

## Property, Markets, and Human Freedom

### 1

#### Introduction

Kant's political philosophy is based on freedom; chapter 1 of part 1 of the text concerns private property rights. What is the relation between these? My aim in this paper is to investigate the relation between freedom, property and economic justice in Kant's political philosophy by thinking about the relation between what Kant calls external freedom, his account of property and so-called free markets. Kant is usually taken to have a broadly liberal political philosophy<sup>1</sup> and liberalism is associated with so-called free markets, but what conception of free markets follows from a Kantian account? What is it for markets to be free? As is well known, Kant's very late *Doctrine of Right*, his main presentation of his political philosophy, is sketchy, leaving much work for us to do in working out what follows from the account. As a result, my argumentative strategy is reconstructive and not primarily based on claims made in Kant's texts directly about markets and the economy (of which there are very few<sup>2</sup>), and many of the issues I discuss with respect to markets are contemporary concerns. However, my aim is to explore what follows from central assumptions in Kant's political philosophy. I argue that neither the competitive markets of economic theory nor the idea of markets in which there is no role for the state gives us a fundamental of what it is for markets to be free in Kant's framework; rather, this would be a matter of having markets that are embedded in conditions of civic equality.

My approach is influenced and informed by the work of Charles Mills, in relation to three movements in his work: one, his focus on Kant's dehumanizing attitudes such as racism and sexism and how these may affect the content of his theories, two, his critique of ideal theory, and three, his rethinking of liberalism.<sup>3</sup> I have discussed Kant's racism elsewhere, and it will not be my focus here, though the impact of exclusionary attitudes in the interpretative tradition is relevant to the second and third concerns. In multiple critiques Mills has argued that the philosophical tradition's focus on ideal theory has been harmful in two central respects. First, focusing on the requirements of ideal justice can lead to insufficient attention being paid to theorizing oppression (and other non-ideal concerns), and can also, second, lead to our idealizing our actual situation and history. Both these concerns seem to me accurate with respect to the hypocrisies of the liberal political tradition in philosophy, and the enlightenment

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Kant's account is sometimes presented in contrast to contemporary liberal thought, for example, (Katrin Flikschuh 2000); I see my approach here as compatible with this, but taking 'liberal' in a broader sense, to refer, at base, to a political philosophy based on freedom.

<sup>2</sup> Though he does explicitly say that the sovereign must manage the state's economy and finances (6: 325). He also attempts to give a philosophical account of money and some intellectual property (6: 286-92).

<sup>3</sup> (Charles Mills 2018; 2019; 2017; 2019; 2007).

tradition more broadly, supposedly based on reason, autonomy, and the freedom of each, but developed in countries engaged in colonialism and the transatlantic slave trade.<sup>4</sup>

Despite his critiques of the hypocrisy of the tradition and of the harms of its focus on ideal theory, Mills argues that this need not necessarily lead us to reject its core concepts and starting points, rather, we should, in his terms, ‘occupy liberalism’.<sup>5</sup> I take it that part of what this involves is rethinking the liberal tradition in order to see whether what actually follows from its starting point of individual freedom might be more radical than both its defenders and its critics have assumed. In relation to Kant’s racism, Mills argues that we should not simply pay attention to the racism and then proceed with the system as we previously thought we understood it; we should take seriously the possibility that both overt racism (like Kant’s) and also the exclusions of the liberal tradition have resulted in its proponents failing to fully think through what is really required by equal freedom.<sup>6</sup> In particular, the focus of the interpretative tradition on the ideal theory aspects of Kantian or liberal theories may have led to failing to think through what realizing equal freedom or justice requires in non-ideal conditions. I take this critique to set us an interpretative project, of which I see this paper as a part: rethink the foundations of liberal political thought without assuming that we know what follows from starting with equal freedom. My interest in this paper is in theorizing non-ideal concerns specifically in relation to property and markets, where, it seems to me, an emphasis on ideal theory (in particular, competitive market economic theory) plausibly leads to both types of harms Mills identifies: insufficient attention to non-ideal concerns and idealized understandings of our actual situation. Kant’s political philosophy contains both ideal and non-ideal concerns, and disentangling these from each other as well as from his prejudices, and his concerns with specific features of his own context, is a complex task, especially in the light of the sketchy nature of his writings on legal-political philosophy.

The main non-ideal features of property exchange I will discuss is what in economic theory is called an externality: a cost or a benefit of a transaction that affects a third party who is not engaged in the transaction and has not consented to the effects. While there are positive and negative externalities; I’m going to talk only about negative externalities. Daniel Hausman calls negative externalities *spillovers* and argues that they are ubiquitous not exceptional, and that

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<sup>4</sup> For example, it is common to read descriptions of human right and individual liberties as ‘western’ values. But broad discussion of human rights *began* after world war II, as an international project, in response to European atrocities, and it seems wildly implausible to attribute widespread support for human rights to European or North America culture until relatively recently, when we consider that letting go of European colonial power in Africa only *started* in the middle of the 20<sup>th</sup> Century, and when we consider when these societies started ending race and gender based discrimination. Despite how recently European and North American countries have achieved an interest in anything like universal human rights, it is arguable that the self-understanding of these countries involves seeing individual rights as a core value of theirs for much longer. Mills’ argument can provide a diagnosis of this, in terms of the idea that the emphasis on ideal theory in the liberal political tradition of Anglo-American political philosophy contributes to an idealized self-understanding. Mills describes this as an epistemic injustice (Charles Mills 2018). See Losurdo for a detailed account of liberal hypocrisy (Domenico Losurdo 2014).

<sup>5</sup> (Charles Mills 2017).

<sup>6</sup> (Charles Mills 2019). However, Mills’ ‘Black Radical Kantianism’ draws only on Kant’s moral philosophy, and, in my view, underestimates the resources in Kant’s political philosophy.

while economists think about them from the perspective of efficiency and inefficiency we also need to think about them from the perspective of justice.<sup>7</sup> He says:

‘What is needed is a view of market processes that sees voluntary exchange among individuals as an integral part of a series of complex social linkages. One must reject the picture of an ideal market in which individuals always or even typically bump up against one another only by choice. One must not ignore spillovers, and one should not wall them off as externalities, from which one typically abstracts and which (apart from transactions costs) one deflates to merely frictional and distributional issues. Externalities should be at the center of the picture in any but narrow short-run analyses. Externalities are the normal case. Pure voluntary exchanges without spillovers are the exception.’ (Daniel Hausman n.d.)

While the term ‘externalities’ comes from 20<sup>th</sup> century economic theory, it tracks a distinction that arguably plays a role in thinking about Kant’s account of property. In explaining Kant’s account Arthur Ripstein distinguishes between cases in which someone else’s action affects your purposiveness and those in which their action merely changes the context in which you act. For example, he says:

“I grow porcini mushrooms in the shadow of your garage. If you take down your garage, thereby depriving me of shade, you *harm* me, but you do not *wrong* me in the sense that is of interest to us here. Although you perform an affirmative act that worsens my situation— exposure to light destroys my mushrooms—I do not have a right, as against you, that what I have remains in a particular condition” (Arthur Ripstein 2009).

Similarly, by buying the last bottle of milk in the store I change the world and affect the context in which you act, but do not dominate you or threaten your capacity to set and pursue ends for yourself. This distinction enables us to say that I wrong you by interfering with your property (even if I don’t harm you<sup>8</sup>) but there are ways I can set back your interests (such as buying the last bottle of milk) which do not affect your rights or wrong you. One might think that this is precisely the distinction Hausman is telling us to avoid: free, independent individuals with their own defined property bundles bumping up against each other by choice. I argue that thinking about what resources Kant’s account has to address externalities has implications for how we think about how property exchange and the state’s role in the economy can be just. Before trying to say something about this I will outline briefly some key debates at issue with respect to property and economic justice in Kant’s account.

## 2

### Freedom, Property and Economic Justice

This section starts with an outline of the basics of Kant’s account of property and then sketches three issues discussed in the literature in relation to economic justice within Kant’s account: 1. state provision of protection against poverty, 2. what he calls passive citizenship, and 3. the provisionality of property claims. Kant’s political philosophy starts with the claim that all humans have an innate and equal right to what he calls external freedom: the right to be their

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<sup>7</sup> (Daniel Hausman n.d.).

<sup>8</sup> A harmless trespass can still be a wrong.

own masters, exercise their capacity of choice for themselves, and not be coerced or dominated by others, and to interact with others as equals (6: 237). Our innate right is to freedom that is consistent with everyone else having the same freedom.<sup>9</sup> Kant holds that the realization of everyone's equal freedom requires a political authority that represents all of us (an omnilateral authority) and which has coercive power to enforce creating the conditions of freedom.<sup>10</sup> Further, he holds that only coercion that opposes hindrances to freedom and is therefore not a limitation of freedom justifies the coercive power of the state. Importantly, on his account the public institutions constitutive of a state which represents all its citizens enable us to be free in a way that it is not possible for us to be in a state of nature (whether people are vicious or virtuous in a state of nature). For example, public roads linking all bits of private property enable us all to move around pursuing our purposes without needing permission from private landowners, and this makes us free in a way we would not be without such roads (even if the landowners gave permission).<sup>11</sup> Thus, while the account is based on freedom and not on the promotion of some good, it is arguable that freedom is not understood only negatively, as non-interference, but rather has institutional and material implications, and working this out is a large part of what debates on economic justice in Kant's account are about.

In addition to our original right to freedom, through things we do we can acquire rights to things (property), to other people's performance (contract), and rights with respect to people themselves (such as by marrying or having children). Kant holds that finite embodied agents like us need to use objects in the world to carry out our purposes, and that being able to exercise agency in this way requires having some assurance with respect to objects we are not currently holding that we are the ones who get to determine what happens to them. This need grounds the institution of property, understood as the right to the private use of a thing and the right to exclude others from the private use of a thing (6: 260-1). He thus distinguishes property (as a normative relation to other people with respect to a thing) from mere possession (controlling a thing), and understands property as involving the right (against other individuals) to be the one who determines what happens to a thing and how it is used.<sup>12</sup> He holds that without the possibility of having such rights with respect to things all of our agency would be needlessly limited and compromised. But on the other hand he thinks that unilateral claims to things by individuals, as well as the exclusions involved in property, do not seem to be consistent with everyone else's innate right to freedom (6: 264). He argues that making them so consistent requires a state, and various specific features of the state such that it represents the will of all,

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<sup>9</sup> On this account, where your doing what you want is limited by the condition of its being consistent with everyone's equal freedom this is not to be thought of as a (justified) limitation of your right to freedom, because what is being limited is not something to which you have a *right* (an enforceable entitlement). You only have a right to freedom that is consistent with everyone's equal freedom.

<sup>10</sup> Importantly, we should not read this as Kant's account of what we do and should value about *community*, or the idea that Kant disregards features of society and community other than freedom; rather, the account is simply what he takes to be coercively enforceable. This is compatible with there being many other (non-coerceable) valuable (even humanly and morally essential) aspects to community, some of which he discusses in his account of the role of moral community in his (Immanuel Kant 1996 (1793)).

<sup>11</sup> (Arthur Ripstein 2009 ch. 8).

<sup>12</sup> (S. M. Love, n.d.).

and that only in a just state can property rights be conclusive.<sup>13</sup> Claims to property in a state of nature have normative force, but this can only be understood as a provisional right, which can be conclusive only in a state with the right institutions and structure to represent the will of all the people in it, and in which law is consistent with defending each person's innate right to freedom, and in this sense can be thought of as consistent with their will.<sup>14</sup> What conception of economic justice would follow from this account is debated in the literature, and three issues are crucial to this debate: 1. poverty and redistributive taxation; 2. passive citizens; 3. the provisionality of property rights.

1. Poverty. A number of authors argue that on Kant's understanding of what external freedom is, it is threatened by poverty, and that his account supports redistributive taxation for poverty relief. Ripstein, Helga Varden and Ernest Weinreid argue that, for Kant, the material dependence poverty involves is a form of private dependence (dependence on other particular human beings) that is inconsistent with the right to external freedom.<sup>15</sup> Ripstein argues that poverty is inconsistent with the poor person's being their own master because it makes the poor person's use of their faculty of choice completely subject to the choices of others (Arthur Ripstein 2009; Varden 2010). He also says that it is inconsistent with the united will that the public authority is supposed to represent because the poor person can't will the situation in which they are excluded from any property (Arthur Ripstein 2009, 273), and that the state is obliged to protect people against poverty because in virtue of protecting property rights the state creates the system which will result in private dependence in the absence of public provision against this. Varden argues that external freedom is impossible without any material means, and that if the law does not provide against being in private dependency relations, it fails to represent those citizens (Helga Varden 2020, 299). These claims are rejected by Luke Davies, while Rafeeq Hasan argues that they do not go far enough.<sup>16</sup> This dispute turns on what is entailed by external freedom or being one's own master, and what defending the rightful independence of each requires materially and institutionally from the state. I cannot pursue this here, but simply note that it is indisputable that Kant does assert the need for poverty relief through taxation (6:325-6), and as Varden emphasizes, he says this in the context of his discussion of public right – the rights, duties and institutional structure of a rightful state – so this is not a claim about enforcing the duties of private persons, such as beneficence (which cannot be rightfully enforced, on Kant's account). Further, he says that this support is needed to *perpetuate* the state - the system of laws that protects the equal freedom of each – which means it is a condition of the continued existence of a just state, and therefore of equal freedom. He says that the poor must be supported by tax, not voluntary contributions, that this must be paid for by the present generation. He says that the rich can be taxed because they owe their existence to the state and that no one can withdraw from current contributions which can be used to

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<sup>13</sup> As Flikshuh puts it, he first argues *that* it must be possible to acquire property but he then requires an account of the general will to show *how* it is possible, consistent with everyone's right to freedom (Katrin Flikshuh 2000, 145).

<sup>14</sup> How to understand Kant's account of the general will is controversial. As I understand it, willed by all does not mean voted by all or contracted by all; I take it to mean consistent with the innate right to freedom of all, so rationally willable.

<sup>15</sup> (Arthur Ripstein 2009; Varden 2010; Helga Varden 2020 )(Ernest J. Weinreid 2003).

<sup>16</sup> (Luke Davies 2020; Rafeeq Hasan 2018).

support the poor (6:325-6). This provides strong reason to find an interpretation of rightful external freedom which takes state provision against poverty to be a condition of realizing everyone's equal freedom.

2. Passive citizens. Understanding Kant's account of our innate right to freedom is complicated by a distinction he introduces between what he calls passive citizens who are not fit to play a part in managing the state (vote) and active citizens who are fit for this (6: 314–5). The unfitness of passive citizens is either on grounds of natural incapacity (which he takes to include children and women) or lack of some kind of material independence.<sup>17</sup> Passive citizens, Kant says, include apprentices, domestic servants, private tutors,<sup>18</sup> day labourers who sell their labour in people's homes and lands rather than selling their goods in the marketplace, and more generally people whose being fed and protected depends on arrangements made by other private individuals rather than themselves or the state. How to understand this distinction and what should follow from it is controversial,<sup>19</sup> and is complicated by the sketchiness of Kant's account, together with the complexity of untangling his concern with non-ideal features of his particular context from his ideal theory, as well as from his prejudices. It is not clear, for example, whether the idea of passive citizens is a part of Kant's account of a minimally legitimate state or something that could feature in an ideal just republic.<sup>20</sup> Since Kant is not aiming to do democratic theory or theorize voting, for my purposes here his views (perhaps simply prejudices) about what qualifies citizens to vote are less relevant than the kinds of dependency relations he is trying to analyze with this category, which clearly trouble him. He includes in this category domestic servants, and, notably, this is a category which he thinks needs the protection of *status right*, a specific category of law that governs relations in which independence and consent is compromised, and which he introduces immediately after property and contract, and without which private right is incomplete.<sup>21</sup> He holds that it would be wrong to understand these relationships simply through contract, and that domestic servants (like children and spouses) would have their freedom and equality compromised in the absence of specific law that governs these relationships and protects them.<sup>22</sup> One way of understanding this in the context of domestic work is that the intimate and indeterminate

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<sup>17</sup> The lack of material independence here might not be the same as the material dependence of poverty because the passive citizens are not in need of provision from the state to meet their basic needs. They are not destitute, but they are problematically materially dependent.

<sup>18</sup> Something Kant was for a time.

<sup>19</sup> It has been used in diametrically opposed ways in discussions about Kantian economic justice. See (Luke Davies 2020; Rafeeq Hasan 2018).

<sup>20</sup> And does Kant's claim that passive citizens must be able to work their way up to being active citizens simply mean that no one should forbid them from doing this (formal, legal equality), or does it mean the state must actually make provision for providing meaningful equality of opportunity? One might take the condition of passivity to be a problem which the state is obliged to address. But there are at least some citizens (children) with respect to whom (current) 'natural incapacity' does render incapable of actively participating in running the state; Kant takes it that these citizens' rights as free and equal humans still need protection by law. See (Helga Varden 2020) for a developmental account.

<sup>21</sup> His concern with 'domestic servants' is not simply anachronistic - there are of course many people in the world, including in developed democracies, who work in homes and who sell their labour in the ways Kant takes to involve problematic dependency relations which require the special protection of law.

<sup>22</sup> Actually, *status right* protects *both* parties in dependency relations.

nature of the duties of domestic servants, as well as asymmetrical power, makes it difficult to specify such jobs fully in contracts. As others have noted, the logical structure of this concern is easily extended beyond the domestic sphere to other asymmetrical status relations, for example, those with doctors and teachers, and to labour law more generally.<sup>23</sup> The category of status right shows that Kant's account does not simply start with analyzing self-sufficient individuals with their property bundles, but rather explicitly includes a political analysis of dependency relations in which consent is compromised by asymmetrical power, and sees this as a problem that requires law, to enable and defend equal freedom.<sup>24</sup>

3. Provisionality. A crucial feature of Kant's account is the claim that conclusive property rights can exist only in a civil condition (in a just state); prior to this we have only provisional property rights. How we understand the nature and force of provisional rights and the distinction between provisional and conclusive rights, is relevant for understanding what his account implies with respect to economic redistribution as well as historical injustice.<sup>25</sup> One debate about this is whether provisional rights are *determinate* claims which merely lack assurance and defense,<sup>26</sup> or whether part of what it is to be provisional includes having a content still to be conclusively determined. Cutting across this are questions about whether property rights are conclusive in minimally legitimate states (as well what it takes for states to be minimally legitimate) or only in an actual just civil condition (which would mean that property rights in all current states are not conclusive).<sup>27</sup> These are crucial questions with far-reaching implications for the account. It is clear that Kant takes provisional right to have normative significance; but it is also clear that he takes there to be indeterminacies in the content of property rights which require resolution by just law. I will argue that the provisionality of property rights has extensive implications for how we think about markets, especially in relation to common resources and climate instability.

Kant describes property rights as the right to the private use of a thing (6: 260) and the right to exclude others from the private use of a thing (6: 261). Unlike those who think property is a mere 'bundle' of rights,<sup>28</sup> Kant takes it to be a relation with an intelligible, specific basic structure.<sup>29</sup> However, this a priori account leaves out much important detail and specificity, and he immediately adds that "[b]y the term 'property right' (*ius reale*) should be understood not only a right to a thing (*ius in re*) but also the *sum* of all laws having to do with things being mine or yours' (6: 261). This says that property has a lot more specificity which will be determined by the legal system, not a priori philosophy. Thus, on the one hand, Kant thinks that the basic structure of property can be understood without the state, is neither entirely conventional nor a mere bundle, and holds that pre-political property claims have normative significance. But on

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<sup>23</sup> See (Arthur Ripstein 2009 ch. 3).

<sup>24</sup> See (Helga Varden 2018; 2012).

<sup>25</sup> The normative force of provisional right opens the possibility for thinking about rectificatory justice within the account.

<sup>26</sup> See (Sharon Byrd and Joachim Hrushka 2010; Luke Davies 2020).

<sup>27</sup> See (J.P. Messina 2019; Rafeeq Hasan 2018).

<sup>28</sup> (A. M. Honore 1993).

<sup>29</sup> See (Arthur Ripstein 2017).

the other hand, he takes enforceable and determinate private property rights to require just political authority, which means that property is not *simply* a 'natural' pre-political relation that gets ratified and protected by the state. And the account holds that there are many aspects of property rights that are dependent on the actual system of laws, independent of which there are no conclusively rightful property claims.

Even from this brief sketch we can see that the relation between equal freedom and property is complex, and does not take as a base-line self-sufficient individuals with determinate property bundles with respect to which no one else has any rights. The account does start with the need for individuals to have things from which they can rightfully exclude others but far from taking this as setting parameters which limit everything that follows, Kant takes it to be an inherently unstable point raising problems that can be resolved only by the total system of justice (including international and cosmopolitan justice).

### 3

#### Two conceptions of what makes markets free

Despite the complexities sketched in the previous section, once we have private property rights this is supposed to mean that we get to be the ones who determine what happens to our property, and this might be thought to straightforwardly include our rights to buy and sell things that we own as we wish – to whom we choose, where we choose, and at what price we choose. So it might seem that it is obvious that when it comes to the conception of markets supported by Kant's theory, what we should have is so-called free markets. Further, it might seem that the most basic conception of what makes markets free is that they consist of private individuals who choose where, when, to whom and at what price to buy and sell their property and services, with no intervention or interference from the state, and it might be thought that this follows from an account which defines private property as Kant does, and links it to freedom as well as to the right to private contract. The idea would be that the market is free because it consists of people making decisions for themselves about what to do with their things and how to contract their powers.

It is important not to conflate this with a different conception according to which what makes the exchange of goods and services free is that it takes place in what economists define as competitive markets: markets in which a large number of buyers and sellers interact on specified conditions of equality, such that no one controls the market. While competitive markets are also defended in terms of their consequences for efficiency, productivity and innovation, they are argued to represent conditions of freedom because people get to make their choices in conditions of equal (market) power and information, engaging in voluntary transactions which benefit both (otherwise they wouldn't agree to the transaction).<sup>30</sup> These two conceptions of freedom in property exchange are liable to be conflated because a central idea of competitive market theory in economics is that in the ideal case they are the supposed to be

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<sup>30</sup> See for example Robert Taylor who argues that competitive markets are conditions in which people are not dominated (Robert S. Taylor 2013).

the same: in the ideal case, everyone's individual private choices with no central planning or coordination or other kinds of 'interference' will result in a perfectly competitive market, which is maximally efficient (in the economists' specific understanding of efficiency<sup>31</sup>). But in all non-ideal cases – all actual cases - they are very much not the same, and should not be conflated.

Crucially, a basic feature of competitive market theory is that it is based on idealizing assumptions which aren't even approximately met in any actual situation (and probably couldn't be, even in principle<sup>32</sup>). As described by Joseph Heath, the assumptions of competitive market theory include:

“there must be no economies of scale (which means no advantages to mass production), no possibility of influencing prices through one's supply or demand decisions, no transaction costs (a category that includes everything from lawyer's fees and accounting expenses to transportation costs and unpaid bills), no uncertainty about the future (or, in situations where there is uncertainty, an option to purchase insurance against any eventuality), and no information asymmetries (in particular, customers who know everything that the manufacturer knows about the products they are considering purchasing). And most important of all, there must be no “externalities,” which is to say, no uncompensated costs or benefits imposed upon others. What this means, in practice, is that there would have to be a “complete” set of property rights: each individual would have to have the right to control every aspect of his or her environment.”(Joseph Heath 2010).<sup>33</sup>

Where the assumptions of competitive market theory are not met (all actual conditions), *some* law and regulation (interference with what people can do with their property) will help markets approximate the conditions under which they can function in the way economic theory understands as competitively (and some law and regulation will not). An easy case is regulations governing labeling that tells us what is in products; this is an intervention that reduces asymmetries of information, and therefore enables prices to function as a more efficient (competitive) mechanism than they would in the absence of labeling. The 'interference' makes the market closer to the conditions in which prices function as competitive market theory says that they do. Similarly, unions and labour law may help approximate the more equal bargaining position economic agents would be in in an economy that truly met the conditions of competitive market theory (in which there are no advantages to economies of scale and no barriers to entry, so no powerful corporations). This will be a case by case, empirical (often very complex) question.

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<sup>31</sup> Strictly speaking this is said to result in an efficient equilibrium. Hayek argues that this ideal theory equilibrium cannot even be taken as characterizing competition (Friederich A Hayek 1948 ch V).

<sup>32</sup> Is it even possible to imagine finite humans having markets with no transaction costs, no future uncertainties, no information asymmetries, perfect price elasticity, repeat purchases, and a market in all commodities (no unpriced goods)?

<sup>33</sup> This is without mentioning assumptions about the nature of rationality, self-interest, and 'natural' (undistorted) preferences.

Of course none of this is news to economists. However, it seems to me that competitive market theory, as an ideal theory, is liable to create both of the harms of which Mills accuses ideal theory: leading to insufficient theorizing of actual (non-ideal) conditions and idealized views of our actual conditions. By comparison: the proponents of the Rawlsian ideal theory that Mills critiques are of course not guilty of thinking that their ideal accounts of justice are theorizing oppression. But this does not show that the focus on ideal theory isn't liable to the harms Mills ascribes to it: leading to too little attention to theorizing injustice and to idealizing our actual politics and histories. With respect to ideal theory economics, one illustration of the first harm is such externalities as pollution and the use of unpaid for resources not being at the centre of economic policy.<sup>34</sup> Mills' second harm is illustrated by the common political rhetoric of regulation being an intervention in 'free markets': this supposes that there exist "natural" competitive markets without governments. When such rhetoric implies that simply in virtue of being 'interference' regulation will make markets less 'free' and efficient, it is running together non-interference with idealized competitive markets which do not exist. For example, regarding government interventions in wages as disruptions in a competitive market assumes that wages are set by a perfectly competitive market, when in fact they are to a large extent a function of immigration policies, together with many other facts of human life that make labour less mobile than the ideal assumptions of competitive market theory requires.<sup>35</sup> As political economist Steven Vogel argues, the very word 'intervention' used in relation to government roles in markets is an illustration of a false view of markets as natural and existing without government (Steven K. Vogel 2018, 135); he makes similar points about the terms 'free markets' and 'market forces' (Steven K. Vogel 2018).<sup>36</sup>

Rhetorically conflating free markets in the sense of non-interfered-with markets with free markets in the sense of competitive markets is particularly common in the economic rhetoric of those whose uncompetitive powerful position in markets enables them to make profits, and who want to resist interference with this (supposedly in the name of competition and efficiency). But it may also be done by those who want to oppose or critique what are said to be market forces, but also talk as if these are naturally existing things. For example, Hasan argues that economic inequality that results in unequal bargaining power is inconsistent with rightful freedom and therefore that the Kantian state can 'counteract market-based concentrations of wealth if and when they threaten external freedom' (Rafeeq Hasan 2018). This seems to grant that there are competitive market forces which produce market-based accumulations of wealth,

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<sup>34</sup> Kate Raworth argues that this is true also of the way economics is standardly taught, saying that macro-economic is typically taught treating the economy as a closed system which doesn't take resources out of anywhere or dump rubbish into anywhere (Kate Raworth 2017).

<sup>35</sup> Not to mention historical injustice and oppression.

<sup>36</sup> He argues, along similar lines to Mills' critique of ideal theory, that the dominance of an idealized version of "free" markets distorts research agendas (Steven K. Vogel 2018, 122) and 'obscures our own agency in crafting markets for our own purposes' (Steven K. Vogel 2018, 150), and that idealized versions of free and natural, state-free markets leads to economists under-estimating and under-attending to the challenges of crafting good markets (Steven K. Vogel 2018, 123), to paying too little attention to the ways real world markets are distorted by 'imbalances of private power, abuses of power, fraud, and waste' (Steven K. Vogel 2018, 149), to paying too little attention to scholarly literature on markets as institutions (Steven K. Vogel 2018, 131), and to ignoring 'a critical category of government failure: the failure to develop markets' (Steven K. Vogel 2018, 124).

and then argue that we shouldn't just accept what competitive markets lead to. The latter is a fair point, but we also shouldn't accept that these actual accumulations are the result of competitive markets or 'natural' market forces.

Once we avoid the conflation, our question is whether either of these understandings of free market exchange would follow from Kant's account. Since he combines an account of private property and individuals' right to do what they want with it with the view that state coercion can be based only on realizing freedom and not promoting some good (including the good of 'efficient' markets), it might be thought that his account should be committed to a non-interference conception of markets, even if this results in markets which are not very competitive. Some argue that this is what consistent libertarians are committed to. For example, Samuel Freeman says that 'efficiency considerations will be sacrificed to maintain libertarian rights of contract and property' (Samuel Freeman 2002, 137). Hayek, for example, argues that there is nothing unjust about monopolies – being in a position to make profits out of a particular skill you happen to have that others do not have is not an injustice to them, so long as nothing is preventing them (F. A. Hayek 1982, vol 3 73).

I will raise three problems with thinking that a non-interference conception of what makes markets free is consistent with Kant's account. The first problem, which is not decisive, but worth mentioning, is based on a feature of competitive markets that is plausibly appealing and relevant to freedom: the idea of voluntary exchange in conditions of equal market power and information. The rosy lens of idealization which runs non-interfered with markets together with competitive markets makes each seem a more complete conception of free exchange than they are on their own. But actual non-interference markets can result in people making choices in massively unequal and uninformed conditions – markets with information asymmetries, no product labeling, no food safety regulations, no building standards, no licensing laws for professionals are ones in which choice may be sufficiently compromised that it is not obviously meaningfully free.<sup>37</sup> This seems in tension with Kant's concern with protecting people in dependency relations where consent is compromised, as well as with his view of civic equality as being free from domination.

The second problem is that even in the absence of regulation aiming at the conditions of the competitive markets of ideal theory, markets depend on the state to a degree that undermines the coherence of a non-interference conception. Property, and property exchange, requires law and the state not just because it requires protection against theft and destruction (criminal law), but in addition markets require, at an absolute minimum, such institutions as contract law and a deeds office, which of course do not exist in a state of nature. Much more is needed for corporations and modern financial markets, including trust law, corporate and bankruptcy law, and intellectual property rights, not to mention the complex law that creates modern financial markets and their products, as well as central banks. Institutional approaches to political economy includes numerous ways in which both the elements of and the structures of modern

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<sup>37</sup> See Debra Satz's argument that markets characterized by severe power and information asymmetries are noxious and compromise free choosing (Satz 2010).

economies depend on states. For example, legal scholar Katharina Pistor makes a detailed case for the way in which law is needed to create capital out of assets and is therefore responsible for the creation of wealth and its distribution (Katharina Pistor 2019). As she says, '[t]his should be only too apparent with respect to financial assets and intellectual property rights that do not exist outside the law' (Katharina Pistor 2019, 19).<sup>38</sup> Clearly no one has intellectual property rights in a state of nature.<sup>39</sup> A further obvious example is corporate law which is needed for the firm itself (Katharina Pistor 2019; see also Simon Deakin et al. 2017, 198). Pistor argues that paying detailed attention to how capital is coded in law shows the extent to which it is linked to and dependent on state power, and how wealth and inequality are created through policy choices and not 'natural' property exchanges happening independent of the state.<sup>40</sup>

A related case is made with respect to the institution of money by legal scholar Christine Desan, who argues that it has an internal design, which affects prices (Christine Desan, n.d.),<sup>41</sup> and that it needs to be understood as a common resource. Relatedly, through analysis of the role of central banks, legal scholars Robert Hockett and Saule Omorova argue that modern finance is partly publicly supplied and should be understood as something like a public-private franchise arrangement, under which 'the sovereign public, as franchisor, effectively licenses private financial institutions, as franchisees, to dispense a vital and indefinitely extensible *public resource*: the sovereign's full faith and credit' (Robert C. Hockett and Saule T. Omorova, n.d., 1147).<sup>42</sup> At a basic level, Vogel argues, that simply taking on board the banal fact that 'markets are institutions governed by laws, practices and norms' leads to seeing that there cannot be a clear dichotomy between governments and markets, rather, markets are public institutions (Steven K. Vogel 2018).

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<sup>38</sup> She says that intellectual property rights 'have been on the rise over the last few decades and account for the lion's share of the valuation of many firms today' (Katharina Pistor 2019).

<sup>39</sup> I have noted Hayek's view that monopolies are not necessarily unjust; in addition, he argues that are not necessarily inefficient (where the provider in question is able to maintain their position through their superior service, and not through preventing others). However, they can be created through intellectual property law, which while in one sense enabling markets through creating property rights, also creates barriers to entry that are in tension with the assumptions of competitive market theory (and can be understood as preventing others). And *how* intellectual property rights are created is a matter of choice and policy, and does not reflect 'natural' property rights anyone would have in a state of nature.

<sup>40</sup> In addition to undermining the idea of a market which exists without states, she argues that this 'analysis shifts attention from class identity and class struggle to the question of who has access to and control over the legal code' (Katharina Pistor 2019, 18). Relatedly, Deakin et al argue that 'social scientists have paid insufficient attention to the role of law in constituting the economic institutions of capitalism' (Simon Deakin et al. 2017). They argue that this applies also to Marx, who, because he saw law as relatively superficial (superstructural), doesn't pay enough attention to laws as necessary and essential parts of constituting economic relations (Simon Deakin et al. 2017, 191).

<sup>41</sup> She says that 'If societies design money and that design affects prices, then we cannot coherently conceptualize general equilibrium as a trade among individual and independent agents' (Christine Desan, n.d., 111).

<sup>42</sup> They argue that 'continuous public accommodation and monetization of private liabilities constitute the key mechanisms through which continuous generation and distribution of capital throughout the financial system occurs' (Robert C. Hockett and Saule T. Omorova, n.d., 1143) and therefore that 'it is the sovereign public that ultimately generates and underwrites capital flows in a modern financial system' (Robert C. Hockett and Saule T. Omorova, n.d., 1149).

These are all arguments showing ways in which economic institutions and markets depend on the state, and against the idea of a basic dichotomy between state and the market.<sup>43</sup> These analyses present markets as *public institutions*, with public conditions of possibility, which do not come into existence merely by allowing private individuals to make private decisions about buying and selling their property and powers. While many of these arguments appeal to features of modern financial markets, some features would also be relevant to the markets with which Kant would have been familiar (such as the public institution of money), and such markets would also have been public institutions – taking place, for example, in a specific place such as a town square, and governed by law. Further, the arguments show there is no neutral non-interference conception of markets: rather than being ‘natural’ or neutral places to exchange determinate pre-existing ‘natural’ property bundles, both the structures of exchange and some of the very products exchanged, and the resulting distributions of wealth, are the product of social, legal and political choices.<sup>44</sup> I mentioned above Ripstein’s argument that in virtue of creating property rights the state creates a system which will result in private dependence without protection against this, and therefore that property laws cannot be reconciled with each citizen’s freedom without provision against poverty. Similarly, the system that creates markets and finance, as public institutions, involves choices, and must be reconciled with each citizen’s freedom, such that it could be willed by all.

The third problem I want to raise with the idea that pure non-interference could be a Kantian conception of freedom in markets is based on the idea that externalities undermine the possibility of determinate ‘natural’ property rights. I will discuss this in the next section.

#### 4

#### Externalities and Civic Equality

One of the most obvious assumptions of competitive market theory that is seldom, if ever, met in actuality, is the idea that there are no externalities. Externalities arise when a transaction between two people has unconsented to effects on others who aren’t part of the transaction. In the terms of competitive market theory, externalities are market failures – they wouldn’t happen in perfectly competitive markets. A central reason for this kind of market failure is that many of the resources which are used and affected in actual market transactions aren’t priced – the buyer and the seller don’t pay for them. Ideal competitive market theory, in contrast, assumes that there is a market for all commodities. A very obvious externality is pollution. If there were a market in all commodities – if everything going into the cost of a commodity were priced – the cost of a cheap takeaway coffee in a plastic cup would include the cost of the pollution caused in creating the plastic as well as the cost of getting rid of the plastic cup (amongst many other uncoded resources and negative effects and maybe some uncoded positive effects). If these costs are not priced, then the transaction supposedly involving two people’s free use of their own property (exchanging money for a cup of coffee) is using and

<sup>43</sup> See also (Matthew H. Kramer 1999 ch. 7).

<sup>44</sup> See also Murphy and Nagel who argue that because ‘[t]here is no market without government ... and what type of market there is depends on laws and policy decisions that government must make,’ it is incoherent to think the pretax distribution of resources as the distribution produced by a free market’ (Murphy and Nagel 2002 32-33).

affecting many things with respect to which they do not have clear property rights and affecting people in ways they have not consented to. Externalities are ubiquitous and obviously of particular concern in relation to climate instability, given the unpriced effects of production, exchange, and disposal, on air, water, forests, habitats, and the climate system. The extent to which our economic activity depends on the use of uncosted, unpaid for common resources was highlighted by a study sponsored by the United Nations Environmental Program which looked at corporate profits and just 6 environmental costs (leaving aside social costs): water use, land use, greenhouse gas emissions, waste pollution, land pollution, and water pollution.<sup>45</sup> The report claimed that when the externalized environmental resources were costed, none of the supposedly most profitable industries were making a profit.

One way in which competitive markets are thought to be expressions of freedom is that people consent to the costs and benefits of transactions. Externalities mean that there are costs and benefits to which people have not consented so actual markets are not free in this sense. If we wanted to deal with the use of all natural resources through competitive market theory, we would have to allocate property rights in *everything*.<sup>46</sup> Heath describes what it would be to have a complete set of property rights as follows:

“To imagine what a “complete” set of property rights would look like, you have to picture everyone walking around in very large, opaque, soundproof, temperature controlled plastic bubbles. No one is allowed to introduce anything into your bubble—no light, no noise, no liquids or gases, nothing—without your express permission. They’re also not allowed to touch your bubble, or even to get in your way. If anyone wants to do any of these things, you have a right to charge them (just as they have a right to charge you for fiddling with their bubbles). You can also have personal property outside the bubble, and no one is allowed to touch or use any of that, either. As a result, you cannot be involuntarily subjected to any visual or auditory stimulus, you are not obliged to ingest or inhale anything you don’t want, you can amass as many possessions as you like and use them however you like, and you can roam freely without worrying about other people” (Joseph Heath 2010).

Even if it were possible or desirable (both of which are implausible), it is clear that creating such rights would require a massively complex amount of planning and intervention. In the absence of property rights in everything attempts can be made to ‘internalize’ externalities through taxes and fines. There are numerous complications with this, including the fact that it is hard to see how there could be any ‘natural’ way of determining prices for all currently unpriced commodities.<sup>47</sup> Further, even if we could know what people’s voluntary choices would be in the

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[https://www.exposingtruth.com/new-un-report-finds-almost-no-industry-profitable-if-environmental-costs-were-included/?fbclid=IwAR2KgCfSu9AKR0TuWdycw0Syd9sm\\_IGy0LbDLtMR6vaISdWtL9er7mFlu1o](https://www.exposingtruth.com/new-un-report-finds-almost-no-industry-profitable-if-environmental-costs-were-included/?fbclid=IwAR2KgCfSu9AKR0TuWdycw0Syd9sm_IGy0LbDLtMR6vaISdWtL9er7mFlu1o)

<sup>46</sup> Notice that introducing a market in one commodity, for example carbon trading, does not mean we have achieved the conditions in which competitive market theory says that markets are efficient, as this requires a market in *everything*, as well as numerous other idealizing assumptions mentioned above. And notice that such markets would have to be created.

<sup>47</sup> Understanding the total effects of internalizing particular externalities is highly complex and interventions can make things worse, and if interventions are done in the name of promoting some good, we still need a way of reconciling them with everyone’s rights. For discussion see (R. H. Coase 1960).

idealized conditions of a perfectly competitive market, imposing these would involve not respecting people's actual choices (as well as actual histories about these). On the other hand, without such interventions people are not getting to make choices about all the unpriced resources used in transactions.

Externalities are market failures from the point of view of competitive market theory, but my interest here is in the idea that they further undermine the possibility of a pure 'non-interference' conception of property ownership, exchange and use because this conception of property depends on there being clear and determinate property rights. In fact, however, everything we do makes use of and affects resources in which we do not have property rights, such as clean air. Where people's use of their property and their transactions with others are using common resources they have not paid for and do not have property rights in, then the rightfulness of these interactions cannot be argued to follow from property rights alone.

On the one hand, it seems that externalities challenge Ripstein's Kantian distinction between the idea of wronging someone by interfering with their property rights and merely altering the world in which they exist, suggesting it may be based on thinking property rights are more specific than they are. However, on the other hand, we clearly need this distinction to be able to act in the world without wronging others. We need a principled way of distinguishing between cases which are merely bad luck for the person who has their interest set back (my buying the last bottle of milk in the local shop) and those which concern justice and other people's rights (destroying clean air, or buying all the global supplies of a crucial vaccine). Is pulling down my shed simply a use of my property that I am entitled to, or is the change in the shade you are using to grow your mushrooms a negative spillover which must be theorized from the point of view of justice? What if my use of my property is polluting your air or stream, or destroying your view, or if the wealth created by country A's industrialization affected common resources in a way that destabilizes the climate such that country B is going under water? Do property rights include an entitlement to abandon a thing – throwing it 'away' into the commons? The ubiquity with which our use of our property uses and affects resources in which we do not have prior clear property rights suggests that there is cannot be a 'natural' pre-political answer to this question based on pre-existing property rights. Rather, these determinations are made by policy and law.

Ripstein and Varden both argue that the state is entitled and obliged to govern markets and resources with respect to systemic concerns (such as preserving resources and maintaining the stability of the financial system).<sup>48</sup> I am arguing that prior to this, there is indeterminacy even in the boundaries of what we consider our property (or in the uses of our property), since we cannot use, create, buy and sell our property without using and affecting resources in which we do not have property rights, and which, in Kant's account, can only be theorized as possessed in

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<sup>48</sup> (Arthur Ripstein 2009; 2017; Varden 2010).

common.<sup>49</sup> We have seen that Kant holds that one of the functions of public law is to resolve indeterminacies in property rights. Among the indeterminacies he mentions are property boundaries and game running between different people's lands.<sup>50</sup> While he is of course not concerned with the contemporary crisis of climate destabilization, the structure of his position implies that among the indeterminacies public law can resolve concern our rights with respect to our use of our property in relation to effects on common resources in which we do not have property rights.

On Kant's account, initial acquisition of property involves taking control of something (that is not owned by anyone else) and giving a signal to others that one has done this, with a view to having property rights determined by a just state (6: 258-268). Clearly, this is not something that it is even possible to do with respect to many resources, such as clean air or biodiversity and we do not have property rights in these things. Yet in property transactions we use them (and damage or destroy them) in ways that may benefit us (and people can generate profits and wealth from doing this) and since this is an unavoidable feature of our situation we need a way to make it consistent with right. Further, Kant holds that the state is obliged to preserve itself in perpetuity, which gives it a right and an obligation to govern the use of resources and the effects of transactions on common resources for their continued existence in the future, as well as in ways that preserve human health. Crucially, creating a framework of law which regulates the use and effects of property transactions on common resources cannot be regarded as interfering with property rights (since people don't have natural property rights in all the resource their property affects), cannot be regarded as interfering in markets (which don't exist without the state), cannot be regarded as anti-competitive (since competitive market theory would require all such resources to be paid for) and must be determined by considerations of justice and civic equality, which include protecting public health as well as common resources.

As mentioned at the beginning, Hausman argues that the ubiquity of externalities (what he calls 'spillovers') means that we need to analyse them from the perspective of justice, not just 'market failure'. However, he argues that we can't solve the problem of spillovers with a rights based approach, because there would be too many rights involved, and lots of them seem trivial, a claim made plausible by Heath's description, quoted above, of complete property rights. Hausman takes it to follow that the solution is consequentialism. One problem with this is that it is not a political solution in the sense that it does not explain how we justify the imposition of a chosen set of consequences.<sup>51</sup> However, a solution based on *property* rights is not the only possible rights-based solutions; an alternative, I suggest, is embedding markets

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<sup>49</sup> Kant holds that we must think of the earth as having been originally possessed in common (6: 258, 6: 267); this possession, in my view, should not be understood as ownership, as it is not a property relation. Property, in Kant's account, is not mere possession.

<sup>50</sup> Debates about what his account should say about redistributive taxation and poverty are also concerned with property boundaries, in determining how much each is entitled to.

<sup>51</sup> In contrast, an appeal of Kant's political philosophy is that by making equal freedom and civic equality the justificatory ground of state coercion, law does not coercively impose a conception of the good that people have not chosen, but rather simply defends and enables everyone's equal freedom.

(and property rights) in conditions of civic equality. In my view, this is plausibly a Kantian solution, and Kant's notion of the provisionality of property rights is helpful.

The idea that markets, as public institutions, need to be reconciled with equal freedom, is a very different starting point to taking each person's right to do what they want with their determinate property bundles as primary. If equal freedom requires protecting public spaces and protecting a private sphere it requires limits to where and how people can buy and sell things (so you can neither set up your business in the public park or street, nor conduct your noisy business out of the flat above me late at night). Having a market as a free public sphere where citizens meet on conditions of civic equality requires law that prevents discrimination against members of groups you don't approve of (like bakers who don't want to make cakes for same-sex weddings), not as a (justified) limitation of freedom, but rather as part of the condition of a *public* market. A free public market in which people meet in conditions of civic equality is also enabled by interventions to create access to differently-abled citizens. Protection of people's autonomy in relations in which consent can be compromised can require licensing regulation. Labour law that prevents people from accepting dangerous working conditions protects their capacity to choose, as does poverty relief. These laws and interventions protect people's civic equality and their freedom. Crucially, on this account they do not need justification as interventions in people's free transaction choices, because there is no prior free market. In addition, I have argued that managing common resources to preserve them in perpetuity is something the state is both entitled and obliged to do, and that the framework this creates within which people can produce and exchange goods is not a limitation on prior property rights.

## 5

### Conclusion

There are of course ways to think about economies which don't start with private property and individual freedom, and I have not argued against these. Rather, my aim has been to explore what follows from starting with individual freedom and personal private property. There are numerous critiques of competitive markets as not able to create public goods, distorting preferences, eroding the civic sphere and other human values through commodification, potentially exploitative, potentially noxious in ways incompatible with meaningful free choice, and as potentially distorting of democratic politics.<sup>52</sup> It might be thought that the alternative is intervening and limiting property ownership and exchange in order to promote other goods. I have argued that prior to such debates, there is a question about what conception of markets really follows from individual freedom. Kant's political philosophy starts with each human's innate right to freedom, takes this to require rights to private property, and does not take the state to be justified in intervening with people's choices about what to do with their things in the name of promoting some good (which people may not have chosen). However, this does not entail assuming determinate private property bundles with which self-sufficient individuals are entitled to do as they please as a starting framework which constrains the rest of the

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<sup>52</sup> See, for example, (Anderson 1990; Michael Sandel 2012; Satz 2010).

account. Rather, he takes our need for property rights to create a problem – the need to reconcile our rights with others, and therefore the need for justice - which leads all the way to international justice and cosmopolitan justice. We do not have determinate, conclusive and rightful property ownership without this (though it is still important that provisional right has normative force).

While it might be thought that the right to do what you want with your things entails the right to choose how, where and to whom to buy and sell them, we have seen that a pure non-interference conception of property exchange has no necessary relation to people being in conditions of free and equal choosing, underestimates the extent to which markets are public institutions which require the state, and wrongly assumes determinacy with respect to our entitlement to use, affect and damage common resources in which we do not have property rights. Kantian states have grounds for creating public institutions within which people can make private choices about buying and selling goods but voluntary market exchange of property is something that depends on and is subordinate to the framework of civic equality, rather than something fundamental which drives what civic equality is and constrains it.<sup>53</sup>

On this account, free public markets require the state<sup>54</sup> and can be understood as a common good.<sup>55</sup> In order to respect everyone's freedom we need just initial acquisition of property and we need our account of justice in initial acquisition to be just to people who come into existence after most land has become owned (two considerations this paper has not discussed). In creating property law that gives people the assurance needed to use property, including in market transactions, we exclude people who have nothing, which is why Ripstein, Varden and others argue that the state must defend people against absolute poverty. Further, as I have argued, everything we do with our things uses and affects resources with respect to which we don't have property rights; in order for this to be done justly, we need a system of laws which governs this, including managing resources for their productive and safe use in perpetuity. Free markets in a framework of civic equality would be neither non-interfered with markets (which rely on a fantasy of determinate property right and do not result in conditions in which citizens meet as equals), nor the ideal competitive markets of economic theory (which do not exist), nor actual modern markets, which are not embedded in civic equality, are not based on just initial acquisition, do not enable all participants to meet in conditions of equality, and allow those who can to extract profit from harming and using up common resources without paying for this and which will destroy them for future use.

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<sup>53</sup> Once we are intervening to try to co-ordinate the market so that it realizes some end (market efficiency), we no longer have either a freedom based or a competition based objection to interventions, and it seems we can simply ask what ends we want to realize. Regulation that promotes competitiveness is promoting one good amongst others; to the extent that competitiveness enhances freedom such regulation enhances freedom.

<sup>54</sup> As Garrath Williams put it to me, in conversation, we don't get free markets for free.

<sup>55</sup> See Rose, who argues that they are a part of the commons (Rose 1994).