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## Article

# Rights for Sale

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### INTRODUCTION

In the 2000 presidential election numerous websites encouraged Nader voters in swing states like Michigan, Wisconsin, Oregon, and Pennsylvania to swap their votes with Al Gore supporters in Republican-dominated states like Texas.<sup>1</sup> The idea behind these initiatives was to enhance Gore's chances of winning the Democratic-pledged electors in the swing states, while preserving Nader's share of the national popular vote for funding purposes.<sup>2</sup> Should the legal system have allowed Ralph Nader supporters residing in swing states to swap their voting rights with Gore supporters residing in Republican-dominated states? What about the sale of voting rights for money? Or, to take a broader perspective, should the legal system allow the exchange or sale of other rights, such as tax benefits? Assume, for example, a taxpayer considering a contribution of \$1000 to her favorite charity, who has no taxable income by which to enjoy the tax benefit. Should she be able to sell her deduction to another taxpayer so that she can enjoy at least part of the incentive provided by the Government?

At first glance, markets for governmentally provided benefits—whether voting rights or tax attributes—may seem prob-

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1. See Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. L.A. L. REV. 1297, 1302–06 (2001) (discussing vote swapping websites during the 2000 presidential election).

2. *Id.* at 1303.

lematic. Yet for public entitlements such as pollution quotas, trade between polluters who do not fully utilize their quotas and those who wish to utilize the surplus seems natural and is actually encouraged.<sup>3</sup> Can the differences in treatment be normatively justified? Does it make sense to overwhelmingly reject a market in tax benefits or the sale of votes for money, while allowing trade amongst potential polluters? In an attempt to resolve these puzzles this Article reexamines existing conventions regarding the alienability of these and other public entitlements.

The rights that individuals enjoy in relation to the government are of assorted types, and include: voting rights, the right to trial, procedural safeguards in criminal trial (such as the right against self-incrimination), the right to public education, the right to pollute, as well as various subsidies and tax attributes.<sup>4</sup> For simplicity, we term these rights “Public Entitlements” (PEs). These rights are usually considered from the vertical, individual-government perspective.<sup>5</sup> This paper, in contrast, moves the spotlight to the currently neglected horizontal, individual-individual viewpoint, focusing on the alienability of the rights. The new perspective of this paper—namely combining the discussion of alienability and public entitlements—offers new insights with regard to each of these concepts.

First, expanding the horizons of the alienability discussion beyond its traditional arenas of taboo markets (such as organs,

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3. See Andrew M. Wolman, *Effluent Trading in the United States and Australia*, 8 GREAT PLAINS NAT. RESOURCES J. 1, 7–9 (2003) (providing a brief history of pollution trading).

4. See Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1410–11 (2009); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936–37 (1985). Of course, characterizing these attributes as benefits rather than costs or as rights versus duties depends upon one’s baseline. See Rose-Ackerman, *supra*, for a further discussion of the baseline issue and for a distinction between alienable and inalienable rights and duties. The baseline question, and its derivative right/duty classification, is immaterial to our current project which focuses on the alienability-inalienability issue. Obviously there is interdependency between the alienability and the baseline issues: whether or not a certain Public Entitlement is alienable may affect preferences regarding it and, as a result, may impact its initial allocation as well as the political process leading to such allocation. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347.

5. See, e.g., Rose-Ackerman, *supra* note 4, at 931 n.2 (identifying works that discuss the traditional view of property rights and the law).

babies and sexuality)<sup>6</sup> to the unexplored terrain of PEs accentuates the complexity of alienability. Unlike the above mentioned classic cases—whose alienability entails concerns of a similar nature, typically translating into a binary “on/off” approach—the PE arena reveals the richness of the normative considerations underlying alienability, ranging from efficiency, to distribution, commodification, autonomy, and democratic participation.<sup>7</sup> This complexity of normative underpinnings allows the dismantling of the dichotomy between alienable and inalienable resources and the conversion of this conceptually deficient binarism into an array of legal mechanisms. We argue that the binary choice between alienability and inalienability is over-simplistic, if not outright arbitrary.<sup>8</sup> Full-blown alienability and complete inalienability are actually two endpoints on a continuum of legal techniques that serve a variety of normative goals. Accordingly, we present a detailed framework of such intermediate alienability techniques—ranging from total inalienability, to gifts, to non-monetary exchanges, to full marketability. One object of our Article is thus to expose the modularity of alienability and facilitate creative ways for its use in promoting a wide array of normative goals.

Second, viewing public entitlements through the currently neglected horizontal prism of alienability enriches our understanding of PEs and enhances the appreciation of their capacity as public policy instruments. In arguing that there is nothing inherently inalienable about public entitlements, and adding the alienability layer to the concept of PEs, we expose a malleable feature of these entitlements currently viewed, unreflec-

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6. See Fennell, *supra* note 4, at 1405 (providing a recent survey of the literature on these topics).

7. See Rose-Ackerman, *supra* note 4, at 937–41 (discussing a range of factors to consider in analyzing restrictions on alienability).

8. In so doing, we expand on Rose-Ackerman’s “modified alienability” conceptualization, which recognized instances of partial inalienability where “sales are forbidden, but gifts are permitted and may even be encouraged by state policy.” Rose-Ackerman, *supra* note 4, at 935. We also build on the suggestion that alienability is an adjustable dimension of property ownership as opposed to a “binary switch to be turned on or off . . .” Fennell, *supra* note 4, at 1408. Fennell goes on to demonstrate this non-binarism with a host of examples ranging from limits on the occurrence of a transfer (through taxes, procedural requirements, and other means), to restrictions on the transfer price (such as price floors or ceilings), and triggering conditions for a shift of control or penalties. *Id.* at 1443–51.

tively, as unitary and rigid.<sup>9</sup> A second object of the Article is thus to engage in fragmentation of public entitlements.

We apply the insights regarding the modularity of alienability and PEs using the counter-intuitive example of tax benefits for charitable contributions. Tax attributes, in general, and tax benefits for charitable contributions, in particular, are currently allocated on a taxpayer basis.<sup>10</sup> They are considered inherently personal and inalienable: “the folk definition of ‘taxes’ that governs our fiscal language apparently holds that favorable tax attributes, such as credits and deductions, cannot properly be traded . . . .”<sup>11</sup> This Article argues that such restrictions on the alienability of tax benefits are neither necessary nor desirable. Rather, there could be considerable benefits to constituting a market in tax attributes for charitable contributions in terms of promoting the social goals underlying them.

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9. Conventional wisdom views public entitlements as inalienable, or at least considerably limited in alienability. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 745 (1964) (“In addition to being revocable without compensation, most forms of largess are subject to considerable limitations on their use. Social Security cannot be sold or transferred. A television license can be transferred only with FCC permission.”). According to Susan Rose-Ackerman:

Following Charles Reich, many commentators view government transfer programs as creating a kind of ‘new property.’ If so, the new property rights are often conditionally coercive. In general, people cannot sell or give away their benefits to others, and for some benefits, such as public housing, people forfeit their claim to a service by not using it. Even the right to receive straight cash grants through a welfare program with no restrictions on use is not a pure property right. An eligible person can give the payments she receives to anyone but cannot transfer the right to receive these payments.

Rose-Ackerman, *supra* note 4, at 959 (quoting Reich, *supra*, at 733). As we will show, concerns over full-fledged alienability can be addressed through targeted restrictions on different dimensions of alienability without resorting to complete inalienability—leading to a range of formulations of PEs starting with completely inalienable entitlements, through entitlements that can only be transferred via gifts or trades in kind, and ending with fully marketable entitlements.

10. *See* Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006) (“Currently the vast majority of tax incentives operate through deductions or exclusions, which link the size of the tax preference to a household’s marginal tax bracket.”).

11. DANIEL N. SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT’S MARCH TOWARD BANKRUPTCY 17 (2007). Shaviro goes on to describe and critique this assumption regarding the inalienability of tax benefits. *See id.* at 17–19. In addition to denying the alienability of tax benefits, policy makers constantly seek ways to curtail tax planning and tax sheltering. *See* Leo Katz, *In Defense of Tax Shelters*, 26 VA. TAX REV. 799, 801–09 (2007) (arguing that tax planning and tax sheltering leads to inefficiencies and deadweight loss).

In order to substantiate our claims, we start out by unveiling the normative considerations at the base of the question of alienability. We focus on the classic normative building blocks of the alienability debate—efficiency, distribution, autonomy, personhood, and democratic participation—and use PE examples to illustrate how these considerations operate. We then use these normative considerations as the framework for constructing intermediate alienability techniques. Namely, we demonstrate how the normative equilibria formed by the interaction between efficiency, distribution, autonomy, personhood, and participation translate into specific alienability mechanisms that run along two axes: The Potential Transferees Axis and The Mode of Transfer Axis.<sup>12</sup> The Potential Transferees Axis distinguishes between alienability regimes in which the resource can be transferred to a restricted set of recipients and alienability regimes in which the resource can be transferred to an unrestricted group of transferees. This axis, we claim, reflects the classic tension between distribution and efficiency. The Mode of Transfer Axis distinguishes between modes of alienability based upon the nature of the transaction. As will be demonstrated, this axis differentiates between sales, barter, gifts, and waiver of the resource—reflecting different forms and relative weights of autonomy, personhood, and participation-related considerations. The intersection of these two axes generates seven techniques of alienability (along the alienability spectrum) and matches them with specific normative equilibria. We conclude with the application of our theory to trade in tax benefits for charitable contributions. The application of our model will show how specific alienability regimes for the provision of tax benefits in the context of charitable contributions lead to more efficient allocation of those benefits, reinforce distributive goals, and facilitate taxpayer autonomy, personhood, and participation.

This Article will proceed as follows: Part I surveys the normative considerations underlying the question of alienability by using examples from the PE arena. Part II uses these normative considerations in order to construct intermediate alienability techniques: spelling out and exemplifying our taxonomy of alienability mechanisms. Part III concludes with the application of our theory to trade in tax benefits for charitable contributions.

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12. See *infra* Figure 1.

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I. THE NORMATIVE BUILDING BLOCKS OF  
ALIENABILITY

Individuals are entitled to a multitude of rights vis-à-vis the government. These can include voting rights, the right to trial, the right against self-incrimination, the right to public education, the right to pollute, as well as various subsidies and tax attributes.<sup>13</sup> These rights differ from one another in several respects: their substantive contents, their normative goals, the constitutional protections provided to them, and how they are allocated and ultimately distributed.<sup>14</sup> Despite these differences, however, all share the common characteristic of governing the individual's interaction with the government.<sup>15</sup> It is this feature that attracts the attention of lawyers and dominates the discourse on public entitlements.<sup>16</sup> However, this vertical view of PEs, anchored in the interface between individual and government, overlooks their horizontal dimension, relating to the potential interaction among individuals. Understanding PEs as the object of interaction among individuals links up to a host of debates emanating from the realm of private law, currently not associated with these rights.<sup>17</sup> Our discussion will focus on one such horizontal aspect of public entitlements—their alienability. In this Part, we set out to connect PEs to the alienability debate and scrutinize them with the analytical tools provided by the extensive literature on alienability.

As mentioned at the outset of this Article, the issue of PE alienability can be illustrated by way of comparing the assignment of voting rights, on the one hand, and the allocation of pollution quotas, on the other. The right to vote is considered

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13. See Reich, *supra* note 9, at 734–37 (describing various entitlements from the government that can be considered in the context of property rights).

14. See *generally id.* (describing various forms of government entitlements and the relationship between individuals and the government with respect to those entitlements).

15. See *id.* at 756 (“The recipient of [government benefits], whether an organization or an individual, feels the government’s power.”).

16. See *generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (40th Anniversary ed. 2002) (exploring the interaction of competitive capitalism and the role of government in the market); Reich, *supra* note 9 (discussing the dominance of the government’s programs and how individuals interact with those programs).

17. Examples may include issues of unjust enrichment (which may arise when one individual appropriates another’s PE), torts (when one individual impairs another’s ability to enjoy a PE, when one is harmed by another’s use of a PE use by another, or when one induces the government to breach a PE), and contracts.

an inalienable right.<sup>18</sup> This inalienability is grounded on a social pre-commitment to a certain distribution of voting rights among the public (one vote per person).<sup>19</sup> Pollution quotas, by contrast, are designed as tradable entitlements.<sup>20</sup> The emphasis is placed on the aggregate consumption of these benefits, as opposed to their ultimate distribution among various individuals, thus allowing for the emergence of a market for pollution quotas (and for a quota per dollar model).<sup>21</sup> In these respects, voting rights and pollution quotas represent two antithetical paradigms of PE alienability regimes. Despite their disparate outcomes, however, it is our contention that they are premised on similar normative infrastructures. Our discussion will now proceed to expose these shared normative underpinnings—the classic considerations of efficiency, distribution, autonomy, personhood, and democratic participation—that emerge as the building blocks of the alienability debate. Our application of these normative considerations to the context of Public Entitlements will lead to a nuanced landscape of PE alienability, which, in turn, will be the first step toward our construction—in the next part—of alienability as a non-binary choice.

#### A. EFFICIENCY

Under conditions of perfect competition and zero transaction costs, the “market produces and distributes [commodities] with unsurpassed efficiency and in unsurpassed abundance.”<sup>22</sup> Where no market failures exist, market forces ensure that resources end up in the hands of the highest value users.<sup>23</sup> In the absence of a market, those to whom resources are allocated may initially derive a suboptimal value from their consumption. Put differently, marketability enhances the value of the resource for the initial holder because resources that can be

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18. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 (2000) (describing the general illegality of vote buying in the United States).

19. See *id.* at 1328 (“Modern society views vote buying with opprobrium.”).

20. See Charles W. Howe, *Tradable Discharge Permits: Functioning, Historical Applications, and International Potential*, 4 COLO. J. INT’L ENVTL. L. & POL’Y 370, 376–79 (1993) (discussing various instances of tradable pollution permits in the United States).

21. See *id.* at 371–76 (discussing the functioning of a pollution quota system).

22. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 167 (1993).

23. See Michael Abramowicz, *The Law and Markets Movement*, 49 AM. U. L. REV. 327, 387 (1999) (“[M]arket mechanisms tend to allocate goods to their highest valuing users.”).

sold are typically worth more than parallel resources that cannot be sold.<sup>24</sup> Marketability is also an efficient mechanism for conveying information as to the potential market value of a given resource.<sup>25</sup> The market gives clear one-dimensional indications as to the value of the resource, precluding the need to invest in highly specialized and complicated processes of information gathering.<sup>26</sup> Obviously, under conditions of market failure—e.g., imperfect information, strategic barriers, or externalities—regulating the market or partially restricting alienability could be necessary.<sup>27</sup> In fact, as noted by Susan Rose-Ackerman<sup>28</sup> and Richard Epstein,<sup>29</sup> inalienability can sometimes serve as a cost-effective alternative to restrictions on acquisition or use. As demonstrated by Lee Ann Fennell, restrictions on alienability can also provide ex-ante benefits in mitigating hold outs, commons and anti-commons tragedies, as well as information asymmetries.<sup>30</sup>

These market failures notwithstanding, the abovementioned efficiency considerations can be extended to publicly provided entitlements as well. In fact, the existing practice of tradable pollution quotas is reflective of such infiltration of market logic to the PE realm. Thus, under conditions of perfect

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24. Easterbrook, *supra* note 4 (“A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action.”); *see also* IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 45–47 (2005) (defining and discussing option value).

25. Sanford J. Grossman & Joseph E. Stiglitz, *Information and Competitive Price Systems*, 66 *AM. ECON. REV.* 246, 246 (1976) (“[T]he price system is conventionally praised as an efficient way of transmitting the information required to arrive at a Pareto optimal allocation of resources . . .”).

26. *See id.* (“[T]he price system conveys all the information from the informed individuals to the uninformed.”).

27. *See* Rose-Ackerman, *supra* note 4, at 938–40.

28. *Id.* at 937–41.

29. Richard A. Epstein, *Why Restrain Alienation?*, 85 *COLUM. L. REV.* 970, 971–78 (1985).

30. *See generally* Fennell, *supra* note 4. Fennell emphasizes three efficiency-based arguments supporting inalienability. First, inalienability rules might reduce the incidence of holdout or hold-up problems: rather than dealing with the owners’ veto power through liability rules, inalienability can encourage ex ante the self-selection of owners who are likely to be relatively high-valuing users over the long run. *Id.* at 1438–42. Second, inalienability can serve as an alternative means for addressing strategic dilemmas, such as commons and anti-commons tragedies. *Id.* Third, carefully designed inalienability rules can more efficiently overcome information asymmetries through the self-selection process, prompting high-valuing users to identify themselves. *Id.* at 1453–55.



competition, markets for public entitlements can improve their allocation, as well as enhance their value to the initial holder. The “price tagging” of public entitlements would improve the ability of citizens to estimate their value, as well as constitute a good signaling mechanism for the social planner to better align the level of supply of these entitlements with the social optimum.

## B. DISTRIBUTION

Distribution considerations are often associated with inalienability. In transactions that consistently disadvantage certain segments of the population, distributive considerations may justify the restriction of alienability as a means to prevent regressivity.<sup>31</sup> Moreover, when money becomes a hegemonic type of power and encroaches on other forms of valuation, restrictions on alienability may preserve the acoustic separation among the various spheres of social capital.<sup>32</sup> Put differently, allowing the conversion of resources and rights into money enables the market to infiltrate various arenas of social and political influence. This convergence of formerly incommensurable arenas could diminish the power of the underprivileged in the non-market arenas of social and political influence, while, at the same time, giving the affluent the ability to acquire superior capacities in those same realms.<sup>33</sup> Inalienability could be required, therefore, to preserve the separate currencies and to prevent collusive concentration of powers between and across spheres.<sup>34</sup> Yet distributive justice considerations do not necessarily dictate the complete preclusion of alienability. In fact, selective use of the alienability device can promote redistribution. In light of the fact that marketability enhances the value of resources, allowing for only certain underprivileged segments of the population to become market players could have a progres-

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31. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1114 (1972) (“Whether an entitlement may be sold or not often affects directly who is richer and who is poorer.”).

32. See Rose-Ackerman, *supra* note 4, at 932–33.

33. The distributive considerations we are referring to are obviously not limited to income distribution, but, rather, may include distribution on the basis of other characteristics. See, e.g., AMARTYA SEN, *INEQUALITY REEXAMINED* 150 (1992); Calabresi & Melamed, *supra* note 31, at 1098.

34. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1480 (1989) (“A different sort of argument for inalienability . . . would focus on increasing the power of one group in the trade in relation to another.”).

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sive effect. Think, for example, of body organs. While allowing for the free market sale of organs may have adverse distributive effects in that only the wealthy would be able to purchase them, restricting the sale of body organs to be purchased only by a central authority—for subsequent allocation on a need-only basis (rather than to the highest bidder)—may provide sellers with hard currency (paid by the central authority) without such adverse distributive results. Such a seller-only market mechanism would bypass the double bind entailed in the complete banning of alienability, without privileging the affluent in access to organs.

This set of claims applies equally to the sphere of public entitlements. Restricting the alienability of PEs—such as voting rights—could be justified to counter the concern of the concentration of social influence in the hands of privileged groups.<sup>35</sup> At the same time, PE alienability has the potential to circumvent regressive state policies: like other resources, PEs are oftentimes allocated regressively, on the basis of certain demographic and/or social criteria.<sup>36</sup> Making these benefits alienable would enable individuals who were overlooked by the government in the initial allocation to acquire the benefits irrespective of demographic characteristics. For instance, when the right to publicly provided fertility treatments is allocated to married couples only, making this right alienable may allow for gay couples or singles to enjoy the subsidized treatments, thereby reducing adverse distributional distortions.

### C. AUTONOMY

Alienability can also be justified on the basis of autonomy considerations. Although the notion of autonomy takes many forms, it is generally associated with the granting of effective choices to individuals.<sup>37</sup> Alienability and the market enable the fragmentation of resources and allow for conversion of one type

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35. See Rose-Ackerman, *supra* note 4, at 963.

36. For an example of a PE allocated in this regressive manner, see Sarah Wildman, *Not Married? Your Insurance Might Not Cover Fertility Treatments*, SLATE (Mar. 17, 2010, 9:32 AM), <http://www.slate.com/id/2248051/> (discussing the allocation of certain health insurance rights based on marital status).

37. For further discussion of the definition of autonomy, see Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 655–59 (2004).

of resource into another.<sup>38</sup> In this way, they enhance the spectrum of choice for individuals. The one-dimensional structure of the information regarding the value of a given resource, when translated into market terms, could also improve choice-making capacity by simplifying it. Moreover, alienability and the market allow individuals to discard their social identities, thereby facilitating exit and increasing social mobility.<sup>39</sup> It is our contention that similar autonomy-based considerations may support PE alienability. Expanding the spectrum of means by which a public entitlement can be exercised—for instance, by allowing for its partial or full sale on the market—could expand the spectrum of choices available to the entitlement holder. The current binary structure of all-or-nothing choice with respect to exercising PEs hinders more creative utilization of these entitlements. In addition, a market for PEs would increase exit capability, which, in turn, facilitates autonomy.

Yet, alienability could also compromise autonomy in a number of ways if, for example, what seems like free exchange is missing a truly consensual basis. Sellers may choose to sell their resources at sub-market prices due to partial or asymmetric information between sellers and buyers, seller cartelization, or underassessment of risk and long-term interests.<sup>40</sup> In such settings, alienability restrictions can protect sellers from the detrimental outcomes of their own choices, thus substantively protecting autonomy.<sup>41</sup> Moreover, even when the entitlement is traded at market price, some may claim that the transaction compromises autonomy in those instances where market price does not fully capture considered judgment of the entitlement's value.<sup>42</sup> There may be room to claim that the po-

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38. See David E. Chapman, *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 401 (1983) (arguing that many people who would not donate their organs would sell them instead).

39. See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFFALO L. REV. 1191, 1266 (2007) (book review) (describing the market as a space outside politics).

40. See Rose-Ackerman, *supra* note 4, at 939 (identifying the asymmetries between buyers and sellers). *But see* Fennell, *supra* note 4, at 1423–27 (discussing inalienability as a mechanism for mitigating collective action problems).

41. For further discussion in the context of unconstitutional conditions, see Sullivan, *supra* note 34 (“Making . . . rights inalienable because citizens may undervalue the worth of those rights to themselves would be classic paternalism—overruling individuals’ choices for their own good. Individuals’ choices may diverge from their ‘best’ interests for many reasons: for example, because they underassess risk or undervalue their long-term interests.”).

42. Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1918–19 (1987) (“Although a house has market value and we can express our

tential for incompatibility between market price and the social judgment of value is greater with respect to those resources likely to be handed out as government entitlements.<sup>43</sup> Finally, in certain contexts, a wider range of options may neither result in more effective choice, nor in greater autonomy. Too great a variety of options may obstruct one's ability to rationally rank the different alternatives, due to increased information costs as well as behavioral effects.<sup>44</sup> This may be exacerbated in the case of less sophisticated market players, who are susceptible to manipulation by more sophisticated counterparts.<sup>45</sup> In addition to choice-related considerations, autonomy justifications for inalienability also rest on the tension existing between free exit and communal life. The autonomy-enhancing power of certain communities alongside the benefits of community life derive from barriers to exit placed upon community members. It is quite plausible that it is those communities that are easiest to discard that are of the least value to their members and vice versa, with the family unit a most acute example.<sup>46</sup> This line of autonomy-based objections to alienability applies to the PE realm no less. Such a problematic exit-community link is well illustrated by the PE case of voting rights, in which selling one's vote means discarding her voice in the civic community. Accordingly, autonomy considerations can support restricting such PE alienability.<sup>47</sup>

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investment in terms of dollars, there is a nonmonetizable, personal aspect to many people's relationships with their homes.").

43. Cf. ANDERSON, *supra* note 22, at 158–63 (“[P]roviding goods out of pooled resources obliterates any connection of specific donors with specific recipients.”).

44. See BARRY SCHWARTZ, *THE PARADOX OF CHOICE* 102–04, 215–16 (2004).

45. See Sullivan, *supra* note 34, at 1497–98 (“[One concern about redistribution] recognizes that background inequalities of wealth and resources necessarily determine one's bargaining position in relation to government, and that the poor may have nothing to trade but their liberties.”).

46. On the other hand, an effective choice to exit makes the decision to stay a member all the more meaningful. See SCHWARTZ, *supra* note 44, at 111–13 (discussing the relative ease or difficulty of discarding certain relationships).

47. The problematic exit-community link in the context of PEs is well illustrated by the case of voting rights, which refers to the civic community at large. By selling one's vote, a person discards her voice in the community, thereby de facto exiting it. See Karlan, *supra* note 39, at 1710.

## D. PERSONHOOD

Personhood is ordinarily associated with those attributes that are integral to human identity, including “one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, [and] character . . . .”<sup>48</sup> Commodifying these attributes, it has been claimed, can have a reductive effect due to the collapsing of distinguishable spheres of valuation into thin monetary terms.<sup>49</sup> The existence of multiple spheres of valuation is crucial to human identity,<sup>50</sup> while perceiving life through the unidimensional prism of market price could flatten and alter self-perception.<sup>51</sup> The literature on alienability and commodification focuses on such limits of the market in regulating human behavior and criticizes the application of market tools to all realms of life.<sup>52</sup>

In addition to the general commodification critique, it is useful, we hold, to distinguish between two possible manifestations of commodification, currently weaved together in the literature.<sup>53</sup> The two represent distinct bases for evaluating the desirability of alienability. The *first* relates to the monetization of attributes constitutive of identity, what we term “commodification of resources.”<sup>54</sup> The argument is that the sale of certain attributes, and perhaps even their subjection to mere market logic, alters them and transforms their inherent meaning. Paid-for companionship is different from going out with friends; paid-for care is unlike care by family or friends; selling a kidney is nothing like donating an organ; and sex for money is very different from sex for love. The *second* strand of the com-

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48. Radin, *supra* note 42, at 1906.

49. *See id.* at 1884.

50. For an argument that resources differ and should differ not only in how *much* we value them, but also in *how* we value them, see ANDERSON, *supra* note 22, at xiii.

51. *See id.* (“If different spheres of social life, such as the market, the family and the state, are structured by norms that express fundamentally different ways of valuing people and things, then there can be some ways we ought to value people and things that can’t be expressed through market norms.”).

52. *See, e.g.,* Radin, *supra* note 42; Rose-Ackerman, *supra* note 4.

53. *See* ANDERSON, *supra* note 22, at 217–18 (“When value is represented as the object of just one generic response, such as desire or pleasure, we don’t bother to consider whether the ways we produce and exchange goods adequately express the other ways we properly value them or one another.”).

54. *See id.* at 151 (“The goods proper to the personal sphere can only be realized through gift exchange. They cannot be procured by paying others to produce them, because the worth of these goods depends upon the motive people have in providing them.”).

modification critique focuses on the problems associated with commercialization of the interaction between individuals, a phenomenon we call “commodification of interactions.” Portraying interactions as market transactions and as “impersonal, egoistic, exclusive, want-regarding, and oriented to ‘exit’ rather than ‘voice’”<sup>55</sup> strips them of their possible altruistic nature. As Anderson argues, preserving arenas of non-market behavior and relationships based on care, altruism, and selflessness enriches society with essential collective goods.<sup>56</sup>

Though the issue of commodification was traditionally raised as an objection to the market,<sup>57</sup> there are also commodification effects and personhood-based arguments that support alienability.<sup>58</sup> For example, marketability may have a liberating effect in converting resources into monetary instruments. The currency of money is democratic, for market players can effectively discard social identities that restrict participation in other social institutions and arenas. In a world where money buys respect, markets can inculcate a sense of value for things that might be taken for granted when not paid-for.<sup>59</sup> For example, inalienability of housework may lead to under-appreciation of its economic value, whereas its monetization signifies that it has market value.<sup>60</sup> From this perspective, the commodification of housework is a virtue.

Similar to the other normative considerations, the commodification debate is applicable in the PE context. PEs, like any other resource, vary in how closely they are connected to, and

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55. *Id.* at 145.

56. *Id.*

57. *E.g.*, Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 *YALE J.L. & FEMINISM* 81, 84 (1997) (“The standard argument against commodification, often referred to as the ‘commodification critique,’ is that certain human attributes or certain resources should lie wholly or partially beyond exchange, because to allow exchange would be inconsistent with a vision of personhood or human flourishing.”).

58. *See, e.g.*, MARGARET JANE RADIN, *CONTESTED COMMODITIES* 5 (1996), (“[C]ommodification, in conceiving of the person as a commodity-trader, implies a certain view of human freedom . . . unrestricted choice about what goods to trade represents individual freedom, and the maximizing of individual gains from trade represents the individual’s ideal.”).

59. *Cf.* Silbaugh, *supra* note 57, at 90–95 (supporting use of economic terms to better recognize and understand the economic aspects of non-market activities).

60. *See id.*; Nancy C. Staudt, *Taxing Housework*, 84 *GEO. L.J.* 1571, 1618–19 (1996) (arguing that taxing housework “would ensure greater resources for women and would represent a congressional recognition of caretaking responsibilities as valuable and productive labor”).

constitutive of, one's identity—whether as a person, family member, community member, or citizen.<sup>61</sup> The divergences among the identity-forming components of the different PEs lead to varying results when translated into monetary terms: whereas, for some PEs, the anonymity and abandonment of social identity enabled by their marketability has a liberating effect, for others this dissociation entails significant costs in self-perception.<sup>62</sup>

#### E. DEMOCRATIC PARTICIPATION

Alienability can also be justified on considerations of democratic participation. When markets operate in a competitive manner, individual players cannot single-handedly control or alter the operation of the market forces.<sup>63</sup> In this respect, markets are mechanisms for the decentralization of power in society, serving as an alternative to the government decision-making process and constraining centralistic, otherwise absolute, state power.<sup>64</sup>

Alienability in the context of certain PEs could further augment the potential of the market to counterbalance government forces. PEs such as voting rights by their very nature approximate the decentralizing effect of the market forces.<sup>65</sup> Thus, the initial allocation of voting rights to all citizens in effect spreads decision-making power equally among them, providing each individual with a voice and marginal decision-making power. Transforming decision making into a marketable commodity and creating a market for voting rights would facilitate additional venues of democratic participation (along-

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61. Sullivan, *supra* note 34, at 1484–85 (explaining that some attributes are “so closely connected to the person that their alienation would injure personal identity” whereas other approaches “rank different constitutional rights as more or less central to personal identity”).

62. One example of such an identity-constituting PE is the right to vote, which plays a role in shaping a person's civic identity. The exchange of such rights for money “is a form of dismemberment. If citizens could purchase and sell [such] rights, they would have a different and inferior conception both of those . . . rights and of themselves.” *Id.* at 1485.

63. FRIEDMAN, *supra* note 16, at 14. *Cf.* Pamela S. Karlan, *Politics By Other Means*, 85 VA. L. REV. 1697, 1710–11 (1999) (“[T]he right to vote serves a powerful expressive function. This notion is captured in the idea of ‘civic inclusion’ and in the various ways the franchise is used to delineate who is and is not a full member of the community.”).

64. *Id.* at 15.

65. *Cf. id.* at 15–21 (arguing that the market functions to preserve political freedom).

side the existing option of exercising the right to vote), in the form of both passive and active participation.<sup>66</sup> Passive participation refers to mere waiving of the right, which can be a form of protest. Active participation through alienability may enrich the ways in which an initial right-holder can voice her preferences by channeling her right to vote to potential voters.<sup>67</sup> In addition, a market for PEs would establish an option for the purchase of double voice by individuals who have strong preferences for affecting the decision-making process.

However, it is exactly these considerations that may tilt the scales against making PEs alienable and, even more so, marketable. Though the trade of PEs for money has a preference-revealing and liberating potential, as discussed above, it may also distort the picture regarding participation preferences.<sup>68</sup> Indeed, those who purchase additional voice may not necessarily be those who value it most, but rather often merely those who can afford the purchase, and vice versa.<sup>69</sup> This could be the reason why democratic participation considerations tend to tip in favor of inalienability.<sup>70</sup>

#### F. FROM BUILDING BLOCKS TO RECONSTRUCTION

As we have shown, alienability is consistent with each of the five normative considerations discussed thus far—efficiency, distribution, autonomy, personhood, and democratic participation—albeit in a complex and multifaceted manner. On some levels, all of these considerations support alienability; yet on other levels, they each justify inalienability. Nonetheless, these internal tensions within each of the normative con-

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66. For an analogous use of this distinction in the context of citizenship see Shai Lavi, *Citizenship Revocation as Punishment: On the Modern Bond of Citizenship and its Criminal Breach*, 61 U TORONTO L.J. (forthcoming 2011) (manuscript at 7), available at <http://www.law.utoronto.ca/documents/conferences2/Constitutionalism09-Lavi.pdf>.

67. For further discussion of active and passive participation in the context of voting rights, see *infra* Part II.7.

68. See Hanoch Dagan, *Political Money*, 8 ELECTION L.J. 349, 350–51 (2009) (arguing that in the context of political monetary contributions, money can be a legitimate means for expressing preferences, though money reflects the intensity of preferences in a “particularly distorted way due to the effects of wealth”).

69. *Id.* at 356.

70. *Cf.* Sullivan, *supra* note 34, at 1483–84 (noting that the distributive effect of an inalienability rule depends on the power of the buying and selling classes and that “[t]he ‘purchase’ of rights may permit otherwise ephemeral majorities to aggrandize their power at the expense of entrenched minorities”).



siderations do not obscure the conclusion that, on balance, efficiency and autonomy tend to gravitate towards alienability whereas distribution, personhood, and democratic participation lean towards inalienability. These opposing orientations give rise to an external tension among the various considerations in the alienability context. Therefore, framing the choice between alienability and inalienability as a binary all-or-nothing decision turns what we have shown to be a nuanced and multifaceted matter into a crude and simplistic bottom line. There is nothing inherent or essential in the association of each of the specific normative considerations with either alienability or inalienability. Even if alienability poses challenges in terms of the various normative ends, this need not rule it out altogether. Indeed, restricting full alienability need not collapse into complete inalienability, or vice versa. The challenges posed by alienability are not uniform and, thus, the remedies called for need not be of a single nature, both in degree and kind. For example, the personhood problems associated with commodification of a resource as a result of full marketability are unlike those deriving from the distributive concerns associated with providing the wealthy with greater decision-making power. The same holds true with respect to the considerations supporting alienability. The efficiency benefits associated with placing a given resource in the hands of its most valuable user differ from the autonomy justifications and liberating effects of extra choice. We suggest, therefore, that tinkering with various aspects of alienability in a manner that accommodates these differential normative ends will assist in crafting creative alienability mechanisms better suited to the full range of normative equilibria. With this insight in mind, we lay out below a modular and more nuanced set of alienability mechanisms, better suited to a non-binary conception.

## II. A NON-BINARY CONCEPTION OF ALIENABILITY

We will now construct alienability mechanisms that accommodate our non-binary conception of the choice between alienability and inalienability, using the basic normative foundations of efficiency, distribution, autonomy, personhood, and democratic participation. As mentioned above, the central premise of our argument is that the choice between alienability and inalienability need not be a binary all-or-nothing decision. Integrating the five normative considerations into a nuanced model of alienability yields a spectrum of choices running along

two axes: the mode of transfer and the set of potential transferees.

The Mode of Transfer Axis breaks down into four distinct categories according to the gradual means by which the initial right holder can dispose of a PE: waiver (non-consumption); gift (transfer for no consideration); barter (transfer for non-monetary consideration); and sale (transfer for monetary consideration). The Potential Transferees Axis divides into two broad categories, each referring to the potential transferees to whom a PE can be transferred: unrestricted (transfer may be to any member of the public at large); and restricted (transfer may only be to a pre-selected group of potential recipients including the government). Pre-selected recipients can include members of communities distinct in their religious, ethnic, ideological, or cultural affiliation; groups that share unique traits, such as a socio-economic background, income level, gender, physical abilities, or sexual orientation; and the family unit. The intersection of these two axes creates seven<sup>71</sup> applicable categories of alienability mechanisms, as illustrated by the table below:

Figure 1:

		<i>Potential Transferees Axis</i>	
		<b>Restricted Transferees</b>	<b>Unrestricted Transferees</b>
<i>Mode of Transfer Axis</i>	<b>Waiver</b>	<b>Inalienability</b> A	Meaningless B
	<b>Gift</b>	<b>Restricted Gift</b> C	<b>Unrestricted Gift</b> D
	<b>Barter</b>	<b>Restricted Barter</b> E	<b>Unrestricted Barter</b> F
	<b>Sale</b>	<b>Restricted Sale</b> G	<b>Unrestricted Sale</b> (full alienability) H

71. Category B is irrelevant in the PE context because individuals can only waive those PEs to the government as opposed to the public at large.

Each box in the table (with the exception of Box B), represents what we refer to as a specific “mechanism of alienability” and reflects a particular composite of the normative considerations of efficiency, distribution, autonomy, and democratic participation. As a general rule of thumb, the Potential Transferees Axis correlates with the efficiency-distribution tradeoff, whereas the distinctions running along the Mode of Transfer Axis reflect autonomy-personhood-participation balances of various sorts. In other words, mechanisms that fall under the Restricted Transferees Column (Categories A, C, E, G) reflect a greater concern for distributive justice,<sup>72</sup> whereas the mechanisms in the parallel Unrestricted Transferees Column (Categories B, D, F, H) are more attuned to the promotion of efficiency.<sup>73</sup>

Similarly, the categories along the Mode of Transfer Axis are distinguishable on autonomy-<sup>74</sup> personhood-<sup>75</sup> and democratic participation-related<sup>76</sup> criteria. The Sale Row (Categories G,H) relates to instances where enabling the conversion of a PE into monetary terms would enhance autonomy and choice-making capacity. These categories target cases in which complete commodification of both the resource and the interaction between the parties facilitates autonomy. The Barter Row (Categories E,F) represents a different class of cases, in which there is opposition to setting a monetary price tag on the particular PE, but commercializing the party interaction is not considered problematic. In other words, by allowing quid-pro-quo exchanges while prohibiting monetary consideration, this set of mechanisms reflects a particular type of personhood and anti-commodification tendencies, countering the commodification of the resource rather than the commodification of the party interaction. The Gift Row (Categories C,D), which precludes all forms of consideration, reflects a more complete version of anti-commodification sentiments: for the PEs falling under this category, there is opposition to the very quid-pro-quo nature of the interaction between the parties, not only to the commodification of the resource. Still, the gift allows for the use of the particular PE also by individuals other than the initial right holder.

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72. See *supra* notes 31–36 and accompanying text.

73. See *supra* notes 22–30 and accompanying text.

74. See *supra* notes 37–47 and accompanying text.

75. See *supra* notes 48–62 and accompanying text.

76. See *supra* notes 63–70 and accompanying text.

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This brings us to the final row: Waiver (Category A). The waiver category relates to instances in which the only permitted use is self-consumption of the PE by the initial right holder, who, although she can choose to forfeit it, cannot transfer the entitlement to others (and therefore cannot exchange it or sell it). The divide between waiver and gift correlates with the distinction between the two forms of democratic participation discussed above: passive and active participation.<sup>77</sup> Waiver offers only passive participation in the decision-making process (in addition to self consumption of the PE), whereas the gift category represents cases in which the initial right holder can not only consume the right herself or waive it altogether, but also affect the channeling of the right to other potential users, thus actively participating in the decision-making process as to its ultimate distribution.

The rough typology that we sketch above is by no means exhaustive. We are surely not arguing that each of the normative considerations should be restricted to its assigned column or row in the above table. Their scope is obviously broader than that. For example, preferring a gift mechanism to sale may surely emanate from distributive justice considerations and not solely from personhood rationales.<sup>78</sup> Likewise, allowing for transactions with unrestricted transferees rather than limiting the range of recipients may stem from autonomy rationales and not only efficiency considerations. Our admittedly stylized presentation is meant only to provide a preliminary demonstration of the center of gravitation with respect to each normative mix. We will now elaborate on the normative equilibrium in each of the categories using illustrative examples—some of which refer to existing practices while others are yet to be implemented. A caveat is called for, however: the examples we provide are preliminary in nature. They are intended to serve as an initial context for each of the categories rather than to provide a comprehensive analysis or a normative prescription. As befitting the general thrust of the paper, the examples we chose as illustrations for each of the categories below all belong to the PE domain. Obviously, the categories of alienability we

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77. See *supra* note 66 and accompanying text.

78. See W. Stephen Westermann, A Theory of Autonomy Entitlements: One View of the Cathedral Nave Dedicated to Constitutional Rights and Other Individual Liberties 4 n.8 (Apr. 26, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=977964> (arguing that “one possible motivation for permitting gifts but not sales of human organs is to avoid the regressive result of disproportionate sales by citizens who are poor”).

construct can also be applied outside of the realm of public entitlements; therefore, similar archetypical examples for each of the categories can be found, but this discussion is beyond the scope of our paper.

#### A. UNRESTRICTED SALE: POLLUTION QUOTAS

The alienability mechanism represented by Category H is the unrestricted sale of Public Entitlements. Pollution quotas offer a paradigmatic example of this category.<sup>79</sup> Here, the normative considerations gravitate towards efficiency. Under conditions of perfect competition and zero transaction costs, tradable pollution quotas end up in the hands of the highest value users, regardless of their initial allocation.<sup>80</sup> Initial holders of pollution rights who yield sub-optimal value from their direct consumption are incentivized to sell their quotas to higher value users.<sup>81</sup> In addition, implementing a tradable quotas regime creates incentives for the initial right-holders to invest additional resources in pollution minimization research and development, because manufacturers that succeed in such innovations will enjoy a competitive advantage and enhance their trading possibilities.<sup>82</sup> A final advantage of pollution quota trading is that it holds aggregate pollution levels steady at the desired social level.<sup>83</sup>

Restricting such trade by limiting the potential recipients of the pollution quotas could undermine these positive effects.<sup>84</sup>

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79. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341–51 (1985) (discussing a system of tradable pollution rights); Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 10–11, 21–24 (discussing strategies for preserving environmental resources).

80. Wolman, *supra* note 3, at 3.

81. Abramowicz, *supra* note 23, at 353–54 (“[P]ollution rights will tend to flow to those for whom pollution abatement is most expensive . . .”).

82. James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 374 (1989) (“Because costs for controlling emissions vary among plants, some sources will install pollution control devices, reduce their emissions, and sell their excess emissions use rights . . . Over time, polluting becomes more expensive, and polluters have a greater incentive to reduce their emissions.”).

83. Howe, *supra* note 20, at 373.

84. See, e.g., Tripp & Dudek, *supra* note 82, at 387 (citing a Wisconsin water pollution allocation program’s failure as due, at least in part, to the fact that the rights are not freely tradable amongst polluters, “which impairs the value of the rights”). *But see* Ackerman & Stewart, *supra* note 79, at 1350 (asserting that the market system might permit “the creation of relatively high

When achieving efficient results as described is the dominant social goal, the unrestricted transferees option would be the superior choice.<sup>85</sup> Moreover, the sale of pollution quotas does not seem to entail any significant autonomy-related or personhood concerns: pollution quotas are not intimately connected to one's personhood, involve no interpersonal relations, and are not constitutive of identity.<sup>86</sup> Nor does the sale of pollution quotas give rise to any anti-commodification objections, either with regard to the object of trade (pollution quotas) or with respect to the actual commercialization of the interaction between the parties.<sup>87</sup> Hence, the choice of the sale rubric on the Mode of Transfer Axis emerges as optimal.

#### B. RESTRICTED SALE: POLLUTION QUOTAS REFINED

The main opposition to the notion of tradable pollution quotas emanates from environmental justice advocates, who are concerned about the distributive implications of such a trade regime.<sup>88</sup> The central argument they raise is that the classic economic analysis of tradable pollution quotas presupposes an

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concentrations of particular pollutants in small areas within the larger pollution control region" and subsequent toleration of "hot spots").

85. See Abramowicz, *supra* note 23, at 354 (arguing that trading prices indicate the cost of additional pollution reduction, allowing companies to change their strategy, method, or price as the market evolves, and stating that "[t]his dynamic adjustment could not be achieved if the initial pollution entitlements were fixed"). *But see* Wolman, *supra* note 3, at 3 ("Some economists have pointed out that in the real world marketable permit systems could experience domination from a single firm or small handful of firms or could fail to perform well . . .").

86. See, e.g., Yuval Feldman & Oren Perez, *How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement*, 36 J.L. & SOC'Y 501, 519–20, 526–27 (2009). In a study examining how various instruments of environmental regulation affect people's moral intuitions, participants had the lowest moral outrage (toward the pollution source) and emotional reaction (to the pollution itself) to the market-based instrument of environmental taxation. *Id.* at 508–09, 519 tbl.1. The researchers found that participants had a "significant tolerance" for the use of environmental taxation, positing that this market instrument had a legitimizing effect from the joint operation of the rule of law (legalizing the pollution) and the effect of paying for the right to use (pollute) public assets. *Id.* at 526–27.

87. See *id.* at 508, 527 (concluding that the study results are contradictory to the commodification critique, which suggests that use of market-based instruments may be a legitimate mechanism for authorizing use of public resources).

88. Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants*, 28 ECOLOGY L.Q. 569, 580–87 (2001).

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even playing-field on which the market operates.<sup>89</sup> However, they maintain, in the real world, socio-economic factors, income levels, and racial characteristics all affect the initial platform where market players act, tipping the scales in favor of certain groups.<sup>90</sup> Due to these inequalities, market-based mechanisms may fail to distribute environmental benefits fairly, the result being a disproportionate concentration of pollution quotas in the hands of certain groups, as well as a disproportionate concentration of pollutants in geographic regions of vulnerable groups (known as “pollution hotspots”).<sup>91</sup>

It is our contention that this dichotomous framing debate as a question for or against a tradable quota regime is misleading, since it presumes a binary choice between full marketability and complete inalienability of pollution quotas. As can be seen from our model, the choice need not be binary, but rather a continuum of alienability mechanisms is possible. The distributive concerns raised in this debate should be addressed by moving along the Potential Transferees Axis to the restricted sale rubric rather than by rejecting the possibility of sale altogether. Restricting the sale of quotas to polluters located within the same geographic unit would not aggravate the current distribution of pollution, whereas further restricting the buyers of pollution quotas to polluters located in less polluted areas would actually have a positive redistributive effect. In other words, delineating the group of transferees to whom pollution quotas can be sold would prove beneficial when distributional concerns are placed at the center. The alienability mechanism under Category G is well-suited to temper such distributive justice concerns, without forfeiting all the benefits of trade in pollution quotas.

### C. RESTRICTED BARTER: PLEA-BARGAINING

The alienability mechanism embodied in Category E facilitates exchange in kind of PEs with restricted transferees. A paradigmatic example in this context would be the practice of plea bargaining, where a defendant effectively exchanges his Fifth

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89. *See id.* at 580–81.

90. *Id.*

91. *Id.* at 574–81. It should be noted, however, that any tradable quota regime operates under conditions of a preexisting allocation of pollution and polluters. Polluting plants are often located in lower-class neighborhoods to begin with, and, in light of this initial allocation, allowing for the tradability of pollution quotas may often inflate the levels of pollution in such areas. *Id.* at 580–81.

Amendment right against self-incrimination,<sup>92</sup> his Sixth Amendment right to a jury trial,<sup>93</sup> and his right to appeal<sup>94</sup> for punishment concessions from the prosecution.<sup>95</sup>

The object of exchange in the case of plea bargaining—the defendant’s liberty—is fundamental to one’s personhood.<sup>96</sup> This fundamentality justifies its incommensurability across spheres of valuation.<sup>97</sup> At the same time, exchanges within a single sphere—for the same type of currency—do not raise similar personhood concerns. Thus, a waiver of the right against self-incrimination (a cost in terms of one’s liberty) can only be exchanged for punishment concessions (a benefit in terms of his liberty).<sup>98</sup> Relinquishing liberty for monetary consideration, in contrast, could have a reductive effect on the meaning of liberty.<sup>99</sup> This anti-commodification stance with respect to the nature of the resource being exchanged is what sets plea bargains

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92. See Brenna K. DeVaney, *The “No-Contact” Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?*, 14 GEO. J. LEGAL ETHICS 933, 942 (2001) (“[E]ntering into a plea bargain . . . [t]he defendant is essentially waiving many significant rights, including a trial by a jury of peers, the confrontation of witnesses, and the right to challenge the evidence against him.”).

93. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (claiming that the right to a jury trial or the right against self-incrimination is routinely bargained away in the criminal arena, in exchange for sentence reduction).

94. *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 151–54 (1990); see also Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1693 (2001) (arguing that defendants bargain away their right to appeal through plea bargaining).

95. Note that our model is aimed at devising alienability mechanisms with regard to PEs. However, analogous considerations and similar mechanisms could apply in the non-PE context. A parallel, non-PE test case falling under Category E is the example of blood bank donations. Allowing the exchange of blood donations solely for blood insurance while banning sale of blood for monetary consideration is supported by similar, non-commodification rationales.

96. See Mazzone, *supra* note 93, at 827 (“[M]aking constitutional rights alienable undermines the individual dignity that these rights are meant to protect.”).

97. In light of the link between liberty and autonomy, we would like to also preserve the option of waiving these procedural safeguards. We do not highlight this angle in our discussion here simply because, at this point, we wish to focus solely on the sale-barter distinction, as opposed to the inalienability-barter perspective.

98. See Mazzone, *supra* note 93, at 805 (discussing the mechanics of waiver of right against self-incrimination in exchange for punishment concessions).

99. See Michael J. Sandel, *What Money Can’t Buy: The Moral Limits of Markets*, Address at Brasenose College, Oxford (May 11–12, 1998), in 21 THE TANNER LECTURES ON HUMAN VALUES 89, 94 (2000) (providing a discussion of the corruptive effects of commodification).



apart from pollution quotas and, more generally, what distinguishes sellable PEs from those exchangeable in kind only.

Unlike the reservations regarding price-tagging liberty and commodifying the object of exchange in plea bargaining, similar anti-commodificatory concerns do not arise with regard to the actual bargaining process between the prosecution and defense or to the quid-pro-quo nature of their interaction.<sup>100</sup> In fact, opening the criminal justice arena to negotiations enhances the defendant's decisional autonomy<sup>101</sup> and her right to exert effective control over the manner in which her fate is determined.<sup>102</sup> Thus, while reducing the object of exchange (liberty in our example) into monetary terms impairs personhood by collapsing distinguishable spheres of valuation into market terms, the ability of the parties to exchange resources within a single sphere of valuation (in our case, liberty for liberty) enhances their choice-making capacity.<sup>103</sup>

#### D. UNRESTRICTED BARTER: SCHOOL VOUCHERS

The alienability mechanism represented by Category F is barter—exchanges in kind only—with unrestricted transferees: a paradigmatic example in this category is the bartering of public school vouchers.<sup>104</sup> Assume that a variety of high schools in a hypothetical local municipality, offer, in addition to an identical core curriculum, specific fields of specialization: some schools focus on the liberal arts and humanities, while others are more science-oriented. For the purpose of illustration, suppose that under such a regime, each potential student is allo-

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100. *But see* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 220–26 (1977) (arguing that an absolute right to waiver can potentially “involve [an] unacceptable exploitation of a defendant’s ignorance or too costly a sacrifice of the need to accomplish or at least appear to accomplish accuracy”).

101. *See* Easterbrook, *supra* note 4, at 346–47 (discussing the exchange of constitutional rights for monetary and non-monetary benefits).

102. *See* Dix, *supra* note 100, at 219 (discussing the notion of defendant autonomy).

103. For further discussion of the autonomy-related considerations underlying plea-bargaining, see generally Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943 (2007).

104. *See generally* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (discussing the constitutionality of school vouchers in the context of the Establishment Clause); Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613 (advocating for the adoption of a public school voucher system to alleviate the problems of under-resourced schools).

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cated a voucher allowing her to attend the school that is closest to her place of residence. The reason for this allocation is to ensure enrollment of a relatively equal number of students at each school. Allowing each student to barter her voucher for another voucher would be a Pareto improvement in that it would better tailor education to individual preferences.<sup>105</sup> School vouchers would thus end up in the hands of higher value users, regardless of the original allocation. The unrestricted nature of the barter increases the number of potential transactions, while the alternative of placing restrictions on such exchanges may undermine these positive effects. Thus, when efficiency through preference satisfaction and enhanced choice in education are the dominant social goals, the unrestricted recipients (Category F) is preferable to Category E on the Potential Transferees Axis.

If we were to highlight the distributional effect on the efficiency-distribution tradeoff, however, Category E could prove to be the superior potential transferees option. For example, if it were to emerge that schools focusing on liberal arts attract a disproportionate number of female students, while those focusing on the sciences were the favored choice of males—and assuming this to be an objectionable outcome from a social perspective—restricting barter to same-sex recipients could prove preferable. Allowing female students to exchange vouchers only with other female students, with the same restriction applied to male students, would preserve the male-female ratio at each school. At the same time, the schools would better accommodate the preferences of individuals within each group: females with a lesser aversion for the sciences would end up in the science-oriented schools and a similar result would obtain for male students preferring the liberal arts.

With regard to the Mode of Transfer Axis, similar claims can be raised in the context of the right to education as those made above regarding criminal procedure safeguards. The object of exchange in the context of school vouchers—the individ-

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105. But note, unlike in-kind exchanges, a conversion of school vouchers into monetary currency could, in effect, distort the preference-revealing mechanism at their base in those instances when affluent people bid higher even when their preferences are lower. Disallowing such conversion of vouchers into money by restricting the transaction to a single valuation sphere (vouchers for vouchers only) would avert these distortions, thus enabling true preferences to be revealed and different vouchers to be channeled to their highest-valuing users. This point can obviously be phrased in distribution terms as well.

ual's right to education—is, like liberty, formative of one's personhood.<sup>106</sup> Whereas exchanging one form of education for another form of education increases the range of currently available choices and, at the same time, sustains the student's personhood and prospective choice-making capacity, relinquishing the right to education altogether for monetary consideration (or for no consideration whatsoever, as in the case of gifts under Category D) will curtail the future ability to choose from among alternative ways of life. This justifies the incommensurability of the right to education for money.<sup>107</sup> Note, however, that it is the exchange of education for money that is problematic, rather than the quid-pro-quo nature of the interaction between the exchanging voucher-holders.

#### E. UNRESTRICTED GIFT: RIGHT TO FILE SUIT

The Category D mechanism of alienability is gifts—for no consideration—to members of the public at large, with donations of organs for transplant a classic example in the non-PE arena.<sup>108</sup> In the PE context, a hypothetical example under this category would be the right to file suit. It could be plausibly claimed that forbidding all forms of alienability with respect to such a right—i.e., restricting the victim's options to either file suit herself or waive the right altogether—would undermine deterrence and hinder compensation in circumstances in which she lacks the financial, cultural, and emotional resources necessary to access the court.<sup>109</sup> Moving from inalienability to a gift regime on the Mode of Transfer Axis, then, would enable the transfer of the right to file suit from the victim to more sophisticated players in the legal system. The marginal costs of additional court proceedings could be lower for the latter than

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106. See *Zelman*, 536 U.S. at 676 (Thomas, J., concurring) (starting his reasoning from the viewpoint that education is an essential part of being free).

107. Moreover, for those who insist that education must be essentially merit-based, arguing that any involvement of money taints the very nature of education, the possibility of exchange rather than sale of school vouchers would prevent these negative spillover effects.

108. See generally Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107 (discussing whether payment for oocytes is appropriate or if it should be a donation based transaction); Sara Krieger Kahan, *Incentivizing Organ Donation: A Proposal to End the Organ Shortage*, 38 HOFSTRA L. REV. 757 (2009) (addressing current methods for organ donation and the possibility of financial incentives).

109. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 736–42 (2005) (arguing that plaintiffs purchasing tort claims will prevail more in court).

the former, turning the action into a positive value claim for them.<sup>110</sup> Such effects can also result from the consolidation, by a single player, of claims relating to different victims. Moreover, even when the value of the claim does not increase substantially with the transfer of the right, another important social purpose is served by the gift option: individuals who wish to participate in the public discourse through the legal system are given access to the courts by enabling them to use original victims' unexercised right to bring suit. At the same time, a transfer of this right allows the victims themselves to voice their claims vicariously via the transferees.<sup>111</sup> Thus, allowing for the transfer of the right to sue not only contributes to deterrence, but also enhances participation in public deliberation. In instances where these normative considerations are of paramount concern, the gift mechanism is preferable to inalienability. Yet there may be cause to object to a progression from gift to sale. As argued by proponents of the champerty doctrine,<sup>112</sup> commodifying the right to sue—especially in the context of bodily harm—could have the derivative reductive effect of commodifying the victim's bodily integrity.<sup>113</sup> The personal nature of the lawsuit could be tainted when traded for monetary consideration.<sup>114</sup>

On the Potential Transferees Axis, the ability to transfer the right to file suit to unrestricted recipients would promote efficiency and deterrence. Constraining such a transfer with restrictions on the potential recipients of the right could undermine these social objectives by excluding capable litigators for no good distributive reason.

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110. Mass tort cases are a good example in this respect. *See id.* (discussing the pooling of torts cases by a purchaser).

111. *See id.* at 740 (“[T]ransfers of claims allow plaintiffs to obtain better representation or to bring claims that otherwise would not be worth bringing . . .”).

112. *See* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 818 (2011) (“The [champerty] doctrine’s underlying policy is to discourage excessive, unnecessary, or speculative litigation, which is often associated with third parties seeking profit for themselves, rather than redress for their clients, through suits.”).

113. *See* Abramowicz, *supra* note 109, at 704.

114. *See id.* at 724. For further discussion of the commodification of legal claims, *see id.* at 697–779.

## F. RESTRICTED GIFT: CONSCRIPTION EXEMPTION

The Category C mechanism of alienability is gifts—transfer for no consideration—to a restricted group of recipients. An illustrative example is the right to exemption from mandatory conscription.<sup>115</sup> In countries with mandatory conscription, some communities typically enjoy exemption rights, usually on religious or cultural grounds.<sup>116</sup> In Israel, for instance, the ultra-Orthodox can obtain an exemption from military duty if they prove exclusive devotion of their time to religious study.<sup>117</sup> Such rights of exemption are currently nontransferable and are granted on a case-by-case, renewable basis.<sup>118</sup> The government, however, lacks sufficient information to detect the most promising religious scholars and those truly interested in fully applying themselves to their studies.<sup>119</sup> This may lead to over-inclusion of unworthy or less interested religious scholars and under-inclusion of commendable and dedicated ones.<sup>120</sup> An alternative allocation mechanism (one that would fall under Category C) that could alleviate this problem would be to grant transferable exemption rights but with potential transferees specifically limited to members of the ultra-

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115. See Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 943 (1991) (discussing “narrow, effectiveness-related exemptions” for those unfit to serve, as well as conscription systems with “broader policy-related exemptions” for individuals deemed capable of performing worthier roles elsewhere in society).

116. See, e.g., Matthew G. Lindenbaum, *Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and § 6(j) Revisited*, 36 COLUM. J.L. & SOC. PROBS. 237, 248 (2003) (discussing a statute that only exempted members of religious denominations whose tenets forbade the bearing of arms from a mandatory national conscription law enacted during the Civil War).

117. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2006), available at <http://www.state.gov/g/drl/rls/irf/2006/71423.htm#occterr> (explaining Israel’s Tal Law, which allows ultra-Orthodox Jews to postpone military service in one-year increments to pursue full-time studies at religious schools).

118. See *id.* (specifying that individuals exempted from conscription under the Tal Law must renew their deferment each year by proving they are still full-time students).

119. See Barak Medina, *Political Disobedience in the IDF: The Scope of the Legal Right of Soldiers to be Excused from Taking Part in Military Activities in the Occupied Territories*, 36 ISR. L. REV. 73, 80 (2002) (suggesting that not all cases of exemptions granted to ultra-Orthodox Jews by the Tal Law reflect “full” conscientious objection).

120. See *id.* at 92–95 (discussing the intense political debate and scrutiny surrounding the broad scope and consequences of the Tal Law’s exemptions, as well as suggesting that the refusal of some individuals to serve is “unjustified”).

Orthodox community. This sort of transferability would serve as a partial preference-revealing mechanism vis-à-vis community members and, at the same time, allow for community leaders to fine-tune the ultimate allocation of exemptions, including through the imposition of social and religious sanctions and rewards.<sup>121</sup> Restricting the group of potential transferees ensures the internalization of the benefits by the community, thereby preserving the distribution of conscription duties across communities in line with the social planner's initial intention, while preventing a spillover of the exemption phenomenon into other sectors of society.<sup>122</sup>

As to the Mode of Transfer Axis, in the context of conscription exemptions, autonomy considerations validate the borderline between the gift and barter categories. Personhood concerns tilt against a quid-pro-quo exchange of military exemption rights for two reasons. First, the exchange of exemptions rights for other resources would dilute their expressive value as a sign of excellence in religious scholarship. Second, the commodification of the interaction would taint the altruistic nature of the transfer of the exemption right to fellow community members and would transform communal bonds.<sup>123</sup> The borderline between inalienability and gift on this axis is supported by participation considerations. By transferring the conscription exemption to another member of his community, the transferor affects the ultimate distribution of the exemption rights. The gift regime, unlike total inalienability, thus allows individuals to participate in the decision-making process re-

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121. For a discussion of the advantages and disadvantages of self-regulation of a community by its leaders, see Anthony Ogus, *Rethinking Self-Regulation*, 15 OXFORD J. LEGAL STUD. 97, 97–99 (1995) (arguing that advantages of self-regulation include better access to information and expertise, lower monitoring costs, and the internalization of administrative costs, and arguing that the disadvantages of self-regulation include the potential for rent-seeking behavior and abuse of power by community leaders themselves).

122. For an example of how the group of potential transferees who may benefit from the Tal Law's conscription exemption is restricted, see Medina, *supra* note 119 (explaining that the current policy in Israel is to grant exemptions to ultra-Orthodox Jews while denying the same sort of exemption from military conscription to individuals who refuse to serve based on non-religious grounds, including opposition to the Israel Defense Forces' policies).

123. *Cf., e.g.*, Rose-Ackerman, *supra* note 4, at 947 (providing an example of how commodification of gifts may impact altruism by discussing the implications of allowing individuals to purchase donated blood and suggesting that turning blood into a saleable commodity might actually deter donors who thought they were providing a "gift" from donating blood).

garding the allocation of exemptions, and derivatively, who will engage in religious studies.<sup>124</sup>

#### G. INALIENABILITY: VOTING RIGHTS

Category A encompasses inalienable PEs. The cases falling under this category are distinguishable from other classes of cases in that declining to exercise these rights results in their complete waiver (as opposed to non-exercise only by the initial rights-holder). The paradigmatic case under Category A is voting rights. Unlike in the case of pollution quotas, the allocation of inalienable voting rights stems from a social precommitment to their equal distribution among the public (one vote per person, regardless of social or political status).<sup>125</sup> Under prevailing law, one cannot buy someone else's voting right to augment one's own voting power (i.e., cast two votes instead of one in support of the political candidate that one favors), nor can votes be bought in order to silence the supporter of a political opponent (i.e., to diminish the political support of the buyer's least-favored candidate).<sup>126</sup> In the terms of our model, voting rights can thus be described as a paradigmatic Category A case.<sup>127</sup> On the Potential Transferees Axis—in the efficiency/distribution tradeoff—the normative equilibrium therefore gravitates towards distribution, since efficiency considerations do

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124. In fact, for ultra-Orthodox Jews, this decision may amount to vicarious participation in Bible scholarship. Supporting Bible scholarship by others is an ideal in and of itself under Judaic Law and is considered the equivalent of Bible studying by the supporter in terms of the spiritual virtuousness it offers. See DIANE TICKTON SCHUSTER, *JEWISH LIVES, JEWISH LEARNING: ADULT JEWISH LEARNING IN THEORY AND PRACTICE* 52–54 (2003) (encouraging Jewish adults to support others' Jewish learning by reinforcing such practice through encouragement and reward).

125. See Rose-Ackerman, *supra* note 4, at 963 (arguing that “[v]ote selling is widely recognized to be inconsistent with egalitarian, democratic principles because it biases political decisions in favor of the wealthy”).

126. See Hasen, *supra* note 18, at 1324 n.1 (discussing the legal consequences of “vote buying” in the United States). Other examples of inalienable PEs include entitlements of the regulatory and welfare states, such as social security and welfare benefits. See Radin, *supra* note 42, at 1854 n.20. With respect to the Mode of Transfer Axis, the very ability not to consume food stamps, a form of welfare benefits, allows eligible consumers to dissociate themselves from other needy individuals and reflects respect for their non-material preferences. As far as efficiency and distribution considerations are concerned, waiver promotes efficient distribution of such benefits by acting as a preference-revealing mechanism.

127. *But see* Saul Levmore, *Voting with Intensity*, 53 *STAN. L. REV.* 111, 137 (2000) (challenging the traditional opposition to vote buying in the corporate law context and pointing to circumstances where such buying may be desirable).

not unequivocally support marketability in this case.<sup>128</sup> Though at first glance selling votes for money seems like a good way to allow voters to express the intensity of their preferences, it also would generate substantial costs.<sup>129</sup> Critics note a host of inefficiencies entailed by vote trading, including the negative externalities that could be imposed on the public at large when vote buyers attempt to rent-seek by using their post-election political power and access to the public treasury to pay for their ex-ante vote buying.<sup>130</sup> Another source of inefficiency is the potential for “coalitions of vote buyers and sellers to monopolistically prevent competition for the sale of votes.”<sup>131</sup> A third concern, raised by Levmore, relates to collective action problems associated with vote selling.<sup>132</sup>

The distributive argument against vote trading is premised upon its regressive effects. If vote buying were allowed, the poor would likely sell their votes to the rich, due to their disparate financial capabilities as well as the decreasing marginal utility of money.<sup>133</sup> Not only would this result in the exclusion of the poor from the public decision-making arena, but it would also have an adverse effect because “candidates chosen in elections where the wealthy buy the votes of the poor more likely

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128. For an analysis of vote buying from an efficiency perspective, see Zvika Neeman & Gerhard O. Orosel, *On the Efficiency of Vote Buying When Voters Have Common Interests*, 26 INT'L REV. L. & ECON. 536 (2006) (exploring the efficiency of vote buying in the specific context of corporate elections).

129. See Levmore, *supra* note 127, at 118 (noting that markets are more likely to do a better job of optimizing goods-production by sending the right signals to producers than are individual voters).

130. See Epstein, *supra* note 29, at 984–88 (discussing various negative externalities stemming from the sale of voting rights in both corporate and political contexts).

131. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 272 (1962).

132. See Levmore, *supra* note 127, at 123. Levmore states that:

[I]f vote selling were legal, many entitled individuals would sell their votes at trivial prices even as these voters recognize that a large block of votes is a valuable asset. But it does no good for an individual to hold out for the value that a buyer might attach to each vote in such a block because there are many other potential sellers willing to part with their shares for some trivial price. Absent some coordination strategy, these voters reason that since others will sell at a low price rather than be left holding essentially worthless rights, they too may as well sell at a price greater than zero but far less than what might be obtained from an eager buyer if these sellers could coordinate.

*Id.*

133. Hasen, *supra* note 18, at 1325 (noting that the poor are more likely to sell their votes than are the wealthy, thereby leading to a regressive system in which political outcomes favor the wealthy).



will reflect the views of the wealthy.”<sup>134</sup> In other words, if the wealthy were able to purchase additional shares in the political process, they would be able to take over the process and intensify the disproportionality in decision-making power in society.<sup>135</sup>

On the Mode of Transfer Axis, the preclusion of vote trading stems from the relative weightiness of personhood and participation considerations. Indeed, translating votes into monetary currency seems to fundamentally contradict the essence of what it means to be a part of a democratic society. It has been asserted that voting is not only about preference satisfaction or personal gain, but also about the realization of one’s civic personhood.<sup>136</sup> In light of what Sandel terms “the republican ideals implicit . . . in contemporary democratic practice,” the experience of collective decision-making is distinct from and greater than the sum of individual votes.<sup>137</sup> Something important is missing, therefore, when a single right is sold for personal gain. In addition to its detrimental impact on civic personhood, marketability creates negative effects in the commodification of the interaction between the parties. As Levmore has noted, “[p]erhaps the most defensible or intuitive form of the anti-commodification argument stresses the communal nature of voting; a voting right is like an invitation to a party, and both are nontransferable for the same externality reason.”<sup>138</sup>

Participation considerations also bear considerable weight in the context of voting rights, pulling towards inalienability. As we argued in the framework of the justifications for alienability on participation grounds, markets tend to decentralize decision-making power in society and, therefore, restrain the centralistic, otherwise absolute, state power.<sup>139</sup> In the case of

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134. *Id.* at 1330.

135. *See id.* (arguing that “[e]ven if the poor would be willing to accept money in return for giving up the right to vote,” egalitarians would object to this sale based on the belief that the rich and poor should have equal influence over political outcomes).

136. Karlan, *supra* note 39 (arguing that “the right to vote serves a powerful expressive function” and captures the ideal of “civic inclusion”); *see also* Sandel, *supra* note 99, at 114–18.

137. Sandel, *supra* note 99, at 118; *see also* Rose-Ackerman, *supra* note 4, at 963 (noting that although voting, on the one hand, is seen as a private act, it also demands well-informed decision making because of its effect on the larger democratic society).

138. Levmore, *supra* note 127, at 116; *see also* ANDERSON, *supra* note 22, at 164–65 (noting that certain social spheres and values are governed by participation in social practices and cannot be effectively governed by market principles).

139. *See* FRIEDMAN, *supra* note 16, at 7–22.

voting rights, we posited, marketability seems to add another layer of decentralization on top of the initial allocation of these rights, which, in itself, approximates the decentralizing effect of the market by providing each citizen with a voice and with marginal decision-making power. However, in light of the possibility of capture and cartelization in a market for votes, it could in fact be claimed that a market in voting rights would operate against the initial decentralization and concentrate decision-making power in the hands of the affluent.<sup>140</sup>

Since distributive, personhood, and participation objections to alienability play such a central role in the normative equilibrium in the context of voting rights, and since efficiency gains from trade in voting rights are dwarfed by the costs entailed, the inalienability in Category A would seem to be the natural choice for this particular PE. However, similar to what we claimed in the context of the pollution quota debate, with voting rights, non-tradability need not collapse into complete inalienability. Instead, our model offers non-binary options along a spectrum of alienability mechanisms: some of the personhood and participation concerns raised with regard to trade in voting rights could be addressed by moving along the Mode of Transfer Axis to the Gift Row, perhaps even to the Barter Row. In other words, these concerns can be contended with through alienability mechanisms that prohibit selling votes but, at the same time, allow voting rights to be donated to others (gift) or even exchanged for a similar kind of consideration (barter), as in the 2000 presidential election example opening this paper.<sup>141</sup>

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140. See, e.g., Calabresi & Melamed, *supra* note 31, at 1098.

141. The distinction between barter and trade in votes was recognized in the Nader vote swapping case, where the United States Court of Appeals for the Ninth Circuit ruled that “[w]hatever the wisdom of using vote swapping agreements to communicate . . . [voters’] positions, such agreements plainly differ from conventional (and illegal) vote buying, which conveys no message other than the parties’ willingness to exchange votes for money (or some other form of private profit).” *Porter v. Bowen*, 496 F.3d 1009, 1020 (9th Cir. 2007). In addition, the court indicated that vote buying may be prohibited “without trenching on any right of association protected by the First Amendment.” *Id.* (quoting *Brown v. Hartlage*, 456 U.S. 45, 55 (1982)). Yet vote swapping, the court noted, involves a “promise to confer some ultimate benefit on the voter, *qua* . . . citizen[ ] or member of the general public” and the only benefit a vote swapper can receive is a “marginally higher probability that his preferred electoral outcome will come to pass” or, in our terminology, the exchange takes place within a single scale of valuation. *Id.* (alteration in original) (quoting *Brown* 456 U.S. at 55).

As to the gift alternative, Rose-Ackerman posits, “[s]ince voters who pull party levers or follow the endorsements of *The New York Times* are de facto

### III. ALIENABLE TAX BENEFITS FOR CHARITABLE CONTRIBUTIONS

Our discussion has hereto dealt with aligning different mechanisms of PE alienability with their underlying normative considerations. This correlation between normative equilibria and alienability techniques is the essence of our project: to provide any given normative equilibrium envisioned by society regarding a particular PE with the fitting alienability mechanism. This theoretical framework obviously is context contingent. The discussion below will devise one possible context in the sphere of PEs, namely, the hypothetical framework of a market in tax incentives for charitable contributions. Viewing tax incentives through our model's lens and through the prism of its flexible conception of alienability illustrates the benefits in converting PEs into alienable rights.<sup>142</sup> We start out by reviewing the rare cases of alienable tax benefits and argue that there is no inherent reason to restrict tax benefit alienability to these particular settings or to oppose the alienability of the vast majority of tax benefits. We demonstrate the prospects for expansion of the alienability of tax benefits beyond the ex-

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donating their votes, why not permit more formal assignments which, like corporate proxies, can be revoked at any time before the election?" Rose-Ackerman, *supra* note 4, at 963. In line with our discussion above, the move from inalienability to gift, which would allow donation of voting rights, would provide the initial right-holder with another avenue of participation even if she transfers her right. She would not only be able to exercise or waive her right to vote, but also to indirectly participate in the decision-making process when transferring it to others, who might enjoy a comparative advantage in terms of information or decision-making capacity. In this sense, the transfer of votes enhances the power of a single vote and enriches the ways in which it can be used beyond electing one's favorite candidate in a direct manner.

Thus, our model accommodates a variety of normative equilibria in terms of participation: if passive participation is more essential, then Category A will prove the superior mechanism; if active participation is considered more important, Categories D or E will be preferable. A similar analysis holds with respect to the varying nuances of personhood and commodification. If the objection to alienability of voting rights centers on the monetization of the right to vote and is less concerned with the commodification of the interaction and its effect on the community, then under our model, sale would be disallowed but not necessarily exchanged in-kind by logrolling.

142. The analysis in this paper does not mandate a decisive position in the larger debate regarding the dichotomy between "core" tax provisions and tax expenditures. Our project is not prescriptive in its nature but rather is aimed at matching alienability techniques with specific normative equilibria (which are the product of political deliberation). Thus, the tax expenditure question, like other base-line issues, remains beyond the scope of this paper.

isting categories by looking into the example of alienable tax benefits for charitable contributions.

#### A. ALIENABLE TAX MECHANISMS

Tax attributes are ordinarily assumed to be inalienable, making them a classic Category A case under our model.<sup>143</sup> Some rare exceptions do exist. A well-known example is the “safe harbor leasing rules” of the Economic Recovery Tax Act of 1981.<sup>144</sup> Under this Act generous tax benefits (credits and deductions) provided to various industries were made transferable.<sup>145</sup> Companies that could not use the benefits were effectively permitted to transfer them by providing safe harbor leasing.<sup>146</sup> This safe harbor regime was repealed by Congress

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143. See SHAVIRO, *supra* note 11, at 18 (criticizing the conventional wisdom that maintains “[p]rovisions that are labeled ‘tax benefits’ are not supposed to be tradable”). Despite formal inalienability, tax planners have developed a host of mechanisms to enable de facto trade in their tax attributes. *Cf. id.* at 54 (describing the tax planner’s job as “finding pinpricks in the law and driving trucks through them”). Various forms of tax arbitrage facilitate trade in attributes, ranging from deductions (e.g., depreciation or childcare expenses) that lower taxable income, to losses that could offset taxable income, to credits (e.g., affordable housing credits or foreign tax credits) that may lower tax liability, to specific exemptions (e.g., a tax exemption for non-profits or for people with disabilities). See I.R.S. Pub. 17-10311G (Dec. 8, 2010), available at <http://www.irs.gov/pub/irs-pdf/p17.pdf>. Traditionally, such attributes are offered to a selected group of taxpayers who either earned the right to hold them (e.g., lost money or invested in affordable housing) or have certain unique features (e.g., are disabled or are working parents). See *id.* In practice, however, a variety of planning tools have emerged—often to the dismay of the tax authorities—that allow some of these attributes to be enjoyed by taxpayers other than the original beneficiaries. *Cf.* Laura Saunders, *30 Last-Minute Tax Tips*, WALL ST. J., Apr. 2, 2011, at B7, <http://online.wsj.com/article/SB10001424052748703461504576230743028469786.html>. Accordingly, depreciation deductions are being traded through leasing transactions, losses are shifted through stripping mechanisms or flow-through entities, and credits are exchanged through dividend transactions or by partnering with taxpayers who can actually use them. *Cf.* Batchelder, *supra* note 10, at 33 n.36 (detailing how some tax credits are sold by developers to syndicated partnerships that recruit investors who can use the tax credit to become limited partners in the project). These practices, however, are restricted to those who can afford the high fees of tax planners and the risk and potential costs of litigation. *Cf. id.* at 30 (describing the administrative and compliance costs associated with refundable credits).

144. The safe harbor provision was found in § 168(f)(8) of the Internal Revenue Code and was enacted in Title II, § 201(a) of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, 203 (repealed 1982). For a detailed overview of safe-harbor leasing, see generally Alvin C. Warren, Jr. & Alan J. Auerbach, *Transferability of Tax Incentives and the Fiction of Safe Harbor Leasing*, 95 HARV. L. REV. 1752 (1982).

145. See Warren & Auerbach, *supra* note 144, at 1762.

146. See, e.g., SHAVIRO, *supra* note 11, at 17–18. Shaviro describes this safe

the very next year in the face of public protest and a higher than expected budget deficit.<sup>147</sup> Another, more recent, example of alienable tax benefits can be found under Louisiana's film and TV tax credit program, approved by the State Legislature in 2002.<sup>148</sup> According to this program, the State grants marketable tax credits worth up to 30 percent of the movie production costs.<sup>149</sup> Out-of-state companies often sell the excess credits to Louisiana-based firms or individual taxpayers, who then use them to reduce their tax liability.<sup>150</sup> Similar arrangements have been applied in Louisiana with regard to companies partnering with Louisiana universities under the State's Technical Commercialization Credit Program.<sup>151</sup> In Virginia, the 2002 Amendment to the Land Conservation Act of 1999<sup>152</sup> provides another example of alienable tax benefits, allowing landowners to sell tax credits given for conservation easements to other taxpayers.<sup>153</sup> In addition to these existing tradable benefit regimes, there have been proposals to provide transferable tax benefits to financial institutions managing Individual Development Accounts (IDAs).<sup>154</sup>

Though these examples illustrate the viability of making tax attributes alienable, the current frameworks represent only the very margins of the tax arena. We maintain that serious consideration should be given to making tax attributes alienable on a broader scale. Like in other regulatory areas, alienable tax attributes offer a promising venue site for tax policy.<sup>155</sup> In

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harbor as amounting to transfers of fees at arm's length, although the act did not literally permit sale of these benefits. *Id.* at 18. For a detailed description of the transfer technique, see *id.*

147. See *id.* (describing the roots of this public outrage as anchored in the "fact that safe harbor leasing actually was working as intended").

148. LA. REV. STAT. ANN. § 47:6007 (2009).

149. *Id.* See also *Overview: Production Incentives*, LOUISIANA ECON. DEV., <http://www.louisianaentertainment.gov/film/content.cfm?id=149> (last visited Oct. 11, 2011) (providing a description of the law).

150. *Overview: Production Incentives*, LOUISIANA ECON. DEV., *supra* note 149 ("The incentives are fully transferable and Louisiana has no limit to the amount of incentives that can be earned by a single production.").

151. LA. REV. STAT. ANN. §§ 51:2352–2365 (2009) (renewed by 2011 La. Acts. 416).

152. VA. CODE ANN. § 58.1-513(C)(1) (2010).

153. See W. Eugene Seago, *The Effects of the Virginia Land Preservation Credit on Federal Taxable Income: Should the Right Hand Take From What the Left Hand Gave?*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 1, 3 (2007).

154. See CARE Act of 2003, S. 476, 108th Cong. § 511 (2003) (*cited in* Batchelder et al., *supra* note 10, at 33 n.36).

155. Obviously, certain tax benefits would be less suitable than others as

what follows, we use the normative infrastructure developed in Part II to construct the appropriate alienability mechanisms and design a market for tax attributes in the context of charitable contributions. We chose these particular tax attributes as our test case since the discourse on tax benefits for charitable contributions is premised upon a variety of teleological objectives.<sup>156</sup> This multiplicity of ends allows us to move along the two axes of our model in order to illustrate the nuanced distinctions and creative applications that we envision for alienable PEs. We will demonstrate how moving away from box A (inalienable PEs) offers varying kinds and levels of benefits in this particular context. Namely how, given particular budgetary constraints on the public resources invested in charities, different forms of alienability prove superior to complete inalienability in terms of efficiency, distributive justice, autonomy, personhood, and participation. It will emerge that various mechanisms of alienability along the spectrum (unrestricted sale, restricted sale, restricted gift) can accommodate differentiated normative equilibria similar to those cases discussed in Part II.

#### B. THE NORMATIVE UNDERPINNINGS OF CHARITABLES

Tax benefits likely contribute to the size and success of the charitable sector.<sup>157</sup> There are many ways to design a tax system that supports charitable contributions (and, even more so, that supports charitable organizations).<sup>158</sup> Some possibilities are direct subsidies,<sup>159</sup> tax exemptions for charitable organizations,<sup>160</sup> or tax incentives directed at contributors to these or-

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objects of transfer. For example, one may distinguish between allocational and distributive tax expenditures in this regard. For a discussion of this distinction in the context of a general anti-avoidance rule, see Tim Edgar, *Building a Better GAAR*, 27 VA. TAX REV. 833 (2008). Our purpose here is only to provide an illustrative example of the potential benefits of alienability in the tax context, depending upon the promotion of pre-determined normative ends and following a political deliberation process. The precise guidelines for when alienability would prove preferable for the provision of a specific tax benefit are beyond the scope of our current project.

156. See, e.g., Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 507–11 (2010).

157. *Id.* at 513–14.

158. See *id.* at 511–13.

159. See *id.* at 517.

160. See *id.* at 511–13.

ganizations.<sup>161</sup> Our discussion will focus on the third alternative: tax benefits for contributors.

Opinions vary as to the focal point of the justification for such benefits.<sup>162</sup> Whereas some traditional scholars regard the deduction for charitable contributions to be merely a proper way of measuring income,<sup>163</sup> contemporary scholars tend to emphasize that the deduction for charitable contributions is a subsidy for the promotion of desirable social goals.<sup>164</sup> As such, these benefits give rise to a need for further inquiry into their underlying normative justifications.

One line of reasoning justifies tax benefits for charitable contributions on distributional grounds.<sup>165</sup> Under this line of argument, charities tend to serve the weaker segments of society, and subsidization is thus a form of redistribution.<sup>166</sup> Others contest this reasoning on empirical grounds, claiming that many charitable organizations cater to the needs of the affluent rather than the poor (e.g., opera houses, theaters, and museums).<sup>167</sup> Yet others emphasize the efficiency perspective, holding that tax attributes correct market failures, which derive from information deficiencies and free-riding tendencies in the market for charity.<sup>168</sup> The thrust of this argument is that charities provide mixed public goods that confer non-excludable and non-rivalrous positive externalities on the public at large.<sup>169</sup> Absent state subsidization, free-riding would lead to under-supply of these goods and services.<sup>170</sup> Other scholars em-

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161. *See id.* at 511.

162. *Id.* at 513–14.

163. *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 313–15 (1972); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 344 (1989) (summarizing Andrews' model).

164. Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1058 (2009); David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 533 (2006).

165. *See, e.g.*, Pozen, *supra* note 164, at 562–64 (summarizing current distributional theory scholarship).

166. *See id.* at 563 (“On the other hand, many charities subsidized by the deduction do cater to worse-off persons and thereby effect a progressive redistribution of welfare organizations.”).

167. *Id.* at 562–63; *see* Henry Hansmann, *Nonprofit Enterprise in the Performing Arts*, 12 BELL J. ECON. 341, 342 (1981).

168. *See, e.g.*, Benshalom, *supra* note 164, at 1058–62.

169. *Id.* at 1058–59.

170. *Id.* at 1059 (“Through contributions, charitable organizations increase their supply and lower the prices of the public goods they provide. Charitable relief also mitigates the free-riding problem by reducing the price of contribu-

phasize the information benefits of privatizing the decision-making process regarding the ultimate destination of the public funded subsidies.<sup>171</sup> By allowing the public to decide which charities enjoy public support, rather than being determined by central planning through direct grants, the regulator reaps the benefits of the synergy of private information.<sup>172</sup> This allows for more informed and efficient funneling of public resources.<sup>173</sup> Furthermore, tax benefits for charitable contributions serve as a preference-revealing mechanism, in that private donations are a prerequisite for public support. Only those private donors expressing a high demand for the given charity enjoy greater public support of their chosen charity, and vice versa.<sup>174</sup> Public choice considerations have also been raised in support of decentralizing the decision-making process. As Levmore asserts, the involvement of taxpayers in this process mitigates rent-seeking opportunities that might otherwise affect the legislative process.<sup>175</sup>

In addition to the efficiency-based considerations underlying tax benefits for charitable contributions, writers in the field have raised participation-based rationales: “subsidies are warranted because a democratic process dependent on majority preferences will only supply public goods at a level demanded by the median voter.”<sup>176</sup> Tax benefits for charitable contributions allow individuals with a vision of the public good that is distinct from that held by the majority to redirect some of the public resources toward their particular vision.<sup>177</sup> In this way, tax benefits perform the unique political function of bypassing the majoritarian decision-making process: not only affecting the channeling of public resources but also expanding the choice-making capacity of individuals.<sup>178</sup> Levmore offers an interesting twist to the participation argument in this context, suggesting that such active and direct participation by the taxpaying public in the decision-making process regarding which projects are funded, enhances the commitment to these charities.<sup>179</sup> Finally,

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tions and encouraging more private giving to underprovided social goods.”).

171. See, e.g., *id.* at 1061.

172. See *id.* at 1061–62.

173. See *id.* at 1062.

174. See Fleischer, *supra* note 156, at 527.

175. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 408 (1998).

176. Fleischer, *supra* note 156, at 521.

177. *Id.*

178. *Id.*; see also Levmore, *supra* note 175, at 405–06.

179. Levmore, *supra* note 175, at 406.



tax benefits for charitable contributions have also been justified on personhood grounds. Charitable organizations operate outside the market realm, are constructed on altruistic motivations, and constitute non-market scales of valuation.<sup>180</sup> There is room to claim that these non-market associations enrich society in facilitating alternative routes of human interaction.<sup>181</sup>

In sum, granting tax benefits for charitable contributions promotes various value-based ends that are external to the particular goods and services provided by the charities: distributive justice, efficiency, participation, autonomy, and personhood. Different normative equilibria emerge from different mixes of these considerations. We will now proceed to match mechanisms of alienability to these various equilibria.

### 1. Unrestricted Sale of Charitable Benefits

Under prevailing U.S. law, itemizing taxpayers are allowed a deduction of up to 50 percent of their adjusted gross income<sup>182</sup> for contributions to tax-exempt organizations.<sup>183</sup> This deduction mechanism has a regressive effect, in that it allows high-income taxpayers to reap greater benefits from their contributions as a result of their higher marginal tax rate, while individuals lacking tax liability are deprived of this benefit.<sup>184</sup> In a recent article Lily L. Batchelder, Fred T. Goldberg, Jr., and Peter R. Orszag propose, instead, a uniform refundable tax credit

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180. See David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 225–28 (2009).

181. See ANDERSON, *supra* note 22, at 164–65. For an application in the tax context, see Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93 (2009), which argues that charitable organizations and charitable donations can be conceived of as another point along a spectrum of activities that are ordered according to their relation to personhood. This spectrum ranges from unrealized talents (endowment), to self-provided services (imputed income), to the provision of services within families and their mutual provision among friends (gifts). *Id.* at 115–30. “Such a spectrum can further be extended to include . . . charitable contributions, where tax credits can be explained as a subsidy for nonmarket (not-for-profit) institutions.” *Id.* at 135. The tax treatment of these activities can (and, in many cases, does) reflect a degree of (non-) commodification correlating to their position on the spectrum. *Id.* at 131. In other words, the current support for charitable contributions is a form of fostering altruistic, non-market behavior as a good in and of itself.

182. I.R.C. § 170(b)(1) (2006); see also *id.* § 170(b)(1)(G) (defining “contribution base” as “adjusted gross income”).

183. Such organizations must promote religious, charitable, scientific, literary, or educational ends. *Id.* § 170(c).

184. See Batchelder et al., *supra* note 10.

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equal to a fixed percentage of tax payers' contribution.<sup>185</sup> The authors point to the efficiency-based virtues of such a tax regime for all tax incentives, charitable incentives included.<sup>186</sup>

It is our claim, however, that even such a non-regressive, one-size-fits-all mechanism has substantial downsides in terms of efficiency and participation. From the efficiency angle, the refundable credit mechanism misallocates incentives on both the high end and the low end of the target population, leading to a waste of public resources. Due to the uniform nature of the tax benefit, there will be contributors for whom lower tax incentives would have sufficed to motivate them to make an identical contribution and who now receive unnecessary excessive benefits. The mirror image of the misallocation problem relates to those taxpayers interested in contributing above the cap, if provided with a tax benefit, who would forego the additional contribution absent the tax incentive. For simplicity we will hereby refer to both manifestations of the misallocation of incentives phenomenon as a problem of over- and under-inclusiveness. We argue that making the tax credit alienable will entail efficiency gains on both fronts.<sup>187</sup>

In addition to its efficiency drawback, the refundable credit mechanism also hinders participation in the decision-making process regarding the channeling of tax benefits. Specifically, it limits involvement exclusively to contributors and correlates the extent of their impact with contribution level. One could argue that the decision-making capacities as to the allocation of public funds (as opposed to personal resources) should not be assigned according to ability or willingness to contribute to charity. If that is the case, we should note that the credit mechanism marginalizes the influence of non-contributors on such decisions and their ability to voice their preferences as to recipient charities of public funding. It is our contention that modifying this mechanism through resort to the alienability option and adherence to the principles underlying our model could resolve these problems. Moreover, allowing for alienability of tax benefits for charitable contributions would broaden the spec-

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185. *Id.* at 43. An example of a uniform refundable tax credit is 20 cents per dollar, irrespective of the taxpayer's liability. In order to sustain a budgetary constraint, the refundable credit must be capped at a certain level.

186. *See id.* at 43–57 (arguing that the default for all tax incentives for socially valued activities should be uniform refundable tax credits).

187. This is not to suggest that the proposed model ensures Pareto efficiency. Instead it is designed to allow for Pareto improvements in terms of level of contribution for a given public expenditure.

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trum of choices offered to individuals, in a way that furthers their autonomy as well as assists in the realization of distributive goals.

We shall begin with the efficiency considerations. The claim we will formulate in this regard is that alienability can mitigate waste of public resources and increase the overall sum of contributions per given public expenditure on subsidies for charity.<sup>188</sup> In other words, alienability could lead to Pareto improvement<sup>189</sup> over parallel inalienable regimes. The underlying intuition is that since taxpayers vary in their preferences for charitable contributions, and thus in the marginal benefits they derive from donations, granting a uniform benefit is bound to be high for some taxpayers and low for others. Absent the option of alienability, the obvious solution to the over-inclusiveness problem (reduction of the benefit) could aggravate the under-inclusiveness problem (creating an incentive which is too low for those with a low preference for donations). Alternatively, one could suggest increasing the cap to allow for more contributions by high-preference taxpayers. Unfortunately, this option will not work either, as it is likely to break the given budgetary constraint.

Therefore, improving efficiency under a given budget requires fine-tuning of the high-end incentive (so as not to provide excessive subsidies for contributors) while preserving the level of contributions. Alienability offers an attractive policy option here: Allowing taxpayers to sell their tax credits will let the government break its given budget into smaller incentive packages and thus mitigate the over-inclusiveness problem. At the same time, it would neutralize the risk of under-inclusiveness by increasing the number of such packages and creating a market for tax benefits that will efficiently allocate them. This market would facilitate the purchase of tax benefits beyond a given cap: individuals wishing to contribute in excess of the cap but still enjoy tax benefits for the surplus would be able to purchase those benefits from individuals uninterested in contributing to charity. These market features would allow for a modular and differential consumption of benefits, better

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188. It should be noted that the proposed model is not aimed at reaching the optimal subsidy-contribution ratio. Rather, it assumes a pre-determined social decision as to how many public resources should be designated in order to induce contributions in society, and the model seeks its optimal targeting so as to maximize contribution level under a budgetary constraint.

189. Richard A. Posner, *Economic Analysis of Law* 18 (5th ed. 1997) (describing the Pareto principle).

suiting to the incentive structure for donations and thus leading to the channeling of tax benefits to their most efficient users.

## 2. Example:

To illustrate this point, assume the government is interested in spending \$2000 to support charitable contributions and that the taxpaying population is comprised of twenty taxpayers with varying levels of preference for charitable contributions. For purposes of clarity, assume a random distribution of preferences for contributions, expressed in the table below as the monetary benefits of making a \$500 contribution. These range from \$300 to \$480 for each taxpayer. Suppose the government provides each taxpayer with a uniform benefit of \$200 per \$500 contribution. This will lead to 10 contributions (marked in **bold**) of \$500, totaling \$5000 in charitable donations, at a social cost of \$2000.

**Figure 2:**

	Benefit from a contribution of \$500	Benefit from a contribution of an additional \$500	Benefit from a contribution of an additional \$500	Benefit from a contribution of an additional \$500	Benefit from a contribution of an additional \$500	Benefit from a contribution of an additional \$500
A	<b>480</b>	460	440	420	400	380
B	<b>460</b>	440	420	400	380	360
C	<b>440</b>	420	400	380	360	340
D	<b>420</b>	400	380	360	340	320
E	<b>400</b>	380	360	340	320	300
F	<b>380</b>	360	340	320	300	280
G	<b>360</b>	340	320	300	280	260
H	<b>340</b>	320	300	280	260	
I	<b>320</b>	300	280	400		
J	<b>300</b>	280	400			

Such a mechanism would suffer from the over-inclusiveness problem described above, in that it would provide a \$200 benefit to taxpayers who would have contributed \$500 even with a lower tax incentive (Donors A–I). Attempting to rectify this by reducing the benefit (say to \$100 per \$500 contribution) would lead to 5 contributors only (Donors A–E), for a total of \$2500 in contributions at a social cost of \$500. Though the subsidy-contribution ratio is improved, the result is still suboptimal in light of the lower total level of contributions.

In addition to over-inclusiveness, such a regime also generates under-inclusiveness, for it limits the amount of subsidized contribution to \$500 even for taxpayers who may be interested in contributing more if given subsidization. It might appear that the under-inclusiveness phenomenon could be remedied by lifting the subsidized contribution cap. This would, indeed, increase the level of contributions, but at the same time could lead to excessive social subsidization of charities. For example, if the cap is increased to \$1000—namely, a \$400 benefit is granted per \$1000 contribution—this will result in 9 contributions (Donors A–I) of \$1000 each, totaling \$9000 in charity at a social cost of \$3600.

Though this would yield a better subsidy-contribution ratio, the social investment would exceed the desired \$2000 level. In other words, though the government has an interest in facilitating charities, this is not without limit: since it essentially functions as a partner that subsidizes individual contributions, the government has an interest in limiting the aggregate level of such public participation, regardless of the prospect of greater participation by contributors in charities.

Against this background, now assume that the tax benefits were alienable. Under the alienability regime, the over-inclusiveness problem is mitigated by allocating only a smaller \$100 benefit per \$500 contribution. The decrease in the initial benefit would save \$100 per contributor for Contributors A–E. On the other hand, it will crowd out Contributors F–J, seemingly exacerbating under-inclusiveness. However, allowing individuals to purchase unused benefits would result in Donors A–E purchasing and contributing nine additional benefit pack-

ages<sup>190</sup> more than offsetting this effect. This will result in 14 contributions of \$500 each, totaling \$7000 in charity at a social cost of \$1400, a considerable improvement from the original \$5000 in contributions raised with \$2000 of public money.

It is certainly possible to imagine other ways of simultaneously resolving both ends of the inclusiveness problem.<sup>191</sup>

190. Those underlined in the following table:

Contributor/Contribution of	\$500	additional \$500	additional \$500	additional \$500	additional \$500	additional \$500
A	<b>480</b>	<u>460</u>	<u>440</u>	<u>420</u>	<u>400</u>	380
B	<b>460</b>	<u>440</u>	<u>420</u>	<u>400</u>	380	360
C	<b>440</b>	<u>420</u>	<u>400</u>	380	360	340
D	<b>420</b>	<u>400</u>	380	360	340	320
E	<b>400</b>	380	360	340	320	300
F	<i>380</i>	360	340	320	300	280
G	<i>360</i>	340	320	300	280	260
H	<i>340</i>	320	300	280	260	
I	<i>320</i>	300	280	400		
J	<i>300</i>	280	400			

191. Another regulatory remedy for both inclusiveness problems would be setting a minimal contribution amount as a precondition for the tax benefit. A floor would be beneficial under the plausible circumstances of decreasing marginal utility with relation to the size of contribution. For example, in the table from footnote 190, setting a \$2000 floor would allow us to provide only \$440 in benefits (the average of the marginal contributor, expressed in the fourth row of the table). This would lead to four contributions of \$2000 (totaling \$8000 in charity) at a social cost of \$1760. Yet, even under such conditions, marketability may prove superior, for it opens the way to consolidation of contributions by different contributors or, conversely, to fragmentation of the benefit. In other words, the market strategy of consolidation may address under-inclusion in cases of individuals who have difficulty meeting the minimal contribution requirement and, therefore, do not participate in charitable contribution.

Consolidation enables such individuals to cooperate with others in a way that will increase their overall contribution level. Thus, in our illustration from footnote 190, if there were more than a single contributor in each row, Contributor E for instance, could join other similar contributors (not described in the table) in contributing \$500 each. Yet the possibility of consolidation could lead to less desirable situations, where individuals who would be induced to meet the floor even without the consolidation option would, given the option, cooperate with others in a similar situation, thereby decreasing their aggregate level of contribution. For example, in the illustration from footnote 190, Contributor D, who might have been induced to contribute \$2000 absent the option of consolidation, could now choose to consolidate with others and make only a partial contribution. The end result in terms of whether consoli-

Tinkering with the cap and benefit amounts—for example, by enlarging the former while lowering the latter—could lead to an improvement in the level of contributions under a given budgetary constraint, and given a preferences distribution where a large bulk of the potential donors have a preference for high contributions at a low tax incentive. However, this does not run counter to our claim, for even under such an improved regulatory regime, alienability might still lead to superior results. So long as there are individuals for whom the cap is too low and others for whom the benefit is not great enough, the possibility of trade may increase contributions per a given budget.

We would like to conclude the discussion on the efficiency perspective of alienable tax attributes by reiterating the purpose of our model. The thrust of our argument is not that the alienability option achieves Pareto efficiency under any set of circumstances. Rather, our claim is a more modest one, striving merely to show that alienability could prove superior to the existing mechanisms (as well as those proposed by legal scholars)<sup>192</sup> under a realistic set of assumptions regarding the inevitability of a budgetary cap on social subsidy of charitable benefits and a plausible set of preference distributions. As a result, total disregard for the alienability option unnecessarily constricts the social planner's choices from among the best possible options.

Thus far, we have examined the efficiency of an alienability regime of tax benefits for charitable contributions. We now move to considerations of participation. Recall that a central justification of supporting charities by encouraging private contributions (as opposed to direct government funding) is the participation of the public in the decision-making process regarding which charities garner public support.<sup>193</sup> It is our claim that a market for tax attributes would enhance participation in the decision-making process by including even non-contributors in it. Indeed, providing individuals with a public benefit they can either realize (through contribution) or sell to others (who will realize the benefit through contribution) gives them the option

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dition would improve the level of contribution is essentially an empirical matter: it all depends on the ratio of these two groups of individuals between those with difficulties in meeting the floor and those who, absent the consolidation option, would have met the floor.

192. See, e.g., Batchelder, *supra* note 10.

193. See Benschalom, *supra* note 164, at 1061–62; Fleischer, *supra* note 156, at 521.

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of voicing their preferences even if they make no contribution to charity. Such individuals could also sell their benefits to the charities of their choice. By so doing, they would be able to channel public funds to their preferred charity even if they cannot afford to or simply choose not to contribute.<sup>194</sup> On the other hand, allowing non-contributors to take part in the public participation may have a downside as well, as non-contributors may be less committed to the ideas they support, since such a mechanism does not require them to put their money where their mouths are.

Distribution and personhood considerations seem to have less of an effect on the unrestricted sale category, and yet there is something to be said with respect to each of them: allowing taxpayers to sell tax credits for a price may promote wealth redistribution, if, as a general matter, buyers of such credits are better off than sellers. Under this scenario wealthy individuals will pay poor sellers for their unused credits, thus sharing the tax benefit with them (meaning that a larger part of the tax benefits would get into poor sellers' hands than under inalienable credits).

While a stronger inclination of the wealthy to contribute than of the poor to contribute seems plausible, this is not necessarily the case; sellers may represent individuals who do not wish to contribute rather than individuals who are unable to do so. If the former is the case, alienability will not necessarily further a more progressive redistribution of tax benefits. Still, if people's low preference for contributions is negatively linked with their income level—the bottom line would still be a more progressive redistribution scheme.

As for personhood considerations, there may be room to claim that the tradability of credits poses the risk of increasing the commodification of charity giving. The mere provision of tax credits for contributions has commodifying aspects in and of itself, for it incorporates a quid-pro-quo dimension into altruistic giving. But allowing such credits to be sold seems to add another commodificatory layer, for it involves a market transaction

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194. Even under a sale regime, some contributors may still prefer to abstain from direct exercise of their benefits, because doing so might taint the altruistic element of the act of donating. Under the prevailing regime, this arrangement amounts to a simple waiver of the benefit, which thus returns to the state. Under an alienability regime, however, such contributors could donate their benefit to the charity of their choice, either for resale under the unrestricted sale mechanism (Category H) or for use by other donors under the unrestricted gift rubric (Category D).



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in which a price tag is being put on the altruistic dimension of giving. A person with a high preference for giving will be inclined to pay a higher price for the credits. This is more commodifying in two ways. The first way is the exact price tag being put on the non-altruistic component of the donation (which is more accurate and thus perhaps more commodifying than the one-size-fits all tax benefit under an inalienable credit). The other way is the commodification of the interaction between the buyer and the seller (and not only between the donor and the tax authorities, which rates them both according to their altruistic preferences).

### 3. Restricted Sale of Charitable Benefits

The move from a regime of unrestricted sale to restricted sale of charitable benefits could be justified on distributive grounds, for unrestricted sale in the context of tax attributes could yield adverse effects in terms of distribution. To begin with, it could amplify the influence of the better off and enable them to direct public resources to the charities of their choice by purchasing additional tax benefits for their increased contribution to such charities. This purchasing, in turn, could lead to a disproportionate concentration of public resources in the hands of charities that cater to the preferences of the better off.<sup>195</sup> If, for example, affluent individuals have a preference for opera houses or theaters as charitable organizations,<sup>196</sup> a regime allowing unrestricted sale of tax attributes could lead to excessive public support of these institutions and to a biased distribution of public resources.

Shifting to the Category G regime of restricted sale could mitigate this undesirable distributive outcome. Limiting the sale of tax benefits to non-profit organizations only, while prohibiting such trade with private individuals, could somewhat constrain the ability of the better off to purchase excessive decision-making power. The poor, who typically are less inclined to contribute, due to a lack of resources, would be able to sell their tax benefits to the charities of their choice, with no accompanying regressive augmentation of the influence of the affluent. This could, however, only partially remedy the distributional bias, for stronger non-profit organizations (such as opera hous-

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195. *Cf., e.g.*, Pozen, *supra* note 164, at 562–63 (discussing similar potential implications under the charitable deduction structure).

196. *Id.* at 563 (recognizing opera houses as “the quintessential exemplar of a non-redistributive ‘public charity’”).

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es) might still wield an advantage in terms of ability to pay the competitive price of the tax benefits (relative to weaker non-profits). A possible solution would be to restrict potential transferees—for example, allowing only pre-specified non-profits to purchase the tax benefits.

Of course, promoting distributional goals in this manner may come at a cost in efficiency. Both types of restricted sale regimes tinker with market forces by artificially decreasing demand and increasing transaction costs. In addition, limiting sale to pre-specified charities would, for its part, undercut the advantages associated with public participation. Such a restriction provides the social planner with the ability to shape which charities reap public funding, thereby re-incorporating centralized planning in what was meant to be a locus of decentralized decision making. In sum, if the teleological goals underlying tax benefits for charitable contributions gravitate towards distributive justice, the alienability mechanism most suited to such a normative equilibrium is restricted sale. If, however, the efficiency considerations prove more central, an alienability regime of unrestricted sale will be superior.

#### 4. Restricted Gifts of Charitable Benefits

Giving extra voice to the better off not only raises distributive concerns (related to the outcomes of the decision-making process), but could also be problematic in the context of the deliberation procedure itself (irrespective of its end results). As argued above, participation in the public discourse over the channeling of public support to various charities is constitutive of one's civic personhood and should, therefore, not be contingent solely upon contribution capabilities. The civic personhood concern is reinforced by Levmore's claim that involvement in the decision-making process, regarding public funding of non-profits, facilitates social commitment to charity work and incentive to monitor charitable activity.<sup>197</sup> Lastly, we must bear in mind the benefits associated with the preservation of multiple spheres of valuation in this regard. As we asserted above, such non-market associations enrich society in facilitating alternative avenues of human interaction. This array of concerns shifts the focus from the Potential Transferees Axis to the Mode of Transfer Axis and could justify moving from a sale regime to a gift regime in our model: the incommensurability of

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197. Levmore, *supra* note 175, at 406.

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tax benefits across spheres of valuation would insulate the decision regarding the identity of the ultimate benefactors of the particular tax attributes from monetary considerations. These advantages come at a cost, of course: representation without (non-)taxation enables individuals to impact decision-making without putting their money where their mouths are. The question whether the pros outweigh the cons and the normative weights that are to be attributed to the various personhood, participation and efficiency considerations are all essentially political issues, to be decided through public deliberation in each given society. We do not aspire to resolve this political matter ourselves. Rather, our claim is that if in a given society considerations of civic personhood and preservation of altruistic spheres are of significance, a gift regime may prove preferable to that of sale.

#### CONCLUSION

This Article is an exercise in expanding the horizons of legal imagination by portraying a world where alienability of public entitlements is a viable option, rather than a rare exception. The conceptualization of publicly provided benefits as alienable entitlements was made possible by the two key components underlying our model—namely, the non-binary conceptualization of alienability, as well as the exposure of the overlooked interpersonal dimension of public entitlements. Analyzing public entitlements through the nuanced alienability prism enriches the understanding of the ways in which various alienability regimes, as well as the public entitlements whose scope they define, can be utilized to promote various normative goals. Application of our theory of PE alienability to the unexplored terrain of tax benefits for charitable contributions provided a hands-on illustration of the potential of alienability as a policy tool, and of the ways in which various alienability mechanisms can be utilized to promote any given choice of normative end