the writers to whom I refer do not appear yet to be fully cognizant of the essentially preliberal or postliberal, productive-republican character of their project. And until they attain that form of self-consciousness, their diagnoses of and prescriptions in connection with present financial ills will remain incomplete. I hope here accordingly to assist with the project of completion—hence with the project of full productive-republican recovery.

Here then is how I proceed. Part II first briefly maps the terrain of discussion a bit more fully by quickly elaborating on the notions of "productive republicanism," "liberalism," "preliberal," and "postliberal" to which I have alluded above and which frame the discussion below. Part III then relates a brief personal story that nicely captures, I think, what is at stake when choosing to operate with a liberal conception of markets and market autonomy on the one hand, and with a productive-republican conception on the other hand. It also highlights the ultimate inseparability of republican or liberal finance on the one hand, and republican or liberal economic arrangements more broadly on the other hand. Part IV briefly relates what I call the postliberal finance literature's accounts both of American society's evolution from a primarily republican finance-regulatory culture to a liberal one, and of the consequences of that fateful development. Part V then complements that literature by relating the broader economic counterpart to its finance story. Part VI draws programmatic implications from part V's story, while part VII concludes and looks forward.

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7. *See, e.g.*, ORGANIZING ACCESS TO CAPITAL: ADVOCACY AND THE DEMOCRATIZATION OF FINANCIAL INSTITUTIONS (Gregory D. Squires ed., 2003); Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L. J. 483 (2013); Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004); *cf.* ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP (Thomas M. Shapiro & Edward N. Wolff eds., 2001); JULIA ANN PARZEN & MICHAEL HALL KIESCHNICK, CREDIT WHERE IT'S DUE: DEVELOPMENT BANKING FOR COMMUNITIES (1992); MICHAEL SHERRADEN, ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY (1991); MICHAEL A. STEGMAN, SAVINGS FOR THE POOR: THE HIDDEN BENEFITS OF ELECTRONIC BANKING (1999); RICHARD P. TAUB, COMMUNITY CAPITALISM (1988). I do not for present purposes cite the important work of Robert Shiller and others inspired by him (including some of my own work), which is devoted more to the project of extending the benefits of modern financial innovation to smaller market participants than it is to the related but nevertheless distinct project of restoring traditional financial services to communities that in recent decades have lost them.

II
THE CONCEPTUAL TERRAIN

It is helpful before I proceed to say a bit more about what I mean by "republican," "productive-republican," "liberal," and "preliberal" or "postliberal" in what follows. I start with "liberal," by which I mean a tradition of political morality pursuant to which a particular conception of human autonomy both figures centrally and carries certain entailments. The conception in question is that implicated by the oft-discussed notion of "negative liberty."[8] Per this conception, liberty, autonomy, or freedom are understood most immediately as "freedom from" rather than "freedom to," with the gap following "from" typically filled by some form of governmentally or otherwise collectively imposed restraint.[9] Freedom from state coercion accordingly enjoys pride of place in the liberal vision. The baseline presumption from which evaluations of state action proceed is that the state must either justify its actions by reference to the preservation of negative liberty itself or not act at all. The polity is in this sense viewed primarily as an adversary—at best a necessary evil—per the liberal vision.[10]

The "republican" view of the state, as the etymology of the word itself hints,[11] is rather less dark than the liberal. Associated with that view, moreover, is a somewhat more capacious view of what autonomy, liberty, or freedom themselves involve.[12] Republican autonomy is freedom "to" as much as it is freedom "from." And that which follows the "to," in order to be practically afforded, typically requires some form of affirmative state action—e.g., the provision of basic education or other resources essential to the leading of a productive life. Republicans accordingly view the state as an indispensable instrument of the citizenry—a "thing of the public," or "res publica."

Where the thing that is to be practically afforded by affirmative state action is the material wherewithal to participate in productive and economically remunerative activity, I call the republic that affords it a "productive," or "producers'," republic. It is a "productive-republican" vision in this sense that I claim, both below and in prior writings, once to have animated American public policy and associated economic and financial law.[13] It is also this sense in which

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8. See, classically, ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), subsequently collected in ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969), thence ISAIAH BERLIN, LIBERTY (2004).

9. The distinction is in a certain sense of course artificial, inasmuch as any "freedom from" can be recast as a "freedom to," and vice versa. As a matter of immediate heuristics, however—perhaps owing to the influence of liberalism itself—many Americans do seem to think in terms of freedom "from" government coercion and freedom "to" do the things that only some measure of government coercion can make possible—e.g., to ensure affordably against otherwise unaffordable health care.

10. *See* Berlin, *supra* note 8. *See generally* Hockett, *The Egalitarian Welfare State*, *supra* note 5; sources cited *supra* note 1.

11. "*Res publica*," or "thing of the public."

12. See Hockett, *The Egalitarian Welfare State*, *supra* note 5, for more on the much greater range of potential application offered by the concept of freedom, autonomy, or liberty than that associated with liberalism.

13. *See* sources cited *supra* note 1.

both Jefferson and Hamilton thought of themselves as "republicans," as noted above.

What I have in mind when referring to a "productive" or "producers' republic" in what follows, then, is this: It is a polity constituted and maintained by citizens who enjoy more or less equal material opportunity to engage in productive, activity-yielding, sufficient remuneration as to enjoy roughly equal material autonomy—i.e., independence of the mere whims of others, including of prospective employers. The latter form of autonomy in turn enables productive-republican citizens to participate meaningfully both in the governance of the polity itself and in productive decisionmaking within the firms or other productive arrangements through which they earn their livelihoods. In effect, then, a producers' republic melds participatory political democracy with a "partnership economy" of the sort that seems to be prerequisite to participatory political democracy itself.

Finally, a word on "preliberal" and "postliberal." I refer to the "alternative banking" and "democratized finance" literature mentioned above and discussed below in part IV as "preliberal" or "postliberal" in view of its dissatisfaction with freely operating, "liberalized" financial markets whose "liberalization" over the course of the 1970s and after seems to have been prompted by a resurgence of liberal political attitudes.[14] The literature I discuss attributes the modern financial system's underserving of nonwealthy constituents to that liberalization itself, hence commits itself to a position concerning finance that one can call "preliberal" or "postliberal."[15]

Insofar as the contributors to this literature wish to guide future policy by reference to some well elaborated affirmative rather than just antiliberal vision, however, I believe they will ultimately have to become much more self-conscious and articulate about their actuating ideals than they have been up to now. Becoming articulately *republican* would be one way to do so. It would be one way to move forward from being merely "preliberal" or "postliberal" to being what I call "productive-republican." To become the latter, however, will be to embrace not only the tale told below in part IV, but also that told in part V—not to mention prescriptions like those elaborated in part VI.

III
AN ILLUSTRATIVE ENCOUNTER

I turn now to a brief personal story that will help dramatize what is at stake in the choice between liberal and productive-republican alternatives as elaborated just above. It is partly about how I became a lawyer and, in particular, a business and financial lawyer.[16] But it is ultimately about the

14. See *infra* Part IV for fuller elaboration and substantiation of the premises embedded in this definition.

15. *See id.*

16. For the fuller story, see ROBERT HOCKETT & RAYMOND HOWZE, CHAKA'S WINDOWS: WORKS AND DAYS IN THE LIFE OF A HOMELESS ENTREPRENEUR (2005) (unpublished manuscript)

"backstory" to the postliberal finance literature's bank story, and in that sense is very much about that bank story itself. It is also, for reasons I highlight below, about how that bank story is itself part of a much larger economy and polity story—a story to which society must respond in order to do anything effective in response to the bank story.

During the late 1990s, I was writing a dissertation about the effects of a shifting global division of labor on American income-earning, asset-accumulation, and homeowning patterns. As I was writing, I began noticing two interesting developments. The first was that the names and logos of certain local banks with which I was familiar began changing, generally to names and logos that were common in other localities and indeed other states. Banks, in other words, began morphing from local to regional, even global, in character.[17] Insofar as they did, the postliberal finance writers remind us, they became less embedded in, and less responsive to, the needs of local communities.[18]

The second development was that large numbers of homeless adults were beginning to appear in my city. It would have been harder not to notice this development even than it would have been not to notice the changes to the banks. Not only were there a great many such people, and not only were they out often on street corners busily washing windshields, but they would also stop people, including myself, to chat. In thus stopping, and in ultimately taking up residence with my new friends under the bridge where they lived, I learned a great deal both about banking and about working, not to mention about belonging and citizenship.[19]

The first lesson I learned was that most of my friends, though hardworking and clever, found contemporary patterns of wage-laboring and work-life separation intolerably alienating. They had accordingly come to form, in effect, a sort of working communion or "homeless kibbutz," an organizational option not clearly open to them as an off-the-rack business form here in the United States prior to fashioning it themselves. Work, life, mutual ownership, shared productive decisionmaking, and a sense of noncontingent belonging—a feeling of what I am tempted to call "material citizenship"—were all of a piece for my friends. And the world they made under the bridge where they lived, which largely paralleled and barely touched on my world above, reflected that deep integration.

The second lesson I learned was that my friends earned a great deal of money through car washing but had no satisfactory means of saving, accumulating, or productively investing it. Pockets were fine for a while, but money burned holes if it stayed there for long. My new friends' old business

(on file with the author).

17. These changes came in virtue of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, H.R. 3841 (103rd), the full text of which is available at http://www.gpo.gov/fdsys/pkg/BILLS-103hr3841enr/pdf/BILLS-103hr3841enr.pdf.

18. More on this *infra* Part IV.

19. *See generally* HOCKETT & HOWZE, *supra* note 16.

accordingly brought little accumulation, consolidation of gains, building, or growth. In consequence, my *friends* did not enjoy such gains or growth either. They were stuck in a "holding pattern." They could not transit from material citizenship in their own world to material citizenship in mine. Indeed it seemed sometimes as though I were the principal bridge between their world and mine. In this sense, I suppose it was fitting that we came to know one another under a bridge.

The third lesson I learned under the bridge was that I might be more useful to my new friends—and might write a better dissertation as well—if I did something that I had considered anathema before: pursue a *vocational* education in law, finance, or both. I had read a *New York Times* story of American Indians going to management schools and then starting businesses back on their tribes' reservations. Perhaps I could do something similar, bringing some measure of legal and financial know-how to our under-bridge "tribe." In so doing, I might also enrich my more abstract, model-heavy graduate training with more institutional and "real world" appreciation, and thus ultimately write a better-informed dissertation.

I did finish that dissertation, which I hope was a good deal better for my time under the bridge. But I also did two other things, corresponding to the two other lessons I mentioned above about banking and "homeless *kibbutzim*." These two things bear on the postliberal finance writings, as well as on the choice between liberal and productive-republican financial and broader economic arrangements, that I noted above and discuss more below.

First, I started what my homeless friends and I called a "shoebox bank." My friends would come to my flat, which I maintained while living under the bridge so as to have an address and a shower. There, they would "deposit" spare cash into a shoebox and initial a ledger that I would initial as well, then "withdraw" from an as-needed basis. In time, several of my friends saved enough money to pay union dues with which they secured well-paying automobile plant jobs.[20] Two even returned to the blue-collar middle class.[21]

We never advanced to credit-extension or payment services—ours was more bailment or "savings bank" than "full service" banking. But we did perform one critical banking service—a service that ultimately brought two of our number into the world of well-paid productive activity. In this sense, our ad hoc, internal "financial system" helped underwrite both "real" economic and personal development. Intriguingly, it brought some "political" development as well, in that those friends who managed to save and find gainful employment grew more interested both in how we arranged life under the bridge and in how various local and national political issues were resolved.

The second thing I did in these years was to help draft articles of partnership for those who wanted to formalize the "kibbutz"-like arrangement that they

20. There might seem a tension here with the "kibbutz" preference. But even these fellows returned to the camp to rejoin us for dinner and recreation most evenings.

21. At least for as long as I remained in the city.

had spontaneously developed. They planned to share a workspace, an adjoining living space, and automobile-detailing earnings. In putting this commune-cum-enterprise together, we brought my friends' world into more complete commerce with the wider world. They were now able to contract with other firms and institutions—both for living and operating space and for equipment and other "inputs" to what they did "for a living." We made of this kibbutz-like partnership a small "social union" fit for inclusion in that Rawlsian "social union of social unions" which was—or, at any rate, should have been and still should be—the American polity.[22] This remarkable commune–cum-firm was still a going concern when I left town to finish my doctoral work in 2000.

Now the first experiment—the shoebox bank—is obviously that with the clearest pertinence to the subjects discussed in the "postliberal finance" literature. For the tale of what made it *necessary* for a first-year law student and a group of his homeless friends to fashion a "bank" out of shoeboxes is effectively that told in many of the postliberal finance works I discuss. Professor Baradaran, for example, in her article tells some of the legal story of how mutually owned American thrift institutions lost sight of the working and nonworking poor.[23] Professor Barr, for his part, highlights many of the consequences of those developments where patterns of account-holding and access to other banking services are concerned.[24] Although this is not their focus, Professors Baradaran and Barr show, in effect, one side—the poor's side—of the process pursuant to which American finance became more a matter of *rentier*-benefitting primary and, especially, secondary markets, than of primary credit- and capital-accumulation markets. And that, I indicate, is the process pursuant to which America became more banana republic than producer or civic republic—more a land of "liberally" exploited dependents and debtors-in-hoc to elites than of republican producers and mutual creditors responsible to and for one another.

For these very reasons, however, the *second* experiment that I mentioned—that with the "homeless kibbutz"—is also importantly relevant to the postliberal finance literature, and hence to the story of our nation's political-economic and consequent civic decline in recent decades. For, as noted above and further substantiated below, there is a very tight link between how to configure and conduct enterprise on the one hand and how to configure and conduct finance on the other. Fully describing what an optimally inclusive and sustainable banking and broader financial system would look like is not possible without also specifying what an optimally participatory productive culture and attendant mode of capital accumulation would look like. The steps by which

22. A "social union of social unions" is what Rawls describes a "well ordered society" as constituting. For further elaboration, see JOHN RAWLS, A THEORY OF JUSTICE 527–29 (1971). For a remarkably sensitive look at how assetlessness feeds into citizenshiplessness and consequent exclusion from social unions, see Yxta M. Murray, *Peering* (working paper) (on file with the author).

23. *See* Baradaran, *supra* note 7; *infra* Part IV.

24. *See* Barr, *supra* note 7; *infra* Part IV.

society has lost sight of the first—that is to say, the steps culminating in the subject of the postliberal finance writings—are accordingly likewise the steps by which society has lost sight of the second. They are the increments by which Americans have ceased being productive republicans, in the Founders' sense of "republic," and have ironically "liberalized" themselves straight into neofeudal productive and financial arrangements.[25]

The remainder of this article now turns to tracing these developments, highlighting their symbiotic character, and drawing tentative would-be collective-action-guiding conclusions. I begin first with finance, then turn to productive and remunerative activity in the "real" economy. Thereafter I offer integrative prescriptions in regard to both.

IV
FROM PRELIBERALLY BANKED TO LIBERALLY BILKED

The United States has a distinguished tradition of "productive-republican" finance in the sense elaborated above. It is a tradition pursuant to which productive assets are deliberately spread broadly among diligent citizens ready to better the lives of themselves, their families, and, ultimately, their communities, through thoughtful hard work.[26] Historically, the tradition is rooted in two complementary sources. First is an implicitly opportunity-egalitarian, "productive yeoman" colonial culture and subsequent national self-image, stemming in large measure from the civic republican origins of the American republic itself.[27] Second is an attendant suspicion of large aggregations of financial capital, stemming not only from such aggregations' inconsistency with equal material opportunity and productive yeomanry themselves, but also from many of the Founders' and their forebears' personal experiences as agronomists subject to exploitative absentee London banking.[28]

It is not difficult to appreciate how these attitudinal and ideological predilections might have come to underwrite a view of finance that is best kept both locally responsive and generally supportive of broad-based productive development. Healthy finance, per the dominant late-eighteenth and nineteenth century ideal, is inherently adjunctive to productive activity in the "real," material economy.[29] That real economy is the product of countless forward-looking, often interactive, productive decisions taken by millions of more or less

25. Ironic, of course, because the feudal period precedes that liberal in Western history.

26. *See* sources cited *supra* note 1.

27. *See id.*

28. *See id.* In view of its concentration among colonists in the Virginia and North Carolina tidewater and Piedmont Delta regions, this mentality might be called the "Piedmont," or "Tidewater" complex. *See also* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) (thesis of which is that size and place regulation of financial intermediaries is attributable to successful lobbying by corporate managers seeking a free hand in managing firms, which diffuse capital markets facilitate more readily than do powerful financial institutions).

29. *See* sources cited *supra* note 1.

autarkic households building materially better lives for themselves and, in so doing, for their shared polity.[30] Finance itself, via its subservience to distributed productive activity, is accordingly viewed per this vision as best kept decentralized and democratic.[31]

The practical and, in particular, legal consequences of this vision concerning American banking and finance were profound. Banking institutions used to be, by regulation, deliberately kept small and inherently local. Government routinely enacted policies and programs designed to channel productive opportunity in the form of access to resources, vocational education, and "start-up" funding to broad swathes of the (white male) population.[32] These were among the underlying determinants of the so-called "market revolution" in early-nineteenth century America, the subsequent homesteading and land grant educational movements of the late-middle years of that century and much of the homegrown positive and normative economic theorizing of the time.[33] Banking institutions continued to operate under statutory restrictions on interstate-banking and branching that remained in place until the 1990s. They were also effectively conscripted as instruments of republican social policy via the Progressive and New Deal Eras' government-sponsored mortgage, educational, and small business–financing innovations that worked remarkably well until roughly the same time.[34]

What, then, occurred during the latter period to change things? What was so "special" about the mid-1990s and the years that led up to them? A particular strength of the postliberal finance writings is that they trace the transformation back to the fateful 1970s and 1980s. Another such strength is that they trace the change through its salient manifestations in a particularly important institutional context, where productive-republican finance is concerned—namely, the precincts of several distinctively American, mutually owned, financial-institution types, the nurturing regulatory regimes that were eviscerated between 1880 and 1900.[35] The postliberal finance writers

30. *Id.*

31. *Id.*

32. *See, e.g.*, Hockett, *Jeffersonian Republic*, *supra* note 1, at 98–153; Hockett, *Stock Ownership Plans*, *supra* note 1, at 868–69; Hockett, *Whose Ownership?*, *supra* note 1, at 9–10. *See also* ROE, *supra* note 28.

33. *See, e.g.*, Charles Sellers, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846 (1991). *See also* sources cited, Hockett, *supra* note 1. For an interesting account of the domestic economic thought of the time, see, for example, PAUL K. CONKIN, PROPHETS OF PROSPERITY: AMERICA'S FIRST POLITICAL ECONOMISTS (1980).

34. *See, e.g.*, Hockett, *Jeffersonian Republic*, *supra* note 1*,* at 98–153; Hockett, *Stock Ownership Plans*, *supra* note 1*,* at 868–69; Hockett, *Whose Ownership?*, *supra* note 1*,* at 9–10. *See also* Robert Hockett, *Bailouts, Buy-Ins, and Ballyhoo*, 52 CHALLENGE 93 (2009) on what went wrong from the 1980s to 2008, when financial crisis brought the system a cropper.

35. I emphasize mutual ownership—i.e., ownership by depositors themselves—of these institutions because (1) that is the one salient feature that all of these institutions shared, and (2) there seems to be a deep complementarity, at least in potential, between ownership of financial institutions by those who deposit in and borrow from them on the one hand, and broadly distributed productive credit opportunity—what I am calling "productive-republican" finance—and mutual business ownership of

understandably have less to say about the larger phenomenon—American and indeed global economic history circa 1970 to 2000—the effects of which they trace to their chosen institutions. But this is not their aim, and in any event these matters will constitute the subject of part V below.

The mutually owned institutions of republican finance upon which the postliberal financial literature concentrates are credit unions (CUs), savings and loans (S&Ls), and so-called "Morris banks" and industrial loan companies (ILCs). In all three cases, postliberal authors find a shared historical development pattern. First, invention came in response to a broadly experienced necessity. Second, growth came through a dialectic of mutually reinforcing proliferation on the one hand, and legislative notice, blessing, and prudential regulation on the other. Finally, once each of these institutions had by and large accomplished its mission of bringing the erstwhile non-well-to-do into the latter-day "yeomanry"—the storied American "middle class"—it fell victim to its own success, on the postliberal finance literature's telling, and there emerged a new dialectic of mutually reinforcing sharp competition and deregulation, culminating in decline and demutualization.

CUs, as Professor Baradaran in particular observes, first developed during the late-nineteenth and early-twentieth century Progressive era. They then proliferated rapidly during the years of the Great Depression among western and midwestern farmers while shareholder-held northeastern commercial banks became increasingly lent to the large industrial concerns that had grown in the Northeast and upper-Midwest after the Civil War.[36] CUs were the product of spontaneous collective action among multiple constituents whose vocations, and hence, whose individual credit needs and risk profiles, were significantly similar, but whose individual surpluses and deficits at any one moment tended to countervary. (You might need credit while I might have surplus this year, for example. Next year our positions might reverse, then reverse yet again in the following year.) Mutual agricultural lending societies, such as the first CUs, were a natural response to such circumstances when established shareholder-owned commercial banking institutions were preoccupied elsewhere and the only existing alternative took the form of unregulated, predatory "loan companies."[37]

As the CU form spread, state, and then federal, law took notice, undertaking both to subsidize CUs with a view to facilitating their further proliferation, and to establish strict prudential and consumer protection standards to which any firm purporting to be a CU could be legally held.[38] The reasons for legislative solicitude were straightforward. One, which the postliberal finance literature emphasizes, was to assure that the credit needs of

the partnership or Kibbutz varieties on the other.

36. *See e.g.*, Baradaran, *supra* note 7, at 500–03.

37. *See e.g.*, *id.*

38. *See e.g.*, *id.* at 503–05.

productive but non-well-to-do farmers could be safely met.[39] Another, which the literature does not emphasize but complements that which it does, is the Jeffersonian, civic republican tradition of American self-imagining and public policy noted above, by which the productive agricultural labor of freeholding "yeomen" on "small family farms" long has been valorized in American popular and political rhetoric.[40]

What then became of the CUs? As most tell it, the CUs might have, in a certain sense, fallen prey to their own successes in facilitating the movement of previously non-well-to-do farmers into the post–World War II middle class. I suggest below that, although there is a sense in which this characterization is fair and instructive, there is ultimately much more—and much darkness—to the story as well. For the moment, however, I hew to the postliberal finance literature's narrative.

Postliberals have observed that, as non–mutually owned commercial banks' and other financial institutions' clienteles grew more affluent during the postwar prosperity, because these institutions were less tightly regulated, they were able to peel clients away from CUs by offering savings and other investment options that yielded higher returns.[41] Heralding a pattern that was to become all too familiar to banking and financial institutions lawyers over the course of the late 1970s and 1980s, the CUs responded by lobbying for changes to those state and federal laws that underwrote their distinctive differences from commercial banks—just as the latter would subsequently lobby to be permitted to act more like lightly regulated mutual funds.[42] Over time, these lobbying efforts were successful and induced further lobbying for further relaxation of rules and so on, until CUs came to look virtually identical to shareholder-owned commercial banks in their "memberships," benefits, and investment activities.[43] Their clientele, like the banks, is now predominantly middle- and upper-middle-class; they offer returns on deposits and "voice" to depositors not much different from that which the banks offer; and they lend to and invest in much the same issuers as do the banks.[44] To summarize, their clientele is no longer principally made up of farmers.

The tale that postliberals tell of the S&Ls is much like that which they tell of the CUs; the primary difference is that the former developed, and then received, legislative assistance and safeguarding with a view to facilitating credit extension for home purchases, rather than agricultural needs.[45] Like the CUs, the S&Ls were mutual societies owned by their depositors, and were aimed at

39. *See e.g.*, *id.* at 500–03.

40. *See, e.g.*, Hockett, *Jeffersonian Republic*, *supra* note 1, at 98–153; Hockett, *Stock Ownership Plans*, *supra* note 1, at 868–69; Hockett, *Whose Ownership?*, *supra* note 1, at 9–10.

41. *See e.g.*, Baradaran, *supra* note 7, at 505–09.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See e.g.*, *id.* at 510–11.

facilitating mutual lending among said depositors.[46] Also like the CUs, they developed first in the South, West, and Midwest during the late-mid-nineteenth century in response to a strong, civic republican–rooted cultural favoring of homeowning over home-renting, and dominant northeastern banking institutions' preoccupation with industrial lending during that same time.[47] Finally, they too proliferated especially quickly during the late Hoover and early Roosevelt years of the Great Depression, while both administrations and Congress sought to consolidate and build upon the advantages that these institutions offered during a time when not only the longstanding American value of civic republican "yeoman" homeownership, but also the economically critical home-building industry, was under great stress.[48]

The story of the S&Ls' decline largely replicates that of the less familiar CU story just summarized, albeit with more notorious and more disastrous consequences. Like the CUs, the S&Ls lost depositors to commercial banks as constituents grew more affluent and, consequently, more interested in higher-yield deposit and other investment options.[49] In addition, the S&Ls joined the commercial banks in lobbying for lighter regulation of their portfolios and the returns that they offered to depositors, in order that they might better compete with the increasingly popular money market and other mutual funds that proliferated during the inflationary 1970s.[50] In all of these cases, the lobbying was successful until the S&Ls came to look more like, and in many cases even converted into, commercial banks.[51] The S&Ls went further, however, by participating in a big way in the best known fad-investment craze of the era—the so-called high-yield, or "junk," bond innovations associated with Michael Milken of Drexel Burnham Lambert.[52] In the end, then, the S&L industry was all but eviscerated by the early 1990s, leaving a vacuum that soon came to be filled by unregulated self-proclaimed "mortgage banks" of the Countrywide variety, which just produced even more calamitous consequences, the aftershocks of which American society continues to struggle with to this day.[53]

The Morris bank and ILC story is somewhat similar to the CU and S&L stories, save that, in this case, the originator of the idea was a well-to-do industrialist with philanthropic pretensions and the beneficiaries were industrial laborers, rather than farmers or would-be homebuyers.[54] Arthur Morris's aim

46. *Id.*

47. *Id. See also* Hockett, *Jeffersonian Republic*, *supra* note 1, at 98–153; Hockett, *Stock Ownership Plans*, *supra* note 1, at 868–69; Hockett, *Whose Ownership?*, *supra* note 1, at 9–10.

48. *See* Hockett, *Jeffersonian Republic*, *supra* note 1, at 98–153; Hockett, *Stock Ownership Plans*, *supra* note 1, at 868–69; Hockett, *Whose Ownership?*, *supra* note 1, at 9–10.

49. *See e.g.*, Baradaran, *supra* note 7, at 514–19. *See also infra* Part V; *see generally* Robert Hockett, *A Fixer-Upper for Finance*, 87 WASH. U. L. REV. 1213 (2010).

50. Baradaran, *supra* note 7, at 514–19.

51. *Id.*

52. *Id.*

53. Hockett, *supra* note 49, at 1255.

54. *See e.g.*, Baradaran, *supra* note 7, at 519–22.

was apparently to satisfy the credit needs of poor laborers by means less crudely exploitative than those of the dominant pawnbroker and loan sharking "industries" of the early twentieth century.[55] In place of collateral, which most laborers lacked in sufficient abundance as to secure sizeable consumer loans, Morris developed a "cosigner" system requiring two additional cosigners for each borrower—a system not unlike that employed in microlending arrangements today.[56] In order to evade usury laws that would have prohibited the interest rates that Morris believed necessary to offset the default risk attendant on lending to working-poor borrowers, Morris developed a repo-like "dual" transaction arrangement that masked the money-rental rate he effectively charged.[57] (A sale and repurchase (repo) agreement effects a loan through sale of an asset by the borrower to the lender, accompanied by agreement to repurchase the asset later at a higher price. The difference between the sale and repurchase prices is effectively the interest charge. Repos constitute a significant part of the credit markets—not to say the "shadow banking system"—today, with Treasury and mortgage-backed securities serving as the sold and repurchased assets. Morris's "dual" transactions with his borrowers were not in securities, of course, but functioned similarly in giving interest payments the form of price differentials.)

Rather, as in the CU and S&L cases, the law eventually came to recognize and, in limited ways, encourage, some proliferation of Morris banks.[58] At their peak during the early years of the Great Depression, the institutions operated in some thirty states, though it is unclear precisely how many states had specifically tailored Morris-bank legislation, and federal law never expressly took notice of the institutions.[59] Morris banks quickly morphed into ILCs—in effect, consumer-finance arms of consumer-goods manufacturing firms—over the course of the 1930s and 1940s, or otherwise simply went out of business.[60] The movement of commercial banks into the person loan business was the principal force driving this evolution, as they looked for more lending business and recognized the soundness of the newly invented—and largely Morris-bank based—installment loan structure. Doing so enabled them to operate more efficiently on the strength of their already accumulated depositor base.[61]

By the 1980s, in consequence, all Morris banks had either been acquired, edged out by, or converted to the same commercial banks with which CUs and S&Ls ultimately sought to compete.[62] The only exceptions were the consumer finance divisions established by some manufacturing firms that were able to facilitate purchase of their own products by lending directly to would-be

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 522–23.
59. *Id.*
60. *Id.* at 523–25.
61. *Id.*
62. *Id.*

buyers.[63] Thus were born such ILCs as GE Capital and GMAC, operated by General Electric and General Motors, respectively.[64]

Where does this leave society today, where finance for the non-well-to-do and the "working poor"—now, alas, a rapidly growing class—is concerned? In one sense, the answer lies in the "shoe box bank" and "homeless kibbutz" tale I told in part III. It leaves society today with sizeable numbers of folk like my friends under the bridge, whose only hope of participating in that would-be productive republic lies in acting as the amateur do-gooder ready to start up a "shoebox bank." In another sense, the answer lies in the fuller phenomenology of exploitative check-cashing, payday lending, and other fringe banking "services" described by Professors Baradaran and Barr, in particular.[65] Finally, in still another sense, the answer lies in a battery of disturbing macrostatistics—including an over-28% "unbanked" or "under-banked" rate across the national population, and an over-50% "under-credited" rate across the same—that Professor Baradaran and Barr in particular relate with compelling force.[66]

In effect, the arc traced by the postliberal writings begins with a late-nineteenth- and twentieth-century political economy in which some banking institutions serviced those that had already accumulated capital, whereas other banking institutions serviced those in the process of building up capital. It continues to a twenty-first century political economy in which (1) a multitude of "fringe" financial institutions prevent growing numbers of Americans from accumulating capital at all by exploiting their desperate straits; (2) other, putatively more respectable such institutions effectively *slow* the rate at which many Americans can accumulate capital by extracting opaque "fees" from them in lending and even in holding their savings (upon which the banks profit by lending); and (3) the same institutions facilitate further accumulation by those elites—the proverbial "one percent"—who have already amassed, or inherited, massive accumulations, including ownership stakes in the shareholder-held (i.e., nonmutual) commercial banks themselves.

None of this, of course, sounds very good. It sounds like liberal or banana republican, not productive-republican, banking. Indeed, it would seem to be precisely why the "Occupy" movement that burgeoned in 2011 chose the geographical area surrounding Wall Street as its first occupation site. But what can be done about it, other than banging pots and pans, camping in (ironically, privately owned) parks, and holding placards? (The first "Occupiers" occupied privately owned Zucotti Park because the large city parks in Manhattan prohibit camping while tiny Zucotti Park did not—hence the referenced "irony.") The answer, I think, requires first considering the "real" economy

63. *Id.*

64. *Id.*

65. *Id.* at 485–98; Barr, *supra* note 7, at 128.

66. Baradaran, *supra* note 7, at 485. "Un-" and "under-banked" mean without formal relations with a bank and without access to incremental credit, respectively. "Under-credited" means unable to borrow $2000 within thirty days to respond to an emergency.

counterpart to the "banking" economy story told so ably in much of the postliberal finance literature.

V
FROM REPUBLICAN TRADESMEN TO LIBERAL BONDSMEN

As noted above, America's productive-republican financial tradition had a "real" economy counterpart. That was the "yeoman" ideal of the largely autarkic, civically engaged, productive agrarian household. This ideal found expression in much more than bank-regulatory and broader finance-regulatory policy. Indeed, productive-republican finance-regulatory policy was very much the tail to democratic development's dog.

Early American property law abandoned British common law primogeniture to ensure broader ownership of the newly conquered continent's most conspicuous resource: arable land.[67] Subsequent late-eighteenth- and early-nineteenth-century federal legislation, most notably the Northwest Ordinance, had the same aim.[68] Later still, the Homestead and Land Grant Acts of the second half of the nineteenth century reflected a national policy favoring the broad spread of productive assets (including vocationally relevant higher education in the Land Grant Act case) over a population of industrious, civically engaged, and responsibly productive-republican citizens.[69] These enactments enjoyed at least one finance-regulatory counterpart: the National Bank Act of 1863, which established not only the Office of the Comptroller of the Currency (OCC)—the nation's oldest operating bank regulator—but also a network of nationally chartered, local depository institutions at which citizens could purchase Treasury securities so as both to accumulate assets and finance the Civil War effort.[70]

As the productive and populational center of the nation shifted over the course of the late-nineteenth and early-twentieth centuries, from rural agrarian to urban industrial, American economic and broader public policy stumbled over the question of how best to adapt the productive-republican ideal, which had presumed a largely agrarian economy since its inception in preimperial Rome, to these new circumstances.[71] This difficulty was reflected in growing

67. *See, e.g.*, Hockett, *Jeffersonian Republic*, *supra* note 1, at 99–100.

68. *See id.* at 99–102; *see also* Hockett, *Whose Ownership?*, *supra* note 1, at 11–14.

69. *See* Hockett, *Jeffersonian Republic*, *supra* note 1, at 99–102; Hockett, *Whose Ownership?*, *supra* note 1, at 11–14. *See generally* CONKIN, *supra* note 33; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970) (discussing the republican ideology of the "free soil" movement); SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850 (1984) (discussing the rise of working class self-consciousness in 19th century America).

70. *See* National Banking Act of 1863, ch. 58, 12 Stat. 665 (February 25, 1863); National Banking Act of 1864, ch. 106, 13 Stat. 99 (June 3, 1864).

71. *See, e.g.*, Hockett, *Jeffersonian Republic*, *supra* note 1, at 102–04; Hockett, *Whose Ownership?*, *supra* note 1, at 13–15. The difficulty imagining what an "industrialized" republicanism might look like presumably accounted, in part, for resistance by Jefferson, Madison, and many of their intellectual descendants to industrialization itself. Much of my own scholarship is actuated by the hope to envisage

wealth disparities and labor pauperization during the so-called "Gilded Age" of the late-nineteenth century.[72]

The Progressive movement that emerged in response to that age marked the first flowering of productive republicanism's adaptation to industrialization. Among the movement's signal accomplishments were (1) extending the franchise to the nation's women and rendering the political process both more transparent and more direct; (2) modernizing education; (3) regulating wages, working conditions, and collective bargaining rights for laborers for the first time; (4) implementing the first antitrust laws, which aimed less at protecting consumer surplus than at guaranteeing a large number of individually owned small businesses instead of a small number of elite-owned conglomerates; and (5) enacting the first federally collected progressive income tax.[73] A critical finance-regulatory complement to these enactments that arguably fell outside the scope of the postliberal finance literature was the Federal Reserve Act of 1913, which finally established a federally administered system of liquidity risk pooling among depository institutions, thereby rendering their fates no longer contingent upon the beneficence of private clearing houses or grandees like John Pierpont Morgan.[74]

Notwithstanding the gains made by the Progressives, inherently market-destabilizing income and wealth disparities[75] continued to grow in America, albeit at a slower pace, until the years following World War I. At that point they spiked, rendering the so-called "Roaring Twenties" the most volatile decade on record until the 2000s.[76] As income concentrated at the top of the distribution, the wealthy, with their low marginal propensities to consume (MPCs), sought exotic new investment outlets for their new wealth.[77] Those below the top of the distribution, with their correspondingly higher MPCs, symmetrically sought new means of borrowing to maintain or improve material living standards. The upshot was two classic debt-fueled asset price bubbles, one in real estate, the other in corporate equities, which both peaked and burst, respectively, in 1928

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and design precisely that updating—and broadening—of the republican ideal to no longer agrarian productive conditions. *See* sources cited *supra* note 1 and sources cited *infra* Part VI.

72. For more on the period, see RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE (1990); *see also* JEAN STROUSE, MORGAN: AMERICAN FINANCIER (2000).

73. *See generally* LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA, 1890–1914 (2001); RICHARD HOFSTADTER, THE AGE OF REFORM (1972); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920 (1967); WILENTZ, *supra* note 69.

74. *See* Federal Reserve Act (ch. 6, 38 Stat. 251, enacted December 23, 1913, 12 U.S.C. ch. 3). *See also* CHERNOW, *supra* note 72; STROUSE, *supra* note 72.

75. *See* Robert Hockett & Daniel Dillon, *Income Inequality and Market Fragility: Some Empirics in the Political Economy of Finance* (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204710.

76. *Id. See also* Richard Vague & Robert Hockett, *Debt, Deflation, and Debacle: Of Private Debt Write-Down and Public Recovery*, White Paper, Global Interdependence Center, Federal Reserve Bank of Philadelphia, April 9, 2013, *available at* http://www.interdependence.org/wp-content/uploads/2013/04/Debt-Deflation-and-Debacle-RV-and-RH1.pdf.

77. Hockett & Dillon*, supra* note 75.

and 1929.[78]

The Great Depression brought a second wave of progressive legislation that built upon and consolidated the productive-republican gains made by the Progressives a generation before.[79] Among the relevant New Deal enactments were the National Labor Relations Act, which further strengthened the hand of American labor to lock-in a livable share of national income growth; the Social Security Act, which provided the first federally supplied income safety net for Americans as they aged; the Federal Housing Act, which established a mortgage refinance program and a system of mortgage default insurance to maintain and facilitate broader homeownership; the Federal National Mortgage Association (Fannie Mae) Act, which established a secondary mortgage market maker for Federal Housing Administration (FHA)–insured mortgage loans and lowered the cost of primary mortgage credit; and a host of local and regional infrastructural development projects that tightened up labor markets, raised wages, and provided public goods that served as foundations for further employment-inducing market activity.[80] All of these developments helped to reverse income concentration trends and strengthen the bargaining power, and thereby the relative productive autonomy, of nonwealthy, non-*rentier* Americans.

Finance-regulatory complements to these enactments during the New Deal era existed just as there had been in earlier eras, though most of them again fell outside the postliberal finance literature's scope. Best known among them were the Federal Home Loan Bank Act of 1932, noted in the postliberal finance literature as one way that federal law provided a boost to the S&L industry; the Federal Deposit Insurance Act of 1933, which backstopped the depository assets of nonwealthy Americans; the Glass-Steagall Act of 1933, which prohibited nationally chartered depository institutions from speculating in risky securities markets; the Securities Act of 1933 and the Securities Exchange Act of 1934, which rendered the securities markets themselves less risky by strictly prohibiting fraud; the Investment Company and Investment Advisors Acts of 1940, which imposed strict standards on the nascent investment-fund industry; and, later, the Public Utility and Bank Holding Company Acts of the mid-1940s, which limited affiliations among traditional banking institutions and more speculative financial concerns under conglomerate structures.

All of these impressive New Deal enactments built upon the Progressive era's accomplishments and fostered the continuing development of an industrial-era counterpart to the primarily agrarian "yeoman" class of the previous century, and thereby carried the productive-

78. *See* Hockett & Dillon, *supra* note 75; Vague & Hockett, *supra* note 76.

79. *See generally* MICHAEL HILTZIK, THE NEW DEAL: A MODERN HISTORY (2011) (providing a history of the achievements of the era); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940 (1963) (providing a history of the achievements of the era).

80. *See id*. *See also* Hockett, *Jeffersonian Republic*, *supra* note 1, at 99–102.

republican ideal into the modern era.[81] The primary focus in so doing was on the "real" economy prerequisites to that goal's accomplishment—in particular, job security, homeownership, and a robust social safety net. A secondary but no less important focus was on regulating finance in a manner that kept it subservient to the needs of the productive-republican "real" economy.[82]

Following World War II, New Deal–era policies largely continued for another three decades. Income and estate taxation remained highly progressive; labor protections remained fully in place and were strictly enforced; incomes continued to hew closer together and grow only in tandem; social safety nets were expanded to aid the poor and elderly; homeownership rates continued to grow; and higher education and small business–finance programs, patterned in large measure after the New Deal home-finance programs, came to complement the latter as a favored form of asset-spreading over the middle class.[83] Financial regulatory policy continued to be taken seriously as well, with the first Securities and Exchange Commission (SEC) prosecutions for insider trading commencing in the 1960s.[84]

What, then, changed on the "real" economy side of the ledger during the 1970s that could induce those changes to the financial economy side? The answer comprises two mutually complementary components.

First, the U.S. dollar faced unprecedented, and ultimately unsustainable, inflationary pressures during that time period. Arms-race, space-race, and Vietnam-War expenditures, in conjunction with the Johnson Era Great Society programs and the postwar requirement that the United States maintain growing current account deficits to provide the growing global economy with sufficient liquidity, constituted such pressures.[85] The consumer price inflations that followed undermined prudential bank regulations aimed at preventing interest rate competition and concomitant speculative investment behavior on the part of depository institutions. The price inflations also delegitimized the Keynesian underpinnings of progressive post–New Deal fiscal and monetary policies. That, in turn, invited a backlash from "monetarist" and yet more reactionary circles of economists and policy advisors, as well as from conservative politicians ready to listen to them.

Second, mounting civil unrest in the form of protests against the arms race, the Vietnam War, and ongoing racial injustice, in combination with the

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81. *See* Hockett, *Jeffersonian Republic*, *supra* note 1, at 104–17.

82. *See id.* at 105–10.

83. *See generally* DAVID HALBERSTAM, THE FIFTIES (1993); GEORGE R. TYLER, WHAT WENT WRONG? (2013).

84. *See, e.g.*, S.E.C. v. Texas Gulf Sulfur, 401 F.2d 833 (2d Cir. 1968).

85. *See* Robert Hockett, *Bretton Woods 1.0:* A *Constructive Retrieval for Sustainable Finance*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 401 (2013); *see also* Hockett & Dillon, *supra* note 75; Vague & Hockett, *supra* note 76; *see also* Daniel Alpert, Robert Hockett & Nouriel Roubini, *The Way Forward: Moving From the Post-Bubble, Post-Bust Economy to Renewed Growth and Competitiveness* (The New America Foundation, Cornell Legal Studies, Research Paper No. 12-01, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987139.

Democrat-sponsored Civil Rights Act of 1964, brought additional reactionary impetus, this time from conservative and racist quarters in the American South and elsewhere.[86] The Republican Party, never friendly after the nineteenth century to progressive economic policies, successfully exploited this reaction by prying many white Southern voters away from the Democratic Party and thereby won repeated national electoral victories, commencing in 1968.[87] That not only brought antiprogressive politicians into office, but also opened the door to growing influence on the part of the aforementioned reactionary economists.[88] In time, it even caused Democrats who sought to win national office to call themselves "new," speak with southern accents, and move to the right.

The upshot of these developments was profound and far-reaching. Taxation grew steadily less progressive and social safety nets were drawn in over the ensuing decades.[89] Collective bargaining rights came under threat first from Orwellianly named "right to work" statutes legislated in conservative states, and then from the federal government as the Republican Party consolidated its gains during the Reagan era.[90] Labor-protective legislation more generally lost momentum for the same reason, as well as in response to steadily expanding trade-liberalization first under the General Agreement on Tariffs and Trade (GATT), then under the North American Free Trade Agreement (NAFTA), and finally under the World Trade Organization (WTO) agreements. After nearly a century of steady gains in both income shares and working conditions, American labor suddenly found itself competing with a veritable global reserve army of underprotected, unprotected, and even prison-based labor abroad.[91] Real wage and salary incomes accordingly ceased rising during the 1970s, whereas capital incomes at the top of the national distribution steadily increased their share, capturing nearly all gains in the national income.[92]

The rise in capital's share of national income gains, combined with the inflation rates of the 1970s and early 1980s (which both built upon those of the 1960s and were worsened by the Organization of Petroleum Exporting Countries (OPEC) embargos in 1973 and 1979) induced further deregulation of financial institutions as well, essentially along the lines laid out above. Inflation rendered the "real" rate of interest on thrift, and then, bank deposits, negative. This led growing numbers of depositors to place their savings in mutual funds,

86. *See* Hockett & Dillon, *supra* note 75; TYLER, *supra* note 83. *See also* John E. Roemer, *Ideology, Social Ethos, and the Financial Crisis*, 16 J. Ethics 273, 280–81 (2012), *available at* http://johnroemer.commons.yale.edu/files/Ideology.SocialEthos.J.Ethics.2012-copy.pdf.

87. *See* Roemer, *supra* note 86 at 276–77. This was the vaunted "southern strategy" promoted by Kevin Phillips, then an aid to presidential candidate Richard M. Nixon. *See* KEVIN PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969).

88. Roemer, *supra* note 86, at 277.

89. *See generally id.* (discussing shift in political attitudes toward taxation and wealth distribution).

90. *See generally* Charles W. Baird, *Right to Work Before and After 14(b)*, 19 J. Lab. Res. 471 (1998).

91. *See* Roemer, supra note 86, at 281; *see also* Alpert, Hockett, & Roubini, *supra* note 85, at 3.

92. *See id.*

which were permitted to make riskier investments than depository institutions were and to offer correspondingly higher returns on "deposits" instead.[93] The growing constituency for these investment vehicles eventually cited capital's growing share of the national income as a justification for allowing investment companies to offer more bank-like options, including mutual funds with check-writing privileges.[94] The more bank-like these institutions became, the more urgently bona fide banks lobbied for permission to offer higher returns on deposits and make the riskier sorts of investments necessary to render them possible.[95] Thus commenced the long march of financial deregulation that stretched from the late 1970s into the early years of the present century, a story with consequences for non-well-to-do would-be thrift depositors that the postliberal finance literature narrates so well.

There is one additional aspect of this story that illuminates the intimate link between its "real" and financial facets with particular clarity. Because full employment remains a legislative desideratum as well as a Federal Reserve mandate, U.S. policymakers and regulators are apt to find at least one noble reason to favor some degree of financial deregulation, given conditions like those described.[96] Import competition and stagnating real incomes of the sort that are noted above drain growth- and employment-supportive purchasing power from precisely those segments of the population with the highest MPCs.[97] Meanwhile, those at the top of the distribution whose incomes are growing, with their comparatively lower MPCs, tend to look for new investment vehicles in which to place their accumulating wealth.[98] Accordingly, it becomes tempting among regulators to view with favor such financial innovations that enable those at the top of the distribution to recycle their gains back toward those below, such as investments associated with consumer credit and regulatory changes that facilitate development and use of those growth-supportive products.[99] It likewise becomes tempting to favor such innovations that enable credit to flow in a manner that artificially inflates the value of assets held by the nonwealthy—notably housing assets—and thereby capitalize on the temporary macroeconomic benefits that can be had via the expenditure-boosting wrought by the so-called "wealth effect."[100]

In essence, this seems to be what occurred over the course of the 1980s and 1990s, culminating, by 2008, in the level of inequality last seen eighty years earlier and in a crash of a magnitude last seen seventy-nine years earlier.[101] Federal policymakers increasingly relied upon private-debt buildups to

93. *See generally* MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS: AN INSIDER'S VIEW (2011).
94. *Id.*
95. *Id.*
96. *See* Hockett & Dillon, *supra* note 75.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

compensate for stagnating real incomes and to thereby maintain economic growth and employment, both as sources of purchasing power in their own right and as fuel for temporary wealth-effect-effecting asset price rises.[102] The strategy works for a time, but is virtually by definition not sustainable in the long run.[103] Over the longer term, the only way to keep both employment and finance stable is to keep national income and wealth accumulation broadly distributed.[104] The only way known thus far to do that in this nation, in turn, is in the productive-republican manner that has characterized so much of progressive American public policy since the founding era.[105]

VI
FROM LIBERAL TO PRODUCTIVE-REPUBLICAN LABOR AND FINANCE: WHAT MUST BE DONE

In light of the foregoing, it is easy to sympathize with the proposals made in the postliberal finance literature, all of which involve public facilitation—and, in some cases, outright public provision—of small-scale banking for the less well-to-do.[106] One must be skeptical, however, that much can be accomplished this way in the absence of counterpart action on the "real" side of the economy.

Small-scale community reinvestment, development banking, and microlending, as well as reenlisting the post offices as savings outlets for the financially humble, are very good ideas—particularly the latter, in my view.[107] Essentially, they offer means of effecting more systematically and reliably that which my "shoebox bank" accomplished, but on a much larger scale and with no pretense or consequent expectation of huge profits.[108] That is nothing to sneeze at because that can render already-difficult lives appreciably less difficult. It can also facilitate modest degrees of capital accumulation among at least some constituents, which Michael Sherraden and colleagues long have shown to yield manifold advantages to beneficiaries and, in some cases, their families.[109]

My only concern with proposals of this sort is with the danger that they can raise false hopes, consequent disillusionment, and long-term complacency in the absence of real, productive-republican reform on the "real" side of the economy. Utopian stories of Muhammed Yunus's bringing his magic to Arkansas, of South Shore Bank's revitalizing the south side of Chicago, and of the transformative "miracles" of compound interest and financial innovation

102. *Id.*; *see also* Vague & Hockett, *supra* note 76; Alpert, Hockett & Roubini, *supra* note 85.

103. *See id.*

104. *See id.*

105. *See* sources cited *supra* note 1.

106. *See, e.g.*, Baradaran, *supra* note 7, at 533–47.

107. *See id.* and other sources cited *supra,* note 7, for the postliberal finance literature's elaboration of these suggestions.

108. *See supra* Part III.

109. See, for example, Hockett, *Jeffersonian Republic*, *supra* note 1, at 78 n.84, for more on the work of Professor Sherraden and colleagues.

were staples of the illusorily prosperous Clinton years.[110] It all looked, sounded, and felt very good until it turned out to be castles in air built on mountains of bubble-inflating private debt. Even the vaunted federal surpluses of the era's final years were but the public sector correlates of those steadily mounting private-sector deficits. Meanwhile, real incomes, in contrast to unsustainably bubble-inflated stock market and housing wealth, continued to stagnate.[111] As a polity, society still has done nothing about that for over forty years. Real *wealth* will not grow below the top of the distribution until real *incomes* again grow under the top of the distribution. Asset accumulation programs will do little until there is something to accumulate.

What, then, is to be done? An excellent start, I suggest, is both to adopt the postliberal finance literature's proposals and to begin reinstating, slowly but steadily, productive-republican policies of the kind elaborated above in connection with the Progressive and New Deal movements. The nation must first act to write down the mortgage debt that continues to drag down growth- and employment-inducing consumer expenditure.[112] It must also undertake a serious program of nationwide infrastructural renewal, employing idle labor and, in so doing, raising real wages.[113] In the longer term, it must renew and extend collective bargaining rights for labor—including retail labor, which represents a much larger part of the labor force now than does manufacturing labor. It must also reintroduce seriously progressive income and, especially, estate taxation, using the proceeds to revitalize essential social safety nets and productive education at all levels.[114] Meanwhile, in respect of global economic relations, it must render continued liberal trading arrangements contingent on foreign labor's enjoyment of the same standards as American labor, and foreign-manufactured products' being subject to the same quality standards as American-manufactured products.[115]

110. *See* Roemer, *supra* note 86, at 300, for more on this. For more on the period during which microlending was a "hot topic" in American policy circles, see, for example, Mark Shreiner & Jonathan Morduch, *Opportunities and Challenges for Microfinance in the United States*, *in* REPLICATING MICROFINANCE IN THE UNITED STATES 19–61 (James H. Carr & Zhong Yi Tong eds., 2002).

111. *See* Vague & Hockett, *supra* note 76; and Alpert, Hockett, & Roubini, *supra* note 85 for more on these developments.

112. *See* Alpert, Hockett, & Roubini, *supra* note 85. *See also* Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES ECON. & FIN. 1 (2013); Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121 (2012).

113. Alpert, Hockett & Roubini, *supra* note 85. *See also* Robert C. Hockett & Robert H. Frank, *Public Infrastructure Investment, Renewed Economic Growth, and the U.S. Fiscal Position* (Cornell Legal Studies, Research Paper No. 12-04, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987656.

114. *See* sources cited *supra* note 1.

115. *See* Hockett, *Bretton Woods*, *supra* note 85, at 453–66; Alpert, Hockett, & Roubini, *supra* note 85, at 28–29; *cf.* Robert Hockett, *Insource the Shareholding of Outsourced Employees: A Global Stock Ownership Plan*, 3 VA. L. & BUS. REV. 357 (2008) (proposing that gains from globalization be channeled to outsourced employees).

In the still longer term, the nation must work to construct a global central-bank-like institution that supplies global liquidity in the form of a bona fide global currency not issued by any one country as soon as possible, and adopt; the alternative is continued overvaluation of the dollar relative to other currencies, with consequent depressive effects upon domestic production and employment.[116] The nation must also forthrightly embrace an employer-of-last-resort function for the federal government, enabling the latter to influence domestic wage rates through "open labor market operations" much as it influences domestic borrowing rates through open (Treasury) market operations.[117] And finally, the nation must begin developing asset-spreading programs that ultimately render as broad a segment of the population as possible able to derive income from both capital and labor sources.[118] The ultimate aim, so far as possible, should be for each individual to replicate, in her own income portfolio, the same source composition that characterizes the national income portfolio as a whole.[119] That will yield both optimal diversification where individual income-risk-minimization is concerned, and also automatic balancing (and hence stabilizing) between productive and absorptive capacity where the macro-economy is concerned.[120]

Finally, none of the gains realized through these measures will be secure in the absence of sensible macroprudential and consumer-protective financial regulation.[121] Wealth-destroying bubbles and busts must be preempted proactively. Preventing exploitation by sharp operators of nonfinanciers who derive increasing portions of their incomes from capital assets will become all the more urgent.

It might prove necessary to shrink and restrict the financial "services" industry to little more than prudential asset management on behalf of quasi-public investment funds in which citizens diversify holdings. Certainly, the secondary markets will become less crucial for purposes of lowering credit costs in the primary markets, as the general public and its legislators grow increasingly cognizant of the fact that credit is ultimately a public resource,

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116. *See* Hockett, *Bretton Woods*, *supra* note 85, at 466–81; Alpert, Hockett & Roubini, *supra* note 85.

117. *See generally* Hockett & Omarova, *supra* note 6.

118. *See generally* Hockett, *Stock Ownership Plans*, *supra* note 1; Hockett, *Jeffersonian Republic*, *supra* note 1, at 124–42.

119. *See* ROBERT HOCKETT, A REPUBLIC OF OWNERS: JEFFERSONIAN DEMOCRACY, HAMILTONIAN FINANCE, AND A PLAN FOR PERMANENT POST-CRISIS AMERICAN RENEWAL (2014) (unpublished manuscript) (on file with author).

120. *Id.*

121. *See* Robert Hockett, *The Macroprudential Turn: From "Safety and Soundness" to "Systemic Stability" in Financial Supervision*, 9 VA. L. & BUS. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206189; Robert Hockett, *Leaning, Cleaning, and Macroprudence*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE & FIN. REG. (March 27, 2013), http://blogs.law.harvard.edu/corpgov/2013/03/27/leaning-cleaning-and-macroprudence/; Robert Hockett, *Practical Guidance on Macroprudential Finance-Regulatory Reform*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE & FIN. REG. (Nov. 22, 2013), http://blogs.law.harvard.edu/ corpgov/ 201311/22/practical-guidance-on-macroprudential-finance-regulatory-reform/.

rooted in the full faith and credit of the sovereign taxing authority. That public resource—credit—will be allocated by the public, partnering with private banking institutions. The limits on direct public provision of credit are few, and there is ultimately no fundamental necessity that primary market credit outlets—banks—be privately shareholder-owned either. Given how many are now recognizing the "public utility" character of finance—after a long history of heterodox calls for the "socialization" of the same—and given how overtly in recent years the federal government has socialized the risks taken on by privately owned financial institutions, there seems no reason for the public not to assume a much larger role in the provision and regulation of finance, and correspondingly trim back the role assumed in the last several decades by oversized private concerns.[122]

VII
CONCLUSION

Perhaps needless to say, the overtly republican, only grudgingly liberal research and policy agenda proposed above is an ambitious one. It is nevertheless a necessary one. With nearly eleven million American home-mortgage loans still underwater and new household formation rates at twenty-year lows,[123] with real wages and labor force participation rates still lingering at forty-year lows,[124] and with GDP growth anemic even after six years of innovative Federal Reserve monetary policy, it is likely that growing numbers of Americans will be forced into straits much like those of my friends mentioned in part III above for years, if not decades, to come. As the experience with those same friends suggests, progress can be made by ensuring that banking and other financial services are available to those in such straits. As that same experience suggests, however, the ultimate utility of such services will remain inherently limited in the absence of meaningful work and associated incomes that can accumulate into wealth.

The postliberal finance literature is a helpful first step in thinking through what a recovery of finance for the financially disenfranchised will look like. It is also, relatedly, an important contribution to the ongoing effort to understand how the disenfranchisement took place and, accordingly, how it might be avoided in future. As I hope by now to have made clear, however, an essential complement to the postliberal finance literature's effort will be the set of its "real" economy counterparts. Just as my friends' "shoebox" bank was conjoined to a "homeless kibbutz," so will postliberals' and others'—including my own—efforts to "rebank" the un-banked and under-banked have to be integrated with re-employing and re-endowing the unemployed and underemployed and the unendowed and underendowed. To do both of these

122. *See* Hockett & Omarova, *supra* note 6, for more thoughts along these lines.

123. *See* Hockett, *supra* note 112, for more on the state of the housing and mortgage markets.

124. *See* Alpert, Hockett & Roubini, *supra* note 85.

things in tandem, I have suggested, will be to cast off financial and broader economic liberalism and to restore the productive republic.