

WHAT KINDS OF STOCK OWNERSHIP PLANS SHOULD THERE BE? OF ESOPS, OTHER SOPS, AND “OWNERSHIP SOCIETIES”

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Present-day advocates of an “ownership society” do not seem to have noticed the means by which, since the 1930s and 1960s respectively, America has become an ownership society already where homes and human capital are concerned. Nor have those advocates considered whether these same means, which amount to publicly facilitated private financial engineering, might be employed to spread shares in business firms as widely as we have spread homes and higher educations.

This Article, the third in a trio of pieces devoted to exploring what a contemporary ownership society consistent with American values, endowment psychology, and legal tradition would be, endeavors to begin the process of filling that gap. First, it shows that there is indeed a gap to be filled—that firm ownership remains nowhere near as widespread as home and human-capital ownership. Next, the Article shows that the Employee Stock Ownership Plan (ESOP) can be viewed as a tentative, but incomplete, first step toward filling that gap.

The Article accordingly generalizes from the ESOP along two salient dimensions—patronage and credit—in order more fully to replicate our federal home and higher education financing programs in the realm of stock ownership plans. It first proposes a number of analogues to the ESOP grounded upon nonlabor patronage forms. It then sketches a “capital mortgage” financing program that is the full analogue to our present-day methods of home and higher education finance.

Our fuller ownership society, the Article concludes, is a would-be “three-legged stool” that awaits its third leg.

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INTRODUCTION: THE THREE-LEGGED STOOL'S MISSING LEG

The phrase "ownership society" exerts a peculiar allure.¹ Those who employ it appear to be genuinely invoking, even promising, something. But it isn't quite clear yet just what that might be. It seems to have something to do with freedom—with material freedom and therefore with bounded, accountable freedom: "joint and several" freedom, one might say.² We picture, perhaps, a coordinated array of mutually delimited spheres of personal autonomy—a just distribution of real opportunity and risk—underwritten by law. We are drawn by this picture's implicit promise—of ownership's right of control over some basic minimum that each of us needs and can live on productively. And we are drawn by its nod to a modest, contained self-sufficiency, its regard for the grace of "a gracious plenty." For we know that it's fitting to leave "enough, and as good,"³ for our fellows as that which we take, from the store of such resources as none of us has produced.⁴ It is an enduring, sustainable *society* of owners we picture, after all, not a fantasy island or Robinson Crusoe world.⁵

¹ In using this term, I do not wish to identify with the recent "tax relief" or Social Security "reform" proposals presently associated with the phrase. For a conspicuous case of such use of the term, see The White House, Fact Sheet: America's Ownership Society: Expanding Opportunities (Aug. 9, 2004), <http://www.whitehouse.gov/news/releases/2004/08/20040809-9.html>.

² Briefly, material freedom is freedom exercised through control over resources. That freedom is bounded and accountable because everyone shares equal moral claims to resources that they have not created. I intend "joint and several" freedom to suggest a conceptual complement to joint and several liability. The idea is that everyone would enjoy resources in equal amounts as a fraction of the jointly shared total. See generally Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005) (describing the relationship between liberty and equal opportunity).

³ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that individuals obtain ownership through their labor over property previously held in common, "at least where there is enough, and as good left in common for others").

⁴ See *id.*; see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174–82 (1974) (coining the term "Lockean proviso" to describe Locke's theory of acquisition and offering a Paretian update to the proviso deeming an appropriation of resources ethically permissible only if those consequently excluded from access to those resources are no worse off than they otherwise would have been).

⁵ Perhaps this sustainable society of owners would resemble James Meade's "property-owning democracy," the image of which figures briefly, before disappearing, in the work of John Rawls. J. E. MEADE, EFFICIENCY, EQUALITY AND THE OWNERSHIP OF PROPERTY

Once, when nearly all we required could be had from the land, and there was rather more land than we needed, we began to build such an “ownership society.”⁶ We just spread the land, in graciously sized parcels, to all who by working could render it productive and live on it.⁷ We spread the know-how required to do that as well: Some of the land endowed free-access schools of agricultural extension.⁸ These resources—land and land-grounded human capital, along with a few rudimentary implements and mutual insurance arrangements—were all that we had to spread widely to realize a then-modern, prosperous republic of owners. We called it “homesteading”; but in fact it was high-yielding “farmsteading” and farm-grounded “schoolsteading.”⁹

Then the land ran out. And so did the land’s capacity, when spread in small parcels, to satisfy our ever-developing wants: It became no longer possible to *give* land without *taking* land.¹⁰ And an agrarian yeoman republic could no longer be an opulent or modern republic

40–65 (1965); see JOHN RAWLS, A THEORY OF JUSTICE 242 (rev. ed. 1999). Or perhaps this society would be something like that envisaged by Meade’s contemporaries, the Distributist contributors to early-twentieth century Catholic social thought. See generally HILAIRE BELLOC, THE SERVILE STATE *passim* (1912) (arguing that people are not truly free where there exists centralized ownership of means of production); G. K. CHESTERTON, THE OUTLINE OF SANITY *passim* (1927) (advocating a wide distribution of small holdings of land and other capital as the best guarantee of a free society). For an interesting contemporary echo of such thinking, see RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY 30–36 (2003) (noting how the difficulty of obtaining funding in underdeveloped financial systems stems from a “tyranny of collateral” and results in such economies being both underproductive and distributively unfair).

⁶ This began with early American land policy and accelerated during the early 1860s with the Homestead and Land Grant Acts. See Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society,”* 79 S. CAL. L. REV. 45, 99–104, 143–46 (2005).

⁷ See *id.* at 103.

⁸ See *id.* at 144–45.

⁹ Not surprisingly, some scholars disagree over the degree to which the Homestead and Land Acts contributed to the spread of farms and the growth of agricultural productivity in the nineteenth century. Compare, e.g., ALAN F. ZUNDEL, DECLARATIONS OF DEPENDENCY: THE CIVIC REPUBLICAN TRADITION IN U.S. POVERTY POLICY 26–42 (2000) (judging the Homestead Act to have been largely successful), with ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 71–72 (1985) (arguing that the Homestead Act “made but a modest contribution to farm ownership”), and Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 506–13 (2002) (arguing that private contracting preceded the Homestead Act and was a more efficient manner for distributing land). See generally Hockett, *supra* note 6, at 99–104 (outlining the history of the Land and Homestead Acts of the eighteenth and nineteenth centuries and their relation to the Civic Republican, Classical Liberal, and Pragmatic Consequentialist political traditions). No final adjudication is necessary here. Even if critics were unambiguously correct, the tendency to idealize the period would itself reveal some deep feature of our desires and ideals.

¹⁰ Of course, we took land for homesteading too. But, sadly, we took it from people whom we believed had no rights. On the political significance of public giving without the appearance of taking, see Hockett, *supra* note 2, at 80–81.

in any event. So we turned to another public resource apart from the land, one that could seemingly be given without taking. We used public credit—“*full faith and credit*.”¹¹ We harnessed belief in a shared future, as embodied in a government that we counted our agent, to spread homesteads’ homes¹² and human capital—houses and higher (no longer just agricultural) education.¹³ But we have not yet recovered homesteads’ nonhuman capital.¹⁴ We have yet to find and spread a counterpart to *that*, an analogue to the productive land itself. What is the analogue?

The analogue, it is tempting to think, must be business capital—shares in firms.¹⁵ That is what now plays the role parceled land and plows did. If the phrase “ownership society” is to designate anything at all in our time—much less get off the ground, so to speak—we must surely get serious about spreading shares in firms.¹⁶ But how to do *that*?

Simple taking and giving probably are not in the cards. Perhaps they never were.¹⁷ But happily, it seems, they have never been needed. For as we noted above, when the land finally ran out we began publicly spreading the private owning of homes and human capital by other means. We collectively mobilized, guaranteed, and securitized individually (and productively) used *credit*.¹⁸ Might we not spread firm shares the same way? Indeed, in a sense, that is what we do now, in modest and piecemeal fashion. Or so we shall presently see.¹⁹ So perhaps we need only extend our ambition.

¹¹ Under the system where the United States government issued and honored bonds, the American people served as the ultimate guarantor of loans, thereby creating a national market and lessening risk. See Hockett, *supra* note 6, at 93. “Full faith and credit” alludes to the constitutional use of the term to describe obligations of the federal government. Because the U.S. government has never defaulted on its debt, it may be the best possible guarantor of credit.

¹² See *id.* at 104–20.

¹³ See *id.* at 146–53.

¹⁴ See *id.* at 95.

¹⁵ I find this thought hard to escape. If I am simply misguided, I’ll be grateful to be corrected.

¹⁶ I further discuss the sense in and degree to which the government has not yet seriously spread firm shares in Part I.

¹⁷ But see *supra* note 10.

¹⁸ See Hockett, *supra* note 6, at 92–94.

¹⁹ See *infra* Part II. This Article primarily treats ESOPs. Another present (and again piecemeal) means is public encouragement of new and small business formation. I think that these efforts are laudable, but not enough. Why I think ESOPs are inadequate will emerge in this Article, in particular in Part III. In a subsequent article, I will treat why small business encouragement is inadequate. The short answer is that small business encouragement is analogous less to the nineteenth century spreading of land than it is to the sixteenth century financing of exploration. It is terribly important and much to be praised, but also too speculative a public venture upon which to ground a stable and sustainable ownership society. It also bears noting that currently, ownership stakes in privately held companies—sole proprietorships, partnerships of all kinds, subchapter S corpora-

But now here's the rub. We have avoided the appearance of taking and giving in the home-spreading, school-spreading, and piece-meal stock-spreading cases by exploiting a fact quite peculiar to those cases: The beneficiary must *labor* to pay down the debt and make her investment pay off. Where it is a home we have helped her to purchase, she has toiled to pay down the mortgage and maintain the premises.²⁰ That secures the premises' value, in order that they might appreciate even as the debt itself amortizes. Where it is education we've spread, our beneficiary has worked at her studies and built up human capital assets.²¹ Then she has toiled at her job, which pays all the more thanks to the schooling itself, to pay down her loans. So value-additive toil and remunerative employment have been key to our latter-day ownership spreading's actuarial and political successes. But then, what to do when the last thing to be spread—a share in employing firms themselves—is itself counseled precisely because the employment is not always there to be had?²²

The Employee Stock Ownership Plan (ESOP), it is tempting to think, offers a glimpse of our answer, but is not itself our answer. It hints at our answer because, as in the home-spreading and education-spreading cases, it employs the credit-augmenting strategy and ties benefit to toil. And it spreads shares in firms—our hypothesized primary analogue to homesteading's land. But it is not our *full* answer *also* because it ties benefit to toil—to toil that is not always there to be had. And it concentrates risk: Beneficiaries derive capital and labor incomes from the same source. Is there some way to have what is good here while avoiding what is not?

Yes. Or so I am tempted to think.²³ The key is to fix on two facts: First, that the ESOP rests more heavily upon single firms' credit than

tions, and limited liability companies—are concentrated among Americans situated in the top decile of income and wealth. See Brian K. Bucks et al., *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances*, FED. RES. BULL., Mar. 22, 2006, at A24.

²⁰ See Hockett, *supra* note 6, at 96.

²¹ See *id.* For statistics on the pervasiveness of federal loan assistance for education, see *id.* at 153.

²² See *infra* Part III; see also Robert Hockett, *Just Insurance Through Global Macro-Hedging: Information, Distributive Equity, Efficiency, and New Markets for Systemic-Income-Risk-Pricing and Systemic-Income-Risk-Trading in a "New Economy,"* 25 U. PA. J. INT'L ECON. L. 107, 174–82 (2004) (discussing income risk in the modern global economy).

²³ I do not wish to speak dogmatically or with a false certainty here, but it appears that this is both desirable and possible, particularly in view of our shortfall in spreading securities, see *infra* Part I, the contrasting success of our finance programs for homes and education, see *infra* Part V, and the ease with which one can dispel the more obvious objections, see *infra* Part VI. Thus, it is tempting to think both that we should spread more stock ownership and that we can fashion an analogue to our home and education programs for doing so. If I am wrong about the urgency of this need, or if this analogy breaks down, I would be grateful to have my error pointed out.

on the public's much greater full faith and credit.²⁴ Second, that employment is but one form of such firm patronage as can ethically warrant the reward that is ownership.²⁵ So the ESOP is piecemeal indeed as a business capital analogue to public-credit-fueled private-home and education spreading. If we step farther out along both aforementioned dimensions—the credit and patronage dimensions—we might generalize the ESOP into a method of business capital spreading on a par with our present-day home and education spreading. Then our ownership society might again stand on three legs; it will be complete in the way that it began to be when there was land enough and when land was enough.

Our plan in this Article, then, is as follows. Part I takes the measure, so to speak, of our shortfall. The aim is to indicate how few Americans hold substantial, material-independence-conferring or participation-fostering stakes in firms. To show this up front seems important in view of some evidently widespread perceptions, among some citizens and policy elites, that most of us are stockholders already.²⁶ Learning the truth of the matter up-front serves to underscore the compellingness of the need we address in succeeding Parts.

Part II then rehearses the workings and successes of the leveraged ESOP—the principal means, thus far, by which we have sought as a society to spread shares in firms.²⁷ The aim here is first to show, mechanically, how publicly augmented firm credit actuarially underwrites employee share acquisition, thereby augmenting nonowners' purchasing power for such acquisition. The aim is second to indicate, now more politically than mechanically, how employment as a salient form of firm patronage appears ethically to underwrite the benefit that ESOPs confer upon acquiring employees. The latter is important to show not only because the aforementioned benefit might otherwise resemble a politically contestable giving, but because it entails an ill-disguised taking as well: It dilutes the holdings of others who already own, yet is nonetheless acquiesced-in—in large part because it is publicly subsidized, we shall see. And patronage appears to explain public acquiescence in the subsidy.

²⁴ I address the critical role of credit in financing stock option plans (SOPs) in *infra* Parts II.A, III.D, and V.

²⁵ For a discussion of the apparent political need of this ethical warrant, see Hockett, *supra* note 2, at 80–83. I discuss patronage and the ethical warrant that it provides in Parts II.C and IV.

²⁶ See *infra* notes 33–40.

²⁷ The other principal means through which society distributes corporate ownership is retirement funding. See *infra* notes 90–91 and accompanying text. My concern here, however, is with building an ownership society in which citizens partake for more than the final years of their lives.

Part III then turns to the *deficiencies* of ESOPs as share-spreading engines of a completed American ownership society. These deficiencies are associated with the two previously noted dimensions—those of patronage and credit. The ESOP relies solely upon the employment relation as ultimate patronage form warranting benefit conferral. That seems unduly to limit the range of stock-purchasing possibilities, and accordingly both to exacerbate the dilution problem and to concentrate precisely that risk which a comprehensive ownership society should diversify.²⁸ The ESOP also relies principally upon firm credit as frontline guarantor of individual stock-purchasers' credit. That both (a) unduly limits individuals' stock-purchasing credit, and (b) necessitates more potentially objectionable dilution of existing shareholders and taxpayers than appears to be socially necessary.

Part IV initiates our two-front approach to discharging the task of generalizing the ESOP along the two aforementioned dimensions. The aim is to sketch ESOP analogues grounded in forms of patronage additional to the employment relation. So it considers such schemes as "customer stock ownership plans" (CuSOPs), "resource" or "rent-recouping stock ownership plans" (RentSOPs), and, ultimately, simple "citizen stock ownership plans" (CitSOPs) and diversifying "meta stock ownership plans" (MetaSOPs). In each case we consider the ways in which the form of patronage upon which the benefit conferral is grounded serves to render that conferral perceivedly earned or deserved, hence better than a "handout" or giving. And in each case we accordingly see why the taking—the dilution of existing owners—recedes as a potential political problem.

Part V proceeds to the second dimension, that of credit. The aim here is to indicate, mechanically, how we might generalize from the ESOP idea by using beneficiary credit and the public's full faith and credit, instead of just firms' tax-break-assisted credit, to underwrite stock acquisition by nonowning citizens. That is what we have done in the cases of home spreading and education spreading, we'll see; and there seems no reason in (financial) theory why we could not do the same in the case of stock spreading. There might, however, be somewhat more poignant, endowment-psychology-rooted political obstacles in this case. And so we shall find the patronage discussion of Part IV helpful in conceiving conditions—"strings"—that might be attached, hence afford public warrant, to the benefits conferred by any "capital mortgage finance" program.

²⁸ See *infra* Part III.

Part VI addresses anticipated objections to the lines of inquiry and tentative proposals set forth in Parts IV and V. Then I conclude and look forward.

I

THE MEASURE OF OUR SHORTFALL: PATTERNS OF SECURITY-HOLDING IN CONTEMPORARY AMERICA

It seems reasonable to hope that anyone who has read this Article's two companion pieces²⁹ will find the prospect of a completed ownership society, and hence the prospect of publicly facilitated stock spreading, at least provisionally attractive. Provided that these are indeed prospects rather than *faits accomplis*, there are grounds for that hope. For it would be difficult to examine the means by which we have worked publicly to facilitate home spreading³⁰ and higher education spreading³¹ without marveling at two of those means' features in particular: first, their sheer financial ingenuity; and second, the ways in which their shared financial form both respects and gives expression to core American values and endowment dispositions. One is naturally tempted to ask whether the same means might be adapted to stock spreading in a manner that might supply the missing leg to that three-legged stool which would constitute a completed American ownership society—a society in which all participate in a responsible material freedom.³²

It might also be wondered, however—at least by some—whether the mentioned “third leg” has not already been supplied. For there seems a tendency among at least some Americans to suppose that the United States already approximates to something like an “equity culture”³³ or, say, a “shareholder society”³⁴: Our securities markets are

²⁹ Hockett, *supra* note 6; Hockett, *supra* note 2.

³⁰ See Hockett, *supra* note 6, at 99–120 (detailing historical and modern American home finance).

³¹ See *id.* at 144–53 (detailing historical and modern American higher education finance).

³² See *id.* at 99 (noting that the “three-legged stool” consists of homesteading, capital homesteading, and human-capital homesteading).

³³ B. MARK SMITH, *THE EQUITY CULTURE: THE STORY OF THE GLOBAL STOCK MARKET* 6 (2003) (describing the equity culture as “pervasive” and “commonplace”).

³⁴ See STEVE FRASER, *EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE* *passim* (2005) (providing an exhaustive cultural history of Americans' self-image as constituting a “shareholder nation”); see also PETER F. DRUCKER, *THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA* 1 (1976) (suggesting that the United States is “the first truly ‘Socialist’ country” because workers, through pension funds, own the “‘means of production’”); RANDY MARTIN, *THE FINANCIALIZATION OF DAILY LIFE* 12 (2002) (asserting that financialization “asks people from all walks of life to accept risks into their homes that were hitherto the province of professionals”). Particular thanks to Jeff Rachlinski, who pressed on me the significance of this apparently widespread perception.

deep and liquid.³⁵ News outlets continuously report stock index performances.³⁶ Pop investment advisors appear regularly on television³⁷ and radio programs, as well as maintain Web sites, where they share investment strategies with presumably broad audiences of share-holding viewers and listeners.³⁸ Some of the same personages, along with others, write books that sell widely.³⁹ And all of it scarce wonder, we might suppose: Government reports even tell us quite directly that half of us own stock.⁴⁰ And since many of the other half are either children or retirees for whom holding other financial assets makes more sense, from a risk-management point of view, than would stock holding, it might then seem natural to conclude that firm owning already is spread just as optimally as are home owning and human capital owning.

But that conclusion, it turns out, is false. And the observations just related that might seem to warrant the conclusion are all, in potential, quite grossly misleading. For it is one thing for many to own *some* stock. It is quite another for many to own *significant* amounts of stock. And it would be yet more to claim that many owned large blocks of stock that confer independence and foster participation. Only a miniscule few own blocks like that.⁴¹ And few indeed own significant amounts of stock, or of other financial assets with significant present value for that matter, at all.⁴²

³⁵ See Brian C. Roseboro, Assistant Sec'y, Office of Pub. Affairs, U. S. Treas., A Review of Treasury's Debt Management Policy, Teleconference Address at the UBS Eighth Annual Reserve Management Seminar for Sovereign Institutions (June 3, 2002), available at <http://www.ustreas.gov/press/releases/po3149.htm> ("[The] Treasury over the past few decades has been quite successful at . . . fostering the deepest, most liquid securities market in the world.").

³⁶ See, e.g., MSNBC, Stocks & Economy, <http://www.msnbc.msn.com/id/3032222/> (last visited Apr. 7, 2007).

³⁷ See, e.g., *Wall Street Week with Fortune* (PBS television broadcast Aug. 27, 2004) (interviewing Internet analysts on the IPO of Google).

³⁸ Consider The Motley Fool, a Web-based investment site whose investors regularly turn up on radio talk shows. See The Motley Fool, <http://www.fool.com/> (last visited Apr. 7, 2007). Similarly, *Marketplace*, the syndicated public radio program highlighting financial news, also maintains a Web site. See Marketplace, <http://marketplace.publicradio.org/> (last visited Apr. 7, 2007).

³⁹ See, e.g., BOB FROELICH, WHERE THE MONEY IS: HOW TO SPOT KEY TRENDS TO MAKE INVESTMENT PROFITS (2001); DAVID GARDNER & TOM GARDNER, THE MOTLEY FOOL INVESTMENT GUIDE: HOW THE FOOL BEATS WALL STREET'S WISE MEN AND HOW YOU CAN TOO (rev. ed. 2001); JAMES K. GLASSMAN & KEVIN A. HASSETT, DOW 36,000: THE NEW STRATEGY FOR PROFITING FROM THE COMING RISE IN THE STOCK MARKET (1999); PETER LYNCH WITH JOHN ROTHCHILD, BEATING THE STREET: THE BEST-SELLING AUTHOR OF *ONE UP ON WALL STREET* SHOWS YOU HOW TO PICK WINNING STOCKS AND DEVELOP A STRATEGY FOR MUTUAL FUNDS (1993).

⁴⁰ See, e.g., INV. CO. INST. & SEC. INDUS. ASS'N, EQUITY OWNERSHIP IN AMERICA, 2002, at 15 (2002) (noting that approximately 49.5% of U.S. households owned equities in 2002).

⁴¹ See *infra* notes 57–65 and accompanying text.

⁴² See *infra* note 57 and accompanying text. Although ownership of other financial assets is certainly relevant to one of our primary concerns—income independence—this

First I consider stock holding irrespective of whether it be direct, indirect, or beneficial.⁴³ Then I track ownership patterns under those classifications separately.⁴⁴

A. Direct, Indirect, and Beneficial Holding Combined

It is true that, literally speaking, most Americans own at least *some* shares in firms, either directly, indirectly, beneficially, or in some combination of the three. According to the Investment Company Institute and the Securities Industry Association, that could be said of about 52.7 million American households representing some 84.3 million adults in 2002.⁴⁵ And that amounted to nearly 52% of American households.⁴⁶ But we must qualify these statistics in two important ways, one potentially troubling and the other determinately so.

The potentially troubling qualification comes via the Federal Reserve's most recent triennial survey of American family finances.⁴⁷ According to the Federal Reserve, these statistics represent the peak of a trend begun over ten years ago—a trend in the direction of gradually growing percentages of households owning stock in one form or an-

Article focuses on equities for two reasons. First, most Americans who own corporate equities own other kinds of financial assets to a much lesser extent (and in an even more unequal distribution), meaning that holdings of the other financial assets do not substantially offset the shortfall in stock ownership. See Bucks et al., *supra* note 19, at A10–A19 (providing distributions of household financial assets, broken down by quintile of household income, and showing that bank accounts, bonds, stocks, life insurance, and other assets are even more unevenly distributed than equity securities); see also SEC. INDUS. ASS'N, 2005 SECURITIES INDUSTRY FACT BOOK 66–67 (Grace Toto ed., 2005) (stating that the median household holding liquid financial assets beyond cash holds 36.9% of those assets in equities and 11.1% in federal, municipal, and corporate bonds). Second, conventional wisdom suggests that individuals nearing retirement typically exchange equity holdings for less volatile investments.

⁴³ See *infra* Part I.A. The distinctions between these categories will become plain as we proceed. Briefly, “direct” ownership is holding title to securities of the firm that issues those securities. In contrast, ownership of a firm is “indirect” when one holds title to shares in a firm which itself holds title to the securities. And “beneficial” ownership simply refers to one’s legal status as beneficiary of a trust managed by a trustee, which holds title to the securities.

⁴⁴ See *infra* Part I.B. My reason for this division lies in the way I organized the predecessor articles. Briefly, spreading ownership resonates with several American ideological traditions—what I call, with I think little if any idiosyncrasy, the Civic Republican, Classical Liberal, and Pragmatic Consequentialist traditions. See Hockett, *supra* note 6, at 49–55. All three traditions, and especially the first two, value the independence that ownership confers upon owners. See *id.* But the first also conspicuously values the manner of responsible civic engagement—participation—that ownership encourages. See *id.* at 49–51. Accordingly, with respect to firm ownership, the Civic Republican tradition will favor direct owning over indirect owning, and both of these over mere beneficial owning.

⁴⁵ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 15.

⁴⁶ LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2004/2005, at 287 (2005) (stating that 51.9% of households held stock of some kind in 2001).

⁴⁷ See Bucks et al., *supra* note 19, at A1.

other.⁴⁸ This trend now has begun to reverse. Since 2002, “the fraction of families holding any . . . stock [has fallen] 3.3 percentage points, to 48.6 percent, a level apparently last reached some time between the 1995 and 1998 surveys.”⁴⁹ In this same period, moreover, “the overall median value of direct and indirect stock holdings dropped 33.8 percent.”⁵⁰ So we must not conclude from all of the rosy late-1990s chatter encountered in the popular media⁵¹ even that half of us own shares in firms any longer, particularly if present apparent trends continue.⁵² For purposes of this Article, however, I shall by and large ignore the more recent bad news.⁵³ For what seems more important is that stock ownership in the United States, even in that peak year, fell very far short of underwriting anything like a meaningful equity culture.

So much for the potentially troubling qualification to the “half of us own stock” statistic. The *determinately* troubling—and much more significant—qualification is this: Even a moderately careful perusal of available data reveals that we have never, as yet, come anywhere near to constituting a meaningful ownership society where firm shares are concerned. For, irrespective of the (only marginally) varying percentage of Americans who have owned “some” stock since data on this question has been available, the total *distribution* of stocks, tracked share by share, has never yet failed to be highly *skewed*.⁵⁴ It has been substantially more so, in fact, even than that of most other assets, such as homes.⁵⁵ It has also been substantially more so than that of (non-dividend) income.⁵⁶ And these facts hold true even when we take direct, indirect, and beneficial securities-holding into account.

“Let’s do the numbers”: A few figures and graphics prove telling. In 2001, the top 0.5% of stock-owning households in the United States

⁴⁸ See *id.* at A19.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See, e.g., GLASSMAN & HASSETT, *supra* note 39, at 4 (asserting that while stocks in 1999 were on the rise, “astounding profits will be made [and] [t]his book will show you how easy it is to participate”).

⁵² See Bucks et al., *supra* note 19, at A19.

⁵³ See, e.g., MISHEL ET AL., *supra* note 46, at 1 (“Despite being two and a half years into economic recovery, many of the problems that beset working Americans in the 2001 recession and protracted jobless recovery persist today.”).

⁵⁴ See, e.g., Mihir A. Desai et al., *Taxation and the Evolution of Aggregate Corporate Ownership Concentration* 34–36 tbls.1 & 2 (Nat’l Bureau of Econ. Research, Working Paper No. 11,469, 2005).

⁵⁵ See MISHEL ET AL., *supra* note 46, at 286 (describing homes as more widely held than other assets like stocks and bonds); Bucks et al., *supra* note 19, at A22 (noting that ownership of homes rose most for families in the middle of income and wealth distributions).

⁵⁶ See, e.g., Desai et al., *supra* note 54, at 34–36 tbls.1 & 2 (showing that over the years 1929–2000, the top 1% of Americans received on average 13.15% of nondividend income, yet received 28.4–63.79% of all dividend income for an average of near 50%).

held 25.6% of all shares.⁵⁷ The bottom 80% held only 10.7%.⁵⁸ The distribution, unsurprisingly, remains quite concentrated at the top end when tracked by dollar value; and the dollar value of most Americans' holdings, when they hold anything, is remarkably low: In 2001, the top 1% of households in America (in net worth terms) who owned any stock at all had on average \$3,568,400 invested either directly or indirectly in stock.⁵⁹ The comparable figure for the next 9% of stock-owning households was \$512,300.⁶⁰ For the next 10% it was \$131,900.⁶¹ For the next 20% it was \$41,300.⁶² The middle 20% had \$12,000 on average invested either directly or indirectly.⁶³ And the bottom 40% of stock-owning households had a mere \$1,800.⁶⁴ (We are still ignoring, recall, the roughly half of Americans who hold *no* equity securities in any manner.) While the average stock-owning American household, then, indeed had \$106,300 invested in stock either directly or indirectly,⁶⁵ it would be erroneous to suppose that a significant number of American households held portfolios with anything near that value in view of the distribution just catalogued.

Graph 1 makes the point pictorially. It illustrates the total distribution of holdings in 2001 by wealth class of stock-holding Americans.⁶⁶ Perhaps the most striking fact apparent here is that, while the wealthiest 10% of American households owning any stock at all—those represented by the first two columns—held approximately 76.9% of all stocks, the least wealthy 40%—those represented by the last column alone—held only about 0.7%.⁶⁷

57 MISHEL ET AL., *supra* note 46, at 287 tbl.4.7.

58 *Id.*

59 *Id.* at 289 tbl.4.9.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

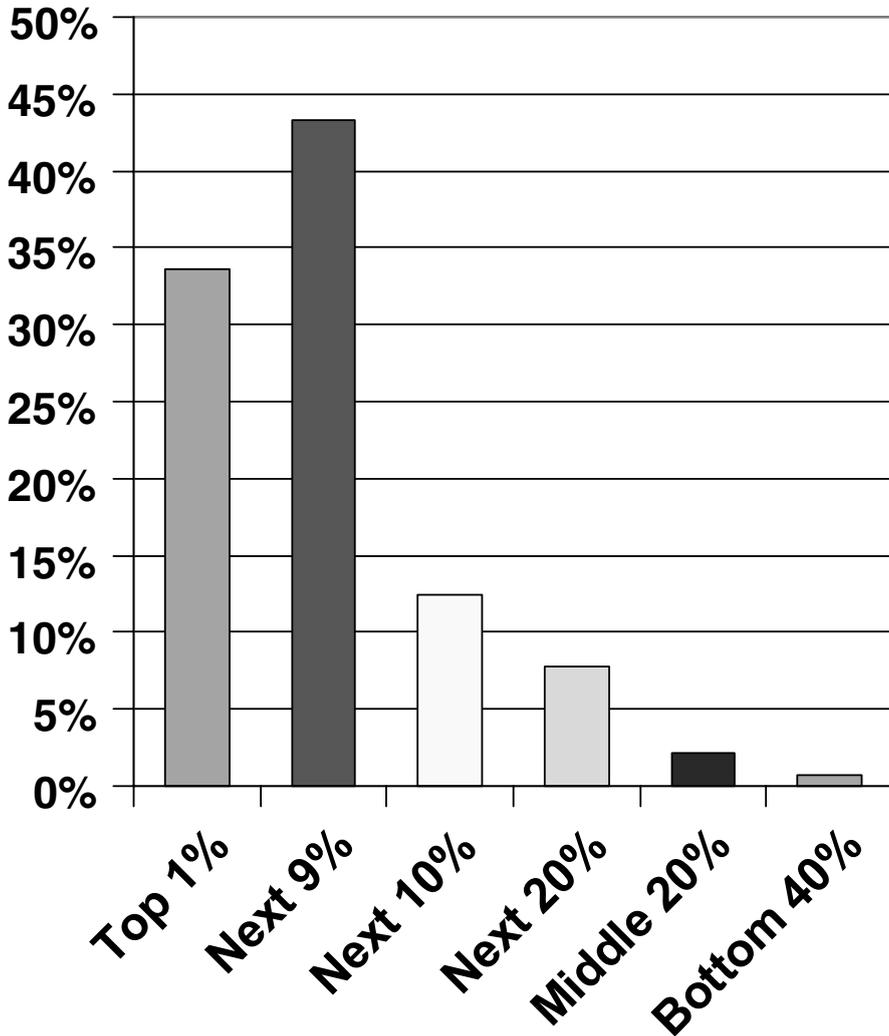
64 *Id.*

65 *Id.*

66 Wealth class is determined by the household's net worth.

67 MISHEL ET AL., *supra* note 46, at 290 fig.4D.

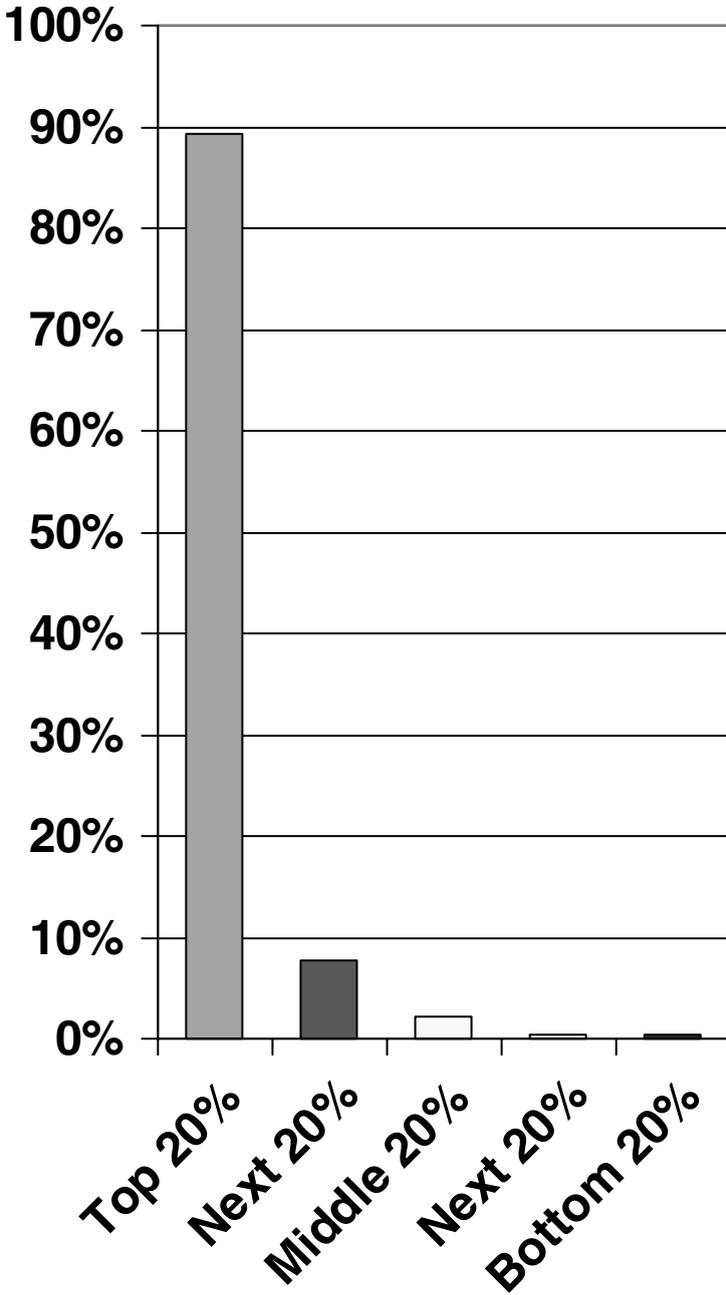
GRAPH 1: SECURITIES HOLDINGS TRACKED BY AMERICAN STOCK-HOLDING WEALTH CLASSES, 2001



Dividing classes evenly, say into quintiles, renders the skew in the distribution both more transparent and more dramatic: The first three vertical bars in Graph 1 have to be stacked into one bar, while the last bar has to be subdivided into two yet shorter bars.⁶⁸ Things then look like this:

⁶⁸ For simplicity, I have divided the percentage of shares owned by the bottom 40% equally in Graph 2. However, it is possible that all or most of this meager quantity of shares belongs to people in the sixtieth to eightieth percentile, with the bottom 20% owning no stock.

GRAPH 2: SECURITIES HOLDINGS TRACKED BY STOCK-HOLDING AMERICAN HOUSEHOLD WEALTH QUINTILE, 2001



That's pretty telling, but there is more. In 2002, nearly half of all equity investors (again, this class itself comprises but half of Ameri-

cans generally) held equity assets valued at less than \$50,000.⁶⁹ Over half of these in turn held assets valued at less than \$25,000.⁷⁰ Over half of *those* held assets valued at less than \$10,000.⁷¹ And only 7% of equity investors held equity assets valued at \$500,000 or more.⁷²

Table 1 provides a more detailed breakdown. It shows what percentage of equity investors (again, a universe comprising but half of Americans) owned stock portfolios from \$0 to \$1,000,000 or more, tracked by \$10,000, then \$15,000, then \$25,000, and finally yet larger increments, in 2002.⁷³

TABLE 1: DISTRIBUTION OF EQUITY PORTFOLIOS TRACKED
BY INCREMENTS, 2002

Less than \$10,000	14%
\$10,000 - \$24,999	11%
\$25,000 - \$49,999	24%
\$50,000 - \$74,999	15%
\$75,000 - \$99,999	7%
\$100,000 - \$249,999	15%
\$250,000 - \$499,999	7%
\$500,000 - \$999,999	4%
\$1,000,000 or more	3%
Mean	\$171,000
Median	\$50,000

B. Direct Versus Indirect and Beneficial Holding

The distribution of undifferentiated stock holding as just portrayed should give pause to those who believe that the United States

⁶⁹ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 6 fig.5. Each of the following percentages should of course be divided approximately in half in order to calculate what percentage of the population at large holds portfolios of the associated values. If we include a null portfolio for those holding no securities at all, we must add 50% to half of the 14% figure to reflect the fact that 57% of Americans hold either no stock at all or stock valued at less than \$10,000. I trust that the average scholarly reader will appreciate how truly small even a \$50,000 portfolio (which 75% of Americans do not have) is.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ The growing increments simply reflect the dramatic nature of the skew found in Graphs 1 and 2. The table would grow very long indeed were it to remain divided into \$10,000 increments, and a tiny fraction of Americans—the very wealthy—would represent most of its length. Also, please note again that, according to the Federal Reserve's latest data, this situation has not improved and indeed appears in most respects to have worsened. See Bucks et al., *supra* note 19, at A10–A19.

constitutes an equity culture already.⁷⁴ But things become yet more problematic when we differentiate stock holding with a view to whether the United States constitutes a *literal* “firm-ownership society.”⁷⁵ For we can usefully distinguish, for some purposes, among the direct, indirect, and beneficial owning of securities.⁷⁶ To the degree that we are interested in securities holding solely in virtue of its capacity to confer a degree of income independence upon the holder, the distinction (like that between equities and other financial or readily liquidated assets⁷⁷) is presumably without difference. To the degree that we are interested in securities holding in virtue of the habits of responsible ownership and shared governance that it might engender, however, the distinction will take on importance.⁷⁸ People with the latter interest—call them “Civic Republicans,” as distinguished from “Classical Liberals” and “Pragmatic Consequentialists”⁷⁹—are likely both (a) to think of “owning” in “controlling” or “governing” terms, and, in consequence, (b) to find present patterns of American securities holding yet more dispiriting even than they have appeared up to now in this Part.⁸⁰ For indirect and beneficial owners do not participate in the governance of firms, and it is these owners who constitute by far the greater part of Americans who own firms in any manner at all.

⁷⁴ By undifferentiated I mean simply those who hold any stock at all, whether directly, indirectly, or beneficially. See *supra* note 43.

⁷⁵ In this sense, ownership includes, as it is typically defined to include, rights to control.

⁷⁶ See *supra* note 43.

⁷⁷ See *supra* note 42.

⁷⁸ So, of course, will the distinction between holding equity as opposed to other financial assets. See *supra* note 43. Absent proximity to “the vicinity of insolvency” on the part of the firm, of course, holding debt does not typically confer control rights or fiduciary rights upon the holder. *E.g.*, *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc’n Corp.*, No. 12150, 1991 Del. Ch. LEXIS 215, at *108 (Del. Ch. Dec. 30, 1991). See generally Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277 (1990) (describing the relationship between fiduciary principles and risk preferences).

⁷⁹ I take the terms from Hockett, *supra* note 2, at 5–28, where I employ them to designate what I identify as the three dominant traditions of American political ideology. I then endeavor to identify a range of overlapping consensus among those traditions with a view toward forging a unitary ideological template upon which to construct a politically stable ownership society. See *id.* at 29–56.

⁸⁰ Adherents to the Civic Republican tradition of American political thought might take interest in holding securities for this reason. See, *e.g.*, DAVID P. ELLERMAN, *THE DEMOCRATIC WORKER-OWNED FIRM* 76–91 (1990) (discussing possible capital rights arrangements in “democratic” worker-owned firms); Gregory S. Alexander, *Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 111, 130 (1993) (discussing the attraction of empowering ERISA beneficiaries to “make decisions and to practice self-governance”); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 *passim* (1991) (discussing historical antecedents of various conceptions of property that foster the kind of citizen autonomy and participation valued in the Civic Republican tradition).

Again the numbers are telling. Direct ownership of firm shares by American households is readily seen to be particularly rare.⁸¹ In 2001, only 21.3% of American households directly held any stock at all.⁸² By contrast, 47.7% of households indirectly or beneficially held at least some stock, subject to the distribution patterns discussed above at Part I.A.⁸³ Most households that owned stock directly also owned stock indirectly or beneficially—80.3%, in fact.⁸⁴ Only 17.1% of all American households held stock both directly and indirectly.⁸⁵

Americans effect much indirect holding of securities through investment companies, typically mutual funds. American investors on average hold much more stock indirectly through mutual funds than directly in issuers. Fully 89% of undifferentiated equity investors (again, only half of Americans generally) owned stock in mutual funds in 2002, while 49% owned non-investment-company issuing firms' shares directly.⁸⁶ Fully 51.5% of American equity investors held only mutual fund shares.⁸⁷ Eleven percent held only individual stock.⁸⁸ And 37.5% held both individual stock and mutual fund stock.⁸⁹

Another principal vehicle through which Americans effect indirect securities holding, and now beneficial owning as well, is the retirement or pension plan. Employer plans constitute many people's first foray into investing, with approximately 48% of American households owning equities in January 2002 initially acquiring their stock indirectly through employer plans.⁹⁰ Indeed, this seems to be the most significant form of Americans' indirect holding or beneficial owning of stock in terms of sheer numbers of owners.⁹¹ About 33.2 million Americans held or beneficially owned stock through some employer plan in January 2002.⁹²

⁸¹ I ignore here the owning of nonpublic firms. It happens that ownership of nonpublic firms is also statistically rare. See Bucks et al., *supra* note 19, at A22. Yet even were this not so, more ownership of public firms, even by owners of nonpublic firms, would be counseled by the diversification considerations discussed in Part III.

⁸² MISHEL ET AL., *supra* note 46, at 288.

⁸³ *Id.*

⁸⁴ *Id.* This suggests that beneficial ownership—primarily through pension plans—constitutes the most significant form.

⁸⁵ *Id.*

⁸⁶ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 4.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 5 fig.3. About 44% initially purchased stock outside of these plans, and 8% initially acquired stock both inside and outside of employer plans in the same year. *Id.*

⁹¹ Indeed, this is sufficiently significant to have prompted Peter Drucker, somewhat hyperbolically, to refer to an "unseen revolution" through which "pension fund socialism" had come to America. See DRUCKER, *supra* note 34.

⁹² INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 4. The corresponding number for indirect holdings through mutual funds outside employer plans was somewhat smaller, with only 28.7 million Americans holding such stock as of January 2002. *Id.*

Percentage-wise, nearly half of indirect stock holding or beneficial owning appears to be effected through employer plans. About 48% of American households owning equities at all in 2002 initially acquired their stocks indirectly through employer plans.⁹³ About 44% initially purchased stock outside of these plans, and 8% initially acquired stock both inside and outside of employer plans in the same year.⁹⁴ The majority of all American equity investors (again, not of all Americans) held at least some stock through employer plans in 2002—66%—while only 17% held some stock directly as well as through an employer plan.⁹⁵

The significant role played by employer plans in indirect or beneficial stock holding by Americans raises more than just the governance or participation concerns that might trouble Civic Republicans.⁹⁶ It also raises risk and diversification concerns that might trouble anyone caring about the reliability of incomes—concerns we shall revisit in detail in Part III below.⁹⁷ Of the 8.8 million households (representing 12.3 million adult individuals) which held or beneficially owned stock through employee plans in 2002, about 51% owned only employer stock through their plans.⁹⁸ Only about 28% owned only nonemployer stock.⁹⁹ And only about 21% owned both employer and nonemployer stock through their plans.¹⁰⁰ Fully 65% of investors holding individual stocks through employer plans in 2002 held only one or two separate stocks through such plans; only 16% owned six stocks or more.¹⁰¹ The median number of stocks held was one; the mean was four.¹⁰² The median number of years that this group owned stock through employer plans was ten years.¹⁰³

Apart from governance and risk-concentration concerns, it bears noting that stock holding through employee plans, though it represents a very large portion of all American equity ownership, nonethe-

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *supra* note 79 and accompanying text.

⁹⁷ These concerns will be elaborated in detail in Part III.

⁹⁸ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 65. This represents 12.3 million individuals. *Id.* Recall that investors who beneficially own shares lack control rights. See *supra* text accompanying note 75–80.

⁹⁹ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 65.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 70.

¹⁰² *Id.* It is perhaps worth noting that a want of diversity also afflicts the direct ownership of stock by most Americans who own in this way. According to the Federal Reserve, 34.6% of those households owning any stock directly in 2004 held stock in only one firm, 59.5% held stock in three or fewer firms, and only 9.5% held stock in fifteen or more firms. See Bucks et al., *supra* note 19, at A15. Moreover, for 37.1% of these direct holders, at least one of the firms owned either employed or had employed the head of the household or that person's spouse or partner. See *id.*

¹⁰³ INV. CO. INST. & SEC. INDUS. ASS'N, *supra* note 40, at 70.

less is quite small when calculated per capita. The median value of investors' individual stock portfolios held through employer plans was \$25,000 in 2002, as compared to \$30,000 in 1999.¹⁰⁴ The mean value of such portfolios was \$150,000 in 2002, as compared to \$105,000 in 1999.¹⁰⁵ Among investors holding only employer stock through their employer plans, the median value of such "portfolios" was \$17,500 in 2002; the mean value was \$86,700.¹⁰⁶ The median value of investors' stock *mutual fund* portfolios held through employer plans was \$30,000, which typically was invested in three mutual funds.¹⁰⁷ The mean value of these portfolios was \$84,100.¹⁰⁸

We could proliferate figures like this *ad libitum*.¹⁰⁹ But there seems little need. The point by now should be plain: Negligibly few Americans directly, indirectly, or beneficially own sufficient securities as to be income secure before reaching retirement.¹¹⁰ Not many more hold sufficient securities to be income secure even upon retirement.¹¹¹ And far, far fewer hold equities directly in such manner as to afford opportunities to participate meaningfully in the governance of firms.¹¹²

In sum, then, we simply are nowhere near, in the realm of firm owning, where we are in the realm of home owning or remunerative human capital owning.¹¹³ And even in the latter two cases there is more to be done.¹¹⁴ If we are to be truly serious about becoming an

¹⁰⁴ *Id.* at 71.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The scare quotes around "portfolios" are meant to convey that a portfolio including but one firm's securities is not truly a portfolio.

¹⁰⁷ *Id.* at 88.

¹⁰⁸ *Id.* For those who worry over the degree to which stock ownership in America is either indirect or beneficial, such beneficial *indirect* ownership may raise additional concern. On the other hand, the greater mean and median values of such portfolios, presumably stemming from their diversification advantages, should afford some solace. There is, of course, some inherent tension between the goals of income security and governance, just as risk avoidance and commitment generally represent alternatives rather than partners.

¹⁰⁹ See, e.g., Bucks et al., *supra* note 19, at A14–A24 (providing many more similar statistics).

¹¹⁰ Consider again the dollar figures assayed above in Subpart I.A, in particular the \$50,000 statistic. See *supra* note 69.

¹¹¹ See *supra* text accompanying notes 104–08 (showing the small size of retirement plans).

¹¹² See *supra* notes 75–80 and accompanying text.

¹¹³ For a discussion of how much more widely distributed these assets became after the federal government implemented strategies to augment credit, see Hockett, *supra* note 6, at 116–17 (discussing home ownership), 153 (discussing human capital). This Article is predicated in part on the prospect of employing the same basic strategy to spread firm shares. See *infra* Part V.C.

¹¹⁴ See MISHEL ET AL., *supra* note 46, at 293. See generally Robert Hockett, Asset-Accumulation Programs for the Middle Class and Poor (Mar. 13, 2007) (unpublished draft, on file with author) (tracking the differences between home finance and higher-education finance programs that benefit the poor and those that benefit the wealthy).

ownership society—a society of responsible, participating, and materially autonomous owner-citizens rather than merely a society in which some people own some things—then we shall have to become more serious about firm ownership spreading than we have thus far managed. We shall have, perhaps, to do with shares something like what we have done with homes and higher educations.¹¹⁵

II

A MODEST FIRST STEP TOWARD REDRESS: ESOPs—WHAT THEY DO, HOW THEY DO IT, AND WHY WE SEEM TO LIKE THEM

It happens that we have as a society made some tentative effort toward spreading firm ownership. The principal means up to now has been the public favoring—mainly the tax favoring, we'll see—of employee benefit plans under the Employee Retirement Income Security Act (ERISA).¹¹⁶ Yet the ultimate aim here, as ERISA's full title suggests, has been mainly to encourage and protect investment for one limited purpose—retirement security.¹¹⁷ There is one partial exception, however: The employee stock ownership plan (ESOP) was originally designed and continues to be advocated, at least partly, as a means by which to foster the *pre*-retirement owning of firms by employees. We shall see in the next Part the senses in which that is an over-modest aim. This Part is concerned more with how the aim is effected, and why we seem willing to effect it in the manner we do. For the mechanics and politics here would seem to be generalizable in ways that might benefit all Americans. I plan to exploit that generalizability in Parts IV and V in the interest of completing our ownership society.

A preliminary terminological point before proceeding. In speaking of ESOPs (or “plans”), one may refer to any of several distinct, cognate kinds of financial arrangements.¹¹⁸ All, as befits their shared name and as intimated above, are meant to facilitate laborers' acquisition of shares in the firms for which they work.¹¹⁹ By far the most

¹¹⁵ See *infra* Part V.C.

¹¹⁶ Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000); see JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 68–84, 89–96 (4th ed. 2000) (discussing the origin and structure of ERISA).

¹¹⁷ The closing of the South Bend, Indiana, Studebaker plant precipitated the congressional action culminating in the passage of ERISA. See LANGBEIN & WOLK, *supra* note 116, at 68–72. Studebaker had grossly underfunded its employee pension fund, leaving the suddenly unemployed pensioners doubly bereft. See *id.* Those familiar with recent bankruptcies, particularly in the airline industry, might be tempted to say *plus ça change*. See, e.g., Evan Perez, *Delta Moves to Shed Pensions*, WALL ST. J., June 20, 2006, at A13.

¹¹⁸ For a brief catalogue of ESOP types, see JOSEPH RAPHAEL BLASI, *EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF?* 64–84 (1988).

¹¹⁹ See *id.* at 64.

common such set of arrangements, however, and the one that will engage us here, is the so-called “leveraged” ESOP.¹²⁰ This, as the qualifier suggests, is the plan that employs credit in the share-acquiring process.¹²¹

A. What: Simple Mechanics and Spread

The leveraged ESOP works as follows.¹²² The employing firm adopts an ESOP as a sponsored ERISA plan—a defined contribution plan.¹²³ Like other ERISA plans, the ESOP takes the legal form of a trust.¹²⁴ It is a distinct, even if firm-sponsored and ultimately board-directed, entity formed to acquire and hold stock on behalf of employees.¹²⁵ Its administrator, though named and directed by the sponsoring firm’s board or a committee named thereby,¹²⁶ accordingly bears fiduciary obligations to those employees.¹²⁷

Now partly in exchange for a promissory note, the trust borrows funds from a bank or some other commercial lender.¹²⁸ It uses those funds to purchase stock issued by the sponsoring firm at fair market value.¹²⁹ The loan proceeds accordingly pass through the ESOP to the sponsoring firm itself—they finance it, we’ll see—and the stock is

¹²⁰ See *id.* at 68–78.

¹²¹ See *id.* at 65–68, 78–84 (describing the principal ESOPs that do not employ credit—“nonleveraged ESOPs,” “tax-credit ESOPs” (TRASOPs), and “payroll ESOPs” (PAYSOPs)).

¹²² The transactions which follow are related, in slightly differing order and somewhat less detail, in EMPLOYEE BENEFIT RESEARCH INST., FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 121–22 (3d ed. 1987).

¹²³ See 29 U.S.C. § 1107(d)(6) (2000) (defining an employee stock ownership plan under ERISA). Defined contribution (DC) plans should be distinguished from defined benefit (DB) plans. See EMPLOYEE BENEFIT RESEARCH INST., *supra* note 122, at 65. The former prescribe a schedule of payments made into an account for the benefit of the employee, who in turn bears both gains and losses realized by the investment portfolio over time. See *id.* DB plans, by contrast, prescribe payments made out to the employee upon her retiring, and the employing firm effectively bears the aforementioned upside gains and downside losses realized by the fund out of which payments are made. See *id.* at 68–69.

¹²⁴ See 29 U.S.C. § 1103(a) (providing that employee benefit plan assets must be held in trust). This insulates funds earmarked for employees from the other financial operations of the firm and affords the employee-beneficiaries the benefit of fiduciary obligations owed them by the plan’s trustee. See *id.* § 1104. It is regrettably not clear, however, that the trust protections offered employees by pension trusts are as fulsome as those offered beneficiaries of other trusts. See, e.g., *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 757–58 (S.D.N.Y. 2003) (finding that ERISA defines fiduciary obligations more narrowly than does the common law trust doctrine).

¹²⁵ See ELLERMAN, *supra* note 80, at 111.

¹²⁶ See 29 U.S.C. § 1103(a)(1). For a partial exception, which need not here detain us, see *id.* § 1103(a)(2).

¹²⁷ See *id.* § 1104(a)(1).

¹²⁸ See ELLERMAN, *supra* note 80, at 111.

¹²⁹ See *id.* Because the trust purchases shares at fair market value, ESOP proponents sometimes misleadingly describe the purchase as an injection of equity. It would be more accurate, however, to characterize it as a publicly subsidized debt finance accompanied by a stock giveaway.

then held in trust on behalf of the employees.¹³⁰ The firm guarantees repayment of the loan by the ESOP to the lender, and the stock held in the ESOP is itself pledged as security.¹³¹

Now over time, the sponsoring firm makes cash contributions to the ESOP just as it would in connection with any defined contribution plan.¹³² In this case the ESOP uses the contributions to amortize the loan originally used to purchase the sponsoring firm's shares.¹³³ As the loan is paid down, stock held by the trust is gradually released from its loan-securing role to individual accounts maintained severally on behalf of the employee-beneficiaries.¹³⁴ It is released to those accounts in proportions that track the beneficiaries' labor patronage of the firm (i.e., their wages or salaries).¹³⁵ Diagrammatically:

¹³⁰ *See id.*

¹³¹ *See id.*

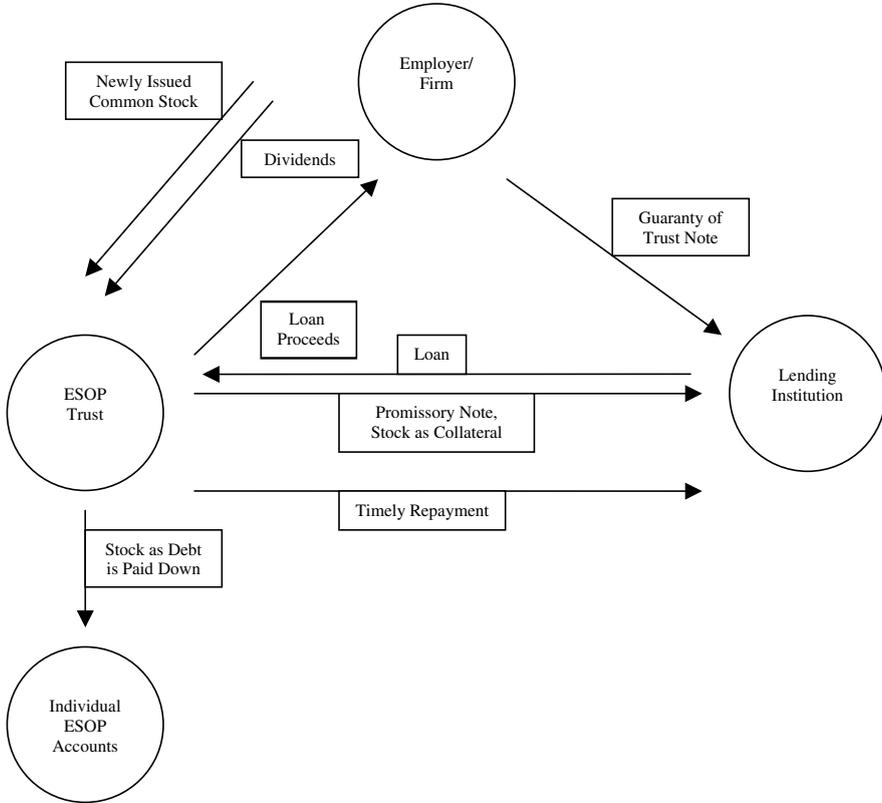
¹³² *See id.*

¹³³ *See id.* Thus the sponsoring firm both borrows and repays on behalf of employees for the purchase of its own stock, giving partial ownership of itself as an employee benefit.

¹³⁴ *See* Darien A. McWhirter, *Employee Stock Ownership Plans in the United States*, in UNDERSTANDING EMPLOYEE OWNERSHIP 43, 44 (Corey Rosen & Karen M. Young eds., 1991). Typically, the employee-beneficiaries can sell or redeem their shares only upon retirement or exit from the firm, and typically the firm buys the shares back. *See id.* at 51–52. There are sometimes voting restrictions as well. *See id.* at 48. This is significant when considering what ownership should mean.

¹³⁵ *See id.* at 45.

FIGURE 1: INSTITUTIONAL/FINANCIAL STRUCTURE OF A LEVERAGED ESOP ARRANGEMENT



Now not surprisingly, in view of the arrangement’s financial structure, this all proves to work rather well as a method of getting more “capital into the hands of labor”¹³⁶ (and this is not yet to mention more debt financing to the firm). Some statistics are again telling: By 1986, twelve years after ESOPs had attained congressional endorsement in ERISA, nearly five thousand firms had adopted plans.¹³⁷ About 25% of those plans held more than 25% of the outstanding stock of their firms, and nearly 2% owned all such stock.¹³⁸ By 1990, over twelve million laborers—about 10% of the workforce—in over ten thousand firms had come to participate in ESOPs.¹³⁹

¹³⁶ With one possible, though minimal, caveat noted below, the employee-beneficiaries neither pay nor pledge anything. The firm, in effect, does it all. Or nearly all, as we’ll see when we turn to the government’s role. See *infra* Part II.B.

¹³⁷ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 105 (1996).

¹³⁸ See *id.*

¹³⁹ See ELLERMAN, *supra* note 80, at 110; HANSMANN, *supra* note 137, at 105; Corey Rosen, *Employee Ownership: Performance, Prospects, and Promise*, in *UNDERSTANDING EMPLOYEE OWNERSHIP*, *supra* note 134, at 1 & 20 tbl.1.2. For a partial list of companies that have established ESOPs, see Gianna Durso, *The Structure and Implementation of ESOPs in Public*

By the late 1990s, the rate of ESOP growth had come to average between three and six hundred new plans per year, accounting for between three- and six-hundred thousand new employee participants per year.¹⁴⁰ Among sponsoring firms over the past thirty years have been such American stalwarts as Avis, Chicago's Tribune Corporation, Delta, Federal Express, General Motors, Kraft, Maytag, Polaroid, Procter & Gamble, Quaker Oats, United Airlines, and Xerox.¹⁴¹ Even skeptics of ESOPs, and of the oft-seemingly "crackpot" financial pronouncements of the ESOP's inventor, Louis Kelso,¹⁴² readily acknowledge their "rapid proliferation,"¹⁴³ hence that "[s]omething is happening that requires attention."¹⁴⁴ But what is it that is happening, and why might it require attention? What do the telling statistics actually tell?

ESOP promoters have tended to speak of ESOPs' successes as though all were a "natural" function of superior financial engineering, the "self-liquidation" of "capital mortgages," and the incentive effects that growing ownership imparts to laborers. Thus Louis Kelso: "[T]he corporation and its employees can achieve [through ESOP financing] several hundred percent greater efficiency in the use of corporate earnings for capital purposes than through conventional . . . financing."¹⁴⁵ And Kelsonian acolyte Stuart Speiser: "Th[e] new capital . . . pay[s] for itself out of the increased profits flowing from expanded pro-

Companies, in THE EXPANDING ROLE OF ESOPs IN PUBLIC COMPANIES 11, 23–27 tbl.2.1 (Karen M. Young ed., 1990); Rosen, *supra*, at 10–11 tbl.1.1. ESOP-like structures have expanded in jurisdictions outside the United States as well. See ELLERMAN, *supra* note 80, at 113–14; Rosen, *supra*, at 18–19. A helpful catalogue of the one thousand largest firms with more than 4% employee ownership is found in JOSEPH RAPHAEL BLASI & DOUGLAS LYNN KRUSE, THE NEW OWNERS 257–301 (1991). The catalogue does not disaggregate employee ownership by ESOP, profit-sharing, 401(k), and option plans, but it is nonetheless suggestive both in light of the fact that ESOPs account for almost half of employee-owned equity, and the surprising number of firms on the list that are 20% or more owned by employees. See *id.*

¹⁴⁰ See *id.* These plans covered between three-hundred thousand and six-hundred thousand new employee participants per year.

¹⁴¹ See Durso, *supra* note 139, at 23–27 tbl.2.1; McWhirter, *supra* note 134, at 60–61; Rosen, *supra* note 139, at 10–11 tbl.1.1.

¹⁴² Kelso believed that contemporary economists remain wedded to the labor theory of value, but that there are "really two productive factors, labor and capital" that enter into production, with the latter accounting for an ever-growing share of value added. ELLERMAN, *supra* note 80, at 119–20; see also Hockett, *supra* note 6, at 125. Economists have not found these discoveries compelling. See ELLERMAN, *supra* note 80, at 119–20. I should perhaps not be so snarky, however. Kelso's motives, energy, and inventiveness, as distinguished from his sally into theory, were nothing if not praiseworthy. He was a lawyer and investment banker, not an academic theorist, who typically pitched his advocacy to legislators and the general public, and thus his primary audience was not the academics that criticized him. See STUART M. SPEISER, A PIECE OF THE ACTION 148–49, 188 (1977).

¹⁴³ HANSMANN, *supra* note 137, at 105.

¹⁴⁴ ELLERMAN, *supra* note 80, at 120.

¹⁴⁵ LOUIS O. KELSO & PATRICIA HETTER KELSO, DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION 62 (1986).

duction.”¹⁴⁶ And the reliably cheery business journal *Inc.*: “[T]here’s considerable evidence that eliminating the employee mentality and creating companies of businesspeople, of owners, has become a kind of Hidden Secret of Success in the American marketplace.”¹⁴⁷

But in fact the mentioned evidence is hardly “considerable”: At best it is thin and ambiguous.¹⁴⁸ Nor does presently leverage-bought ESOP capital “pay for itself” in much more than a trivial sense: It is far from clear that the dividend streams and capital gains that attend ESOP stock would dependably pay the term loans without help of the kind I shall presently describe. And the “several hundred percent greater efficiency,” which quantity incidentally is, like many Kelsonian magnitudes, arrived at by altogether unspecified means, is hardly “natural,” “economic,” or “financial” in any prelegal or prepolitical senses of the terms. For the real “Hidden Secret” of ESOP success, it turns out, is no more obscure than the tax code, ERISA, and combined corporate governance and takeover law: The leveraged ESOP as currently constituted is essentially a public benefit conferred through private channels.

B. How: Private Channels, Public Benefits

Consider first a few tax and ERISA advantages. These, working in tandem, presently account both for the aforementioned efficiency of ESOPs as financing tools and for the apparent capacity of ESOP stock to “pay for itself.” They also afford incentives to the lenders themselves, as well as to nonESOP shareholders from whom an ESOP might seek shares.

1. Tax Advantages

Probably the most efficacious tax advantage that leveraged ESOPs uniquely confer upon sponsoring firms comes via the Internal Revenue Code’s permitting them to deduct contributions made to their plans. The firm may deduct those, to an amount up to 25% of all compensation paid to a plan’s participants, from its taxable income.¹⁴⁹ That advantage works jointly with ERISA’s relaxing, in the case of ESOPs, the now customary mandatory diversification understanding of the so-called “prudent man” standard to which employee

¹⁴⁶ Stuart M. Speiser, *Broadened Capital Ownership—The Solution to Major Domestic and International Problems*, 7 J. POST KEYNESIAN ECON. 426, 429 (1985) (emphasis added). For more on this idea, see *infra* note 314.

¹⁴⁷ John Case, *A Company of Businesspeople*, INC., Apr. 1993, at 79, 86.

¹⁴⁸ For a plenary and not unsympathetic discussion of the available evidence, see BLASI, *supra* note 118, at 25–27, 221–38.

¹⁴⁹ See I.R.C. § 404(a)(9) (2000). ESOPs also enjoy the tax advantages of employee pensions generally. Most of these are noted below, but this section primarily focuses on what is unique to ESOPs.

pension trusts ordinarily are subject¹⁵⁰: In nonESOP cases ERISA requires that employee trusts be broadly invested; a plan will not typically be permitted to hold much of the sponsoring firm's equity.¹⁵¹ But ESOPs are exempted from this standard,¹⁵² meaning that the firm which sponsors a leveraged ESOP can eat the cake and keep the penny: It enjoys the tax favor bestowed upon contributions to its ERISA plans by further financing itself through new share issuance.

Now the aforementioned "further financing"—the "purchase" of newly issued shares by the legally distinct trust for the employees—as noted, is leveraged. But that simply means that the firm is effectively financing itself with debt while enjoying a publicly afforded tax break in return for affording employees new stock. And, as it happens, the lender *supplying* the leverage for ESOPs is tax favored too. Ordinarily, its taxable income is the interest received on lent funds.¹⁵³ But on a loan to a leveraged ESOP, the lender could historically exclude 50% of that interest.¹⁵⁴ So in effect, the legislated favors conferred upon ESOPs amount to significantly government-subsidized debt financing of firms sponsoring ESOPs in a manner intended to encourage those firms to make partial firm owners of firm employees.

But there is more. Ordinarily, dividends paid out to the holders of firms' shares are drawn from firms' after-tax incomes.¹⁵⁵ Dividends paid on the stock held in an ESOP, however, are deductible from taxable corporate income.¹⁵⁶ Capital gains reaped by the trust also go untaxed; they're deferred compensation.¹⁵⁷ The tax code also affords incentives to non-ESOP shareholders to transfer their shares to the ESOP: For one thing, under specified conditions a shareholder of the sponsoring firm who sells shares to the ESOP may defer any taxable

¹⁵⁰ 29 U.S.C. § 1104(a)(1)(B) (2000).

¹⁵¹ *See id.* § 1104(a)(1)(C).

¹⁵² *See id.* § 1104(a)(2). Courts have in some instances agreed with the Department of Labor that there can be circumstances in which the prudent investor standard would require the ESOP trustee to refrain from purchasing employer stock. *See, e.g.,* Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995). Any other assets in which the ESOP might invest remain subject to the general diversification requirement. *See* 29 U.S.C. § 1104(a)(2).

¹⁵³ *See* I.R.C. § 61(a)(4) (including "interest" in the general definition of gross income).

¹⁵⁴ *See id.* § 133(a). *But see* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §§ 1602(a), (c), 110 Stat. 1755, 1833 (repealing the interest exclusion previously allowed under I.R.C. § 133(a) for all securities acquisition loans made after August 20, 1996, except for loans made pursuant to a binding written contract which was in effect before June 10, 1996).

¹⁵⁵ *See* I.R.C. § 311(a) (providing that a corporation may not deduct dividends from its gross income).

¹⁵⁶ *See id.* § 404(k).

¹⁵⁷ *See id.* §§ 501(a), (c). This advantage is not unique to ESOPs as distinguished from other ERISA plans.

gain that she gleans through the sale.¹⁵⁸ For another thing, 50% of the proceeds from sale of a sponsoring firm's stock to its ESOP are excludable from estate taxation.¹⁵⁹ And finally, a decedent's estate may avoid tax-induced liquidity problems by shedding a portion of its estate tax liability to an ESOP, provided that it convey to that ESOP shares in the sponsoring firm of equal value in exchange.¹⁶⁰

2. *Additional ERISA Advantages*

There are further *ERISA* advantages, in addition to the just noted tax advantages, designed to encourage ESOP share acquisitions from nonESOP shareholders in the sponsoring firm: Pension plans ordinarily are barred from purchasing sponsoring firms' shares not only from the sponsoring firms themselves, but from all so-called "parties in interest"—directors, officers, and principal shareholders.¹⁶¹ But *ERISA* exempts ESOPs from that standard.¹⁶² And ESOPs also may *borrow* from such parties in interest in order to acquire employing-firm stock.¹⁶³

3. *Publicly Conferred Governance Advantages*

There is yet more to the public benefit story than just tax and *ERISA* inducement. A cluster of governance advantages offered by ESOPs, in this case working through (once again publicly afforded) corporate and securities law, offers incumbent managers and otherwise satisfied shareholders an added array of incentives: First, the firm's immediate issuance of new shares to a nominally independent, "third party" ESOP dilutes more than the monetary value of older shares; it dilutes older shares' voting power as well.¹⁶⁴ That makes it harder for unsolicited would-be acquirers to assemble a controlling bloc of shares. And this issuance legally *can* in fact be immediate, even in express contemplation of an impending takeover bid. Thus has held the Delaware Chancery.¹⁶⁵

Were new employee-owners reliable voting allies of would-be firm acquirers, of course, the ESOP's promise as a takeover defense would

¹⁵⁸ See *id.* § 1042(b)(1). Such conditions include that proceeds of the sale be reinvested in a domestic corporation within one year, see *id.* § 1042(c)(3), and that the ESOP own at least 30% of the sponsoring firm's shares after the sale, see *id.* § 1042(b)(2).

¹⁵⁹ See *id.* § 2057.

¹⁶⁰ See *id.* § 2210.

¹⁶¹ *Id.* § 4975.

¹⁶² See 29 U.S.C. § 1108(e) (2000).

¹⁶³ See *id.* § 1108(b)(3); I.R.C. § 4975(d)(3).

¹⁶⁴ The ESOP is nominally independent because of the role taken by the sponsoring firm's board in selecting and directing—indeed, even functioning as—the ESOP trustee. See *supra* notes 124–127.

¹⁶⁵ See *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 275–76 (Del. Ch. 1989). *Contra* *NCR Corp. v. Am. Tel. & Tel. Co.*, 761 F. Supp. 475, 495 (S.D. Ohio 1991).

be attenuated. But as it happens, the new employee-owners are not, interest-wise, such reliable allies at all; indeed, quite the contrary.¹⁶⁶ And employee preferences scarcely matter in these cases in any event, for the new employee-beneficiaries of leveraged ESOPs do not typically receive voting rights, at least not right away.¹⁶⁷ That itself constitutes, of course, another incentive for ESOP creation, an incentive enjoyed by the managers: ESOPs work to free managers' hands from such dissatisfied shareholders—including any employee shareholders—as there might be. So it seems more than likely that the ESOP's utility in warding off takeovers, and its strengthening managerial hands, also might account in significant measure for ESOPs' proliferation. And that utility itself, again, like the favorable tax and ERISA treatment, amounts to a public benefit. It is sanctioned and indeed affirmatively encouraged by legislation and court decision alike.

4. *Bringing It All Together: A Telling Counterfactual*

It surely cannot be objectionable, then, to suggest that the legislative and judicial favoring of ESOPs—hence ESOPs' amounting to a public benefit—might be playing a role in their spread.¹⁶⁸ But we quickly can sharpen and supplement, as well as summarize, the point here by appeal to a stylized scenario: We'll suppose there is no tax or ERISA favoring of finance of the firm through the ESOP; the same loan on the same terms can be had by other means. We'll also assume that ESOPs offer no governance or takeover-avoidance advantages. We'll further suppose that employees do not temper their wage demands by dint of their ESOP benefit; their new shares are "all gravy." And finally we'll suppose that our laborers' gradually growing "owner-

¹⁶⁶ Cf. *NCR Corp.*, 761 F. Supp. at 496 ("[B]oth solicitors concur in the proposition that the vast majority of NCR employees will vote with management.").

¹⁶⁷ Most stock held by ESOPs is nonvoting stock—the median ESOP holds 10% of its sponsoring firm's shares but only 5% of that firm's voting rights. See U.S. GEN. ACCOUNTING OFFICE, *EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP* 39–40 (1986). The reason for this differs for closely held and publicly traded firms. With little exception, closely held firms enjoy all applicable ESOP tax benefits even if their ESOPs do not pass acquired stock voting rights through to employees such that these shares only vote on fundamental transactions—matters which must, according to charter or applicable law, be decided by supermajorities of outstanding shares voted. See I.R.C. §§ 409(e)(3), 401(a)(22). Although in the case of publicly held firms the voting rights must be passed through to the employee-beneficiaries, this is only required with respect to stock actually allocated to employee accounts. See *id.* § 4975(e)(7). Yet, the allocation occurs only gradually as the original loan is amortized. See McWhirter, *supra* note 134, at 44. This lack of control rights ought to give pause to those who would see any incipient workplace democracy in the growth of ESOPs. Professor Alexander's general concerns about contemporary pension practice generally are particularly applicable to ESOPs. See Alexander, *supra* note 80 *passim*.

¹⁶⁸ I am far from the first to suggest the importance of public support for the spread. See, e.g., BLASI, *supra* note 118, at 68–78; ELLERMAN, *supra* note 80, at 110–11; HANSMANN, *supra* note 137, at 105–06.

ship” does not appreciably boost shopfloor morale, hence productivity and firm profitability. Under these circumstances, what is happening in Figure 1, above? It seems pretty clear: The firm, via the ESOP, is financing its projects by borrowing and repaying, and while at it, happens to be issuing new stock to employees who pay nothing. But that means the value of pre-ESOP shares is diluted by the value of the newly issued ESOP shares, with no offsetting advantages enjoyed by the pre-ESOP shareholders. Why don't the latter object?

There are less proximate political answers, I believe, to which we shall turn in a moment. But the more immediate reason, of course, is that several of the previously made suppositions, as we have seen, do *not* obtain. There *are* considerable tax, ERISA, and governance advantages gleaned through ESOPs. There is also some evidence that employees *do* temper wage demands in view of the ESOP benefit—that there might even be an implicit bargain to this effect—but this can be no more than a small part of the story.¹⁶⁹ Only the supposition that growing ownership fails to make much difference to productivity appears, in the light of what evidence we have, to be by and large correct.¹⁷⁰ So the tax, ERISA, and governance advantages—the cluster of public benefits—enjoyed by ESOPs must surely be critical to their spread. Pre-ESOP shareholders, at least the less other-regarding ones,¹⁷¹ are *willing* to endure the dilution of their shares wrought by leveraged ESOP transactions. And they are willing to do so precisely because the now much more cheaply (because tax- and ERISA-favoredly) debt-financed firm is sufficiently more valuable, in consequence, as wholly or partly to offset the dilution. And to whatever degree those shareholders are not wholly compensated in this way, the control benefits imparted by ESOPs to management make up the difference; any *dissatisfied* shareholders are *weakened* by the court-sanctioned ESOP transactions.

C. Why: Accounting for the Favor

So now assuming, plausibly it seems, that tax, ERISA, and governance benefits conferred by law constitute *a*, if not *the*, critical reason for the proliferation of ESOPs, we are faced with another question:

¹⁶⁹ The overall impact of this temperance, however, is probably minimal. For one thing, the evidence is scant. See, e.g., ELLERMAN, *supra* note 80, at 90–91. Perhaps more importantly, it seems highly unlikely that rational employees would be willing to reduce their wages sufficiently to offset the dilution. After all, the shares are deferred compensation and confer none of the consumption benefits of control. Finally, the shares are undiversified investments. It would be far more sensible for employees willing to sacrifice pay for stock to insist upon voting and diversified stock.

¹⁷⁰ See BLASI, *supra* note 118, at 25–27, 221–38, 263.

¹⁷¹ The other-regarding shareholders might partly be actuated by the ideological and political motivations that we shall discuss presently.

Why is this public favoring of ESOPs politically accepted? Doesn't the support tamper with natural market forces, and isn't distortion of this sort disfavored?¹⁷² I think it is here that we—or at any rate those who suspect that a completed American ownership society will have to spread business capital as it has spread homes and higher educations—shall find the successes of ESOPs instructive. For there are mutually reinforcing ideological and endowment-psychological reasons that appear to account for the public favoring of ESOPs, and even indeed for the private favoring of ESOPs as well.

1. *Core Values*

The key to the ESOP's political success probably lies in its giving expression to a cluster of interlinked legal-*cum*-political values and endowment-psychological dispositions that a broad swathe of Americans share. As to values, many of us are opportunity-egalitarians.¹⁷³ We believe that what people have should ideally be traceable to equal initial holdings of such ethically exogenous resources—favours of fortune, of chance, or mere circumstance—as no one now living is responsible for having created.¹⁷⁴ And we believe that departures from that baseline ideally would be the product of value-additive or -detractive effort—of choice rather than chance—for which people are responsible.¹⁷⁵ It is tempting to think of access to value-adding opportunity, hence to business capital as well as to dwelling space and basic human capital, as part of that ethically exogenous endowment to which all ideally should enjoy equal access.¹⁷⁶

2. *Endowment Dispositions*

As for psychological endowments and dispositions, we are apt to experience some methods of redressing imbalances in the distribution of that aforementioned exogenous endowment as less discom-

¹⁷² See Richard L. Doernberg & Jonathan R. Macey, *ESOPs and Economic Distortion*, 23 HARV. J. ON LEGIS. 103 *passim* (1986); Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363 *passim* (1990).

¹⁷³ See Hockett, *supra* note 6, at 57–68; Hockett, *supra* note 22, at 142–73; Hockett, *supra* note 2, at 31–51; see also Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion*, 36 METAPHILOSOPHY 93, 97 (2005). See generally Robert Hockett, *Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment* (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 06-039, 2006), available at <http://ssrn.com/author=602726> (discussing opportunity-egalitarian distribution formulae as particularly influential among competing accounts of distributive ethics).

¹⁷⁴ See Hockett, *supra* note 6, at 57–68; Hockett, *supra* note 22, at 142–73; Hockett, *supra* note 2, at 31–51.

¹⁷⁵ See Hockett, *supra* note 6, at 57–68; Hockett, *supra* note 22, at 142–73; Hockett, *supra* note 2, at 31–51.

¹⁷⁶ See Hockett, *supra* note 6, at 57–68; Hockett, *supra* note 22, at 142–73; Hockett, *supra* note 2, at 31–51.

fitting than others.¹⁷⁷ So, for example, our more self-regarding, less altruistic selves are apt to be friendlier toward distributing resources perceived as “new” to the presently underendowed, than toward “taking” already-held resources for redistributive purposes.¹⁷⁸ Those same selves will regard a perceived “refraining from taking” from the underendowed as preferable to a mere “giving” to the same.¹⁷⁹ And finally, the self-regarding will be more amenable to any perceived “giving” to the degree that it can be framed more as a rewarding—hence as ethically endogenized, i.e., earned or deserved by the recipient.¹⁸⁰

3. *How the SOP Structure Conforms*

The leveraged ESOP coheres nicely with these values and dispositions. It spreads a basic endowment—access to productive nonhuman capital—which is not difficult to view as being, at least in part or potential, ethically exogenous.¹⁸¹ It spreads that endowment by distributing what can saliently, if nonetheless superficially, be viewed as “new” capital—newly issued shares in firms.¹⁸² It does that partly in what resembles a return for reward-earning effort—labor patronage or work for the firm.¹⁸³ And it encourages such rewarding privately on the part of lenders and otherwise-diluted shareholders largely by refraining from perceived taking—through tax breaks, rather than through transparent taking and giving.

In a way, then, the leveraged ESOP replicates, albeit in piecemeal and somewhat more convoluted fashion, the same strategies that we have employed more elegantly in connection with publicly facilitated home spreading and education spreading since the early-mid-twentieth century.¹⁸⁴ And this, I am confident, is no accident. Indeed there is considerable historical evidence suggesting that the ESOP was expressly inspired by the federal home finance programs set in place

¹⁷⁷ See Hockett, *supra* note 6, at 73–83; Hockett, *supra* note 2, at 58–72, 80–87.

¹⁷⁸ See Hockett, *supra* note 6, at 73–83; Hockett, *supra* note 2, at 58–72, 80–87. I employ scare quotes in this section to register that the “newness” and “taking” or “giving” in question are experienced pre-reflectively as their proceeding from cognitive dispositions would suggest. Thus, I speak of predisposed framings here rather than considered judgments.

¹⁷⁹ See Hockett, *supra* note 6, at 73–83; Hockett, *supra* note 2, at 58–72, 80–87.

¹⁸⁰ See Hockett, *supra* note 6, at 73–83; Hockett, *supra* note 2, at 58–72, 80–87.

¹⁸¹ It is potentially exogenous in two senses—one trivial and the other less so. First, one must use it responsibly to derive utility from it as a kind of resource. Second and less trivially, how much one has of this resource is at least in part—and sometimes in significant part—the product of fortune or fate rather than effort. One can hold less simply by having been born to the wrong parents, so to speak. See Hockett, *supra* note 2, at 31–51.

¹⁸² Such spreading is “superficial” in light of Part II.B.

¹⁸³ It is viewed as an employee benefit predicated upon lengthy labor patronage—a kind of loyalty—to the firm. See *infra* Part IV.

¹⁸⁴ See Hockett, *supra* note 6, at 98–120, 143–53; see also *infra* Part V.B (discussing the histories and shared financial structure of these programs).

over the 1930s and 1940s.¹⁸⁵ There is also good evidence to the effect that legislators and the public alike found both these and the federal education-financing programs set in place over the 1960s and 1970s appealing precisely because they resonated with the values and dispositions just rehearsed.¹⁸⁶

But then this raises a further question: Is the leveraged ESOP the complete business capital analogue to our contemporary home and education spreading programs?

III

NOT YET ENOUGH SOPs: WHY THE ESOP FALLS SHORT OF OUR HOPES

Notwithstanding its admirable respect for and resonance with the values and endowment sensibilities rehearsed in Part II.C, the ESOP falls very far short of a full business capital analogue to our home and higher education spreading programs. This is so for a few simple reasons. I shall run through them quickly, in so doing setting the stage for new types of SOPs that boast the same and yet greater benefits as the ESOP while shedding the latter's limitations.

A. Income Risk Concentration

Begin with the limitations, at least one of which is familiar. The first (and most familiar) inadequacy of ESOPs is their concentrating income risk among beneficiaries. ESOP promoters tout ESOPs as affording their beneficiaries what they call a "second income," a chance to be "capitalists" as well as "laborers."¹⁸⁷ That in turn affords workers, we're told, a "piece of the action," a chance to get in on "the stock market boom," hence to realize capital gains such as have tended to rise much of late.¹⁸⁸ The "second income" also, the ESOP's inventor has in effect told us, will bring workers' earnings into closer proportional alignment with the relative contributions made by capital and labor as aggregate factors of production in any advanced economy.¹⁸⁹

All of this is true enough so far as it goes. But it does not go very far. For the problem is that, second income though the capital income might be, it nonetheless issues from the same source as the la-

¹⁸⁵ See Hockett, *supra* note 6, at 135–37.

¹⁸⁶ See *id.* at 98–120, 143–53.

¹⁸⁷ See KELSO & KELSO, *supra* note 145, at 160–62.

¹⁸⁸ See *id.* at 65; see also Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1520 (1997) (stating that "stock prices [had] nearly trebled in real terms" in the fifteen years before 1997).

¹⁸⁹ This is, in essence, my charitable reformulation of Kelso's oftentimes puzzling pronouncements. See *supra* note 145 and accompanying text; see also Hockett, *supra* note 6, at 124–30 (discussing Kelso's formulation of the prototype ESOP as a "schema operating for the benefit of the nonwealthy, capitally disenfranchised").

bor income—from the individual employing firm. If one of our reasons for taking interest in ESOPs, as potential firm-spreading engines of a completed American ownership society, is that they spread the contemporary analogue to nineteenth century homesteading's sustenance-yielding land, then presumably we shall want what ESOPs spread to be as close as it can be to being as *secure* a source of sustenance as was land. But the capital incomes thrown off by firms are hardly more secure than the labor incomes paid out by firms.¹⁹⁰ Certainly they are not *as much* more secure as they might be; and they are of course no more secure at all if the labor itself is not there to be had.

B. Structural Slumps, Business Cycles, and Unemployment

That last observation points to a second, albeit cognate, weakness of ESOPs. The fact is that one reason for our interest in sources of income additional to labor is precisely that labor is not always there to be had. Jobs, firms, job descriptions, and even entire industries come and go.¹⁹¹ “Downsizing” and global “outsourcing” regularly disemploy labor, sometimes for lengthy periods.¹⁹² Regular macroeconomic slumps do the same. Often, moreover, prospective laborers have developed their “human capital” in manners specific to particular industries, job types, and even firms.¹⁹³ It can be difficult, then—particularly for older workers—to “retool” for new firms or tasks.¹⁹⁴ In the event of long-term troughs in the business cycle, many workers indeed can be left in that cold.¹⁹⁵ It would seem far from optimal, then, to condition the benefit of stock spreading upon labor alone, when it is in part precisely the possible *absence* of employment opportunity at times that accounts for our interest in stock spreading in the first place.

A related point here, from an opportunity-cost point of view, is that reliable second incomes presumably would buttress aggregate consumer demand in the event of downturns in the business cycle. That would lessen the amplitude of troughs in the cycle and presuma-

¹⁹⁰ To some degree, capital incomes are presumably more secure because downsizing short of full bankruptcy and liquidation sheds laborers but not shareholders, but the basic point remains significant. For an example of how shareholders fare better than workers in downsizings, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 82 (2002).

¹⁹¹ See Hockett, *supra* note 22, at 174–77.

¹⁹² See *id.* at 180–82.

¹⁹³ See *id.* at 177–80.

¹⁹⁴ See *id.* at 178–79.

¹⁹⁵ See *id.* at 180–82. For a general discussion of business cycles, see FISCHER BLACK, BUSINESS CYCLES AND EQUILIBRIUM (1987); ROBERT E. LUCAS, MODELS OF BUSINESS CYCLES (1987); MODERN BUSINESS CYCLE THEORY (Robert J. Barro ed., 1989); EDMUND S. PHELPS, STRUCTURAL SLUMPS: THE MODERN EQUILIBRIUM THEORY OF UNEMPLOYMENT, INTEREST, AND ASSETS (1994) (developing and testing a structural unemployment theory).

bly thereby keep more people employed for longer.¹⁹⁶ So there is affirmative, not merely negative, reason to diversify reliable sources of income among citizens. But reliability here, as elsewhere, will again ride on diversification. So again, it is best not to restrict a worker's capital income to the same source from which labor income derives.

C. It Exploits Only One Form of Patronage

That last observation highlights the fact that one way of viewing these more obvious, just-rehearsed disadvantages of ESOPs is as insufficiently capitalizing upon a more bountiful opportunity. The final two criticisms are more transparently of this form; ESOPs are needlessly hobbled. We both can and should be more ambitious. For we can attain much more benefit at no more political or other cost.

To begin with, consider again why the ESOP is publicly favored: It spreads a perceivedly "new" resource (newly issued business capital shares) in a manner that partly is subsidized by refraining from taking (from taxing) rather than by forthright giving. And it does so in exchange for apparently benefit-warranting behavior (labor) by beneficiaries. But now note how low the ESOP sets the sights in conforming to that abstract description.

First, labor for a firm is far from the only sort of activity that might be perceived as warranting publicly encouraged spreading of firm shares. People patronize, and in some cases even are potentially expropriated by, firms in any number of ways. There are long-term customers whom we call "loyal," suggesting that sometimes people endow firms with their trust or the benefit of their habits. There are firms that enjoy indefinitely increasing returns to scale or that reap other kinds of rents, suggesting that sometimes people might even less voluntarily confer unrecouped benefits upon firms. And there even are people who confer benefits upon all of the rest of us through their national service, or who suffer disadvantages through no fault of their own, hence who are arguably compensable in justice.¹⁹⁷

All of this suggests that we might employ citizen attributes—"desert bases," as they sometimes are called in the ethical literature¹⁹⁸—

¹⁹⁶ It would afford what we might call "automatic Keynesianism"—a means by which business-cycle volatility would be modulated by maintaining income. See Hockett, *supra* note 6, at 129.

¹⁹⁷ For more on these prospects, see *infra* Part IV.

¹⁹⁸ I borrow the term from Joel Feinberg. See JOEL FEINBERG, *Justice and Personal Desert*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 58–61 (1970). A desert base is simply the warrant for a claim that one is deserving of something, as "[d]esert without a basis is simply not desert." *Id.* at 58. For example, my bravery in combat might be the desert base underlying my receipt of the Silver Star for Valor. My persuading warring parties to lay down their arms might similarly ground my receipt of the Nobel Peace Prize. And so on.

additional to firm labor expenditure as means of ethically underwriting the benefit that is publicly augmented firm spreading. Insofar as that is the case, the ESOP, relying as it does solely upon firm labor as desert base, appears needlessly hamstrung indeed. Part IV accordingly assesses analogues to ESOPs predicated upon more than just labor patronage.

D. It Exploits Only One Source of Credit

Second, consider the natural limitation inherent in relying upon tax breaks alone to finance the broad spread of firm shares. The ESOP, we noted, is underwritten in large part by the government's agreement simply to take less in taxes from firms that expand through debt financing while spreading new shares to employees.¹⁹⁹ But this means that share spreading is limited (a) to the remaining increment of taxable income that the government can agree not to tax, and (b) by firms' individual creditworthiness as partly determined by that increment. That, like the limitation to labor as sole benefit-warranting patronage relation to firms, would seem unduly limited. For there are more kinds, grounds, and possible enhancements of credit than tax-cut-enhanced firm credit. There is beneficiary credit, for example, and there is the public's own "full faith and credit."²⁰⁰ And there is the credit enhancement afforded by mortgage insurance, by mortgage-backed securitization, or by both.²⁰¹

These additional types of credit and enhancements figure prominently and effectively in our federal home- and education-finance programs.²⁰² Those programs have long since their inceptions come to constitute the two "legs" we now have in place for that "three-legged stool" that a completed American ownership society would be. But this suggests, in yet another way, that the ESOP sets our sights much too low when it comes to capital spreading. Part V accordingly considers what it would be to generalize federal home- and education-finance policy to the case of firm shares.

First, though, as promised above, we shall generalize the ESOP itself, along the earlier mentioned patronage dimension. For moving from labor to other patronage forms not only takes us quite far even before we reach the credit dimension, but also sets the stage nicely for our tackling that latter dimension itself.

¹⁹⁹ See *supra* Part II.A.

²⁰⁰ See *supra* note 11 and accompanying text.

²⁰¹ For more on the uses of these forms of credit and credit enhancement, see *infra* Part V.

²⁰² See *infra* Part V.B. For a more comprehensive account, see Hockett, *supra* note 6, at 104–20, 146–53.

IV

MORE SOPs FOR THE DESERVING: ADAPTING THE STRUCTURE
TO ADDITIONAL PATRONAGE FORMS

So the ESOP falls short as a stand-alone method of business capital spreading. But that need not lead us, in thinking through what it will be to complete an American ownership society, to abandoning SOPs altogether. There are ways we might generalize the ESOP idea along both the patronage and credit dimensions. In this Part, I work along the former.

Begin by observing that labor with a firm—the employment relation—is an ethically salient patronage relation²⁰³: It is an ongoing relational mode between persons and firms.²⁰⁴ And it is a relation that appears to sanction the conferral of benefits upon persons.²⁰⁵ It renders the latter apparently earning or deserving of the benefits be-

²⁰³ So far as I have been able to determine, Henry Hansmann is the only scholar who has devoted significant discussion to the relations between patronage and firm ownership. See HANSMANN, *supra* note 137. My employment of the concept of patronage will be somewhat more elastic than Hansmann's, however—as is perhaps intimated by my addition of the qualifier “ethically salient.” My understanding of the term will accordingly be a bit different as well. I do not believe, however, that my understanding and employment of the term will be incompatible with Hansmann's.

²⁰⁴ Hansmann appears to be less explicitly concerned with the ongoing nature of patronage relations, while being more explicitly concerned with a particular species of relating to the firm—selling to or purchasing from it—than I. See *infra* note 205. I think our distinct concerns with patronage nonetheless compatible, however. For, first, my concern with the possible *ethical* salience of patronage naturally lends itself to an emphasis upon longer-term relations, at least among those who purchase from or contribute to firms in small increments per transaction. (Duration of relating substitutes for magnitude of individual transaction.) And, second, patronage relations potentially involving more than purchasing and selling seem to be implicit in Hansmann's understanding of the term, as evidenced by his occasional recourse to the broader relational concept of “supplying,” which figures prominently in his treatment of stockholders as financial capital suppliers. See HANSMANN, *supra* note 137, at 15.

²⁰⁵ Hansmann defines “patrons” as “persons who transact with a firm either as purchasers of the firm's products or as sellers to the firm of supplies, labor, or other factors of production.” See HANSMANN, *supra* note 137, at 12. Hansmann devotes much of his path-breaking monograph to showing both that a particular class of patrons typically owns most firms operating within a particular industry, and why those particular classes end up being the more efficient owners. My interest in this Article, though not incompatible with Hansmann's interest, is nonetheless distinct. The distinction accounts for my somewhat broadened understanding and employment of the concept of patronage. My concern is with patronage as a form of ongoing relation between persons and firms, such as can be viewed in part as the patron's consistent conferral of some manner of benefit upon the firm, such as in turn can engage our willingness to view the patron's coming to own a share of the firm as ethically unobjectionable—as something better than the product of a mere handout. That is to say that my angle on patronage here is as a desert basis. See *supra* note 198. I do not believe that this basis for interest in patronage places me in any way at odds with Hansmann's efficiency-grounded basis for interest in the same. For I do not here suggest that firms should be owned by patrons of a different kind than those that he shows to be the more efficient owners of firms in particular industries. Rather, I simply propose that more patrons within the class be added to the rosters of owners. The remainder of this Part will both make this plain and unpack more fully the ways in which patronage

stowed upon labor through leveraged ESOP financing.²⁰⁶ That was one upshot of Part I.C above.

Yet labor is but one way in which people relate themselves to firms. And as shown in Part III, it is a problematical mode for purposes of completing an ownership society. For if we piggyback the public benefit of encouraged ownership spreading upon labor with the very firms whose shares are to be spread, then we forgo one of the principal benefits that afford reasons for finding ownership attractive: its capacity to diversify income risk, and partly to substitute for labor when labor is not there to be had.²⁰⁷

But this raises an intriguing prospect: Perhaps we might rely upon patronage relations additional to the employment relation in order to warrant the public facilitation of ownership spreading, relations that do not concentrate or suboptimally diversify risk to incomes. This Part proposes and assesses a few possibilities, meant to be suggestive rather than exhaustive. No one possibility need cover all of the ground that we wish to cover. It will suffice if all such together, layered progressively atop one another, afford significantly more coverage than we thus far have managed. And the fact that just about everyone patronizes more firms via each of the modes discussed here than via the employment relation affords hope as well—hope that we might indeed more fully diversify each person's capital ownership.

A. Customer Stock Ownership Plans

One conspicuous form of patronage in some respects reminiscent of labor is what I'll call ongoing "customership."²⁰⁸ Some firms from which we purchase goods and services are firms from which we *regularly* purchase them. In some cases that consistency is attributable to something like customer loyalty—an investment of trust, rather than labor, in the firm. In other cases the "loyalty" is perhaps not what we should call voluntary, but reflects a lack of available alternatives—our being held hostage, so to speak. And there are of course middling cases between those extremes—unthinking habit or ignorance of alternative supply sources, for example. In all such cases, however, we can plausibly imagine the relation to be sufficiently sali-

relations might be seen ethically to underwrite benefit conferrals upon current non-owners within patronage classes.

²⁰⁶ See *supra* Part II.C (suggesting reasons behind public support for ESOPs).

²⁰⁷ See *supra* Part III.B.

²⁰⁸ Indeed, customers constitute the most efficient class of owners in certain industries, including the farm supply industry, in which consumer cooperatives are common; rural electricity, in which customer cooperatives are again prominent; clubs affording members high-status associative goods, which, again, tend to be owned by their members; and urban housing, in which housing cooperatives are prominent. See HANSMANN, *supra* note 137, at 147–223.

ent, from an ethical point of view, as to warrant at least some degree of public facilitation of patrons' gradually coming to own parts of the firms that they regularly patronize.²⁰⁹

Consider a homespun example of "loyal" customers. There might be a small university town centrally located, hence perhaps somewhat geographically isolated, in a large U.S. state.²¹⁰ People who live and work in the town see a lot of each other over time, and have come to feel a palpable sense of community in consequence. They feel this not only in relation one to another, but even in relation to the relatively small number of retail establishments that sell to the townspeople. Buyers and sellers are thrown all together, even feel somewhat "centrally isolated" together, perhaps even miss this feeling when sometimes they visit one or another of the large, coastal cities five or so hours' drive away.

Now a marvelous new grocery store complex might come to this town. Everyone talks about this new store, even showing it off to visitors and prospective new residents. Nearly everyone living or working within several miles of the town might purchase their groceries at this store, leave and pick up their dry cleaning there, do their banking there, even leave their children to be attended there while engaging in the aforementioned transactions. Things might go on this way for years. That's an ongoing, many-faceted relation.

Now suppose that we found the idea of an "ownership society" to be an attractive one, for any number of reasons,²¹¹ and so thought that it might make for good public policy to encourage wider ownership of firms. In that circumstance, might we not find it politically acceptable, indeed affirmatively attractive, to work to encourage the voluntary spread of shares in this store or its holding company among all of the regular customers who live in community with and partly

²⁰⁹ Sometimes patrons naturally come to own parts of the firms they regularly patronize, apparently for reasons rooted in comparative efficiencies of governance and contracting. *See id.* at 24–34. But my interest in an ownership society warrants fostering ownership even where it does not naturally arise, as seems to have occurred with the proliferation of ESOPs. *See supra* Part II. Those reasons presumably also afford at least a provisional reply to similar objections that might be made to disgorgement remedies in contract, owing to their inefficiently coupling purchases from with investments in firms. Thank you to Daniel Markovits for calling this latter comparison to my attention. For more on the reasons that I believe prompt our interest in an ownership society, see Hockett, *supra* note 6, at 49–84; Hockett, *supra* note 2, at 1–86.

²¹⁰ I allude to Ithaca, New York, where I live, but there are countless similarly situated locales, not all of them university towns and not all of them as isolated as Ithaca. Indeed, one might plausibly apply this example to a community or sector of a large city, as commonly found in New York, Chicago, and Los Angeles. Also note that the next example makes no reference to such communities at all. All examples in this Article are meant to be illustrative rather than exhaustive.

²¹¹ For an analysis of the various grounds upon which an ownership society might be attractive, see Hockett, *supra* note 2, at 5–78.

organize their lives around it, just as we do in the case of employees? We certainly might.²¹²

Consider a cognate example, one perhaps applicable to larger metropolitan areas or wider regions now in addition to smaller communities: There might be a product or service the supply of which enjoys increasing returns to scale. It is a “natural monopoly.”²¹³ Perhaps it’s a transport system, an electrical power grid, or high-speed Internet network—a public or publicly regulated utility. Customers of the firms that supply such products and services—whether identified by reference to towns, cities, or larger regions serviced by these firms—often might find themselves with no alternatives to their suppliers. They have little choice but to patronize them. That’s a large part of why we regulate them. But might the same rationale not then warrant our facilitating the customers’ gradually coming to own them, at least in part? Surely such customer “hostagehood” is at least as ethically salient a form of patronage as is more voluntary customer loyalty.

Were we to endorse this line of thinking, then we might decide it worthwhile to consider facilitating the acquisition of shares in the firms—the grocery store or the utility—by their patrons in much the same way that we facilitate share acquisition in firms by employees. We might assist firms through tax breaks for debt financing, in exchange for their issuing shares to trusts whose beneficiaries gradually come legally to own what initially they would beneficially own.²¹⁴ In essence, then, we would replicate the financial structure of the leveraged ESOP.²¹⁵ Only the particular patronage relation would change. We might call it a “Customer Stock Ownership Plan,” or “CuSOP.”²¹⁶ Imagine it thus:

²¹² Facilitating local business ownership will not afford optimal diversification, as personal incomes and those of local firms fluctuate together as in the case of local or regional slumps. My aim here is to use patronage relations as ethically salient grounds for public action facilitating ownership, pursuant both to (a) the hypothesis posited in Part II.C concerning public willingness to subsidize ESOP expansion, and (b) the further elaboration of that hypothesis in this Article’s predecessor pieces concerning why we have acted similarly to promote spreading home ownership and higher education. I have already addressed the project of democratizing the sharing of income risk across localities and even across nations in a separate article. See Hockett, *supra* note 22, at 212–56. I hope that these pieces afford a rough template for how best to render our society more efficient at spreading ownership.

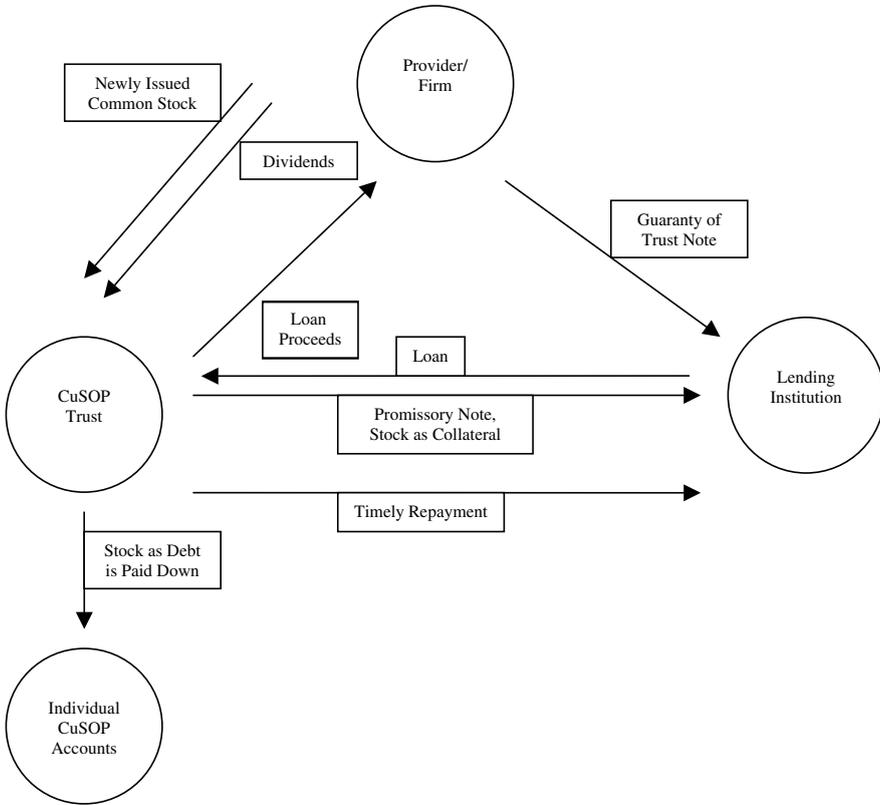
²¹³ In a way, the store in the previous example was also an example of a natural monopoly because small towns support less competition among smaller suppliers than do cities.

²¹⁴ Such shares might be distributed in proportion to customers’ patronage, such as amounts purchased from the firms.

²¹⁵ See *supra* Part II.A.

²¹⁶ This SOP should not be confused with Kelso’s proposed “consumer stock ownership plan,” which appears to be little more than a producer co-op. See KELSO & KELSO, *supra* note 145, at 67–73.

FIGURE 2: INSTITUTIONAL/FINANCIAL STRUCTURE OF A CuSOP ARRANGEMENT



Of course, some things even apart from the differing patronage relation that ethically grounds the CuSOP would be different here relative to the ESOP as presently constituted. There is no, say, federal “CRISA” for “customer benefit plans,” for example, in the way that there is an ERISA structure upon which ESOP programs partly are built. Nor, accordingly, does the Internal Revenue Code currently include any provisions that might encourage firm financing through CuSOPs, as it does in the case of ESOPs. But that is all beside the point. The point is that all of the means by which we currently facilitate stock acquisition by employees *could* be replicated to facilitate stock acquisition by long-term customers—loyal customers, hostage customers, or “in-between” customers. We could legislate to replicate, all with a view to making owners of long-term customers as we do for long-term employees. And the public benefit that this legislation would effectively confer—like that which public facilitation of ESOPs confers—would be warranted, could be advocated, and presumably would be politically embraced, on essentially the same grounds: the grounds of ethically salient patronage.

CuSOPs might in fact even enjoy broader public support than do ESOPs on patronage grounds. For in contrast to the case of ESOPs, we could facilitate share acquiring via CuSOPs by any given long-term customer from any number of regularly patronized firms. Everyone bearing long-term customer patronage relations to any number of firms would gradually become a partial owner of those very firms. ESOPs do this for employees only in respect of the smaller number of firms—generally but one—for which the employee labors. If more people stand to benefit, and if they stand to do so by acquiring stakes in more than one firm each, we might expect more popular support and greater diversification of income risk that an ownership society will value.²¹⁷

B. Resource or Rent-Recouping Stock Ownership Plans

Let's try another one. Sometimes new resources are discovered. Petroleum reserves are found in Alaska, newly exploitable minerals are found in magnesium nodules just off the coast, some portion of the electromagnetic spectrum becomes usable in a way that it was not before, and so on. Sometimes no particular living person or group of persons is to be fully credited with the discovery, or with the discovery's full exploitability. But some such person or persons often can plausibly be *partly* so credited. And our way of doing things in any event is to permit private agents—generally firms—to exploit the new possibilities—to appropriate rents from them.²¹⁸ So we want some of the value of the new resources—rents—to flow very quickly into private hands, even while not all of that value seems to be deserved by those parties.

What should we do with the surplus? We might “windfall profits” tax it, but that might resemble a kind of incremental taking,²¹⁹ and the takings go to the government. We don't seem to like that kind of thing anymore.²²⁰ At any rate we don't find it as palatable as we once

²¹⁷ Of course, this point assumes such a plan will compensate the dilution of existing stockholders as in the case of ESOPs—by an array of benefits counterpart to those described above in connection with ESOPs in Part II. Thanks to Heidi Craig for emphasizing the need to address the dilution concern in connection with SOP forms other than the ESOP.

²¹⁸ The appropriable rents justification for property rights appears to originate, at least in its now canonical formulation, with Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (PAPERS & PROC.) (1967).

²¹⁹ Legally speaking, this claim, associated with Richard Epstein, is hyperbolic. But one can readily grasp the intuition behind it. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 99–100 (1985).

²²⁰ See, e.g., *id.* For a fascinating though disquieting documentary account of the strategic framing of tax policy issues by champions of estate tax elimination, see MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005).

did, perhaps because we are less trusting of the users of the takings—"the government"—than we once were.²²¹ But we still like ownership—we like that very much, in fact—and we are aware that by definition nobody has earned a windfall. So why not widen the distribution of shares in the firms that we authorize to exploit the new opportunities?

So far, so good. But this still leaves open the question of patronage. To whom should the shares be distributed? Is there some perceivedly "natural," salient class of patrons whose beneficiary status would be as readily warranted as that of employees and long-term customers?²²² After all, we presumably would not wish simply to replace one class of windfall beneficiaries with another, as it were, at random. How, then, to think about the matter? I think that we might employ a sort of "sliding scale" here. And indeed, this might be a nice way gradually to generalize the original ESOP idea all the way out, so to speak—i.e., to move incrementally in the direction of broad public recognition that good citizenship itself is a kind of patronage.²²³

Let us think along those lines for a moment: Some new resources might be broadly perceived as bearing some special nexus to the places where they are found. Such places, in turn, might be perceived as being somehow ethically "closer" or "more proximate" to—as it were "more owned by"—their residents than by nonresidents.²²⁴ So, for example, new oil found in Alaska might be perceived as being somehow more saliently "Alaskan" even than "American." And Alaskan citizens might accordingly be thought to stand in a somewhat—even if but incrementally—closer patronage relation to any firm-granted rights to exploit new Alaskan oil reserves than are non-Alaskan Americans.²²⁵ Alaska itself is constitutionally permitted, after all,

²²¹ I employ scare quotes because I seek to convey, rather than embrace, the attitude pursuant to which some view the government as an alien force rather than an agent of collective action.

²²² The goal is to avoid providing a windfall to some group of randomly selected beneficiaries with no greater claim to the rents than does any other member of society.

²²³ See *infra* Part IV.C.

²²⁴ Scare quotes again indicate my attempt to express a pre-reflective manner of perception. See *supra* note 178. I am uncomfortable with this perception and resort to it as what strikes me as a compromise with territorialist psychological dispositions that are regrettable at best. Some such primitive intuition seems to underwrite the judgment that coal found between Canada and Mexico is "American" coal, rather than North American coal or "the coal of mankind." Ideally I would prefer to repudiate the intuition, but if I cannot, I may as well harness it for good purpose.

²²⁵ In 1980, a voter initiative was introduced to establish the Alaska General Stock Ownership Corporation (AGSOC), which would have provided Alaskan citizens ownership interests in the Alaska oil pipeline. See Alaska Div. of Elections, Alaska Initiatives on Previous Ballots, <http://www.gov.state.ak.us/ltgov/elections/initbal.htm> (last visited Mar. 3, 2007). British Petroleum expressed interest in selling its investment in the pipeline to AGSOC, which would have enjoyed the backing of state credit to borrow for the purchase. See William Greider, *Alaska Inc.: An Economic Experiment*, WASH. POST, Oct. 22, 1978, at A1.

to tax firms that extract Alaskan oil reserves, even after the (federal) IRS already has done so.²²⁶ So it must be the case that we tend to view the citizens of political units as being somehow more privileged than noncitizens in respect of the benefits brought by the resources that are found and exploited within the geographic boundaries of those units. Cognate observations might hold true in respect to other resource discoveries as well.

Now let us bring these patronage considerations together with the earlier concerns about windfalls. Would it be too far a stretch to require, as a condition for granting the firm the rights to exploit the new resource, that the firm distribute shares in itself to the residents of any municipality or state with which the new resource is widely perceived to be especially closely associated?²²⁷ Note that if the answer is no, then we might not have to bother with tax or other incentives at all. Or how about this: We *combine* tax and other incentives with the “carrot” that is the prospective new resource exploitation itself, in a manner that enables us to lessen the former relative to what they were in the ESOP and CuSOP cases. We thereby encourage both (a) the entry of firms to do the exploiting, and (b) those firms’ spreading their shares, at less expense to the public fisc. Call it a “RentSOP.”²²⁸ It might look like this:

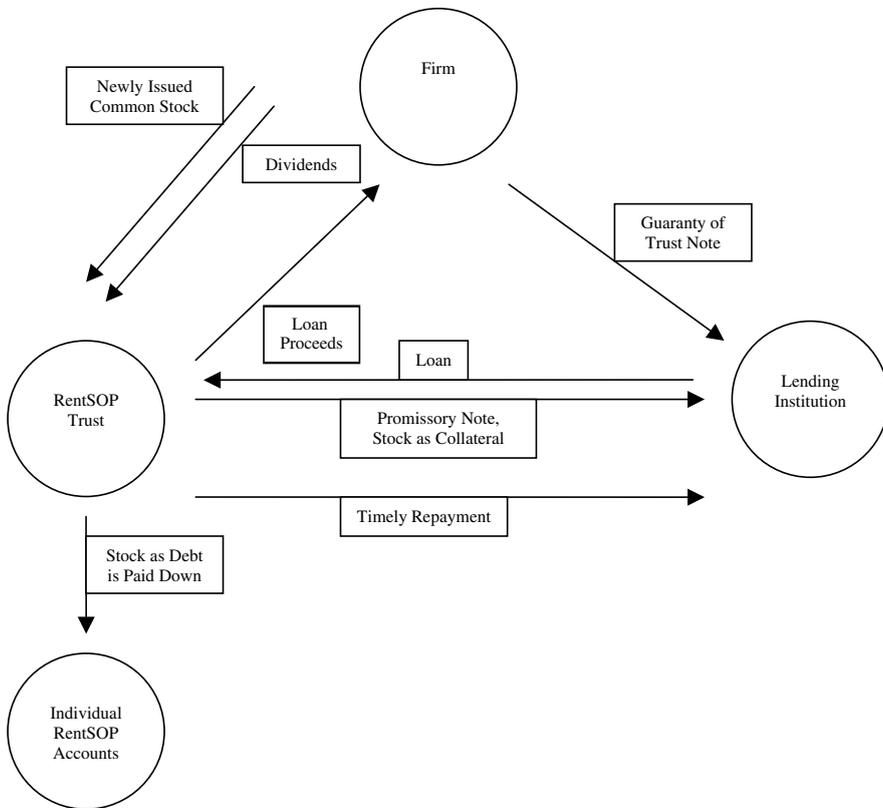
Under federal matching legislation in effect at the time—specifically, Subchapter U of Chapter 1 under Subtitle A of the Internal Revenue Code—AGSOC would also have enjoyed favorable federal income tax treatment. *See* Revenue Act of 1978 § 601, Pub. L. No. 95-600, 92 Stat. 2763, 2892-97 (repealed 1986). The AGSOC plan would also have prohibited any one individual from owning more than ten shares in order to prevent concentrated ownership. *See* Greider, *supra*. The Alaskan ballot measure nevertheless lost on a close popular vote (approximately 78,000 to 72,000). *See* Alaska Initiatives on Previous Ballots, *supra*. Notwithstanding the failure of this ballot initiative, Alaska did adopt a cognate program. *See infra* note 229.

²²⁶ *See* U.S. CONST. amend. X.

²²⁷ For example, we could define a closely associated municipality or state as one that could tax the enterprise exploiting the resource.

²²⁸ This is not to be confused with Kelso’s proposed “GSOPs,” *see* KELSO & KELSO, *supra* note 145, at 75-83, “COMCOPs,” *see id.* at 88-92, or “RECOPs,” *see id.* at 99-103. Though similarly geared toward spreading ownership firms, these proposals are both conceived on entirely different—indeed, puzzling—grounds and are more importantly of different financial structure. For a more general charitable interpretation and correction of Kelsonian theories and schemes, *see* Hockett, *supra* note 6, at 124-42.

FIGURE 3: INSTITUTIONAL/FINANCIAL STRUCTURE OF A RENTSOP ARRANGEMENT



That's right, this is the same diagram as Figures 1 and 2, with state or local citizens standing in as patrons now, instead of employees or customers.²²⁹ What is different here, apart from the changed patronage basis ethically grounding the public benefit, is simply that the tax and other benefits afforded by the public are less than before, since the exploitation rights are themselves a benefit. (That is entailed by the "windfall" considerations.) The loan made to the RentSOP trust might of course have to be participated as well, since in this

²²⁹ Here, the degree of patronage might be measured by years of residence. I ignore, for present purposes, the matter of crafting terms to avoid conflict with court decisions overturning state laws that burden interstate travel. In *Zobel v. Williams*, 457 U.S. 55, 64 (1982), the Supreme Court rejected Alaska legislation that awarded pipeline dividends to state residents based on the duration of their residence until the point when distributions began. In contrast, allowing the number of shares distributed thenceforth to *grow* with years of residence would not seem constitutionally offensive so long as one could begin to accumulate shares immediately upon establishing residence. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (invalidating a one-year waiting period for Social Security Benefits); *Edwards v. California*, 314 U.S. 160, 177 (1941) (striking down a California law prohibiting the transport of a nonresident indigent person into the state).

case, unlike in the ESOP and CuSOP cases, it might be too large for any one lender to make.²³⁰ But all of that is, again, for present purposes neither here nor there. The important point for present purposes is that the firm still finances itself with debt on favorable terms in the interest of boosting its capacity to exploit the new resources, while spreading ownership in itself in the process.

Now note, in connection with the goal of maximizing both the number of possible beneficiaries and the number of firms that beneficiaries might gradually come partly to own, that we can readily broaden our understanding of “local resource.” Matters here, that is to say, are as they were in connection with CuSOPs in Part IV.A, just above—candidates for RentSOPs can be proliferated.

We might thus broaden our understanding of “local resource” along at least two dimensions. For one thing, we can move outward from locality to region to nation—a prospect that we shall consider presently. For another thing, we can plausibly broaden our understanding of “resource” itself. It isn’t always a matter of found objects or substances, after all. A highly desired set of geographic coordinates might count as well—say, a “prime location” upon which some highly remunerative piece of commercial real estate stands. That is a paradigmatic case, in fact, of “rent.” And *rentiers* who hold exclusionary rights to highly desired spaces are rather like the “natural monopolists” considered in connection with CuSOPs above at Part IV.A. That’s why the so-called “classical” economists, pioneers like Adam Smith and David Ricardo, were so suspicious of them.²³¹ But we needn’t be suspicious. We can facilitate the voluntary sale and purchase of the spaces at fair market value instead, by broad classes of locals, simply by treating the spaces like oil reserves or magnesium nodules, and the firms that operate them like the resource extractors

²³⁰ In addition to overcoming capacity, such a system may trigger statutory lending limits. See 12 U.S.C. § 84 (2000). A national banking association cannot have more than 15% of its unimpaired capital and unimpaired surplus in loans and credit extended to an individual, including a trust, that are not fully secured. See *id.* § 84(a)(1). Also, a national banking association’s total outstanding fully-secured loans and credit extensions cannot exceed 10% of the association’s unimpaired capital and unimpaired surplus. See *id.* § 84(a)(2).

²³¹ See, e.g., DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 33–45 (J.M. Dent & Sons Ltd. 1973) (1817) (describing *rentiers* as windfall beneficiaries of scarcity of land); 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 161–63 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776) (describing rent as a monopoly price, not consequent to any expense laid out by the *rentier*).

in Figure 3 above.²³² “Don’t get mad,” we might say, “get owning—get the company.”²³³

Turning from the resource dimension to the locality dimension, if we move outward from seemingly “locally located” resources to more diffuse such resources—e.g., new portions of the electromagnetic spectrum—we can move outward along the patronage dimension as well. We’ll thereby draw-in more beneficiaries, more potential owner-citizens. So we might imagine, say, that the Telecommunications Act of 1996²³⁴ is amended to work somewhat differently than it actually has done: Congress might not authorize the FCC simply to *grant* existing broadcast companies new advanced spectrum without requiring payment in exchange.²³⁵ Instead it might establish a sort of “national RentSOP” on behalf of all citizens, and then offer the combined inducement of occupancy over the HD bandwidths and some (diminished) tax incentives to get the firms to spread shares in themselves to the citizenry. That would not only be a readily intuited ex-

²³² Hansmann suggests a number of reasons for the absence of urban utility cooperatives analogous to rural electrical cooperatives, among them the comparative transience of urban dwellers and conflicts of interest among disparate classes of prospective urban owners. See HANSMANN, *supra* note 137, at 173–79. While such phenomena presumably account in part for the absence of spontaneously generated (sorry—pun foreseen but not intended) urban utility cooperatives, they do not stand in the way of publicly facilitated partial ownership of *corporate* utilities by their customers. Moreover, to whatever degree we might worry that *partial* ownership by customers is “not enough,” we can readily mitigate the worry by means familiar to other, existing utilities-ownership scenarios. Hence, rates can be regulated with a view to preventing price discrimination as among classes of users, and any worry over the development of, say, “absentee ownership” in the long run would seem to be mitigated or mitigable by (a) the fact that highly transient residents of a municipality likely will not come to acquire much in the way of shares in any event, (b) the possibility of recourse to required redemption (indeed, we might even arrange to have transients trade their erstwhile utilities’ shares for shares in utilities located in their new locales, with the utilities themselves in turn exchanging the shares), or at worst, (c) the possibility of recourse to mere beneficial ownership by the new owners, legal ownership to remain with consumer trusts established for the purpose of retained legal ownership. Indeed, as Hansmann himself points out, some municipal utilities can readily be likened to cooperatives, organized, as they are, quite similarly. See *id.* at 178.

²³³ A variation, perhaps, on the 1979 Remington electric razor advertisement, in which Victor Kiam averred, “I liked it so much, I bought the company.” *I Liked the Slogan So Much . . .*, BBC NEWS, May 30, 2001, <http://news.bbc.co.uk/1/hi/uk/1357091.stm>.

²³⁴ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). For commentary, see PETER W. HUBER ET AL., THE TELECOMMUNICATIONS ACT OF 1996: SPECIAL REPORT (1996); 74 AM. JUR. 2D *Telecommunications* § 16 (2001).

²³⁵ See 47 U.S.C. § 336(a) (“[T]he Commission . . . (1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and (2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.”). For a discussion of the FCC’s grant under the Act of a free spectrum for HDTV, see Matthew Spitzer, *Dean Krattenmaker’s Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353, 365–67 (1996).

tension from the more “locally located” RentSOP idea; it would also amount to a convenient bridge to the most universal SOP of all.

C. Citizen Stock Ownership Plans

Isn't citizenship itself a kind of patronage²³⁶—an ongoing relation such as can warrant, in some cases, the public conferral of some kinds of benefits? At any rate isn't *good* citizenship so, such that everyone who “plays by the rules” or perhaps provides some kind of national service, can be said to deserve some solicitude, maybe the guarantee of some “basic minimum,” from us all? Surely we all as a group believe that we owe a “hand up” to those among us who share our core values, obey our laws, and are nonetheless “down” by the workings of fortune rather than fault. That seems to be what our oft-invoked commitments to equal justice, equal worth, and equal dignity commit us to, at the very least.²³⁷ And our means of publicly spreading home ownership and human capital (education) seem to give expression to precisely those commitments: commitments that jointly add up not to a guaranteed equality of citizens' ultimate outcomes, of course, since outcomes impound efforts as well as opportunities, but at least to equality of real opportunity.²³⁸

I don't believe anyone will disagree with these truths, which Americans indeed appear to hold “self-evident.”²³⁹ What we do sometimes disagree about are the empirics of actual responsibility, the comparative degrees to which chance and choice have determined

²³⁶ Even if that patronage is, in a liberal polity such as our own approximates, an attenuated or “thin” kind of patronage. The degree to which citizenship as a form of patronage is thin might track the degree to which the polity's “theory of the good” is thin. See RAWLS, *supra* note 5, at 347. A polity that acknowledges the “priority of the right over the good,” *id.* at 28, will be a polity which, qua polity, maintains but a “thin theory of the good,” *id.* at 347–50, reserving “thicker” conceptions of what it is to lead a good life to citizens as individual life-planning agents. Citizenship itself would accordingly be minimally defined in bare justice terms, and claims to basic resource minima would be rooted in the basic justice to which every citizen is entitled as a citizen. To the degree that a polity departs from the minimal liberal ideal, however—e.g., in the direction of a civic republic whose citizens deliberately share certain thicker values additional to that of justice (such as those of shared participation and deliberation themselves, notwithstanding the wishes of some not to take part)—the form of patronage to which citizenship itself amounts will correspondingly grow thicker. Being a citizen will involve closer relating with and value-sharing with one's fellow citizens qua citizens. And it might then activate concerns we hold on behalf of others which are grounded more in fellow-feeling now as well as in bare justice. For more on the degree to which the American polity appears to incorporate civic republican as well as classical liberal values, see Hockett, *supra* note 2, at 5–24.

²³⁷ See *supra* Part II.C.

²³⁸ See *supra* notes 173–76 and accompanying text.

²³⁹ See Hockett, *supra* note 2, at 29–56. In that article, I endeavor to identify an overlapping consensus among our dominant political traditions—a consensus that converges on a shared ideal that I label an “efficient equal-opportunity republic.” See *id.*; see also Hockett, *supra* note 22, at 142–73. The “self-evident” remark of course alludes to THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

particular citizen's outcomes. I linger at some length upon practical means of disentangling these intermingling inputs to citizens' "wealth functions" in the first of this Article's two companion pieces.²⁴⁰ That article is devoted to working out a consistent set of political-ethical, legal, and psychological foundations, consonant with American tradition, for a comprehensive American ownership society.²⁴¹ For present purposes, however, it will do simply to recall what we reminded ourselves of above at Part II.C: that (a) the younger the prospective beneficiary of an ownership-spreading program, (b) the less well endowed that beneficiary already is, and (c) the more readily viewed as an ethically exogenous resource or material opportunity a spread item is, the easier it is to perceive publicly augmented spreading as a redress of ill fortune and to view public action as vindicating equal opportunity rather than simply giving hand-outs. And that is all the more so when public augmentation takes the form of tax breaks.²⁴²

In that light, it would seem that we might try yet another variation on the ESOP, this one geared toward benefiting those in particular who are young, lacking in resources, or good citizens who play by the rules.²⁴³ We can readily ensure that beneficiaries meet these criteria—criteria that will reflect and in effect define the form of patronage we believe ethically to underwrite the benefit.²⁴⁴ And we can financially structure the arrangement to ensure that beneficiaries benefit only by working, rather as happens in the case of the ESOP.

Here is how. First, establish a national trust, a sort of cross between the national Social Security trust and the humbler ESOP trust schematized at Part II. We might call this trust something like the national "Citizen Stock Ownership Plan" or "CitSOP" Trust. Second, open individual citizen trusts or accounts for every citizen—perhaps upon each citizen's reaching adulthood (in the accounts case) or at birth (in the trusts case), as recently begun in the United Kingdom.²⁴⁵ These individual CitSOP accounts could be administered rather as was

²⁴⁰ See Hockett, *supra* note 2, at 36–51.

²⁴¹ See *id. passim*.

²⁴² See *supra* Part II.B.

²⁴³ We might begin by targeting those who benefit their country through military, AmeriCorps, or like service, similar to the large-scale post-Homesteading era education-spreading programs which began with veterans as beneficiaries. See Hockett, *supra* note 6, at 144–46.

²⁴⁴ We do this already with federal home finance and higher education assistance, which employ both financial need and law-abidingness criteria. See *id.* at 95 & n.119, 96–97.

²⁴⁵ In 2001, Prime Minister Blair implemented the Child Trust Fund (or, more popularly, "baby bonds"). See *Blair Banks on Baby Savings Scheme*, BBC NEWS, Apr. 27, 2001, http://news.bbc.co.uk/1/hi/uk_politics/1297324.stm. Former Senator Bob Kerrey of Nebraska proposed something similar stateside in 2000 called "KidSave" accounts. See *Idea of the Week: KidSave*, NEW DEM DISPATCH (Wash., D.C.), Oct. 13, 2000, http://www.dlc.org/ndol_ci.cfm?contentid=2372&kaid=131&subid=207.

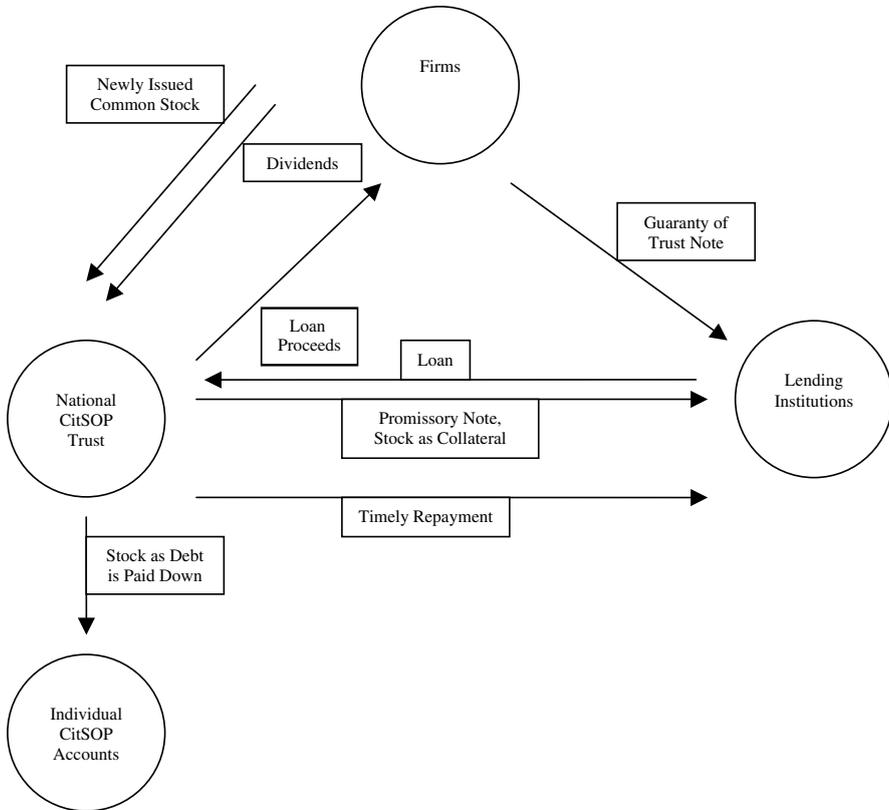
envisaged in connection with the “USA” accounts proposed in the late 1990s, or the Social Security “personal accounts” proposed somewhat more recently.²⁴⁶

Now, let the national CitSOP trust borrow from lending institutions just as firms’ ESOP trusts do, and let them use the proceeds of the loans to purchase newly issued, dividend-yielding common stock from firms. Grant participating firms and lending institutions, in turn, more or less the same tax incentives as they are afforded in connection with ESOP arrangements. Let the national CitSOP trust, in turn, pledge the purchased stock as collateral²⁴⁷ and steadily pay down the debts to the lenders out of, say, the tax revenue brought in from participating firms. Let the full set of arrangements, in short, look like this:

²⁴⁶ In 1999, President Clinton proposed “universal savings accounts” (USAs). See Press Release, Office of the Press Sec’y, The White House, Remarks of the President on Universal Savings Accounts (Apr. 14, 1999), available at <http://clinton4.nara.gov/WH/New/html/19990414-3020.html>; PAMELA PERUN, URBAN INST., MATCHING PRIVATE SAVING WITH FEDERAL DOLLARS: USA ACCOUNTS AND OTHER SUBSIDIES FOR SAVING (1999), <http://www.urban.org/publications/309272.html>. President George W. Bush advocated a similar structure of private accounts, though one without government income support, in his 2005 State of the Union address and in other public appearances. See George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>; *Bush Pushes Private Accounts*, CBS NEWS, May 4, 2005, <http://www.cbsnews.com/stories/2005/05/04/politics/main692991.shtml>.

²⁴⁷ This might be deemed unnecessary in view of the full faith and credit enjoyed by a federal institution. See 12 C.F.R. pt. 3, app. A (2007). Indeed, even if the trust functioned as a government-sponsored entity (GSE), it would be viewed as only 20% risky for bank capital regulation purposes, whereas investments issued directly by the federal government itself are not considered risky at all because the federal government’s obligations are fully guaranteed. See *id.*

FIGURE 4: INSTITUTIONAL/FINANCIAL STRUCTURE OF A
CitSOP ARRANGEMENT



This looks familiar. Yes, it's Figure 1 (or 2 or 3), save again with differing persons and entities—apart from issuing firms and lenders—involved, once more in light of the distinct form of patronage that we are rewarding. The only complications found here but not there (in the ESOP, CuSOP, and RentSOP cases) have to do with how precisely we decide to define the salient patronage form.²⁴⁸ Hence, for example, if we begin with national service of some sort as the salient patronage form, then the amount of stock released over time to the individual beneficiary's CitSOP account will track hours or weeks or years of service. If, on the other hand, law-abiding citizenship itself is the patronage category, then stock amounts will rise simply with years of age—rather as one's Social Security benefit rises with time spent at work.²⁴⁹

²⁴⁸ The previous discussion should have made clear, however, that in all the proposed SOPs, the exact nature of the rewarded patronage relationship can take many forms.

²⁴⁹ See Nancy J. Altman, Response, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1428 (1988) ("Social Security requires that all workers contribute some wage-related amount for their benefits and that

We might also *stratify* patronage subtypes in this case, such that law-abiding citizenship alone entitles the beneficiary to some basic minimum of stock released per quarter, national service of one sort to some increment more, national service of another sort to a yet larger increment more, and so on. Finally, insofar as it is opportunity deficits that have activated our concern, we might “needs test” one or more of the benefits here, perhaps applying a graduated discount factor to entitled benefits as personal wealth rises.²⁵⁰

There are many variations and gradations we might consider and experiment with in all of this. The important points for present purposes are more fundamental in nature. The first is that the basic model can perspicuously accommodate any form of patronage—any form of deserving status such as might ethically warrant benefit conferral—that we envisage. The second is that it can do so while enabling us to confer the benefit in a manner that both broadens firm ownership and respects our core values and endowment sensibilities. That means that the model can be adapted quite flexibly to maximize the number of people who benefit while giving expression to the core values and sensibilities rehearsed above at II.C, which account for our publicly favoring ESOPs, not to mention our home- and education-spreading programs.²⁵¹

D. Portfolio-Diversifying “Meta” Stock Ownership Plans

One particular advantage enjoyed by the CitSOP idea that might not be enjoyed to the same degree by the CuSOP and RentSOP ideas is the automaticity of the CitSOP’s *diversification* of acquired stocks. If a broad variety of firms were to participate in the CitSOP program, beneficiaries would perforce receive shares in a broad array of firms. In the earlier-rehearsed CuSOP and RentSOP cases, by contrast, diversification would ride upon more accidental factors—namely, the number of different corporate firms that the particular beneficiary regularly patronized as customer (voluntarily, involuntarily, or in between), and the number of such rent-extracting firms in more or less close proximity to which the beneficiary lived. That raises the question whether we might design yet one more SOP-like or SOP-complementing arrangement, such as can facilitate optimal diversification among all SOP beneficiaries irrespective of SOP-type. I think that we can.

the longer workers are employed and the higher their covered earnings, the greater their cash benefits. Because benefits are tied to previous living standards, Social Security encourages work.” (footnotes omitted)).

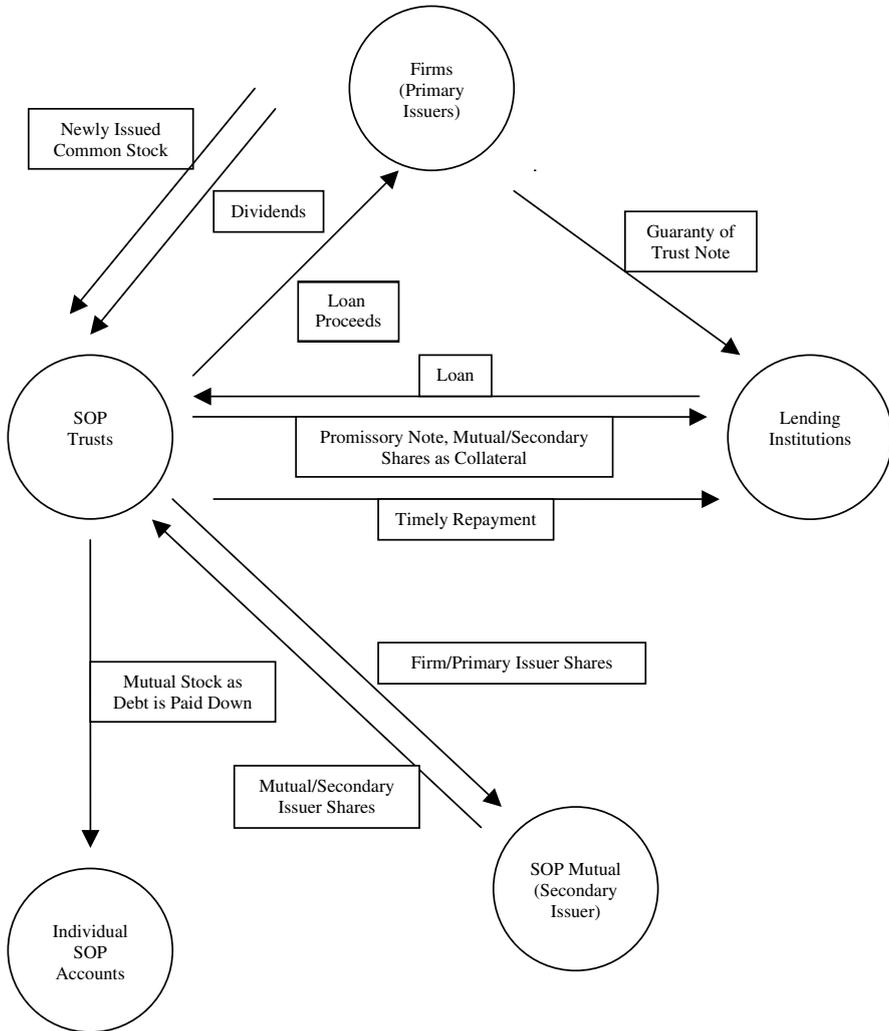
²⁵⁰ For example, the offspring of wealthy families might not qualify for any CitSOP benefit.

²⁵¹ See *infra* Part V.B.

A variety of methods might be employed. I'll model two very simple, exemplary cases here. The first model might be called the "SOP Mutual." Various SOP trusts would convey their primary issuer stock holdings to an intermediary, which in return would convey shares in itself of equal value to the trusts.²⁵² The intermediary (and now secondary issuer) would be, in effect, a mutual fund whose (initial) members were SOP trusts. Subsequently the SOP trusts would, rather than gradually releasing sponsoring issuers' securities to their beneficiaries' individual accounts over time, release SOP Mutual shares instead. And shares of the latter sort also would serve, where shares collateralize loans used for the purchase of primary issuer stock, as collateral. Diagrammatically, then, things would look thus:

²⁵² Fund shares would be valued as are any mutual fund's shares. Individual issuer shares would be valued as are any issuer's—by the market for publicly valued firms, or pursuant to the cash flow method for closely held firms. See generally MCKINSEY & CO. ET AL., *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* 131–297 (3d ed. 2000). I ignore here the question of means of avoiding imprecision occasioned by market fluctuations, accounting indeterminacies, and the like, as there are no difficulties specific to the present case not already dealt with by familiar means in other investment company contexts.

FIGURE 5: INSTITUTIONAL/FINANCIAL STRUCTURE OF A SOP WITH SOP MUTUAL ARRANGEMENT



It seems worth noting here that the SOP trusts participating in SOP Mutual arrangements could be of all types: ESOPs, CuSOPs, RentSOPs, even CitSOPs were there good reason.²⁵³ And the more SOP types and SOPs, of course, the greater the degree of diversity, hence the lesser quantum of value at risk faced by SOP beneficiaries. We might then have here a bit of the “best of both worlds,” so to speak. We would both foster patronage relations between persons

²⁵³ As previously noted, diversification is built into the CitSOP concept. If, however, an insufficient variety of firm types participated in CitSOP arrangements, the added diversification of SOP Mutual would be beneficial.

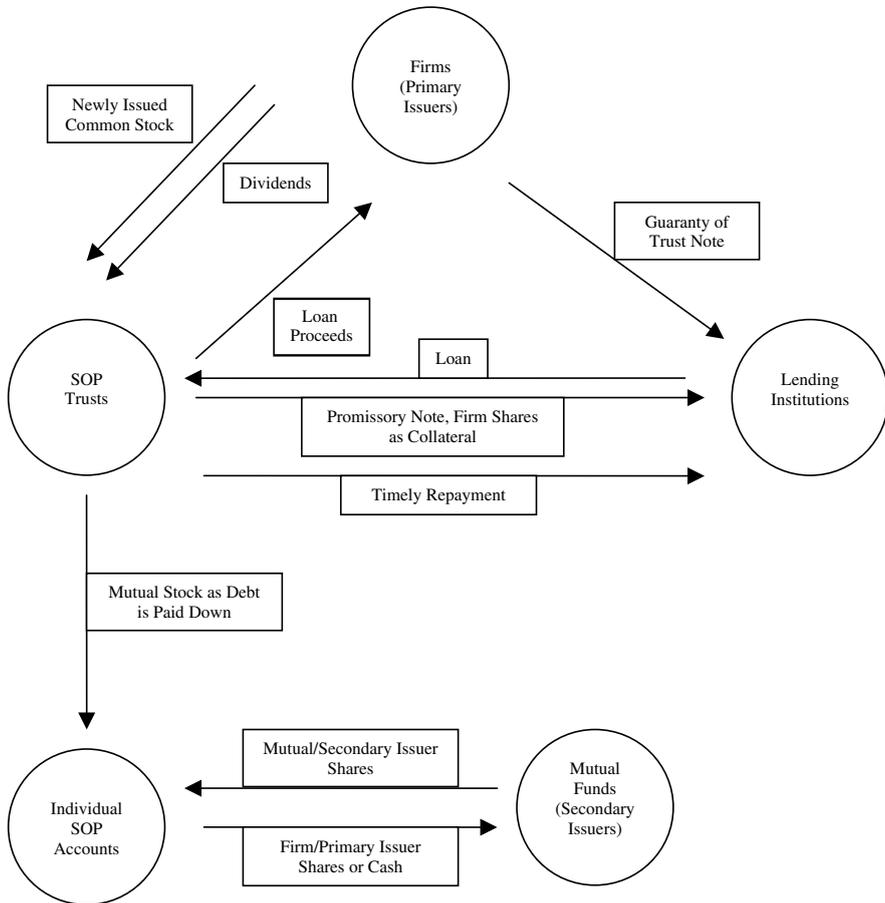
and firms, since benefits ride upon such relations, and dissipate the income risk that attends patronage concentration.

An advantage of the SOP Mutual model is that it enables SOP beneficiaries—not to mention lenders whose loans are collateralized by stocks held by the SOP trust—to reap the benefits of diversification even before they become legal, as distinguished from beneficial, owners. If, however, we found that we had to or wished to forgo that advantage for some reason, we could mutualize at the individual beneficiary level rather than at the SOP trust level. We might, for example, condition beneficiaries' qualifying for the SOP benefit upon their agreeing to diversify their holdings for some period of time. Or we might differently tax gains upon individually owned primary issues and secondary (mutual) stock. Or yet again, what seems more likely, a gradually growing degree of financial understanding enjoyed by citizens holding gradually growing portfolios of securities²⁵⁴ would itself prompt SOP beneficiaries to diversify their legally owned holdings.

²⁵⁴ We might even subsidize or require (the latter perhaps in the form of benefit conditionality) some baseline amount of financial counseling, as it does for federal home and education finance programs. See Hockett, *supra* note 6, at 92.

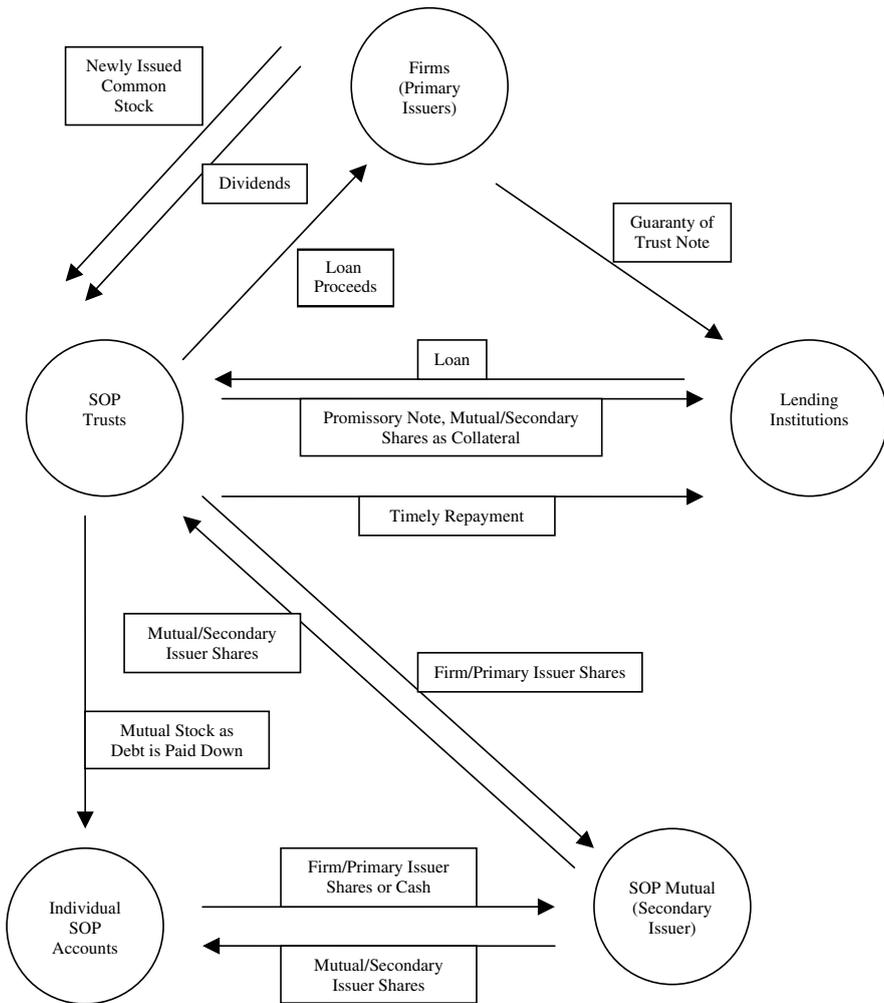
In all events, diagrammatically things would look rather as they do in Figure 5, save that now arrows would link not SOP trusts and SOP Mutuals, but individual SOP beneficiaries and ordinary mutual funds:

FIGURE 6: INSTITUTIONAL/FINANCIAL STRUCTURE OF A SOP ARRANGEMENT WITH DIVERSIFICATION ACHIEVED PRIVATELY



And of course we might imagine ordinary mutual funds serving both in their current capacities and as SOP Mutuals:

FIGURE 7: INSTITUTIONAL/FINANCIAL STRUCTURE OF A SOP WITH SOP MUTUAL ARRANGEMENT AND PRIVATELY ACHIEVED DIVERSIFICATION AS WELL



There seems no reason, then, why we might not achieve optimal diversification among our citizens as they own increasingly more stock, even while rewarding their multiple ongoing patronage relations with a perhaps somewhat lesser variety of firms.

V

ADVANCING ALONG THE CREDIT DIMENSION: FULL FAITH AND CREDIT,
SECURITIZATION, AND “CAPITAL MORTGAGING”

Part IV showed how far we might travel simply by generalizing from the ESOP along what we called the “patronage dimension.” Even by doing nothing more than varying patronage forms—moving outward from mere labor patronage to other bases of benefit warrant—we can both (a) get much more stock into many more hands, and (b) get more diversified portfolios of that stock into those hands. And we can engage in this kind of ownership society expansion consonantly with our core values and endowment sensibilities, just as the leveraged ESOP itself does.²⁵⁵

Promising as all of that might appear, however, we can do better still. For the ESOP, as we saw at Part III, is needlessly unambitious not only in respect of the patronage form that it contemplates; it is also quite needlessly humble in respect of the *credit* form that it employs. In this Part, I accordingly turn to that second dimension, the credit dimension. First, I briefly take stock of the limitations inherent in the ESOP’s reliance upon tax breaks and individual firm credit alone. Then I sketch how the asset types that our incomplete ownership society already spreads much more widely than firm shares—homes and higher educations—are spread much more widely precisely because we use beneficiary credit augmented by public credit-backed credit *insurance* and *securitization*. Finally, I describe how that latter strategy—which continues, like all of the SOPs, to respect the core values and endowment sensibilities discussed at II.C—might be extended to share spreading.

A. Inherent Limitations on Tax Breaks and the Credit of SOP
Sponsors

Recall first how the leveraged SOP spreads firm shares among patrons: By trimming its tax take from both firms and lending institutions, the government encourages individual firms in effect to finance themselves with debt, while issuing new shares in the debt amount to trusts run on behalf of beneficiaries. That was one upshot of Parts II.A–B and IV. But this means that there are two inherent limitations upon SOP share spreading even among any SOP’s already limited class of beneficiary-patrons.

First, insofar as the tax breaks are essential inducements to the lending and share-conveying transactions that constitute the SOP transaction, share spreading is limited by the amount of the government’s tax take that remains to be cut. Once all the clothing is shed,

²⁵⁵ See *supra* Part II.C.3.

so to speak, there is no way to cool oneself further without changing the external temperature. That opens the question whether there might be some means, still consistent with our core values and endowment sensibilities as briefly rehearsed at II.C, by which to turn on the fan or the air conditioner. Might we facilitate more share spreading by not simply refraining, on condition, from taking ourselves, but perhaps more affirmatively by assisting in the prevention of *chance*—of randomly distributed loan defaults—from so taking?

Second, insofar as individual firm creditworthiness (enhanced by tax incentives) in the eye of the private lender is an essential predicate to leveraged SOP share spreading, which Part II.B–C indicated it is, then share spreading is also inherently limited by individual firm credit worth. The amount that the SOP trust can borrow to finance its share purchases is determined by the creditworthiness of its guarantor, the SOP-sponsoring firm. But this means that the lender in any leveraged SOP transaction sees the risk of default concentrated upon a single firm, the SOP trust sponsor. That in turn means, for reasons familiar from the economics of insurance, that less credit than might have been forthcoming ultimately will prove to be forthcoming.²⁵⁶

This then opens the question whether there might be some means, again consistent with our core values and endowment dispositions, by which to boost credit simply by facilitating the spread of default risk over more parties than singular sponsoring firms and their lenders alone. Might we facilitate more share spreading through risk spreading—that is, by not simply rendering borrowing firms more creditworthy through tax cutting, but perhaps by facilitating the development of both primary and secondary (i.e., securitized or monetized) loan default insurance markets?

B. Publicly Augmented Credit: Our Present-Day Home- and Higher-Education-Spreading Programs as Prototypes

If our experience with home spreading and education spreading is any guide, then the answer to our last two questions is yes. For public credit enhancement and securitization are precisely the strategies that we have employed in constructing the two legs upon which our incomplete ownership society presently wobbles. Here I'll recount matters briefly, as the fuller treatment can be found in the second of this Article's companion pieces.²⁵⁷

²⁵⁶ See Hockett, *supra* note 22, at 183–203 (elaborating and discussing relevant insurance economics principles); Hockett, *supra* note 2, at 90–98 (discussing risk in finance and insurance markets); *infra* Part V.B.

²⁵⁷ The following discussion, except where noted, is based on Hockett, *supra* note 6, at 104–20, 146–53.

1. *Home Finance*

First, homes: Early in the twentieth century as now, most who purchased non-agricultural, purely residential real estate did so partly on credit. What was different was that fewer, for that reason, purchased housing at all. Housing credit markets were more fragmented, mortgages in consequence less liquid investments than they are today. Home loans in consequence were extended for much briefer terms—generally two to three years—at the end of which they “ballooned” to coming due in full.²⁵⁸ Loan-to-value ratios, in turn, were very low by modern standards. As little as fifty percent was considered high and was rare.²⁵⁹ Financing on such terms fell far short of most would-be buyers’ capacities, and so second mortgages, junior liens, and rollover refinancings were the norm.²⁶⁰

When real estate prices leveled off, then fell in 1928, short-term mortgages no longer could be refinanced in full.²⁶¹ Resultant forced sales and foreclosures, which reached the rate of over one thousand per day once some fifty percent of all home mortgages in the country had gone into default, brought prices even lower, pulling the real estate market into a classic “downward spiral.”²⁶²

The programs instituted to address this crisis, begun in the last year of the Hoover administration, broadened through the Roosevelt years and continuing in but minimally altered form today, cannot fail to impress in their innovativeness and comprehensiveness. The process began with the Federal Home Loan Bank Act (FHLBA) of 1932,²⁶³ which authorized establishment of a system of regional Federal Home Loan Banks (FHLBs) roughly parallel to that of the Federal Reserve’s system of regional Federal Reserve Banks.²⁶⁴ The regional banks provided standards and supervision to member institutions—the private mutual savings banks (MSBs) then responsible for most mortgage lending—and in return supplied added lines of credit

²⁵⁸ See J. Paul Mitchell, *Historical Overview of Federal Policy: Encouraging Homeownership*, in *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT* 39, 41 (J. Paul Mitchell ed., 1985).

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ *Id.*

²⁶² See Milton P. Semer et al., *Evolution of Federal Legislative Policy in Housing: Housing Credits*, in *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT*, *supra* note 258, at 69, 73.

²⁶³ Pub. L. 72-304, 47 Stat. 725 (codified as amended at 12 U.S.C. §§ 1421-1449 (2000)).

²⁶⁴ See 12 U.S.C. § 1423. The system was overseen by a Federal Home Loan Bank Board (FHLBB) operating rather like the Federal Reserve Board, which oversees the Federal Reserve System. See Hockett, *supra* note 6, at 106.

on the security of the mortgage loans that they held, thus monetizing those mortgages.²⁶⁵

The new Congress that took office in 1933 built upon Hoover's well designed initiative, first with the Home Owners' Loan Act (HOLA) of 1933,²⁶⁶ which provided for refinancing loans on favorable terms to enable erstwhile home-owners to recover their homes, and for the spread of further MSBs by directly affording national charters.²⁶⁷ One year later, the National Housing Act (NHA) of 1934 afforded a system of deposit insurance for the MSBs analogous to that newly instituted for depositors in commercial banks, boosting the availability of lendable deposits.²⁶⁸ More critically, the NHA instituted a system of insurance for the MSBs themselves, against defaulting *mortgagors*. Section 203 of the Act provided for a nationwide "mutual mortgage insurance" system, through which the newly created Federal Housing Administration (FHA) could insure first mortgage loans made for the construction, purchase, or refinancing of one-to-four-bedroom family homes.²⁶⁹

The FHA insurance scheme fundamentally altered the regime of home financing in the United States. It effectively replaced traditional collateralization requirements with national default risk pooling. The uniform requirements upon which FHA conditioned its insurance fostered the development of a standardized home mortgage instrument marketable throughout the country; that opened the door to securitization hence fuller risk-pooling, more on which presently. The housing quality requirements upon which FHA conditioned its insurance also ensured the financial rationality of federally facilitated home finance investments. And FHA's requirements of (a) actuarial soundness and (b) risk classifying and separate pooling ensured that the system retained the traditional efficiencies of a private insurance market.

Congress effectively completed its ad hoc discovery of this method of financially engineered ownership-spreading in 1938 by chartering the first modern "government sponsored enterprise" (GSE): the Federal National Mortgage Association (FNMA or "Fannie Mae") was charged with making a national market in FHA-insured

²⁶⁵ See Hockett, *supra* 6, at 106–07.

²⁶⁶ See Pub. L. 73-43, 48 Stat. 128 (codified as amended at 12 U.S.C. §§ 1461–1468 (2000)).

²⁶⁷ Refinancing was available through a Home Owner's Loan Corporation (HOLC) established by the HOLA. See Hockett, *supra* note 6, at 107.

²⁶⁸ See Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended 12 U.S.C. §§ 1701–1750 (2000)). The MSB deposit insurance system was administered by a newly established Federal Savings and Loan Insurance Corporation (FSLIC), designed along lines analogous to the then-recent Federal Deposit Insurance Corporation (FDIC). See Hockett, *supra* note 6, at 109.

²⁶⁹ See Semer et al., *supra* note 262, at 78.

mortgage instruments themselves, i.e., with securitizing those mortgages.²⁷⁰ In effect, Fannie Mae, along with later progeny (Ginnie Mae and Freddie Mac), closed the proverbial circle, separately completing the markets for housing credit and credit-risk bearing, thereby maximizing the availability of such credit to home buyers in the manner described earlier. Fannie Mae proved sufficiently successful, even on market terms, to privatize in 1968.²⁷¹ It now offers a multitude of home finance services.²⁷²

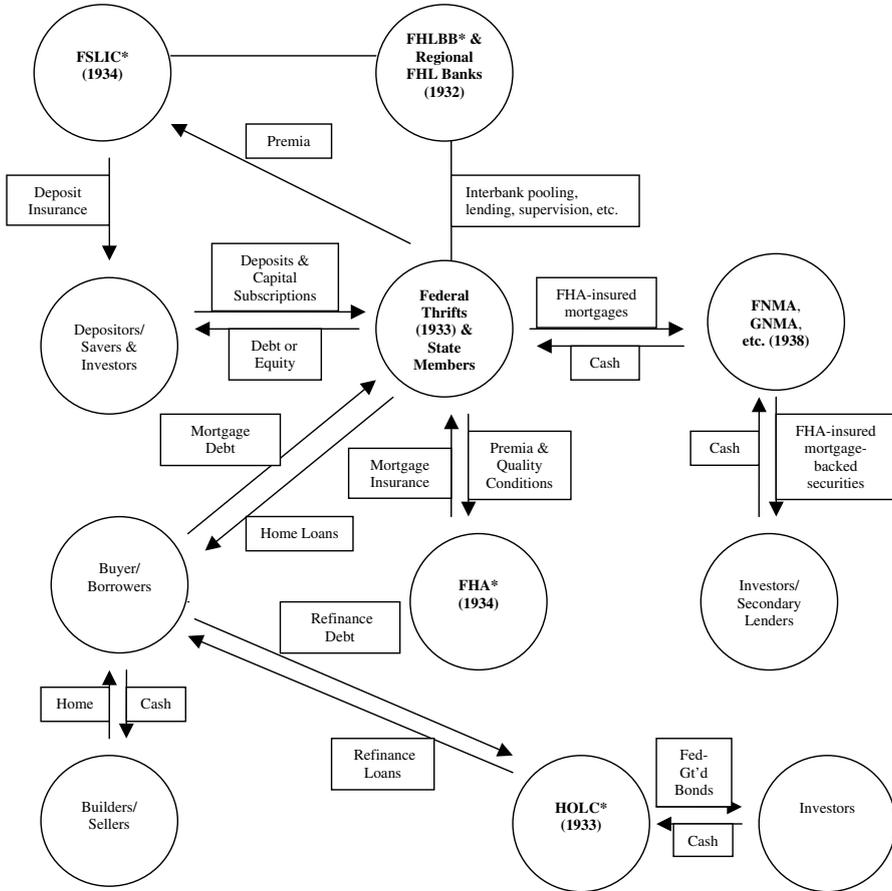
We can summarize the foregoing paragraphs in yet another diagram, the basic institutional-cum-financial structure of which remains intact to this day:

²⁷⁰ See Hockett, *supra* note 6, at 113–14 nn.198–99.

²⁷¹ See About Fannie Mae: Understanding Fannie Mae, <http://www.fanniemae.com/aboutfm/understanding/index.jhtml?p=About+Fannie+Mae&s=Understanding+Fannie+Mae> (last visited Mar. 2, 2007).

²⁷² See Frequently Asked Questions: Fannie Mae's Business, <http://www.fanniemae.com/faq/faq2.jhtml?p=FAQ> (last visited Mar. 2, 2007).

FIGURE 8: HOME FINANCING STRUCTURE SINCE FEDERAL HOME OWNERSHIP LEGISLATION OF THE 1930S



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

2. *Education Finance*

Now human capital: Federal involvement in higher education finance, in this case since the later 1950s and especially the middle 1960s, has substantially replicated that in home finance. Once again, a perceived crisis—this time a 1957 Soviet satellite launch—acted as impetus. Public perceptions of national security and confidence that “we [were] number one” were badly shaken by the launch of Sputnik.

Public discourse accordingly turned quickly to the question of who, or what, was to blame.²⁷³

One principal culprit, as determined by Congress and President Eisenhower, turned out to be substandard science and technical education.²⁷⁴ Congress reacted swiftly by passing the National Defense Education Act (NDEA) of 1958.²⁷⁵ At the heart of NDEA was the National Defense Student Loan (NDSL) program, which for the first time (apart from the GI Bill²⁷⁶) offered long-term, low-interest loans broadly to Americans seeking post-secondary education.²⁷⁷ The NDSL program, renamed the "Perkins Loan" program in 1987, continues today, though subsequently established programs now account for more students and dollars.

As the 1950s gave way to the early 1960s, federal involvement with higher education spreading came to be described not simply in national defense but in "Great Society" terms. The first critical step came with the Economic Opportunity Act (EOA) of 1964,²⁷⁸ whereby Congress established the Federal Work-Study Program (FWSP), which like the NDSL program continues to the present day. FWSP's linking of education aid to work is significant in light of the constraints upon effective asset spreading catalogued above.

The EOA was but a beginning, however. The real milestone of the 1960s, which stands to contemporary higher education finance much as the 1934 NHA stands to contemporary home finance, came one year later with the Higher Education Act (HEA) of 1965.²⁷⁹ The HEA forms the basis of current federal financial assistance programs for seekers of higher education. It not only brought then existent programs under one umbrella, but established critical new programs as well. Most important for our present purposes was the federal Guaranteed Student Loan (GSL) program, now known as the Stafford Loan Program.

As originally designed, the GSL program offered one particularly salient benefit: a federal guaranty of the debts incurred by those fi-

²⁷³ See, e.g., PAUL DICKSON, *SPUTNIK: THE SHOCK OF THE CENTURY* 4-7 (2001). For an interesting archive of materials, see *The New York Times on AOL: Sputnik* (1997), <http://www.nytimes.com/partners/aol/special/sputnik/>.

²⁷⁴ See DICKSON, *supra* note 273, at 227-28.

²⁷⁵ Pub. L. No. 85-864, 72 Stat. 1580.

²⁷⁶ Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 12 & 38 U.S.C.).

²⁷⁷ Servicemen's Readjustment Act § 201-209. The GI Bill offered more modest financial assistance to veterans seeking higher education immediately following the Second World War. That too was consistent with the Method, especially with its "conditioning" strategy.

²⁷⁸ See Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

²⁷⁹ Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 & 42 U.S.C.).

nancing their post-secondary educations through borrowing. The guaranty, of course, operated much as did federal mortgage insurance after the passage of the NHA in 1934.²⁸⁰ It removed lender risk, rendering loanable funds more readily available on cheaper terms.²⁸¹

A particularly important augmentation of the GSL program's credit-enhancing effect came with Congress's 1972 amendments to the HEA²⁸²: those amendments brought the Student Loan Marketing (SLM) Corporation, better known as "Sallie Mae," a GSE bearing distinct family resemblances to Fannie Mae.²⁸³ As its full name suggests, Sallie Mae was chartered as a market maker for shares in pooled student loan obligations.²⁸⁴ Like Fannie Mae, that is, it was and is a securitizer. Also like Fannie Mae, Sallie Mae only *began* as a GSE.²⁸⁵ Once the federal government had established the existence and shown the long-term viability of the requisite secondary market, it gradually withdrew:²⁸⁶ Sallie Mae began to privatize in 1997, then completed the process at the end of 2004.²⁸⁷ And like Fannie Mae, it now does much more than securitizing.²⁸⁸

²⁸⁰ See *supra* Part V.B.1.

²⁸¹ See Hockett, *supra* note 6, at 148–49.

²⁸² See Pub. L. 92-318, 86 Stat. 235.

²⁸³ See *id.* § 133; Fannie Mae: Company History, <http://www.fundinguniverse.com/company-histories/Fannie-Mae-Company-History.html> (last visited Mar. 3, 2007); SLM Holding Corp.: Company History, <http://www.fundinguniverse.com/company-histories/SLM-Holding-Corp-Company-History.html> (last visited Mar. 3, 2007).

²⁸⁴ See SLM Holding Corp.: Company History, *supra* note 283.

²⁸⁵ See, e.g., Sallie Mae, About Us, <http://salliemae.com/about/> (last visited Mar. 3, 2007).

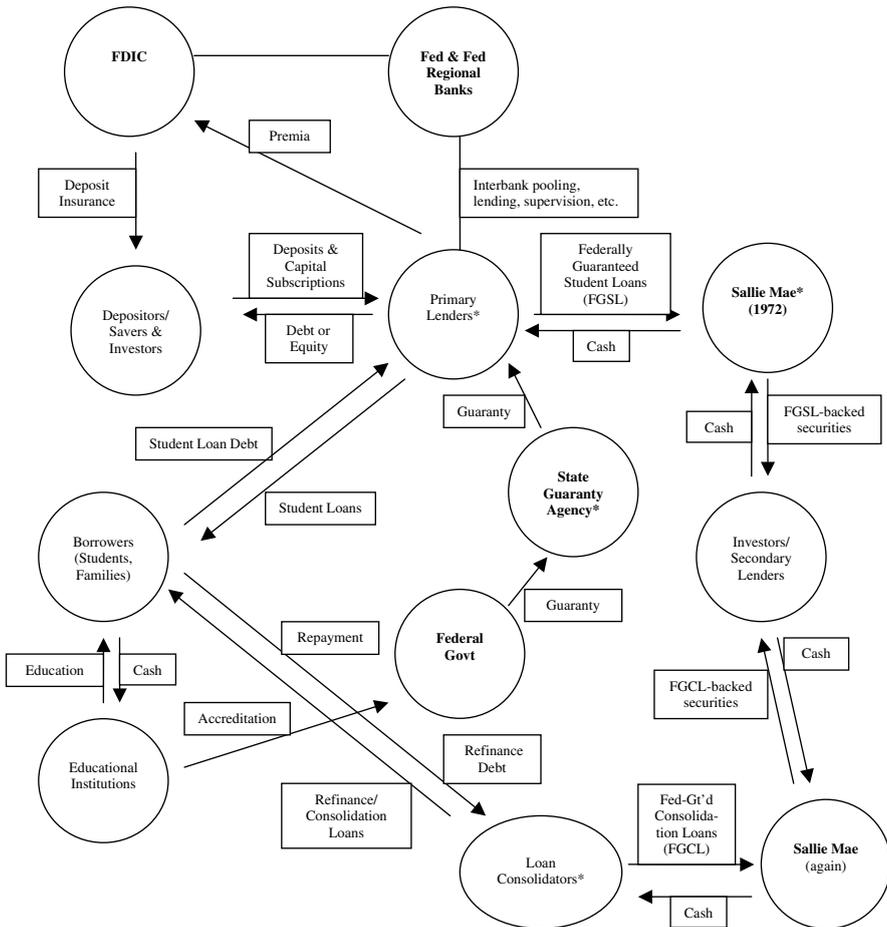
²⁸⁶ See, e.g., SLM Holding Corp.: Company History, *supra* note 283.

²⁸⁷ See Sallie Mae, *supra* note 285.

²⁸⁸ See, e.g., *id.*

Once again we can summarize the foregoing in a diagram. The identity of institutional-cum-financial structure shared by both this Figure and Figure 8 will not go unnoticed:

FIGURE 9: HIGHER EDUCATION FINANCING STRUCTURE SINCE FEDERAL HIGHER EDUCATION FINANCE LEGISLATION OF THE 1960s, 1970s, & 1990s



Again bold-faced terms denote government or originally government entities. “Loan Consolidators” can be primary lenders or other education finance companies like Sallie Mae itself. They can even be state guaranty agencies, which bear mixed public/private status and vary from state to state.²⁸⁹ There is, then, considerable functional and, indeed, public/private status overlap among asterisked entities.

²⁸⁹ See U.S. DEP’T OF EDUC., BIENNIAL EVALUATION REPORT 1993–1994: FEDERAL FAMILY EDUCATION LOAN PROGRAM (1995), available at <http://www.ed.gov/pubs/Biennial/502.html>.

C. Stock Finance: Adapting the Strategy to Share Spreading

Call the publicly augmented private credit strategy shared by our home and education finance programs the “Method” of financial engineering.²⁹⁰ The Method has worked rather well in spreading the owning of homes and human capital over much, though not yet all, of the citizenry of our ownership society in the making.²⁹¹ Might we adapt it to spread shares in firms—our hypothesized analogue to the homesteading era’s productive land? Well, in Part IV we generalized from the ESOP to other SOP types, essentially by replicating the ESOP’s financial-relational structure while changing some terms in the relation. Let’s try that strategy here.

Imagine, then, something like this: We begin with something a bit like the CitSOP structure mapped earlier in Figure 5 above, save that we now add a layer: Citizens have individual CitSOP accounts as they had there,²⁹² but now either instead of, or in addition to, coming legally to own firm shares as a national CitSOP trust pays down debt used to purchase shares on behalf of participants, participants purchase shares *directly*—just as they purchase homes and educations directly. We might imagine, for example, the national CitSOP trust continuing to purchase enough shares to afford citizens a basic minimum, or perhaps to reward such citizens as “serve their country” through some form of national service. Then, share purchases above that threshold would be direct purchases by citizens, as in the case of homes and educations.

Also as with homes and higher educations, citizens’ direct purchases of firm shares would be effected in part by their own borrowing. But again as in the case of home and education finance, we would publicly facilitate the borrowing. We would do so first by establishing, or fostering the private establishment of, a “capital mortgage” insurer analogous to FHA in the home finance case.²⁹³ As in that

²⁹⁰ See Hockett, *supra* note 6, at 87–153; Hockett, *supra* note 2, at 95–102.

²⁹¹ In connection with the “not yet all” caveat, note that higher education finance and home finance often will be of little use to some citizens, absent access to nonhuman capital. For among other things, the Method itself works in conjunction with the beneficiaries’ earning income that enables them to amortize their publicly facilitated mortgage debts or student debts. See *supra* Part V.B. Yet stochastic short-to-medium term “mismatch” between productive investment and consumer demand, mismatch between technology-driven productivity improvements and consumer demand, and global outsourcing periodically slacken domestic demand even for highly skilled labor, see *supra* Part III, which is most Americans’ primary source of income, see *supra* Part I. So there must ultimately be a symbiosis among the three basic types of ownable capital—homes, educations, and firm shares—in an optimally functioning ownership society wrought by the Method. That is, our *completed* ownership society will have to constitute a three-legged stool. In addition to better supporting an ownership society as a whole, the spreading of share ownership can only strengthen the other legs of home and higher education ownership.

²⁹² See *supra* Part IV.C.

²⁹³ See *supra* notes 269–72 and accompanying text.

case, of course, mortgage insurance would lessen lender risk, thereby augmenting the pool of available credit. The insurer also would operate along similar lines to those operated along by FHA and the Federal Stafford Loan program: quality conditions would be imposed upon qualifying securities (and hence issuers themselves²⁹⁴) just as they are upon qualifying homes and institutions of higher learning.²⁹⁵ Likewise, creditworthiness conditions would have to be met by the borrowing citizens.²⁹⁶ As with home mortgages and guaranteed student loans, these imposed conditionalities presumably would come to be in effect codified, thus standardized, in the form of a standard capital mortgage instrument.

The development of a standardized instrument in turn would pave the way for our employing the second mode of public credit augmentation: We would publicly facilitate borrowing by establishing, or fostering the private establishment of, a secondary capital mortgage market maker analogous to Fannie Mae in the home finance case and Sallie Mae in the education finance case.²⁹⁷ Let us (for now, and with some aesthetic regret) call it the “Capital Mortgage Marketing Association” or “Cappie Mae.” Cappie Mae would purchase capital mortgage debt from primary lenders. Like Fannie Mae and Sallie Mae, it would pool and classify the rights to repayment that are those debts in a special purpose vehicle, then issue shares in the pool(s)—“capital mortgage-backed securities,” so to speak. Also as in the case of Fannie Mae and Sallie Mae, of course (for this is the very point), the making of a secondary market in capital mortgages would facilitate the yet more efficient flow of default risk to that risk’s most efficient bearers, ultimately thereby enhancing available capital mortgage credit.²⁹⁸

A possible alternative or supplement to capital mortgage securitization might be capital mortgage *monetization*. The Federal Reserve Bank (Fed) might, for example, credit Member Bank reserve accounts in some discounted amount in return for what capital mortgage debt they hold, perhaps up to some limit—again as with the FHFB and home mortgage debt. In effect, the Fed would be credit allocating just as it does now with home mortgage debt.²⁹⁹ It would be encouraging the extension of capital mortgage credit by Member Banks by purchasing—thus taking the risk attendant upon—capital mortgage debt. This extension would not be as radical as might be supposed: It

²⁹⁴ I will address the market distortion objections that this might occasion *infra* Part VI.A.

²⁹⁵ Hockett, *supra* note 6, at 92; *see also* Semer et. al., *supra* note 262, at 83–84.

²⁹⁶ Congress could also require financial counseling, as with home and education lending. *See* Hockett, *supra* note 6, at 92.

²⁹⁷ *See supra* Part V.B.

²⁹⁸ This, recall from Part V.B, is part of how the Method works.

²⁹⁹ *See supra* text accompanying notes 263–66.

appears that the Fed's discount window was originally fashioned with a cognate purpose in view, and the window has occasionally been opened for precisely such a purpose in cases of financially distressed firms and municipalities thought "too big to fail."³⁰⁰ But I shall assume for present purposes, realistically I think, that the monetization option is closed,³⁰¹ and rest hope on Cappie Mae.

These credit enhancement methods, familiar from the home- and education-finance cases briefly discussed in Part V.B, could be readily combined with the *tax-break* strategies discussed in Parts II and IV in connection with ESOPs and other SOPs. Tax incentives facilitate the home and education finance programs themselves, after all.³⁰² These methods also could be supplemented, as suggested at Part IV.C, with more direct benefit conferrals in the case of constituencies whom we find worthy of special solicitude, either because they are faultlessly under-endowed or because they have performed some manner of valued national service. Here too there is precedent in the home and education finance programs, wherein we do more than just enhance credit availability for some constituencies: In those latter cases, we actually subsidize interest payments on the debts³⁰³ and sometimes even relieve them.³⁰⁴

Again, as with the new SOP forms proposed at Part IV, it is not to my purpose to blueprint in every detail a single preferred program or cluster of programs. The point here is simply to schematize, suggestively and in broad outline, in order to encourage a bit of imaginative and yet workable programmatic design for a completed ownership society. It is to show just how readily we might extend the basic strategies that we already employ from the cases in which we do employ

³⁰⁰ See Federal Reserve Act of 1913, ch. 6, § 13, Pub. L. 63-43, 38 Stat. 251, 263-64 (codified as amended in scattered sections of 12 U.S.C.). Section 13 of the Federal Reserve Act provides for the discount window through which the Federal Reserve monetizes payables of participating depository institutions, in effect trading liquidity for assets in a manner analogous to the way secondary markets securitize payment obligations. Even though not its original purpose, the discount window has primarily been used by government, usually the United States government, though sometimes other government, to monetize its debt by discounting. See NORMAN G. KURLAND, THE FEDERAL RESERVE DISCOUNT WINDOW, <http://www.cesj.org/homestead/reforms/moneycredit/discountwindow.html> (last visited Mar. 3, 2007). The principal nongovernmental uses in large "bailout" packages proposed for institutions thought to be too big or too important to allow to fail. See KURLAND, *supra*; see also Frederick S. Carns, *A Two-Window System for Banking Reform*, FDIC BANKING REV. (Wash., D.C.), June 1995, at n.37, available at <http://www.fdic.gov/bank/analytical/banking/1995sprg/rbr01a01.html> ("Chrysler and Lockheed are nonbank examples."). See Hockett, *supra* note 6, at 136 n.265, for additional discussion of the Federal Reserve's discount window.

³⁰¹ This seems to be a reasonable assumption. See *supra* note 300.

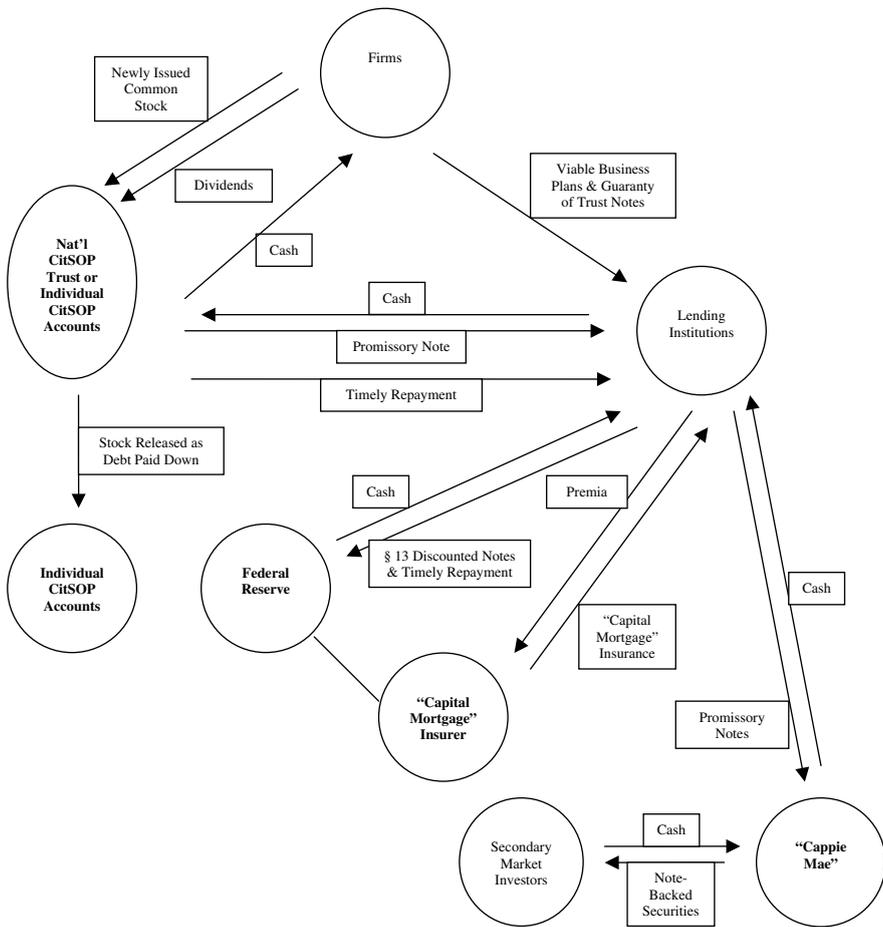
³⁰² See Hockett, *supra* note 6, at 115-16, 149.

³⁰³ *Id.* at 149.

³⁰⁴ See Hockett, *supra* note 6, at 149 & n.308.

them to the one case in which we as yet do not. Accordingly, then, we might summarize our results here in just one more diagram:

FIGURE 10: GENERAL FORM OF PROSPECTIVE CIT SOP ARRANGEMENT WITH “CAPITAL MORTGAGE” INSURANCE AND SECURITIZATION/MONETIZATION



Bold-faced terms again denote government or possibly government entities. The “Capital Mortgage Insurer” might begin as a government entity and might even initially be associated with the Fed, but also might ultimately be privatized. Likewise “Cappie Mae.”

Of course there are potential challenges that might stand in the way of implementing any publicly augmented private “capital mortgage” credit enhancement program. Some such challenges might be more poignant than their analogues in the home and education finance cases, though there also appear to be mitigating factors that operate more effectively in the firm share finance than in those other

cases. We will do best to consider these together in a separate Part, to which I now turn.

VI

ANTICIPATED DIFFICULTIES AND OBJECTIONS

Adapting the full credit-enhancement strategy to spread nonhuman capital would be publicly to facilitate the private extension of credit for indirect, direct, or both direct and indirect citizen purchases of firm shares. Collectively supported private credit risk pooling hence credit—in effect, expected *future* capital—would stand in for already accumulated capital—collateral. That in turn would enable more people to become owners in this realm, just as more have become owners of homes and human capital. Citizens perceived to be faultlessly lacking in nonhuman capital would be enabled, by exercising reasonable diligence or other broadly recognized virtues, to acquire it, just as they now are with homes and educations. And they would be so enabled at little felt cost to those comparatively few who already own these assets in abundance. So public action here, as in the home, higher education, and ESOP cases, would seem to conform to the values and endowment dispositions rehearsed at Part II.C.

Yet none of this is to say that matters here are easy. There are many challenges and potential objections that we can anticipate and ought at least preliminarily to address. In some cases these are more poignant here than they were in the home, education, and ESOP realms. In other cases they are less so. I address them in ascending order of difficulty.

A. “Market Distortion”

One challenge is that in order to ensure the actuarial soundness of any CitSOP or capital mortgage finance (CMF) program, we would have to impose quality conditions on the underlying assets—hence by extension, their issuers as well—whose acquisition we would be facilitating. That, as seen in Part V.B, is a key feature of the Method as applied to home and higher education finance. And it appears to be a critical factor in those programs’ actuarial hence political successes. But imposing such standards in the cases of CitSOPs or CMF might look like the public favoring of some firms, kinds of firms, or kinds of investments over others. And that perceived favoritism, distortion, or inappropriate intermingling of politics and investment is of a kind we have traditionally disavowed, at least rhetorically.³⁰⁵

³⁰⁵ This was a key factor, for example, in Federal Reserve Chairman Alan Greenspan’s and others’ opposition to President Clinton’s proposals in 1999 and 2000 to invest government surpluses in the stock market for the benefit of Social Security solvency. See, e.g., Amy Goldstein & Steven Mufson, *Greenspan Wary of Stock Plan*, WASH. POST, Jan. 21, 1999, at A1;

This challenge is easily met once acknowledged. Note first that *all* public interventions in the economy, whether packaged as facilitative or as regulatory, inevitably affect some firms or industries differently than others. The home finance programs afforded stimulus to the housing industry and thereby “distorted” the housing market and broader macroeconomy.³⁰⁶ The education finance programs did the same to higher education and the macroeconomy. They did not, for example, stimulate the markets for vocational training or apprenticeships to the degree that they did for university degrees.

More generally, contract law “distorts” persons’ capacities to breach agreements without compensating, tort law their capacities to work what we consider unjust injury to others without compensating, property law their capacities to engage in what we consider illegitimate taking from others. Laws against murder “distort” the contract killing market. And so on. The question, then, is not whether the public should “distort” what would have been the workings of “natural” markets absent government intervention.³⁰⁷ The question, rather, is precisely how, in what forms, and to what degrees we should or should not permit our collective actions to affect them.

Note second, by way of answering what one suspects would be most peoples’ answer to that last question, that we would not *have* to evaluate individual businesses or business plans in any micromanagerial sense by requiring that ownership shares acquired by citizens through CitSOPs or CMF meet minimum quality standards. Rather, the requirement can be simply that shares be investment grade per existing bank capital adequacy regulation³⁰⁸ and as determined by reputational intermediaries such as Moody’s or Standard & Poor’s.

Carolyn Lochhead, *Skepticism over Plan for Social Security*, S.F. CHRON., Jan. 21, 1999, at A1; Fred E. Foldvary, Editorial, *Keep Government out of the Stock Market*, PROGRESS REP., 1999, <http://www.progress.org/archive/fold75.htm>.

³⁰⁶ Home finance programs had the opposite effect on the rental market. The choice to favor home-ownership as the primary American domiciliary mode was forthrightly a choice not to favor rental or leasing. See, e.g., U.S. Commission on Urban Problems, *Publicly Assisted and Subsidized Housing*, in FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT, *supra* note 258, at 319, 331–36 (explaining the sluggish results of rental supplements).

³⁰⁷ Indeed it is absurd to suggest that markets could so much as exist absent public facilitation via bodies of law such as those just mentioned. See, e.g., 2 DAVID HUME, A TREATISE ON HUMAN NATURE 293 (T.H. Green & T.H. Grose eds., 1890) (1740) (positing three “fundamental laws” requisite to the preservation not only of markets but of society itself: “that of the stability of possession, of its transference by consent, and of the performance of promises”); 2 ADAM SMITH, THE WEALTH OF NATIONS 213–338 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1904) (describing the necessity of public maintenance of institutions providing for the common defense, dispensation of justice, commercial marketplaces, and general education for society to attain opulence or, indeed, even to endure at all as a society).

³⁰⁸ See 12 C.F.R. pt. 3, app. A (2007).

Alternatively, facilitated investments might be required, in toto per personal portfolio, to yield returns that are subject to no more than some stipulated variance, hence to be diversified.³⁰⁹ Or facilitated investments can be required to be made partly in broad market index funds. In that case, *all* (or at any rate all publicly listed) firms might reasonably be expected to benefit from new investment in proportion as they already have grown.³¹⁰ The investments in turn would be no riskier than the market as a whole. In all such cases, quality of the sort that concerns us will have been reasonably assured, and any distortion of the sort that might reasonably concern us will have been minimized if not indeed virtually eliminated.³¹¹

It might be objected that public credit facilitation involving the aforementioned forms of quality assurance will tend, nevertheless, disproportionately to benefit well established, even stodgy firms over smaller, more innovative, high growth (and high risk) firms. Won't that taint any CitSOP or CMF program with an inherently conservative bias?

This is hardly a problem. Note first that we *want* to be conservative about the reliability of the assets that our ownership society publicly spreads, including shares in firms. We want those stakes, ideally, to be as enduring and reliable as are homes and good educations themselves. Second, there is no reason to think that assuring that reliability will dry up the financing of smaller, riskier, and more innovative ventures. It is in any event quite common for these riskier, more innovative ventures to seek their financing from investment funds spe-

³⁰⁹ It is well established that a portfolio containing as few as thirty randomly selected stocks will bear scarcely more risk than does the market as a whole. See, e.g., WILLIAM F. SHARPE, GORDON J. ALEXANDER & JEFFERY V. BAILEY, *INVESTMENTS* 187 (6th ed., 1999). Choosing stocks not randomly but with a view to their countervailing will, of course, lower the number required to diversify-away idiosyncratic risk. See, e.g., *id.* at 190. There is persistent evidence that as few as ten well-chosen securities can create a portfolio that performs as well or nearly as well as (in some cases even better than) many market indices as wholes. See, e.g., JEREMY J. SIEGEL, *STOCKS FOR THE LONG RUN* 65–69 (2d ed. 1998) (discussing, with caveats, successes of the so-called “Dow 10 strategy”). Much of the research from which these familiar results derive springs from the pioneering work initiated by Harry Markowitz. See, e.g., HARRY M. MARKOWITZ, *PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS* (1959); Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952).

³¹⁰ That is, if new investment with the borrowed funds can reasonably be expected to follow approximately the same pattern as previous investment with unborrowed funds, then there is no reason to expect some listed firms to benefit disproportionately from “capital homesteading”—a manner of analogue, perhaps, to the patronage-tracking on the beneficiary side.

³¹¹ See BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 255–59 (8th ed. 2003) (discussing long-run return reversals). On the other hand, the index fund strategy might cut against the participation values held by civic republican advocates of an ownership society. See *supra* Part I.B. Requiring facilitated investments in funds organized as corporations, in which shareholders hold governance rights, rather than in funds organized as trusts, in which only fiduciary rights protect shareholders, might mitigate such a problem.

cialized to that task.³¹² And their financiers are, of course, typically more risk preferring than the typical stock market participant.

Credit for new share acquisitions by those who are currently capital disenfranchised would be expected to come from the more risk-averse: those not expecting to receive extravagant returns from their investments (the loans they extend), but willing to accept lower returns in exchange for the preferred safety of direct or indirect public guaranty. It would not, then, be likely to cut significantly into the financing of innovative new firms.

B. "Subsidized Speculation"

A second general challenge that any SOP spreading or CMF program might face is the avoidance of publicly facilitating "mere speculation." Now, the line between that and its converse, "bona fide investment," is of course notoriously difficult to draw at the margin. And even the purest of "pure speculation," it is widely observed, is generally beneficial. It diminishes price spreads and with them the inefficiencies wrought by mere ignorance of price-pertinent information. But we would nevertheless presumably not wish to subsidize or otherwise facilitate unambiguously casino-like behavior among newly capially enfranchised novice investors—particularly not herdlike behavior of the sort widely believed to have been a precipitating cause of the 1929 stock market crash and ensuing depression. And isn't that, some might protest, what facilitating the leveraged purchase of firm shares by the erstwhile capially disenfranchised would be? Moreover, and relatedly, mightn't publicly augmented leveraged stock acquisition result in inflation of stock prices, even a bubble?

Like the "distortion" charge, this one is not an especially difficult challenge to meet. Here, though, our answer is more program-practical than legal-theoretical. First, the imposition of quality standards per the preceding discussion would itself significantly dampen any lottery-like nature of qualifying publicly facilitated investment. Second, even were that (improbably) not to suffice, it would seem easy enough simply to place direct limitations, pursuant to the conditions that we attach to the benefit of public credit facilitation, upon the velocity at which purchased shares are turned over. This would be analogous to the tax penalties incurred by early withdrawal of funds from an IRA or cognate vehicle. We might, for example, provide less assistance at

³¹² See, e.g., GLOBAL INSIGHT, VENTURE IMPACT: THE ECONOMIC IMPORTANCE OF VENTURE CAPITAL BACKED COMPANIES TO THE U.S. ECONOMY 18 (3d ed. 2007), http://www.nvca.org/pdf/NVCA_VentureCapital07.pdf (providing various statistical indicators of the importance of venture capital funds to innovative, new technology firms); see also RAJAN & ZINGALES, *supra* note 5, at 64–66 (remarking on the roles played by venture capitalists in "young firms" with "tremendous growth opportunities").

some time to any beneficiary who bought or sold too rapidly at some previous time. Or we might impose transaction excises (sometimes colloquially called “Tobin taxes”) upon such behavior, returning the proceeds to the public fisc.³¹³

Third, in respect of the “bubble” objection, note that the same objection could be leveled in connection with home mortgage debt augmentation and with higher education credit enhancement per the programs outlined at Part V.B. Yet nobody, to my knowledge, counts these programs as having been failures owing to inflation.

Moreover, in the case of firm shares, the purchases, at least if quality conditioned as suggested above at Part VI.A and modulated in the ways suggested in the previous paragraph, would finance firms’ *productivity* growth. That means that public action here could plausibly be expected to be counterinflationary in the goods markets in ways that it is not even in the home and higher education markets. Again, then, there are multiple reasons to expect, and options by which to ensure, the investment-like, as distinguished from the “merely speculative,” nature of the widening ownership of business shares we facilitate.

C. Cost Recovery

A third challenge is cognate with, though perhaps initially more difficult than, the quality-standard and speculation-dampening challenges: how best to ensure that firm shares whose purchase is publicly facilitated will yield discounted long-run returns in excess of their financing costs.³¹⁴ In the case of homes and higher education, such yield is empirically well established, and there seems no reason to expect that to change in the foreseeable future.³¹⁵ Would it be the same for stocks?

³¹³ See generally THE TOBIN TAX: COPING WITH FINANCIAL VOLATILITY (Mahbub ul Haq et al. eds., 1996) (outlining James Tobin’s proposal for an international tax on foreign exchange transactions); James Tobin, *A Proposal for International Monetary Reform*, 4 E. ECON. J. 153 (1978) (proposing arguments for international monetary reform through taxation).

³¹⁴ Kelso and his followers used to say that “capital pays for itself.” See *supra* text accompanying notes 146–48. That claim, however, is either grossly misleading or tautologous. See *supra* text accompanying note 148; *supra* Part II.B. Absent de facto credit-allocative public intervention, arbitrage will close the spread between lending charges and equity returns, and capital will pay for itself in no more than the trivial sense that rational investment dollars will not exceed discounted expected returns. Kelso and his followers do not intend to be trivial; they are simply misleading, conveniently neglecting to mention the credit-allocative role of the public when arguing that capital “pays for itself.”

³¹⁵ See *supra* Part V.B. There has, of course, been a good bit of what might be thought of as irrationally exuberant speculation in the housing market in recent years. I do not intend to rest the case upon yields wrought under those conditions. Nor is the case weakened by what will be unusually low, perhaps indeed negative, returns should it turn out that there has been a bubble and the bubble bursts. I should also note a possible caveat here: Henry Hansmann informs me that some recent studies show housing scarcely to

The answer, at least over the long run, appears to be yes. For one thing, the American (and indeed much of the global) equities market as a whole has tended toward a nine to fourteen percent rate of return since records have been kept.³¹⁶ Average lending rates have been substantially lower than that over the same period, while rates to those whose credit would be publicly augmented would presumably be lower still.³¹⁷ For another thing, even were that not the case, we might at least consider, as a corollary to our quality standards, stipulating that only substantial dividend-yielding stock would qualify for SOP or CMF facilitation.³¹⁸ We could even consider going yet further by prohibiting, say, the financing of new projects by publicly listed firms with retained earnings.³¹⁹ That would, first, free up funds for dividends—potentially enhancing real incomes and discouraging exces-

appreciate in real value over time. Because I have not yet seen these very new studies, I do not yet know what definitively to make of them. But I can say at least the following: First, if housing stock appreciates at any rate greater than the program-dampened real mortgage borrowing rate, then the program creates a spread and enables needful households to arbitrage that spread effectively. Second, this spread is all the greater in as much as one derives value above asset appreciation, one effectively enjoys housing rent free. And third, as in the education case, insofar as we have publicly assisted first home purchase by our citizenry on the basis of values discussed *supra* Part II.C, and those values are realized by housing in the ways discussed *supra* Part V.B.2, then the spread between borrowing rates and realized value is greater still.

³¹⁶ See SIEGEL, *supra* note 309, at 50–51 (citing studies indicating that from 1936 to 1950, annual returns averaged about 12% per year and reached a high of over 14% between 1950 and 1962, and that even factoring in the Great Depression, equity returns averaged 9% per year between 1926 and 1960). See generally ELROY DIMSON ET AL., TRIUMPH OF THE OPTIMISTS: 101 YEARS OF GLOBAL INVESTMENT RETURNS (2002) (providing a broad perspective on international financial markets to 2001); MALKIEL, *supra* note 311 (arguing for index fund investments over individual securities and actively managed mutual funds because of superior returns).

³¹⁷ See, e.g., SIEGEL, *supra* note 309, at 3–18 (charting and discussing superior nominal and real returns on equity over fixed-income-yielding, i.e., interest-bearing, investments since 1802). The puzzling persistence of the premium borne by equity relative to debt—puzzling because arbitrage would be expected to close it—is discussed *infra* Part VI.D.

³¹⁸ This would serve as a quality standard imposed on firms wishing to participate.

³¹⁹ I emphasize once again that I do not wish here to advocate this, only to draw attention to the possibility. Note that Raguram Rajan and Luigi Zingales would seem sympathetic to some such forced recourse to outside finance, given their opinion concerning the regressive roles played by those they call financial “incumbents.” See e.g., RAJAN & ZINGALES, *supra* note 5, at 61–62, 166–71 (discussing linkages between retained earnings, the free cash flow problem, and corporate stagnation and waste wrought by financial incumbents, and contrasting these with the efficiencies and opportunities gleaned by forced recourse to financial markets with many and new participants); see also Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986) (initiating discussion of the free cash flow problem in the financial literature). See generally ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (arguing that management has stripped shareholders of many of the property rights ordinarily thought to inhere in share ownership).

sive speculation in shares.³²⁰ And it would, second, render management more reliant upon, hence accountable to, outside finance—thus upon and to a broader swath of our citizenry, once financing began to originate from the newly SOP- and CMF-capitally enfranchised—than has been the case in recent decades. The societal effects of such change, it seems fair to suppose, would likely be far-reaching and indeed possibly very progressive. I do not wish here to rest anything on that prospect, however. It suffices simply to remind ourselves that it might be considered should we decide to get serious about share spreading, and that such changes would not require outright displacement of traditional state authority, since such governance changes would be in the nature only of conditions attaching to use of one publicly assisted form of corporate finance.³²¹

But what about competition with our would-be CitSOP or CMF program beneficiaries, in that case (and indeed in any case), from large financial intermediaries? If we act to induce greater reliance by firms upon outside financing (or even if we do not), and there is a spread between prevailing interest rates and returns to equity investment as per the previous paragraph, won't lenders—or hedge funds—simply purchase the equities *directly* rather than lending to individuals who turn out, in effect, to be publicly underwritten arbitrageurs?

This objection is fair enough as a matter of theory, but readily dispatched as a matter of present-day finance-regulatory practice. Even ignoring the portfolio-shaping and capital-adequacy rules to which we subject our financial intermediaries—commercial banks in particular³²²—it would seem easy enough to ensure that only presently capitolally disenfranchised citizens enjoy the benefit of any CitSOP or CMF program: Simply limit the publicly facilitated CitSOP trust purchases, or CMF insurance and securitization, not to mention favorable tax treatment, to “capital mortgages” entered into by, or on behalf of, households or individual citizens. And even then do so only up to a stipulated borrowing amount. Home mortgage insurance and securitization under our home finance programs are limited thus, after all. They are available only for the purchase of first homes.

³²⁰ This is so because under a mandatory dividend rule, a principal source of income deriving from ownership would be profit sharing—dividends—rather than exclusively capital gains realized only through selling shares.

³²¹ Moreover, regular dividend payments and reliance upon outside financing have become much less common in recent decades. And in all events most such firms as might be affected by any such change—the well-established firms, per our quality concerns discussed at Part VI.A—already are federally regulated by the federal securities laws, under whose jurisdiction most of these firms fall by virtue of being publicly listed and held.

³²² See 12 U.S.C. § 84 (2000); 12 C.F.R. pt. 3, app. A (2007).

Neither financial institutions nor plutocrats buy homes under the program.³²³

Once again, then, a potential objection to CMF bears an analogue in the home-finance and education-finance cases. And once again, means employed to head off the objection in those cases are readily extended to the present case. Only our final two general challenges seem less readily addressed by a home- or education-finance analogue.

D. “What Market Is Missing?”

The fourth general challenge that might be raised is cognate with the last two but more fundamental.³²⁴ Indeed it can be viewed in part as a rejoinder to some of the answers that we have just offered those challenges. In its simplest form, the challenge runs thus: If well balanced, broad market index portfolios perform reliably in the long run, as I have argued above, and indeed yield returns in excess of prevailing lending rates, what prevents people from capital mortgaging right now without benefit of government help? Relatedly, if there really is this spread, and the banks have not closed it for the reasons I suggest, why have hedge funds not closed it?

More fully elaborated, and now expressly taking cognizance of Part V.B, this objection might run thus: The federal mortgage insurance programs pioneered in the 1930s and 1940s in effect supplied what had been a missing market. Obstacles roughly characterizable as network externalities had blocked development of a potentially profitable market—that for mortgage insurance. Government then did what we observed at Part V.B it often does best: it assumed first-mover risk and attendant costs to establish a market. It thereby (a) showed that there was such a market to be had—indeed that supplying such a market could be highly profitable—and (b) laid the financial-standardization groundwork and cognate infrastructure required for that market’s private continuance.

Indeed, as noted at Part V.B.1, thirty to thirty-five years after their inceptions, the originally government-housed and government-sponsored mortgage insurers and securitizers had privatized. Matters subsequently worked similarly in the case of the higher education loan markets, the securitizer of which also privatized about thirty-five years

³²³ The problem does not arise in the case of higher education finance, of course, because the asset is inalienable by law—it has been very long indeed since we have permitted contracts of indentured servitude. Moreover, there seems a natural limit of sorts to the amount of education most individuals wish to purchase for themselves.

³²⁴ Great thanks to Henry Hansmann for pressing me on the challenges addressed in this subpart.

after its original government inception.³²⁵ So the question that emerges from these observations in connection with any proposed CMF program is: What analogue in the stock finance case is there to mortgage or loan default risk in the home and higher education finance cases that cannot be handled by already available private means? After all, in those two cases what was lacking prior to federal action was default risk pooling and the imposition of risk-mitigating quality standards. But in the case of securities, quality of the sort that concerns us is already achievable through portfolio diversification—as indeed we have noted at Part VI.B and elsewhere.³²⁶ And one may already borrow at fixed rates to purchase such balanced portfolios. So what then is left for “society” or the government to do? What market, precisely, is missing?

I think this objection deceptively simple, though I cannot claim certainty here. I’ll proceed from the more particular to the more general as I hazard my replies. To begin with, note that it is only the quality standards imposed by the federal home and education finance assistance programs that find an analogue in already privately available securities portfolio diversification. And those quality standards, recall, were imposed by FHA and ED originally as conditions attached to its offering mortgage default insurance and student loan guarantees. They were effectively “secondary,” or ancillary, that is to say; they were meant simply to minimize losses that the government might have suffered by dint of its “primary,” insuring role. Had they been primary—had they been, that is, what had been decisively missing—the government would not have been needed at all. Private insurers could just as readily have imposed the selfsame conditions before affording insurance. Indeed such conditions have long been a familiar feature of insurance practice.³²⁷

So then what was the real, “primary” advantage that initial government involvement in mortgage insurance and student loan guarantees offered? It seems to have been the pooling of risk faced by lenders that some borrowers simply would not amortize the loans used to *purchase* the assets, even high-quality assets. And, once again as in the home and higher education finance cases before, in the securities case today there are no means available as yet to pool risk of *that* sort as there is now to pool home mortgage and student loan default risk.

Now, it is of course true enough that the risk here to lenders might seem in some respects less acute or less formidable than it

³²⁵ See *supra* Part V.B.2.

³²⁶ See *supra* Part VI.B.

³²⁷ See, e.g., Hockett, *supra* note 22, at 193–94 (explaining that merit ratings, deductibles, and co-insurance contracts incentivize people to prevent the event that is insured against from occurring).

would have been in the home and higher education cases: it is presumably easier and less transaction costly, for example, to “foreclose” on and liquidate leveraged stock portfolios than homes and, especially, nonindenturable well-educated adults. But it would nevertheless not be anywhere near costless to do so, particularly were large numbers of American households to invest in this manner.³²⁸

Note further that any argument from the easy turning over of securities here cuts both ways: While it is easier to foreclose on a portfolio than on a house, that is, it is for the very same reason (namely, the fungibility of the asset) much easier for *borrowers* in any private arrangement to lower the quality (the diversification and consequent risk-freeness) of the assets that they purchase with their borrowings. They can effectively, and all too easily, “decollateralize.” And it would seem both formidably and needlessly costly, if not indeed impossible, for separate lenders continually and enforceably to *monitor* household borrowers with a view to the holdings in and consequent risk-freeness of their portfolios. That is so particularly in comparison to another, less costly, and better available means. It surely would be much more efficient for the government, with its pooling and plenary enforcement powers, to play the monitoring role—say, in connection with a nationwide program of government-fostered and -assisted asset building CitSOP accounts of the sorts discussed at Part IV.C. At the very least, this would seem so until some more specialized entity—presumably begun as a GSE as were Fannie Mae and Sallie Mae, and for similar reasons—has come into being.

The latter observation implicates another possible network-like externality or missing infrastructural element that might presently stand in the way of private capital mortgaging. This is the absence, thus far, of a comprehensive *architecture* of asset accounts.³²⁹ Here, I believe, the observations made above through Part I are particularly apposite: it is actually *very few* Americans thus far, recall, who enjoy IRAs and other such accounts, let alone know what a margin account might be. It is accordingly much fewer still who are yet in the habit of so much as thinking about such accounts—let alone, again, of purchasing and holding securities for their own accounts.

Now the absence of such widespread account holding might of course partly reflect network or public-good externalities of the pecuniary sort considered above. Presumably there would be, for example, substantial first-mover costs occasioned by any private provider’s estab-

³²⁸ I ignore for present purposes another potential problem—portfolio regulation of commercial lenders—on the theory that those who argue against me in this subpart will simply respond that I ought to be arguing for the removal of that regulation.

³²⁹ See *supra* Parts I and IV.C; see also Robert Hockett, A Jeffersonian Republic by Hamiltonian Means 267–81 (Mar. 7, 2007) (unpublished manuscript, on file with author).

lishing them on a retail basis for large numbers of nonwealthy citizens.³³⁰ And not all of the benefits occasioned by their establishment would be realized by their providers or ultimate holders alone. But one suspects that the absence of such accounts thus far also reflects network effects of another sort to which I shall turn next. Suffice it for the moment to note that even so minimal a collective effort as to establish CitSOP accounts would do much to render private stock acquiring not only more feasible than it currently is; it would render it more *thinkable* too.

The previous thought opens onto yet another family of responses to the general challenge identified in this subpart: it is not clear that the first-mover costs or network externalities surmounted by federal action in the home and higher education finance cases were only of the *pecuniary* variety (anymore than the value we place upon widespread home owning and human capital holding is exclusively pecuniary). In view of the sheer innovativeness of the first of those programs when first they were designed, and indeed of the false confidence with which it was commonly asserted that such forms of insurance were not simply missing but *impossible*³³¹ prior to the governments' having proved otherwise, it is tempting to hypothesize that some manner of what might be called "neural network effect"—even "missing neural network effect"—was at work here as well. That is to say that there appear to be cognitive reasons in addition to collective-action reasons to consider when we seek to explain some missing institution's absence.

Here, more precisely, is what I have in mind. There seems a distinct tendency among most of us simply to fail to appreciate, in prospect, many possibilities that seem obvious in retrospect, once they have been actually envisaged, attempted, and shown viable. A particularly apposite example for present purposes would seem to be that of the market for retail "Arrow Securities." These of course first were proposed, in effect, over fifty years ago, if not indeed arguably earlier.³³² And cognate instruments have been more directly and forth-

³³⁰ For example, even Merrill Lynch's pioneering cash management accounts (CMAs) and their offshoots appear to have been expensive to establish and administer, as evinced by their having originally been available only to depositors of substantial means. See, e.g., *Krinsk v. Fund Asset Mgmt.*, 875 F.2d 404, 406–07 (2d Cir. 1989) (detailing features of CMAs, including the requirement of a minimum initial deposit of \$20,000); 42 Op. Att'y Gen. Or. 273, 275 (1981) ("Participation in the CMA program requires a minimum investment of \$20,000 in securities or cash.").

³³¹ See *supra* Part V.B.1 (citing sources noting that mortgage insurance had been thought impossible for any agent ever to offer profitably).

³³² See generally Kenneth J. Arrow, *Le Role de Valeurs Boursières pour la Répartition la Meilleure des Risques*, in 11 *ÉCONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* 41 (1953) (introducing what since have come to be known as "Arrow Securities," contingent claims to compensation in the event that certain states of

rightly proposed, with proffered institutional designs gradually growing in detail for well over a decade.³³³ Yet it is only within the last several years that recognizable Arrow Securities have actually become available.³³⁴ It behooves us, then, to be ever wary of the prospect that Chicago-style skepticism as to whether the ten-dollar bill lying before us “really” is there might sometimes be leaving us prone to a premature dismissiveness.³³⁵

The fact seems to be that sometimes, even if only rarely, money really does in effect fall out of pockets or lie on the table for varying intervals, awaiting somebody’s pointing it out or picking it up. And lag times, albeit again rarely, are nevertheless sometimes substantial. Many distinct factors account for such lag times from context to context. Often those factors can be usefully described as garden-variety collective-action problems involving no costs or benefits save pecuniary ones. And factors of this very sort, I have just indicated, might well account for the absence of leveraged stock acquisition by American households on a scale with home- and higher-education acquisition.

But often our obstacles include factors that seem to be *more* than pecuniary as well: matters of attitude, risk dread, failed imagination, cognitive inertia, or mere programmatic or enterprise aphasia. These latter factors afflict both the would-be supply and the would-be demand sides of our would-be markets. And they can very often be strongly reinforced by symbiosis as between would-be supply and demand sides of the missing market itself. They can be reinforced by self-fulfilling skepticism on the part of able and foresightful theorists,

the world eventuate, as a means of optimally distributing risk to its most efficient bearers); see also Maurice Allais, *Généralisation des Théories de L'Équilibre Économique Général et du Rendement Social au Cas du Risque*, in 11 *ECONOMETRIE, supra*, at 81 (criticizing the argument in Arrow, *supra*, and offering putative improvements thereto); GERARD DEBREU, *THEORY OF VALUE* (Cowles Found. 1989) (1959) (incorporating Arrow’s proposed use of contingent claims into a complete, abstract model of an economy in intertemporal general equilibrium). Antecedent observations are found in JOHN R. HICKS, *VALUE AND CAPITAL* (1939).

³³³ See generally ROBERT J. SHILLER, *MACRO MARKETS* (1993) (putting forward proposals for establishing new markets to manage the biggest economic risks facing society); ROBERT J. SHILLER, *THE NEW FINANCIAL ORDER* (2003) (advocating the use of financial derivatives to reduce the economic risk faced by individuals and countries); Hockett, *supra* note 22 (exploring, through exploitation of insurance and hedging devices, means available to price and insure against individual income risk wrought by the new global economy).

³³⁴ See HedgeStreet, About HedgeStreet, <http://www.hedgestreet.com/aboutthedgestreet/> (last visited Mar. 5, 2007) (describing a market where traders can hedge against or speculate on economic events and price movements “from commodities and currencies to economic indicators, employment, fuel, housing prices, inflation, and interest and mortgage rates”). The Commodity Futures Trading Commission approved HedgeStreet for operation in February 2004. See Press Release, HedgeStreet, CFTC Approves HedgeStreet Exchange, http://www.hedgestreet.com/aboutthedgestreet/newsreleases/newsrelease_1.html (last visited Mar. 5, 2007).

³³⁵ I am alluding to the old saw concerning the Chicago economist who, when his attention is directed to a ten-dollar bill lying in the street, remarks that it cannot be a real ten-dollar bill because were it so it would have been picked up.

who might sometimes misattribute their own visionary abilities and sophistication to less tutored market actors and, in so doing, perhaps grow overconvinced that what isn't there just cannot be.³³⁶ And where the would-be market actors who concern us—in the present case, nonwealthy Americans, whom we saw at Part I to be quite minimally involved in securities markets, and who lack sufficient wealth (let alone risk taste or awareness) to participate substantially in hedge funds³³⁷—are particularly untutored in matters of finance and of meaningful securities-market participation, there would seem to be all the more reason to suppose that missing markets here might be missing at least as much by dint of such cognitive, attitudinal, and imaginative-inertial factors as by dint of pecuniary ones.

These latter observations seem to be particularly worth considering when empirical evidence of the real spread between market lending rates—let alone partly federally subsidized, hence effectively lowered, such rates—and long-run index fund yields is there and recalcitrant. There just *are* real ten-dollar bills here.³³⁸ It would seem to

³³⁶ A good case in point seems to have been the person of Fischer Black, whose appreciation for the beauty and sheer rationality of the capital asset pricing model (better known as “CAPM”) and general equilibrium theory appears to have led him to suppose that neither asset price spreads nor government monetary policy were possible. See PERRY MEHRLING, FISCHER BLACK AND THE REVOLUTIONARY IDEA OF FINANCE 232–43 (2005). Intriguingly enough, none other than that arch-Chicagoan Milton Friedman dismissed Black’s view here as no more than a rehash of the venerable but discredited “real bills” doctrine. See *id.* at 157. I discussed some of the forms of inertia described here at greater length in Hockett, *supra* note 22.

³³⁷ Regulation (and perhaps economies of scale) thus far prevents small-time players from participating in hedge funds. See, e.g., 15 U.S.C. §§ 80a-2(a)(51), 80a-3(c)(1), (c)(7) (2000). See generally STAFF REPORT TO THE U.S. SECURITIES & EXCHANGE COMMISSION: IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS (2003), available at <http://www.sec.gov/news/studies/hedgefunds0903.pdf> (examining the role that hedge funds play in financial markets and the government regulation of hedge funds).

³³⁸ There are other such spreads, incidentally, which financial theory tells us ought not to endure, and whose presence is now taken to indicate the likelihood of nontheory-tutored preferences, unexpected cognitive distortions, or both on the part of smaller market actors. One is that between otherwise identical assets offered across borders, the price spread between which is commonly attributed to “home bias.” See, e.g., HAL S. SCOTT, INTERNATIONAL FINANCE 460–61 (12th ed. 2005). Another, more puzzling spread is that between participated loans and bonds. See, e.g., HOWELL E. JACKSON & EDWARD L. SYMONS JR., REGULATION OF FINANCIAL INSTITUTIONS 156–57 (1999). Finally, most puzzling of all is the notorious and long-recalcitrant “equity premium puzzle”—the fully six percentage point spread between long-run equity and fixed-income asset yields over the past century, which in theory should long since have been closed by arbitrage. See, e.g., Shlomo Benartzi & Richard H. Thaler, *Myopic Loss Aversion and the Equity Premium Puzzle*, 110 Q. J. ECON. 73, 73 (1995); Narayana R. Kocherlakota, *The Equity Premium: It’s Still a Puzzle*, 34 J. ECON. LITERATURE 42, 43 (1996); Rajnish Mehra & Edward C. Prescott, *The Equity Premium: A Puzzle*, 15 J. MONETARY ECON. 145, 145 (1985). As for the particular spread between lending rates and long-term index fund yields, there appear to be straightforward, small-fry investor-protective and credit-allocative regulatory explanations ready: small-time investors cannot yet participate in hedge funds, see *supra* note 337, and lending limits of course limit commercial lenders’ lending to hedge funds, or indeed to any borrowers over certain percentages of

behoove us, then, to give real thought to whether there might not be ways to afford greater confidence and real capacity to ordinary Americans such as would enable them safely to pick up a few of those bills, rather than leaving them all to a few future Michael Milkens.

It would seem that we might do so, as indicated above, at least in part by building upon already federally facilitated “private” accounts noted above to be already proliferating to a limited extent or recently proposed. In particular, we can do so by building upon them in ways cognate with those envisaged in this Article in Parts IV and V. For these means, as noted, are familiar. And they resonate well with our values and endowment dispositions as rehearsed in Part II.C. The path of least resistance is presumably to vary on what is already familiar, and to do so in respect of well targeted, narrowly defined *features* of what is familiar. It is hoped that the sustained thought experiment that was Parts IV and V might have shown how a deep “gestalt switch” of sorts might be worked, simply by varying a few simple variables that up to now have gone unchanged and for that reason alone perhaps sometimes have looked, quite erroneously, to be constants.

E. “Subsidized Indolence”

The fifth, final, and perhaps most formidable general challenge faced by a prospective CitSOP or CMF program—most formidable because most grounded in our core political-ethical sensibilities—comes through our observations at Part II.C concerning perceived “earning” or “deservingness.” In the case of our higher education finance programs, we saw at Part V.B.2, beneficiaries of the Method must diligently labor to enjoy the benefit: they must study, learn, and earn their degrees, then work to pay down their student debts. In the case of our home finance programs, we saw at Part V.B.1, beneficiaries of the Method must generally labor to make timely mortgage payments from their wages or salaries. And things are likewise, we saw at Part II, in the case of ESOPs, while counterpart forms of patronage were argued at Part IV ethically to underwrite other SOP variants such as CuSOPs and RentsOPs. Is there a ready counterpart in the case of firm shares spread via CitSOPs or CMF?

The answer, again, appears to be yes, but we must make this a *careful* yes. To begin with, capital mortgages could be expected in most instances to be like home mortgages: beneficiaries of federally facilitated capital mortgage insurance and securitization would in most cases, presumably, work to pay down their capital mortgage

their lendable funds, *see supra* note 230. As in the home and higher education finance cases described at Part V.B, federal credit enhancement work in the securities case on behalf of small household investors would both tend to widen the spread I am discussing and could be readily targeted in ways similar to home and higher education finance credit.

debts as surely as they do to pay their home mortgage debts.³³⁹ It might of course happen that their doing so would gradually reduce the hours that they *had* to work, if dividends or capital gains accruing to their stock holdings gradually supplemented, then perhaps partly supplanted, labor income. Indeed this is even to be hoped, since the reduction of dependency and the spread of material freedom is one constitutive part of our very object in seeking to realize an ownership society.³⁴⁰ But there is no reason to anticipate that people would simply cease working or otherwise diligently acting altogether. That is particularly so over the time pertinent to the constraints imposed by our endowment sensibilities³⁴¹—the time during which beneficiaries would have to pay down their capital mortgages.

There are several reasons. For one thing, consumer demand itself tends to grow with income and wealth, even if at a diminishing rate.³⁴² Thus does the perceived need to work continue, particularly in an economy that does not yet generally allow for shortened working hours.³⁴³ For another thing, even were consumer demand not to rise in response to rises in income and wealth wrought by a successful CitSOP or CMF program, those latter rises, insofar as they would be, after all, partly offset by interest payments that would have to be made pursuant to capital mortgages, would be unlikely to render employment unnecessary during anyone's youth and early middle age.³⁴⁴ Finally, even to the degree that rising wealth would allow for less need of employment, it could be expected to encourage more people simply to start their own businesses or to engage in productive behavior chosen on grounds other than desperate need, rather than simply to cease being productive.³⁴⁵ That appears to be the trend, in any event,

³³⁹ Insofar, that is, as the unemployment rate remains relatively low, the long-term rate from individual to individual remains yet lower, and earnings do not stagnate or drop more precipitously than they have for the past three decades.

³⁴⁰ See *supra* notes 2–27 and accompanying text; Hockett, *supra* note 6, at 49–57, 163–64; Hockett, *supra* note 2, at 5–24, 29–31.

³⁴¹ See *supra* Part II.C.2.

³⁴² For an analysis of the marginal propensity to consume, see JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 113–31 (1936).

³⁴³ See JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 19–20 (1998) (“[A]verage hours of work have risen about 10 percent in the last twenty-five years.”); JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 61–66 (1991) (explaining how higher wages allow employers greater control over employees, thereby permitting them to demand more hours of work).

³⁴⁴ Kelso once reported that the newspaper employee-beneficiaries on whose behalf he “invented” the first ESOP retired early, but not before the credit extended their ESOP trust had been paid. See KELSO & KELSO, *supra* note 145, at 53, 124. And this indeed might have been a particularly rosy early retirement scenario in any event.

³⁴⁵ We might expect a more modest version of the culturally enriched, less wanting society prophesied with some whimsy (and some trepidation) by John Maynard Keynes. See JOHN MAYNARD KEYNES, *Economic Possibilities for Our Grandchildren*, in *ESSAYS IN PERSUASION* 358, 372 (1963) (“The course of affairs will simply be that there will be ever larger and

among such few early retirees as we find today.³⁴⁶ So it is highly doubtful that an actuarially successful CitSOP or CMF program would have to offend our endowment dispositions by appearing to be unearned or rewarding of indolence.

Note further that in the case of capital mortgages benefiting the chronically underemployed, at least where that state is attributable to obvious ethically exogenous disadvantage such as physical or mental handicap or poor social circumstances, we are as a society more open to more direct subsidy in any event. That too owes to our core values as adumbrated at Part II.C.1. This is how we find things in the home- and education-spreading realms, at any rate—where, recall, interest is directly subsidized rather than just indirectly lowered (through default insurance or guaranty) for the less well-to-do.

Note, finally, that there is nothing to prevent our substituting other opportunities to work diligently in place of missing employment, as a condition attaching to CitSOP or CMF assistance. In effect we have suggested this already at Part IV.C in connection with CitSOPs. We can, then, simply require that beneficiaries donate hours to Americorps or like programs. Or, if need be, we can establish additional public service corps for which otherwise unemployed beneficiaries of CitSOP or CMF assistance will be required to work to the best of their apparent abilities in exchange for the benefit. Such corps would serve as useful domestic analogues to military service, which as we observed at Part V.B already constitute a primary mode of public service qualifying otherwise unemployed citizens to receive much in the way of home finance, education finance, and health care assistance.³⁴⁷ Again there are multiple possibilities here, and we can do little more in the present work of synthesis than to speak broadly and suggestively. But the time, nevertheless, would seem ripe for beginning to sketch seriously, in broad outline, our preliminary designs.

CONCLUSION: HOPES AND NEXT STEPS

We have come a long way since the Introduction. But of course more remains to be done. For this Article, as suggested in the previous Part, in a sense has amounted to little more than a sustained thought experiment: We have sought to think through just what analogical extensions, from already familiar and well-running programs, both are possible and might draw us closer to completing that owner-

larger classes and groups of people from whom problems of economic necessity have been practically removed.”).

³⁴⁶ See, e.g., DANIEL H. PINK, *FREE AGENT NATION* 233–40 (2001) (using “e-tirement” to show that older Americans past retirement age want to work, on their own terms, and do so via the Internet).

³⁴⁷ See Hockett, *supra* note 6, at 82.

ship society we wish to become. But what to do next, once we've experimented in thought?

Our next step, I think, is to experiment beyond armchair thought: It is first to *model* such programs as are proposed in this Article, formally and econometrically. We should work to draw a better bead upon likely consequences and to quantify those to the degree we are able. I have pointed to what it seems reasonable to anticipate should we institute SOP-types and credit-augmenting programs of the kinds I have sketched. And those expectations do appear reasonable in light of the ready analogies drawn between what's here proposed on the one hand, the successful programs they replicate and adapt on the other. But we can proceed with more confidence and draw wider support if we first "crunch the numbers" and thereby at least provisionally confirm expectations.

After such modeling, if that indeed proves to lend weight to our expectations, we should experiment "on the ground": we should design and try pilot programs. That's how the ESOP began and then spread, after all—one troubled firm at a time. And that is how most programs start and then spread. We might even begin our experimenting for the benefit of disadvantaged constituencies, or veterans, or both (indeed there is overlap here), just as we did in the cases of home and higher education finance. These constituencies are those now in most urgent need, and those our less generous compatriots always are least prone to object to helping. We've been at war for a while now. There will be veterans aplenty in need of our help. Should things work well here, it will be only a matter of time before programs extend to the (increasingly "squeezed") middle classes.

By way of providing yet further encouragement to our further exploring, it bears emphasis again: we are talking here about potentially society-transformative action that is nonetheless primarily *privately driven*. Individuals, firms, and financial institutions will, in a completed American ownership society, be doing most of the driving. Markets will be the primary allocators as they are now, and as our core values prescribe that they ought to be. What "society" will do as a whole, what "we" will do collectively, is simply what we have always done best when we've acted collectively.

We afford tax incentives to spreading firm ownership. We pool and guarantee against risks for the eventuation of which no one is individually responsible. And we jump-start markets that individuals alone, owing to rational calculation and reasonable risk aversion, either cannot or dare not attempt to create single-handedly. Such measures, we saw at Parts II and V.B, are precisely what we have employed to spread ESOPs and to establish both the mortgage insurance markets and the mortgage and student debt secondary markets. Those

latter markets, again, began as public institutions and now have proved viable as private ones after the jump-starting and consequent proof of viability.

If, then, we can but collectively insure against default mortgages for the purchase of business capital now, like the housing and human capital we already publicly spread, and if we can jump-start those secondary markets in the resultant mortgage debt, and if we can adapt the ESOP to other SOP forms grounded on patronage forms additional to labor, we will have completed at long last our post-homesteading ownership society. We will have afforded to everyone who works hard a complete and *contemporary* “homestead” fully counterpart to the responsible freedom-conferring homestead of earlier times. And we will thus have enabled *private* parties financially to engineer something that all other societies, including our own, thus far have dreamed of but failed *socially* to engineer—a real republic of owners.

Regrettably, as we saw in Part V.B, it took national crises—first a stock market crash and depression, then a lengthy and bitter Cold War—to galvanize our modern-day seriousness about home and human capital spreading. It is to be hoped that it won’t take another such crisis—say, a sudden unloading by hostile nations of United States government debt, followed by rocketing interest rates and consequent crash—to prompt seriousness about spreading firm ownership. It will be well to take ownership of our society *before* our debt’s owners decide to disown us.