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WHY MARKETS? WELFARE, AUTONOMY, AND THE JUST SOCIETY

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RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY. By *Eric A. Posner* and *E. Glen Weyl*. Princeton and Oxford: Princeton University Press. 2018. Pp. xxii, 293. $29.95.

INTRODUCTION

Countries around the world are currently experiencing a trend of rising inequality, stagnating economic growth, and political turbulence (p. 276). In their ambitious new book, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Eric Posner[1] and Glen Weyl[2] argue that we must abandon "well-worn ideas," question existing market structures, and embrace experimentation in order to achieve prosperity and progress (p. 276). As the bold title of their thought-provoking book reveals, Posner and Weyl advance a vision of radical markets: "[I]nstitutional arrangements that allow the fundamental principles of market allocation—free exchange disciplined by competition and open to all comers—to play out fully" (p. xvii). They believe that harnessing the inherent radicalism of markets is key to allowing us to face our most difficult challenges. Moreover, they insist that we must jettison the most fundamental premises of both our private law and our public law, namely, our commitments to private property and to the principle of "one person, one vote" (p. 25).

Consider first the problem and the urgent need for new ideas. According to Posner and Weyl, rising inequality within wealthy countries poses the most pressing problem of our time (p. 4). Rather than identifying such rising inequality as the necessary consequence of accelerated growth, they explain that it is actually closely correlated to increased market power.[3] The pattern of growing inequality coupled with the trend of stagnating growth "pose the same problem for the neoliberal economic consensus that stagflation posed

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3. P. 8. Market power is "the ability of companies and individuals to affect prices in their favor." P. 27.

for the Keynesian consensus before it" (p. 11). More generally, the potential of the standard reform proposals across the political spectrum—"increase taxes and redistribute; strengthen markets and privatize; or improve governance and expertise"—is by now spent (p. xv). Our current predicament, Posner and Weyl conclude, stems from a failure of ideas (p. 24). The problem is that "[t]he economic wisdom of left and right did not cut to the core of the tensions in the basic structure of capitalism and democracy" (pp. 24–25). Posner and Weyl thus advocate for radical rethinking and the abandonment of long-held assumptions during this challenging moment (p. 29).

So what do we do? In *Radical Markets*, Posner and Weyl propose that we get to the root of the problem by understanding how our economic and political institutions work and using that knowledge to formulate a response (p. xvi). In a nutshell, their premise is that competitive markets are the best way to organize society; their diagnosis is that the most important markets are currently either monopolized or nonexistent; and their antidote is creating competitive, open, and free markets (p. xvi). Posner and Weyl argue that such an antidote will "dramatically reduce inequality, increase prosperity, and heal the ideological and social rifts tearing our society apart" (p. xvi). They thus see themselves as reviving the spirit of late eighteenth- and nineteenth-century "political economists" and "Philosophical Radicals" (p. 4), who "saw aristocratic privilege restraining markets as the problem" and hoped to "free markets from the control of feudalistic monopolists" and "create political systems responsive to popular sentiment" (p. 16). Posner and Weyl follow suit by both reconstructing markets, which they believe are obstructed with market power, and introducing markets to areas of human life, notably politics, where markets have the potential to significantly improve people's well-being (p. 27).

Posner and Weyl's reform program, summarized in Part I, is full of original and provocative ideas. Their two most important proposals deal with property and democracy (p. 275) and are the focus of this Review. The former proposal is designed to fix existing markets by supplanting private property with a regime in which people can only be "lessees from society" (p. 62). A person's lease on any given property under this regime terminates when a higher-value user enters the equation and desires that same property, whereupon the lease automatically transfers to that new user (p. 62). The latter proposal introduces to politics a market mechanism, which democracy currently lacks, that would properly account for public preferences (p. 92). The core idea there is to design a voting system that allows people to signal the intensity of their preferences.[4]

There is much to admire and quite a bit to endorse in Posner and Weyl's willingness to rethink the obvious, their resistance of the conventional wisdoms of both right and left, and their imaginative reform proposals. Posner and Weyl are also correct to insist that market power is *the*—or rather *a*—nemesis of the idea (or at least a charitable conception) of the market. They

4. *See* p. 92.

are further on point when they imply that reconfiguring our conception of property is key to the construction of proper markets in goods and services and that introducing the intensity of our preferences is key to an amicable idea of politics. Finally, and most fundamentally, Posner and Weyl are right to appreciate that, as a social artifact, the market can be designed in various ways, and that in order to "fix the bugs" of its current form, we need to reenvision the ideal for which the market stands and to redesign it accordingly (p. 286).

Indeed, in order to evaluate Posner and Weyl's proposed reforms we must return to the market's normative DNA. Some of Posner and Weyl's specific proposals are defended on multiple grounds, but others—as well as the final utopia (or is it dystopia?) they draw—are much less ambiguous. Posner and Weyl develop a clear vision of what it means to take a welfarist foundation of the market seriously. Part II of this Review criticizes this vision and its implications for our endowments, citizenship, and, ultimately, agency.

Part III sketches a competing vision of the ideal market, in which the ultimate normative underpinning of the market is our autonomy, rather than our welfare, and highlights some of its implications regarding property, labor, and politics. Like Posner and Weyl's account, this vision is radical both in the sense that it follows some of the legacy of the original Philosophical Radicals and in the sense that it requires us to rethink conventional wisdoms and reconstruct the prevailing mechanics of the market. Moreover, while many specific reforms Posner and Weyl advocate can contribute to this vision of the market—an autonomy-based market should also redress the pitfalls of market power and respect human welfare—other proposals they advance must be rejected because they might efface our humanity. This price, I will argue, is too high even if these proposals may indeed be, as promised, welfare enhancing.

I. Radical Markets

The starting point for Posner and Weyl, and thus of this Review as well, is that central planning does not present a viable alternative for organizing large-scale economies (p. 48). This implies that the market economy is the only game in town. But it still leaves us with a crucial inquiry: we must still "ask how markets should be organized" (p. 19). Markets are complicated "social and institutional arrangements through which goods [and services] are regularly produced for, distributed by and subject to contractual forms of exchange in which money and property rights over goods [or rights to services] are transferred between agents."[5] They thus depend on "well-designed and well-enforced rules of the game" (p. 20).

In their initial presentation of the ideal market, Posner and Weyl argue that the market rules of the game rest on three principles: freedom, competi-

5. John O'Neill, The Market: Ethics, Knowledge and Politics 4 (1998).

tion, and openness (p. 20). Posner and Weyl's definition of a *competitive* market—which for them, as we will see, is ultimately the most important part of this trio—is orthodox: it is one in which individuals lack the ability to manipulate prices by exercising market power, so they must accept as a given the prices they pay and receive (pp. 20–21). Their idea of an *open* market is also familiar: it follows the Radicals' egalitarian conviction that legal and social restrictions are incompatible with a market economy (pp. 21–22). Posner and Weyl's notion of a *free* market is—as will become clear later on—less conventional and somewhat ambiguous. A free market, they claim, is one in which individuals can purchase any goods provided that they pay a price that sufficiently compensates sellers for the loss of those goods (p. 20).

Both this understanding of freedom and the specific significance of openness to the ideal of the market need to be, and indeed will be, further interrogated.[6] At this point, it is sufficient to focus on Posner and Weyl's complaint that economists' assumption that markets are perfectly competitive makes little sense (pp. 25–26). They note that most markets for both goods and services involve unique, one-of-a-kind assets; and in markets for relatively standardized goods, a few dominant firms often prevail (pp. 26–27). Either way, "market power is omnipresent and intrinsic to the current institutional structure of capitalism" (p. 27). Market power is capitalism's main disease, as it keeps property from being used in the most productive manner and thus both restricts productivity and growth and decreases employment (p. 255).

The key remedy for this predicament is to eradicate the institution of private ownership. Since private ownership of any nonhomogenous asset may impede allocative efficiency (p. 38), we need to reconstruct markets so they are "competitive by design" (p. 49). More precisely, we must discard private property and adopt in its stead a regime that partly transfers property's "two most important 'sticks'"—the right to use and the right to exclude—from the possessor to the public at large (p. 61).

In practice this means that people and businesses "would have to list each of their possessions in a public register hosted on an online application and enter valuations for each item—or accept default valuations based on the original purchase price or on a database of prices of used goods" (p. 63). Based on this valuation, which they could change at any time, these owners-turned-lessees would then be taxed on the time-average listed price over the course of the year (p. 63). Posner and Weyl refer to both this tax, which was originally proposed by Arnold Herberger (pp. 56–57), and the regime it instantiates as a "common ownership self-assessed tax," or a COST (p. 61). They show that, properly calibrated, a COST can effectively balance the demands of investment efficiency and allocative efficiency (p. 52).

The key feature of a COST is the empowerment of any individual to exclude the current owner of property in exchange for the self-assessed price (p. 62), which would prevent society's misuse of lands and other important

6. *See infra* Part II and Part III.

resources (p. xviii). By combining "extreme decentralization of power with partial socialization of ownership" (p. 62), a COST will not only effectively raise revenue (p. 73) but will also create "a flexible market in uses" (p. 62). A COST reduces monopoly power, alleviates most barriers to trade, and facilitates the quick shift of goods to their most valued use; it thus contributes to the economy's efficiency and growth (pp. 66–69, 256).

A COST is not only welfare enhancing; it is also distributively just. Since a COST will cause prices to drop, poorer people will benefit and inequality will decrease (p. 256). Furthermore, a COST would have most of the return to capital flow to the public, rather than to the very wealthy and "would thus end the conflict between capital and labor" (p. 75). Finally, unlike private property, which lets owners discriminate by refusing to sell goods to certain people, the structure of a COST is inherently nondiscriminatory (p. 272).

For Posner and Weyl, a COST is a true radical market "because the root market principles of exchange and competition would be extended far beyond their current institutional embodiment; because the new system would transform economic relations; and because human well-being would be greatly advanced through the reduction of inequality and the advance of prosperity" (p. 79). They are fully aware of the fact that a COST would change society dramatically (p. 70) but insist that these changes are all for the better (p. 29).

In particular, Posner and Weyl celebrate how a COST might change our relationship to property by making us think about it in a healthier way (pp. 75–76). They deplore the "[f]etishistic attachment to . . . expensive durable asset[s]," such as a privately owned automobile, and revel in how society's transition to services like Zipcar and Uber is already making such attachment "a thing of the past" (p. 77). Likewise, Posner and Weyl maintain that people's excessive attachment to homes is condemnable, as it inhibits employment and impedes economic growth (p. 77). They note that a COST would greatly reduce people's attachment to such objects (p. 77). Indeed, because a COST taxes objects instead of personal relationships, it vindicates both religious and secular philosophies, as well as a "dissident strain of economics," which criticize people's preoccupation with material possessions (pp. 76–78). A COST would hopefully encourage people to invest more of their emotional energy in personal relationships instead of objects (p. 77). Eliminating the constraints inherent in a system of private property would also strengthen market solidarity—the solidarity that comes from having "a stake in others' prosperity" (p. 271).

Let me turn now to democracy. If market power is capitalism's main pitfall, the main defect of democracy, in Posner and Weyl's view, is that people can effectively voice only three preferences: yes, no, or indifferent (p. 106). More specifically, "the inability of democracy to give consideration to the intensity of people's needs and interests, and to the superior wisdom or expertise of certain voters" is responsible for its "[f]ailures to protect minority rights, the tyranny of the majority, paradoxical victories for bad candidates, repeated use of majority rule to establish dictatorship, and the tendency of democracy to ignore the views of the very knowledgeable" (p. 97). Thus, what is needed in order to fix all these ailments is a market mechanism that would "allocate resources to people with stronger needs and interests, and reward those who demonstrate special talents or insight" (p. 97).

Quadratic Voting (or "QV"), which gives politics a mechanism for incorporating not only bare preferences but also their intensity, is thus Posner and Weyl's second major proposal of a radical market. Like with a COST, delving into the (important) details of this proposal is beyond the scope of this Review. For our purposes, what is important is that, whereas this system shares the "natural notion of fairness" that influence or voice over our collective decisions should be equally divided (p. 110), it introduces the ability "to save up voting power" across different elections (p. 82) and allows voters to manage their "voice credit" (p. 105). Thus, "QV gives weight both to numbers and to the intensity of interests" (p. 109). It enables citizens to use their votes on topics of particular interest (p. 124)—by, for example, investing their "voice credits" on the level of government they care about most (p. 121)—and to cast votes that reflect the strength of their actual preferences (p. 106).

Three happy consequences follow. First, by ensuring that each person's voice is "heard *in proportion* to how important" the pertinent decision is to her (p. 98), the system maximizes the entire group's well-being (p. 106). Second, "a passionate minority can outvote an indifferent majority, solving the problem of the tyranny of the majority" (p. 106). To be sure, minorities may still lose to the majority when everyone's preferences are of similar intensity, "but they will not lose to a majority with weak preferences (unless the majority is extremely large)" (p. 110). Finally, citizens are empowered: they enjoy broader freedom and are encouraged to "express their views in a fundamentally richer and deeper way than [one person, one vote] allows" (p. 124). Thus, they are given more "responsibility and control over collective decisions" (p. 124).

* * *

As this summary demonstrates, Posner and Weyl claim that radical markets would serve multiple important causes. In promoting a COST and QV they highlight, as we have seen, the overall social welfare improvements they believe these reforms will yield. They also emphasize the happy distributional consequences of their proposals as well as their virtues in terms of the type of people our economic and political organization would nurture. A very similar argumentative structure typifies Posner and Weyl's exposition of the other radical markets they propose—which I do not discuss in these pages—namely, allowing ordinary citizens in wealthy countries to sponsor migrant workers (Chapter Three), allowing institutional investors to diversify their holdings only across industries and not within them (Chapter Four), and treating data as labor and thus turning consumers in the digital economy into data laborers who demand compensation for their services (Chapter Five).

Worthy causes may converge, and the aspiration to satisfy multiple normative commitments is commendable. But oftentimes we can't have it all. Indeed, as lawyers know best, even fine-tuning a specific social arrangement, let alone its extension, requires hard normative choices. This legal truism implies that Posner and Weyl's advice "to get at the root of the matter" (p. 276) is particularly acute before we discard our old ways (property; one person, one vote) and adopt in their stead innovative proposals (like a COST and QV). Those who will decide to fully become fellow travelers are bound to use the most fundamental normative commitments of Posner and Weyl's blueprint as their compass for navigating the way forward. But this exercise is no less worthwhile for those—like this reader of *Radical Markets*—who are less enthusiastic about Posner and Weyl's own normative foundations. To be sure, the fact that they were able to promote a COST and QV based on multiple normative grounds suggests that even if their normative underpinnings should be rejected, their proposals must not be dismissed. But it also implies that their ideas should be carefully analyzed and possibly adapted to a better normative foundation—one that is more befitting to the just society to which the subtitle of their book refers.

II. Markets for Welfare

Fortunately, no sophisticated deciphering is needed in order to expose *Radical Markets*' normative commitments. The last part of the book returns to the idea of a market, unpacks the reasons why Posner and Weyl believe that it deserves its status as the foundational institution of our society, and uses this more profound understanding of the market ideal to offer some preliminary—and yet quite important—reflections on both the possible extensions of a COST and QV as well as the limits of markets.

Central planning, Posner and Weyl argue, is necessarily inferior to markets, and markets should be further radicalized because "the market is the appropriate [social design] to achieve the greatest good for the greatest number" (p. 286). Its systemic superiority in allocating resources efficiently does not only lie in Friedrich Hayek's celebrated account of the market's ability to "obtain information about people's tastes and productivity . . . and supply it to those who needed to know it, without the involvement of a government planning board" (p. 278). The even more fundamental comparative advantage of the market is, rather, as Ludwig von Mises argued, that it "miraculously cuts through" the otherwise "computational nightmare" which any system that seeks to achieve allocative efficiency faces (pp. 278–82). As Posner and Weyl explain, the market is "programmed" to allocate resources efficiently by elegantly harnessing and combining the "distributed human computational capacity" (pp. 283, 285). In this sense, the market is similar to "a giant computer composed of these smaller but still very powerful computers" (p. 283). Von Mises's argument, to be sure, was mistakenly taken to imply that markets are natural; Posner and Weyl are here to correct this error and thus encourage us to improve on the way markets are currently programmed (pp. 285–86).

If indeed society is supposed to be organized by competitive markets (p. xvi) due to these welfarist grounds—if indeed achieving the greatest good for the greatest number is the normative foundation of the market—Posner and Weyl's unorthodox omission of any reference to choice or consent in their definition of a *free* market noted above[7] is only to be expected, and their suggested extensions of both a COST and QV, to which I now turn, seem called for.[8] To be sure, Posner and Weyl are careful to note that applying these extensions at this stage would be premature because both technology and society are not ready (pp. 259–60). They thus recommend first examining their proposals in "small-scale experiments," (p. 273) which would also help ensure that they are not "gamed" (p. 275). But subject to these prudential provisos, the way forward envisioned by *Radical Markets* is (alarmingly) clear.

Consider first the extension of a COST from goods to services and Posner and Weyl's claim that "a COST on human capital would be immensely valuable" (p. 258). Imagine that we have the technology for measuring people's preferences as to "how much they work, where they work, who they work with, the conditions under which they perform their work," and the like (p. 259). This would allow a COST to be implemented in the labor market once individuals "self-assess a value of their time, pay a tax on this self-assessed value, and stand ready to work for any employer willing to pay this wage" (p. 258). Such a system, Posner and Weyl argue, promotes social welfare (the greatest good for the greatest number), because it undermines the ability of people—notably the most talented people—to withhold their services until they are paid a monopoly price (p. 258). A COST would thus properly encourage work, penalize the lazy monopolists of education and talent, and reward "ordinary workers for their labor" (pp. 259–61). Posner and Weyl are aware of the fact that a COST on human capital may be seen as a form of slavery, but they insist that this perception is wrong, since if properly designed, it will only require "the talented people to pay a tax if they do not want to work in a job that is most efficient for society" (pp. 260–61).

While a COST can be improved by extending it from goods to services, the key to QV's extension lies in the use of money (p. 264). Monetized QV promotes social welfare because it "allow[s] people to express their preferences for public goods in a very precise way—since they would give up their ability to spend money on themselves in return for the power to influence a public decision" (p. 264). Only after fully integrating the currency of the market into politics will this power be allocated efficiently, namely, in proportion to how much people care about politics (p. 122). Posner and Weyl concede that this system, in which "the rich pay the poor for political influ-

7. P. 20. *See also supra* text following note 5.

8. The welfarist foundation also explains why Posner and Weyl do not even consider initializing their system with some kind of equalizing measures as seems to be required if its main impetus would have been egalitarian (as some of their text implies, as discussed *supra* Part I).

ence," gives the rich "more power than an ideal, nonexistent egalitarian system" (p. 264). But they insist that monetized QV gives wealthy individuals less power than in real-world systems—where they gain influence through donations—at least if supplemented with a system they recommend, which matches small political contributions and taxes large ones (pp. 263–64).

As noted, these extensions of both COST and QV seem to follow Posner and Weyl's program of promoting social welfare by radicalizing the basic market principles of exchange and competition (p. 79). But once we understand that exchange and competition are actually wholly subservient to the ultimate welfarist goal of optimizing allocative efficiency, we can—as Posner and Weyl do—envision markets being replaced by a more efficient mode of economic organization (p. 277). To see where the way forward ultimately leads, we just need to return to their analogy of the market as a giant computer.

Because the market is like a computer program that harnesses the power of individual human minds (p. 286), it could be replicated once the total capacity of digital computers surpasses that of human minds (circa the 2050s) (p. 287). At that time, machines may be able to learn "the statistical patterns in human behavior [and] use this information to distribute goods (and jobs) as well as, or possibly better than, people can choose goods (and jobs) themselves" (p. 289). This development, if actualized, makes markets redundant from a welfarist perspective, since the choices people reveal through the market's operations are, in this view, merely instruments for employing the market's program of allocating entitlements so as to achieve the greatest good for the greatest number. Thus, once people's preferences can be derived not from choices but rather from data, such as their behavior or their physical and psychological attributes (p. 290), people's choices will no longer be necessary (p. 292). The market, at that point, could be substituted by computers that "would tell people what to produce—distributing rewards and meting out sanctions as necessary—and distribute to people whatever they should consume" (p. 287).

Posner and Weyl appreciate the "obvious dystopic risks" of the emerging world, "characterized by the combination of massive computer power and big data supplied by a voluntary (or possibly legally mandated) system of continuous surveillance," especially if pushed to its logical extension in which it governs major life decisions, such as those involving career choices, political judgments, or romantic involvements (p. 293). But partially because it is not clear whether technology will ever advance so far that computers exceed the capacity of human minds, they leave to science fiction writers the question of whether the potential abuses of such a system could be overcome, as well as the (more profound) question of whether people would be "freed to live more meaningful lives or deprived of the ability to do so" (p. 293).

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Analyzing the human (or is it post-human?) predicament under the governance of "big data" is unnecessary for the purposes of this Review. But appreciating that it is indeed, as Posner and Weyl honestly explain, the logical end point of radicalizing the *welfarist* ideal of the market is nonetheless crucial in order to evaluate a program guided by this ideal, which is my task in this Part. Thus, with Posner and Weyl, I will assume that—notwithstanding the challenges that have been launched against their efficiency analysis[9]—a COST and QV, as well as their extensions just noted, are conducive to social welfare. If the world to which they lead seems despotic, I will argue, it is because Posner and Weyl settle on the wrong root. Although the welfarist consequences are undoubtedly important benefits of the market, social welfare does not plausibly represent the ultimate value of the ideal of the market.

The pitfalls of conceptualizing the just society—recall again *Radical Markets*' subtitle—only in terms of optimizing society's allocation of entitlements or in terms of preference satisfaction are hardly news. Back in the 1970s, John Rawls and Robert Nozick, who otherwise disagreed on the nature of the just society, shared some of the most devastating criticism of this conception. The idea that society should "maximize the net balance of satisfaction taken over all of its members," Rawls famously argued, conflates "all persons into one through the imaginative acts of the impartial sympathetic spectator" and thus fails to "take seriously the distinction between persons."[10] Moreover, even for one person at a time, preference satisfaction cannot be an ultimate goal. To see why, recall Nozick's celebrated experience machine. Suppose, Nozick wrote, "there were an experience machine that would give you any experience you desired"; would you plug into it "for life, preprogramming your life's experiences[?]"[11] Nozick's answer—and mine—is negative, and his ultimate reason for it is straightforward. "Plugging into the machine is a kind of suicide" because we humans are concerned not only with our experiences, or with what we do, or even the sort of person we are, but ultimately we are concerned with the fact that it is *we* (rather than the machine, or anyone else) who live our lives.[12]

Some of the conventional wisdoms of the way law currently "programs" the market, which are likely to be discarded if the market is radicalized in a welfarist foundationalist fashion, help to ensure that we are not reduced to experience machines. If we are to remain the ones who live our lives, we *must* have at least some control—some final authority—regarding at least some of our projects. Property law surely has its excesses, which I will revisit below. But the fact that it allows people to secure the authority over some re-

9. *See* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 25–38 (2017); *see also* Oren Bar-Gill & Nicola Persico, *Bounded Rationality and the Theory of Property*, NOTRE DAME L. REV. (forthcoming 2019).

10. JOHN RAWLS, A THEORY OF JUSTICE 23–24 (rev. ed. 1999).

11. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42 (1974).

12. *Id.* at 43–45.

sources (say, the home) beyond what a COST would allow is not one of them. Quite the contrary, by allowing people to secure a temporally extended control of things, property facilitates our ability to carry out (on our own or with the cooperation of others) meaningful projects and pursue comprehensive goals which require a temporal horizon of action. These "ground projects" are qualitatively distinctive from garden-variety preferences, because they make us who we are.[13]

Living our lives also means being entitled to change course, rather than merely living by a script, even if written by our former selves. This proposition does not imply, of course, that we should not be able to commit—recall that living a life requires a temporal horizon of action—but it does imply that the encumbrances we should be able to place on our future self must be circumscribed. I will have more to say about this point in the last Part of this Review,[14] but for our purposes it is important to highlight one limit, which is entrenched in contemporary contract law. Existing law rigidly resists awarding specific performance against service providers[15] and thus makes people's authority to decide, at any given moment, what they will do inalienable. Extending a COST to the labor market is radical exactly because it overturns this conventional rule. Indeed, such a regime goes far beyond the familiar (although also quite controversial) idea of endowment taxation,[16] because it categorically, indeed deliberately, uproots people's authority to decide what they will do next.

Posner and Weyl are likely to respond—indeed have responded—that currently this authority is merely formal for most people, given their needs and wants.[17] "It would be a mistake," they argue, "to think that the current system is not coercive": whereas "educated elites whose native or acquired

13. *See* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (forthcoming 2020) ch. 2 (on file with the *Michigan Law Review*). The concept of "ground project" is borrowed from BERNARD WILLIAMS, *Persons, Character and Morality*, *in* MORAL LUCK 1, 12 (1981). But nothing in my argument turns on Williams's development of the concept of a ground project, including his psychological argument that the demands of impartial morality exert unreasonable pressure on the personal integrity of those who pursue such projects. *See also* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 122–23 (1998) (analyzing the distinction between specific and limited goals and comprehensive goals and the way it defies a simple "summative" account of well-being).

14. *See infra* notes 61–64 and accompanying text.

15. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. LAW. INST. 1981). This rule is not unique to the common law, where specific performance is an exceptional remedy. Rather, it applies also in liberal systems in which specific performance is widely available. *See, e.g.*, Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 226 (1955).

16. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 20–23, 121–25 (2002); *see also, e.g.*, Erick Sam, *From Each According to His Ability: An Analysis of Endowment Taxation and Potential Earnings*, SSRN (Feb. 10, 2018), http://papers.ssrn.com/abstract=3121798 [https://perma.cc/UM8M-CMGP].

17. Posner and Weyl correctly do not invoke people's ability to revise their valuation as a mediating factor, because allowing people to fully avoid others' use of the option to their labor, which COST establishes, by easy revision of this valuation is tantamount to a full-blown reinstatement of the market power Posner and Weyl are trying to uproot.

talents are highly marketable" can make meaningful choices, many others "are given a stark choice: undergo harsh labor conditions for low pay, starve, or submit to the many indignities of life on welfare" (p. 260). If these comments are meant to criticize the performance of our current system in properly securing the minimum welfare for all, they are indeed justified. But if they suggest a moral equivalence between this failure and the failure to ensure some measure of personal independence to all, they are no more convincing than George Fitzhugh's polemical defense of slavery, which argued that "[i]n free society, miscalled freemen fulfill all the offices of slaves for less wages than slaves, and are infinitely less liked and cared for by their superiors than slaves."[18]

The satisfaction of people's preferences, and their welfare more generally, are obviously important. Posner and Weyl are correct to take them seriously and to think about innovative ideas to serve them better. But as Nozick's experience machine teaches us, they are disturbingly wrong in treating preferences or even welfare as our ultimate value; they fail to situate these important interests in a broader understanding of the human self. By categorically deracinating the authority of people "to withhold their services unless paid a monopoly price" (p. 258)—and, for that matter, to "hold out for a large payment" before giving their consent to sell their home[19]—a radical market with a welfarist foundation ends up throwing out the baby with the bathwater. As agents deserving to live (and not only experience) our lives and to develop the projects that make us who we are, we are entitled to have some measure of independence—namely, unreviewable authority—over what we do. This freestanding significance of independence is necessarily lost in a radical market with a welfarist foundation: independence, after all, *is* the authority to hold out. At least in societies that do not suffer from grave poverty, Rawls must have been right in insisting on the priority of liberty.[20]

If independence is the missing element in properly accounting for human agency in the context of our holdings and our labor, Posner and Weyl's depiction of the welfarist-based ideal of politics leaves no room for reason. Again, I am not disputing that in a democracy the fact that people want certain states of affairs and the degree of their desire is a good reason for directing public policy: while " '[j]ustice' conceptually *can* count preferences as relevant reasons," democracy must "always take[] (some) account of people's

18. GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS 221 (C. Vann Woodward ed., Harvard Univ. Press 1988) (1857); *see also* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 209–12 (1980) (discussing the case of the enlightened slave owner).

19. P. 26. Another example for a resource that contemporary law understands as a potentially constitutive medium of the self is copyright. In fact, regarding copyright, existing law even allocates to authors semi-inalienable rights of "attribution" and "integrity," known as "moral rights." *See* Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), Sept. 9, 1886, (rev'd June 2, 1928), *and as amended* Sept. 28, 1979, S. TREATY DOC. No. 99–27; *see also, e.g.*, Study on the Moral Rights of Attribution and Integrity, 82 Fed. Reg. 7870 (Jan. 23, 2017).

20. *See* RAWLS, *supra* note 10, at 302.

preferences."[21] But just as we can't have a proper ideal of politics without an appropriate role for people's preferences, the familiar economic reduction of the currency of politics to preferences,[22] whether they are related to people's own self-interest or to their passion about their convictions concerning the common good, fails to appreciate the significance of reason in our capacity as citizens.

A citizen of a polity is both "one of the society's subjects and . . . one . . . in whose name its authority is exercised."[23] This means that politics is not only an enterprise of producing public goods but also, even more fundamentally, one of collective self-rule. Therefore, its products can be legitimate only if they are justified, at least to some extent, based on public-regarding reasons, judgments, and convictions.[24] This premise is not confined to theories of deliberative democracy, but rather reflects our most fundamental approaches to politics. Indeed, it accounts for the conventional political practice of offering and demanding reasons in attempting to persuade our fellow citizens,[25] which in turn explains why political power is dependent not only on wealth, power, and the comparative advantage of collective action, but also on the appeal to causes, arguments, and ideals.[26] Welfarist foundationalism obscures the role of reasons in politics, because insofar as reasons are concerned, what matters is only the cogency of people's arguments rather than the intensity of their preferences concerning these arguments.[27]

III. MARKETS FOR AUTONOMY

As we have seen, welfarist foundationalism leads us astray in two ways. It can provide only contingent support for according the market the status of a fundamental institution in our society; and—even more dramatically—it "ends up undermining the very reasons which justify caring about satisfying people's preferences and promoting their welfare in the first place, *vis.*, that these preferences reflect and serve people's life plans, and that people's welfare serves as a means for their self-determination."[28] Eradicating the individual's authority to decide what to do and her ability to secure a temporal

21. Robert E. Goodin, *Democracy, Justice and Impartiality*, *in* JUSTICE AND DEMOCRACY 97, 104 (Keith Dowding et al. eds., 2004).

22. *See, e.g.*, Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

23. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 128 (2005).

24. *Id.* at 128–29.

25. Goodin, *supra* note 21, at 104–05. Furthermore, because the democratic practice of preference aggregation itself claims legitimacy due to sensible normative reasons (*see, e.g.*, Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 154–55 (Jeremy Waldron ed., 1984), it cannot dismiss out of hand the role of at least some types of reasons in politics.

26. GEOFFREY BRENNAN & ALAN HAMLIN, DEMOCRATIC DEVICES AND DESIRES 19, 30, 120 (2000); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 67 (2000).

27. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 251, 310–11 (1991).

28. *See* DAGAN, *supra* note 13 (manuscript at 54).

horizon of action would undermine our law's commitment to promoting our self-determination as persons; discarding reason from the center stage of the legal regulation of politics would erode its commitment to collective self-rule.

People are not data points of preferences or joint carriers of the aggregate social welfare.[29] They are agents with projects who are entitled to govern their lives. This is why economists and mainstream utilitarians are correct to attend to preference satisfaction rather than to a (particularly reductive hedonistic) accounting of pleasure and pain in which choice and agency have no room and their exclusive focus on human beings cannot be justified.[30] This is also why the liberal ideal of freedom implies that some measure of self-determination is necessary for people to lead the fully human life they are entitled to.[31] People deserve to have some control over their destiny, "fashioning it through successive decisions throughout their lives."[32]

This fundamental right to personal self-determination is not only, as I've just claimed, the premise of the significance of people's welfare; it is also the reason why they are entitled to participate in, or at least affect, politics; and it is what makes grave inequalities unjust. Furthermore, as I have already intimated, autonomy's foundational role in any credible liberal polity implies that law must secure individuals some measure of independence. It also necessitates that law makes a *qualitative* distinction between people's ground projects—the projects that give meaning to one's life—and their sheer preferences.

Posner and Weyl's grand welfare-based account of radicalizing the market fails to respect these liberal maxims. But its failure does not mean that we should give up on the market or on Posner and Weyl's insistence that the responsible way forward is to critically examine our existing market configurations against the ideal of the market, and be willing to consider both revisions of the rules of the game that structure markets and extensions of market mechanisms, insofar as they would push markets to live up to this ideal. The difficulty with (some of) Posner and Weyl's proposals is not that they are radical, but rather that they radically respond to a misguided ideal. Therefore, in order to get to the root of the matter we need to begin with the ultimate value to which all our major institutions must be accountable: people's autonomy (not to be confused with their independence[33]). With this

29. *See* Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93, 100–01 (2009).

30. For utilitarians, see, for example, R.M. HARE, MORAL THINKING 143 (1981); Daniel M. Hausman, *Hedonism and Welfare Economics*, 26 ECON. & PHIL. 321, 321 (2010). For economists, see, for example, LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 86–87 (1932); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 698 (1939).

31. *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS 19 (Erin Kelly ed., 2001); H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 835–36 (1979).

32. JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986).

33. To be sure, as noted, independence is not an instrumental value, but it is also not an ultimate value. Rather, it is, as hinted, an intrinsic value: a constitutive part—an essential in-

ultimate value in place, we can appreciate the ways in which markets can facilitate our self-determination and can direct their evolution accordingly.

Indeed, the ultimate, noncontingent reason why the market deserves its status as the foundational institution of our society is that it is, or at least can be, autonomy enhancing.[34] Markets are potentially conducive to people's self-determination because they allow individuals the mobility that is a prerequisite for self-determination, and they expand the options available to individuals to function as the authors of their own lives.

Markets enable mobility through the alienation of resources and entitlements.[35] By facilitating the liquidation of existing holdings, markets facilitate people's right to exit: to withdraw or refuse to further engage, to dissociate, to cut themselves out of a relationship with other persons. At a minimum, exit serves a protective function. Leaving is a form of self-defense, and the mere possibility (and thus implicit threat) of one's exit plays an important disciplinary function. Moreover, even with no concern of mistreatment, exit is crucial to autonomy because open boundaries enable geographical, social, familial, professional, and political mobility, which is, in turn, a prerequisite for a self-directed life.[36]

The robust mobility of the market is famously contrasted with social relationships of servility. As Adam Smith (as well as John Stuart Mill and Karl Marx) argued, markets substitute the fixity of status and command with relations based on interest, persuasion, and consent.[37] They, therefore, tend to

gredient—of the ultimate value of self-determination. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 41–45 (2017).

34. The text may seem to gloss over a major difficulty: there is a gap—and unfortunately a rather significant one—between the justificatory potential of autonomy enhancement and contemporary market conditions, which are too often autonomy reducing. This gap raises a concern that an autonomy-enhancing theory of the market would end up as an apologetic exercise, which might entrench established social practices. I do not deny these possible risks, but the alternative of discarding the ideal of the market is onerous as well. By neglecting the possibility of mining this ideal for happier practices—along the lines sketched below—avid critics of the market might paradoxically confirm the indefensible conception of the market, which underlies its corrupt manifestations they rightly criticize. In other words, given the cultural power of the idea of the market, losing the battle over its proper interpretation would, by default, needlessly exacerbate our predicament. By contrast, as with any other major institution (family, community, state, etc.), unpacking the ideal of the market is potentially challenging because it requires, at the very least, a respectable universalistic façade. This idealized picture can be, and often is, a fruitful source of social criticism by setting standards that our current practices do not necessarily live up to. The idealism of our social world, even if hypocritical, is a significant source in any critical engagement. *Cf.* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987) (considering the role of the social critic in presenting societal realities and designing methodologies to integrate those solutions into the societal framework).

35. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 15 (1970).

36. *See id.* at 21–29; Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176 (1998); *cf.* Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11–12, 15–16, 21 (1990).

37. *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 2–4, 17–22 (2017).

undermine hierarchies in which loyalty is taken for granted and need not be enlisted and accounted for. The market can thus liberate individuals from predetermined roles and social positions and emancipate them from relationships of excessive dependence on the authority of others.[38]

Moreover, markets are not only about exit and mobility; they are just as much about entry and commitments. The moral significance of contract—the queen of the market—is exactly that "it allows persons to create obligation where there was none before," thereby giving free individuals "a facility for extending their reach by enlisting the reliable collaboration of other free persons."[39] Contract is conducive to self-determination because it enables people to legitimately recruit others to advance their own goals, purposes, and projects—both material and social. Contract expands the range of meaningful choices people can make to shape their own lives. It enhances our ability to be the authors of our own lives by expanding our repertoire of secure interpersonal engagements beyond the realm of close-knit interactions.[40]

The market extends these autonomy-enhancing functions by further broadening the scope of choices between differing projects and ways of life. Markets create a structure that respects and facilitates divergent ends. Individuals can unbundle their resources according to their own priorities and "gain from the skill and knowledge of others [they] need not even know and whose aims could be wholly different from [their] own."[41] Because "[i]n a market system there is no preordained pattern of value to which individuals must conform," markets multiply the alternatives people can choose from and facilitate experimentation; they "allow people to make their own judgments about what they want to buy or sell, how hard they want to work, how much they want to save, what they value and how they value it, and what they wish to consume."[42] At its best, the market functions as an enabling device which serves self-determination: it enables the individual to act upon her own goals, values, objectives, and her plan of life, without subordination to any other individual or subjection to any collective decisionmaking procedure.[43]

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38. *See id.* at 17–22; O'NEILL, *supra* note 5, at 71, 77–78; JEDEDIAH PURDY, THE MEANING OF PROPERTY 16–17 (2010); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE 24–25, 41–42 (2010). This argument is related to, but nonetheless distinct from, the celebration of the market as a regime of polycentric governance. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 139–42, 238 (1998); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (1962).

39. Charles Fried, *The Ambitions of Contract as Promise*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 20 (Gregory Klass et al. eds., 2014).

40. *See* DAGAN & HELLER, *supra* note 33, at chs. 3, 7.

41. 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 109 (1976).

42. SATZ, *supra* note 38, at 23.

43. *See* JOHN GRAY, THE MORAL FOUNDATIONS OF MARKET INSTITUTIONS 25 (1992).

* * *

An autonomy-enhancing conception of the market need not be oblivious to the way markets promote our welfare. Quite the contrary. Many of our market interactions are not and need not be about ground projects; they do not implicate who we are but simply serve as means for what we have. In these contexts, market power is indeed the core concern, and facilitating competition may well be the proper cure. Contracting about such instrumental goods is strictly an exercise of preference satisfaction and thus can, indeed should, be properly subject to the jurisdiction of a welfarist conception.

Such a purely welfarist conception explains and justifies the law of consumer contracts, which (charitably interpreted) allows people to make quick and secure consumption decisions, freeing them up to engage in their other, more valuable projects.[44] Similarly, there is no reason to *a priori* reject the role that artificial intelligence already plays in reshaping businesses and consumption, or even the idea that in these contexts computerized allocation will substitute (at least part of the operation of) the market (pp. 287–88, 291–92).

By the same token, applying a COST to assets such as long-term spectrum licenses, internet domain names and addresses, or similar characterless assets (pp. 70–71) in order to facilitate their efficient allocation is not only unobjectionable but may well be agreeable. Furthermore, an autonomy-enhancing conception of the market should be attuned to Posner and Weyl's reminder that our personal investment in external resources is socially constructed and that we may benefit from reconsidering and potentially revising some of the conventional ways in which we secure a temporal horizon of action. Posner and Weyl are correct to celebrate the demise of the privately owned automobile. More generally, they are right to encourage us to acknowledge that regarding a significant subset of what is conventionally understood as property, there are good reasons to think that people's appropriate entitlement would be an entitlement to the value of the resource, rather than to the resource itself.[45] There are indeed many holdings—notably of the commercial kind—that should not involve an exacting private authority, because insofar as *these* resources are concerned such an authority is not autonomy enhancing, and may actually be autonomy reducing. Diluting the market power of owners of these resources can indeed transform capitalism, and for the better. But contra Posner and Weyl, these important reforms should not be conceptualized as transitional steps toward a full-blown COST regime, leaving at the endgame only limited exemptions based on the

44. *See* DAGAN & HELLER, *supra* note 33, at 73, 81–82.

45. *See* Daniel Markovits & Alan Schwartz, Who Owns What? Re-Thinking Remedy Theory in Private Law (October 2, 2017) (unpublished manuscript) (on file with the *Michigan Law Review*) (arguing that market efficiency and promotion of liberty interests support treating ownership of many resources as an entitlement to value, rather than entitlement to the resource).

contingent combination of small economic impact and great personal value (pp. 70, 76).

Our current system can surely be improved. But a full-blown COST regime, which fully instrumentalizes our property and our labor, should not be our target. Notice that contemporary law does not limit people's ability to instrumentalize resources or activities. Quite the contrary. A person can decide not to be the owner of her home, but rather its short-term lessee; and she can employ a gardener or a money manager rather than make these activities constitutive of her self-identity. Thus, in sharp contrast to the requirement of an autonomy-based ideal of the market to expand people's repertoire of choices,[46] Posner and Weyl's program would restrict this inventory vis-à-vis current law by eliminating those forms of property and labor that are not fully instrumental.

A similar qualified acceptance applies to Posner and Weyl's political reform. Holding on to a robust conception of citizenship, required by the commitment to autonomy as our ultimate value, does not imply that QV should be dismissed. To be sure, our legal regulation of politics should not abandon the language of reason, which properly resists intensity, and as long as we do not have a better egalitarian mechanism of instantiating it, the one-person, one-vote elections must remain intact. But, as noted, the grammar of collective self-rule is not a grammar of pure reason. It must also take citizens' actual preferences seriously, and—unlike reasons—preferences *are* weighted by the intensity with which they are held.

Thus, Posner and Weyl are correct that we should find a way for registering the intensity of citizens' political preferences.[47] The key for the way forward here is the suggestion, noted above, which they make almost in passing, to apply the idea of monetized QV for political contributions by supplementing it with a system that would match small contributions and tax large ones.[48] Such a system, if it would indeed neutralize the current wealth effects, can rehabilitate the use of money as a means of political communication. Moreover, taking seriously the idea that we should use money as a registrar of the intensity of citizens' preferences implies that the use of this system should not be confined to campaign finance. A proper radical market in politics would leave our election system intact but transform politics by applying this mechanism of calibrating political money in *all* aspects of po-

46. *See* Hanoch Dagan, *Markets for Self-Authorship*, 27 CORNELL J.L. & PUB. POL'Y 577, 586 (2018).

47. Posner and Weyl do not consider the two ways in which the intensity of people's political preferences can already be expressed: they can use their rhetorical skills or invest time and labor in volunteer work. But this omission is inconsequential because the former alternative is open only to a selected few, and leaving the latter as the only legitimate and practical way of expressing preferences is alarmingly illiberal.

48. Posner and Weyl realize that this "would probably violate the First Amendment as it is currently interpreted," but believe "that courts would eventually accommodate political developments that are socially beneficial." P. 316 n.6.

litical participation, notably in interest-group politics.[49] Precisely because giving and spending money for political causes is so significant a means for expressing political preferences, political money in both campaign finance and interest-group politics should be allocated so that it reflects the intensity of these preferences irrespective of their holders' wealth.[50]

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Substituting welfare with autonomy as the rightful foundation of the ideal market can still benefit, as we have just seen, from some of Posner and Weyl's imaginative proposals. But it will go far beyond that.

One (maybe surprisingly) straightforward implication of understanding markets as means for self-determination is that they need to be inclusive. Conceptualizing the right of self-determination as the ultimate value of the market means that the law's support for certain interpersonal interactions needs to be justified by reference to their role in providing people with choices. Given that autonomy is a general, right-based justification,[51] this proposition implies that every human being is entitled to such choices and that a sufficiently diverse set of options must be available to all.[52] I will not discuss here the (rather important) implications of the prescription of ensuring meaningful choices in each major sphere of human action and interaction.[53] What is important for our purposes is that autonomy-enhancing markets must allow universal participation since exclusion and discrimination would undermine their *raison d'être*. In other words, once the market is *properly* radicalized, nondiscrimination is a necessary entailment of the very foundation that justifies the market, rather than an external constraint of the market or a happy by-product of discarding people's authority over their holdings and their labor (p. 272).

Indeed, if markets are to achieve their ultimate goal of empowering participants' self-determination, antidiscrimination rules are a necessary measure.[54] "Markets—in order to be justified by a right to autonomy—*must* be inclusive."[55] This is why legal reforms that remove or diminish discriminato-

49. On the enormous corporate lobbying expenditures and the resulting overrepresentation of corporate interests in Washington, see, for example, LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING (2015).

50. *See* Hanoch Dagan, *Political Money*, 8 ELECTION L.J. 349, 356–64 (2009).

51. Dagan, *supra* note 46. General, right-based justifications are distinct from two other types of justifications. As right-based justifications, they rely on an individual as opposed to a collective interest; as general justifications, they rely on the importance of an individual interest as such rather than on a specific event, as do special right-based justifications.

52. *Id.*; *cf.* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 444 (1988).

53. *See* DAGAN & HELLER, *supra* note 33, at chs. 9–12.

54. Dagan, *supra* note 46, at 590.

55. *Id.*

ry barriers do not depend upon additional justifications. [56] Rather, these reforms are best understood as devices entailed by the idea of the market as means for pushing the law of the market to live up to the market's implicit ideals. An autonomy-based law of the market must ensure that its rules serve the self-determination of all its subjects; it thus cannot authorize the standing of private parties to decide whether or not they can discriminate against their fellow humans.[57]

Understanding the market as a means for self-determination also implies that markets *cannot* function well as a standalone autonomy-enhancing device. In order for the market to benefit from the expanded choice it affords for its legitimacy, a legal regime which makes the market one of its primary institutions *must* be committed to securing the minimal social and economic conditions needed to enable individuals to make autonomous choices.[58] This proposition is particularly important given the market's tendency to generate regressive consequences, which derives from the dependence of the market's currency of willingness to pay not only on people's preferences but also on their ability to pay, as well as from the role that both luck and misfortune play in the operations of the market. Because these regressive consequences threaten to reintroduce new forms of hierarchical relations, which are the antithesis of the autonomy-enhancing ideal of the market, they must be understood and treated as distortions.[59] Some of these distortions can and should be addressed by reconfiguring the rules of the game that constitute the market so that they comply with the prescription of *relational equality*, that is, reciprocal respect for self-determination—another necessary entailment of the autonomy-enhancing ideal of the market that I cannot explore here.[60] But many cannot, and should thus be remedied by a background regime, which means that adjusting our health, education, housing, and welfare policies becomes essential to the market's own legitimacy, or at least its normative desirability.

Finally, since welfare and preference satisfaction are instrumental to the market's ultimate value, which is autonomy, the law of the market must set limits on the power to alienate whenever it erodes our ability to rewrite our life story and start anew, and must avoid the commodification of people and interpersonal relationships.

Autonomous people often choose short-term pursuits, and self-determination allows—to some extent even requires—opportunities for peo-

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56. *Id.*

57. *See generally* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); *see also, e.g.*, Hanoch Dagan, *Between Regulatory and Autonomy-Based Private Law,* 22 EUR. L.J. 644, 652 (2016).

58. *See* RAZ, *supra* note 32, at 207; *cf.* GRAY, *supra* note 43, at 37–38, 57–58, 72.

59. Dagan, *supra* note 46, at 588–89.

60. DAGAN, *supra* note 13, at ch. 4; Dagan & Dorfman, *supra* note 57.

ple to change course and vary their plans.[61] This means that an autonomy-enhancing law of the market must not bolster people's ability to credibly commit without balancing it against the impediment that these commitments pose to their ability to *re*write their life story. This conclusion offers a *principled* justification for existing law's safeguards of our ability to start afresh by limiting the range, and at times the types, of enforceable commitments we can undertake. Examples include: restricting the enforceability of employee noncompete agreements,[62] limiting the advance sale of future wages,[63] and rendering the *unilateral* right of termination of certain long-term contracts semi-inalienable.[64] This conclusion implies a reconceptualization of at least some of these inalienability rules that are conventionally perceived as prima facie troubling measures, which are only *contingently* justified, subject to the development of better technologies (such as the ones discussed above) for ameliorating impeding rationality deficiencies or overcoming other pertinent market failures.[65] These and other limitations on the freedom of contract are not necessarily tentative or primitive legal techniques awaiting more refined technologies. Rather, they need to also be examined as possible responses to excessive limitations on people's freedom to change their minds, which cohere with, if are not strictly required by, the most fundamental underpinning of the market.

The law of the market, more generally, cannot legitimately facilitate types of transactions in which the parties' welfare enhancement threatens their self-determination.[66] Thus, since facilitating parties' preference satisfaction is important because of, and to the extent that it is conducive to, people's self-determination,[67] the welfare surplus which such transactions generate must be understood as an *instrumental* value: a means to the superior end of promoting the parties' autonomy. Therefore, "preferences that undermine self-determination should be . . . generally overridden."[68] This conclusion is significant even beyond the obvious example of slavery, be-

61. *See* RAZ, *supra* note 32, at 384; *see also* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 16 (2018); *cf.* Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 39, at 96, 101–03.

62. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 594–619 (1999).

63. *See* Douglas Belkin, *More College Students Selling Stock—In Themselves*, WALL STREET J., (Aug. 5, 2015, 12:26 PM) https://www.wsj.com/articles/more-college-students-selling-stockin-themselves-1438791977 (on file with the *Michigan Law Review*).

64. *See* Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 333–36 (Andrew S. Gold & Paul B. Miller eds., 2014).

65. *See, e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937–41 (1985).

66. *See* DAGAN & HELLER, *supra* note 33, at 90–91.

67. *Id.* at 91.

68. *Id.*

cause there are further types of contract which instrumentalize people to such an extent that they erase people's ability to self-determine and, thus, efface their humanity.[69] This risk of allowing the means (welfare) to overwhelm the end (self-determination) is particularly acute in the context of employment. Although Marx's account of the proletariat's predicament in labor markets may not be an accurate description of many postindustrialized labor markets, there are still—unfortunately not negligible—employment settings in which workers are dehumanized and treated as "fungible gears in a huge machine."[70] Sweatshops are extreme cases,[71] but there are probably many others in which workers are treated as disposable commodities. Though there are difficult cases in which these types of employment conditions could be legitimate,[72] under most circumstances, "an autonomy-enhancing market cannot sanction transactions that involve such illegitimate commodification."[73]

CONCLUSION

Markets may well be, as Posner and Weyl claim, welfarist "miracles" (p. 277). Therefore, devising measures that would further extend the ways markets facilitate people's preference satisfaction and their welfare is a worthy endeavor. But because in a well-ordered society people's autonomy—and not the satisfaction of their preferences or their welfare—is the ultimate value of all the major institutions, these measures cannot be acceptable if they subvert people's self-determination.[74]

Furthermore, getting to the root of the matter, as Posner and Weyl invite us to do, requires us to appreciate the ways in which markets are conducive to people's autonomy and redesign them accordingly. Radicalizing the markets along these lines indeed implies "creating true competitive, open, and free markets" (p. xvi). But unlike the ideal markets advocated in *Radical Markets*, the configuration of these markets starts with freedom (as autonomy) and thus inclusion, rather than with competitiveness. It is therefore also

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69. *See* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 9 (2012).

70. *Cf.* NATHAN B. OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW 171 (2016).

71. *See generally* LYN K.L. TJON SOEI LEN, MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS 60–64 (2017).

72. The cautionary language of the text refers paradigmatically to cases in which one generation voluntarily undertakes certain derogatory obligations in order to secure the prerequisites of autonomy to its successor.

73. Dagan, *supra* note 46, at 599. For some preliminary responses to this challenge, see *id.*, at 598–600.

74. To be sure, it would have been much more difficult to hold on to this proposition if we were focusing on the *global* scene—affected, as it is, with grave poverty—and considering the option of opening up borders and reconstructing a just world society. *Cf.* RAWLS, *supra* note 10, at 474–75. Even in their chapter that addresses the transnational context, which is beyond the analysis of this Review, Posner and Weyl reject this approach. Pp. 142–46.

both careful not to facilitate autonomy-*reducing* transactions and mindful of the necessary role of nonmarket mechanisms in securing the minimal social and economic conditions required for the market to properly comply with its autonomy-enhancing *telos*.