

Article Abstract

Insource the Shareholding of Outsourced Employees: A Global Stock Ownership Plan

Robert Hockett

With the American economy stalled and another federal election campaign season well underway, the “outsourcing” of American jobs is again on the public agenda. Latest figures indicate not only that claims for joblessness benefits are up, but also that the rate of American job-exportation has more than doubled since the last electoral cycle. This year’s political candidates have been quick to take note. In consequence, more than at any time since the early 1990s, continued American participation in the World Trade Organization, in the North American Free Trade Agreement, and in the processes of global economic integration more generally appear to be up for grabs.

It isn’t clear, on reflection, how to regard these developments from a normative point of view. On the one hand, there seems no gainsaying that the gradual removal of transnational trade and investment barriers have resulted in more rapid economic growth worldwide. And that growth appears to be lifting many once desperately poor persons out of their erstwhile penury. Yet on the other hand, there also is no denying that global trade and investment liberalization are wreaking losses at least as conspicuous as the gains. For many if not most of the victims of globalization are those who till recently occupied positions much like those now coming to be occupied by globalization’s more sympathetic beneficiaries, and who climbed out of them via precisely those legislated standards that offshoring firms now evade. Might we pay Peter without robbing Paul?

This Article proposes an ethically and intuitively attractive answer to that question rooted in financial engineering. The key is to channel a portion of the globalization-wrought gains reaped by outsourcing firms to the outsourced employees themselves. That way the latter are directly benefited by the very processes that currently are harming them. The method proposed is to adapt the already familiar Employee Stock Ownership Plan, or “ESOP,” to spread shares not simply to current labor, but now to “shadow” labor as well. The Article also proposes means of diversifying the portfolio risk that will face “OutsourceSOP” participants, and sketches a supporting role for such international financial institutions as the IMF and the World Bank. In the long run, the Article concludes, we have here the makings of a future “Global Shareholder Society.”

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This piece may be viewed as the latest in either or both of two series of articles devoted to the project of financially engineering a more just and sustainable distribution of opportunity and risk, both intra- and inter-nationally. The first, internationally oriented sequence comprises Robert Hockett, *Institutional Fixes versus Fixed Institutions*, 39 CORNELL INT’L L. J. 537 (2006); Robert Hockett, *The Limits of Their World*, 97 U. MINN. L. REV. 635 (2006); Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice*, 36 METAPHIL. 93 (2005), reprinted in GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE (Christian Barry & Thomas Pogge eds., 2006); Robert Hockett, *From “Mission-Creep” to Gestalt-Switch: Justice, Finance, and Globalization’s Intended Beneficiaries*, 36 GEO. WASH. INT’L L. REV. 167 (2005); Robert Hockett, *Just Insurance Through Global Macro-Hedging*, 25 U. PA. J. INT’L ECON. L. 107 (2004); and Robert Hockett, *From Macro to Micro to ‘Mission Creep,’* 41 COLUMBIA J. TRANSNAT’L L. 153 (2002).

The second, more domestically oriented sequence comprises Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs and “Ownership Societies,”* 92 CORNELL L. REV. 865 (2007); Robert Hockett, *Why (Only) ESOPs*, 12 STAN. J. L., BUS. & FIN. 84 (2006); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means,* 79 S. CAL. L. REV. 45 (2006); and Robert Hockett, *Whose Ownership? Which Society?,* 27 CARDOZO L. REV. 1 (2005).

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INTRODUCTION: THE QUANDARY OF “ROBBED” PETER, PAID PAUL, AND OVERPAID MARY

With the American economy stalled and another federal election campaign season well underway, the “outsourcing” of American jobs is again on the public agenda. Latest figures indicate not only that claims for joblessness benefits are up, but also that the rate of American job-exportation has more than doubled since the last electoral cycle.¹ This year’s political candidates have been quick to take note: The “middle class squeeze,” and the role of global trade and investment liberalization therein, figure prominently in stump speeches by candidates from both major American political parties. They are also the stuff of now nightly jeremiads by popular news pundits.² More than at any time since the early 1990s, continued American participation in the World Trade Organization (WTO),

¹ See “Offshoring Doubles, But Political Focus on Retraining Workers,” *Morning Edition*, March 3, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=87851332>.
² See, e.g., LOU DOBBS, EXPORTING AMERICA: WHY CORPORATE GREED IS SHIPPING AMERICAN JOBS OVERSEAS (2004); LOU DOBBS, WAR ON THE MIDDLE CLASS (2007). May God forgive me for citing these. They do appear, however, to be representative of a distinct and increasingly pronounced strain of the present day discourse on globalization.

in the North American Free Trade Agreement (NAFTA), and in the processes of global economic integration more generally appear to be up for grabs.

It isn't clear, on reflection, how to regard these developments from a normative point of view. For global trade and investment liberalization, when we think carefully about them, present a quandary to those who are serious about distributive justice and human well-being. On the one hand, there seems no gainsaying that the gradual removal of transnational trade and investment barriers has been resulting in more rapid economic growth worldwide.³ That growth, moreover, appears to be lifting many once desperately poor persons out of their erstwhile penury.⁴ And all of this seems to be happening much in the way – pursuant to the very dynamic – that students of political economy since the “classical” era of Smith, Ricardo, and Mill long have predicted.⁵

Yet on the other hand, there also seems no denying that global trade and investment liberalization are wreaking losses at least as conspicuous as the gains – losses of the kind mentioned above, for example. These do not seem to accrue solely, or even mainly, to complacent plutocrat rascals of the sort long since fingered by Smith and his “public choice” school descendants, as being ever the principal advocates of “protectionist” policies of all stripes.⁶ For many if not most of the “victims” of globalization nowadays seem to be those who till recently occupied positions much like those now coming to be occupied by globalization's more sympathetic beneficiaries –

³ See generally Hockett, *Global Macro-Hedging*, supra, headnote.

⁴ Id.

⁵ Id.

⁶ See generally Hockett, *Three Potential Pillars*, supra, headnote.

and who climbed out of their disadvantaged positions via precisely those legislated standards that offshoring firms now evade.⁷

And *this* is, of course, the root source of the quandary to which I refer. For what are we to think of – how are we ethically to assess and regard – a process that “robs,” so to speak, faultless Peter to pay faultless Paul? And symmetrically, what do we make of a status quo ante that kept faultless Paul in his poverty while benefiting faultless Peter? Moreover, how, if at all, should our assessment be altered if Peter is robbed not only to pay Paul, but less sympathetic, rich Mary as well?

Now one might suggest various means by which to address the dilemma I mention – what I’ll call “the assessment dilemma.” One family of such means in particular has been favored, historically, by many mainstream economists and policy advocates since at least Bentham’s day: One suggests, for example, that we seek means of commensurating the gains and the losses to Peters, Pauls, and Marys, then choose such policies as yield the greatest net gains or least losses. Relatedly, and now heuristically more conveniently, one might propose fixing on some readymade index – global GDP, say – then select policies best calculated to “maximize” it. It is remarkable, on reflection, how many contributors to public discussion of globalization adopt points of view of this general type.⁸

I do not think, though, that proffered approaches to the assessment dilemma of this species are apt to prove satisfactory for long, either prudentially or ethically speaking. For as a prudential matter, perceivedly “robbed,” faultless Peters cannot

⁷ Id.

⁸ See Hockett, *Limits of Their World*, supra, headnote. See also Robert Hockett, *Taking Distribution Seriously* (under review); Robert Hockett, *The Impossibility of a Prescriptive Paretian* (under review); and Robert Hockett, *Why Paretians Can’t Prescribe: Preferences, Principles and Imperatives in Law and Economics* (working paper, on file with the author).

plausibly be expected to acquiesce in their “robbery” indefinitely, simply because some of the spoils assist Pauls. This seems especially so given the Peters’ own recent history of struggle to win wealth shares from less sympathetic rich Marys, who presently appear to be benefiting along with – and indeed more than – the Pauls at the Peters’ expense.⁹ More importantly still, as an ethical matter, neither robbed faultless Peters nor anyone else rightfully *can* accept, without alteration or emendation, a systematic transfer from hypothetically faultless Peters to undeserving Marys. At least that is so if truly “faultless” such Peters and “undeserving” Marys they be, and if some workable, ameliorative alteration lies to hand.¹⁰

I’d like in this Article to propose and discuss one such alteration that I think might be open to us. I propose that we add a bit of financial irrigation, so to speak, to the processes of global trade and investment liberalization. It is a set of financial arrangements that re-channel some of the gains which those mentioned processes presently channel away from the Peters to already advantaged Marys, back to those recently and now seemingly again disadvantaged Peters. And it does so by means that are apt, in contrast to garden variety taxation and redistribution policies, to resonate in an intuitively satisfactory way with the ethical commitments and endowment dispositions that all of us – Peters, Pauls, and Marys alike – seem to share.¹¹

We can think of what I shall propose as financial “bypass surgery,” if you like, a bit of added arterial flow to afford globalization a healthier heart. If I am correct in my

⁹ See Hockett, *Three Pillars*, supra, headnote; and Hockett, *Global Macro-Hedging*, supra, headnote.

¹⁰ Id. See also sources cited supra, note 8.

¹¹ By “endowment dispositions” I mean certain behavioral-psychological tendencies that behavioral economists and legal scholars have in recent years documented extensively. I’ll elaborate, as well as endeavor to substantiate the claims I have just made, infra Parts I and II. See also Hockett, *Whose Ownership?*, supra, headnote.

supposition, then it will mean that continued trade and investment liberalization can be made to benefit Pauls in a manner that does not rob Peters *or* Marys. That will be globalization that gives rise to less ambiguous justice- and wealth-gains.

“Smoke and mirrors?,” you might now be asking. Well, no: Finance. Or more to the point: Financial engineering. For the key to solving both our ethical assessment dilemma and our current political stalemate over globalization, I believe, is to channel some shares in Mary’s trade- and investment-benefited firms to the laboring Peters whom crossborder trade and investment increasingly tend to displace. If globalization disemploys faultless Peter, that is to say, and if only lesser paying jobs subsequently remain to be had even after aging Peter “retools,” then make Peter part-*owner* of the firm that’s displaced or discarded him. That way everyone not only wins, but wins in a way that is just as immediately intuitively, as it is ethically, attractive. This is the prospect I’d like to explore.

The Article proceeds, then, as follows: Part I first fleshes out in a bit more detail who I mean here by “Peters,” “Pauls,” and “Marys,” as well as what I mean by “robbed,” “faultless,” “deserving,” and “undeserving” in characterizing these personages. This serves to sharpen the quandary that I am talking about – the assessment dilemma. It also serves to highlight some premises that I think underwrite that quandary – premises that empirical work can serve either partly or fully to corroborate or falsify.¹²

Part II then elaborates the structure of a familiar share-spreading prototype from which my own proposal less familiarly, but straightforwardly, extends: I refer now to the

¹² My proposal can accordingly be taken for conditional in nature: *If* the premises drawn out in Part I are correct – something I believe plausible but do not have space here to do more than partly corroborate – *then* the proposal would seem attractive. I will provide at least partial corroboration of the premises.

employee stock ownership plan, or ESOP. The ESOP, I believe, is woefully inadequate to the task for which it was originally embraced by the UK Parliament and the US Congress – the provision of income security to UK and US laborers. But the financial structure of the ESOP, and that structure’s resonance with a number of deep-seated justice intuitions and behavioral-psychological dispositions of the sort mentioned above,¹³ hold at least one strong attraction: They render it a politically ideal template from which to extend when we seek means of channeling a share of the capital gains currently realized by firm-owners who benefit by trade and investment liberalization, to laborers now faultlessly being displaced by the same.

Parts III and IV carry out the project of analogical extension just projected. I proceed in two steps: Part III shows how readily the ESOP form can be varied simply by varying the patronage relations that both essentially define and ethically underwrite it.¹⁴ Part IV then shows how readily laborers’ displacement by globalization-facilitated outsourcing can stand in as an ethically and endowment-intuitively compelling “shadow” form of patronage. If I am right about this, then we have here an elegant means both of addressing the assessment dilemma with which I have opened this discussion, and of winning more stakeholders in, hence supporters of, globalization than it seems apt to keep should today’s trends continue.

Part V then briefly treats of the central coordinating role that the international financial institutions (IFIs) both can and should take in facilitating, and perhaps even

¹³ Supra, note 11, and accompanying text.

¹⁴ By “patronage” I mean simply a sustained mode of relation between persons and firms. See generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996); and of course infra, Part III. In the case of ESOPs, labor is the salient form of patronage. I argue in Part III that there are other forms, including faultlessly lost employment on the part of those lacking in “retooling” opportunity.

administering, such programs as those I propose in Part IV.¹⁵ For, I'll maintain, programs of this sort are not only programs in respect of which the IFIs bear comparative advantage. They also, and not accidentally, are precisely the sort of fare for which the IFIs – the Bretton Woods IFIs in particular – are designed in their globalization-complementary roles.¹⁶ Indeed, I shall argue, facilitating such programs as these would confer on the IMF and the World Bank roles relative to their earlier missions analogous to that of the WTO relative to its stillborn forebear, the International Trade Organization (ITO) envisaged in the post Second World War founding era.¹⁷

In the Conclusion I briefly address some anticipated objections and look forward.

I. THE QUANDARY SHARPENED & DIAGNOSED, AND A SOLUTION PROPOSED

In order to render the considerations that prompt the proposals below more fully appreciable, it will be helpful first briefly to identify, in a bit more detail, the precise sources of the assessment dilemma described in the Introduction. For there appear to be several widely held assumptions that lurk in the background of much debate over globalization. And these seem not only to underwrite the quandary itself, but to point toward the best means of addressing the same.

The first assumption is that there is, “out there in the world,” a global endowment of “primal stuff,” or of what I shall somewhat more preciously call “ethically exogenous

¹⁵ The principal IFIs I'll consider are the International Monetary Fund (“Fund,” “IMF) and the International Bank for Reconstruction and Development (“World Bank,” “Bank,” “IBRD”). But much that I shall say in Part V carries over to the missions of other IFIs, including the International Finance Corporation (IFC), the African Development Bank (ADB), the Asian Development Bank (ABD), the Inter-American Development Bank (IADB), and the European Bank for Reconstruction and Development (EBRD). Like remarks hold of the G-8, the OECD, and other constituent institutions of the so-called “New International Financial Architecture” (“NIFA”). On the latter, as well as the mentioned institutions, see Hockett, *Macro to Micro to “Mission-Creep,”* supra headnote, and infra Part V.

¹⁶ See supra note 4.

¹⁷ I'll of course elaborate infra, Part V. See also Hockett, *Macro to Micro to “Mission Creep,”* supra, headnote.

resources.”¹⁸ These are things nobody has produced and thus no one can claim credit for or ultimate ethical title to. They jointly add up to a sort of “primal given,” a substrate of basic resources from which other things valued by human beings are made.¹⁹

Informally and intuitively, we might at first pass think of this global “stuff” as including inert and insipid material substances like petroleum, natural gas, coal, copper, gold, magnesium – all manner of useful hence valued materials to which no one initially has any more legal or ethical claim than has anyone else. At next pass, moving outward from heuristically easy examples like those, we can enrich the description of “global stuff” by including what might be called “*cultural deposits*.” Here I refer to accumulated knowledge, practical know-how, even the languages in which we generally think and through which we communicate.²⁰

All things that have been left us by our forebears, which none of us has produced and yet many of us derive value from – hence to which none of us bears any more prior ethical claim than she can assert in respect of newly discovered mineral wealth – would count as cultural deposits of this kind. These deposits too, I suspect, tend implicitly to be viewed as what I am calling ethically exogenous. Their possession or otherwise is a matter of brute luck. From a normative point of view, they no more properly belong to one person than to another prior to anyone’s responsible, value-adding behavior. Access

¹⁸ This is what I call them in the sources cited supra, headnote. Some call them “luck,” some “advantage,” some “resources.” See *id.* Another name for them that I propose elsewhere is “material opportunity.” All of these variants work, but they bear the weakness of suggesting that the user of the term is unaware that some resources, advantages, etc. are themselves the product of responsible action on the part of the beneficiary, in which case they are ethically endogenous and not the sort of thing that concerns us here. See ...

¹⁹ Hillel Steiner has an evocative name for it. He calls it the “global fund.” See HILLEL STEINER, AN ESSAY ON RIGHTS 83 (1994).

²⁰ A remarkably illuminating discussion of the global advantages conferred by birth into a language community is found in DAVID SINGH GREWAL, NETWORK POWER AND GLOBAL ARCHITECTURE (forthcoming from Yale University Press, 2008).

to such forms of wealth owes more to good fortune in the “birth lottery” than to any form of creditably virtuous, value-additive activity.

Now if it is plausible to partition things in this way – to maintain that there *is* some such stock of ethically exogenous yet widely valued “stuff” to which no one bears ethical claims prior to anyone else’s – then it seems fair to suppose something else: It seems sensible to maintain that every human person – everyone who is an appropriate subject of our ethical concern – is entitled in justice to an *equal pro rata share* of this stock. That seems a straightforward consequence of our belief that all people are, ethically speaking, created equal – that is to say, that all are equally entitled to our ethical concern. For such concern surely must include concern that persons bear access to the physical stuff of which successful lives are made. Call it “real,” “material,” or “substantive” concern, as distinguished from merely “abstract” or “formal” concern.

In the case of that portion of “stuff” for the existence of which no one now living is responsible, equal material concern of the kind I’ve just mentioned must surely amount to concern for material equality: That is to say, equality of access to ethically exogenous resources and opportunity.²¹ And *this*, I suspect, is the *second* working assumption that many people attempting to think through the ethical significance of global trade and investment liberalization operate under. We tend intuitively to think of all human beings as bearing, by way of birthright, a right to equal opportunity – not just formal opportunity, but “substantive,” material opportunity as well. And so we view them as

²¹ For more on this, see Hockett, *Taking Distribution Seriously*, supra, note 11.

bearing equal claims to what ever resources are out there that nobody now living is actually creditable with having responsibly brought into existence.²²

The first two assumptions are of course ethical-theoretic in nature. They serve as postulates grounded in first principles that could certainly be argued about, but in connection with which argumentation would not involve appeal to “facts on the ground.” The remaining assumptions, by contrast, involve more melding of theoretic with empirical elements.

The third assumption is that the endowment of global “stuff” to which I have referred per the first assumption is not *actually* distributed equally in the pro rata manner described per the second assumption. It just is not the case that every person actually holds her rightful pro rata share of the world’s ethically exogenous resources.

Some people are born into wealthy countries possessed of abundant natural and even cultural resources, the continuing *in rem* jurisdiction over or title to which is largely enshrined in international law.²³ Others are born into wealthy families whose familial wealth is protected – and nowadays decreasingly taxed – under domestic property, tort, and even constitutional legal arrangements.²⁴ Still other people are faultlessly born *without* such advantages, or even are born with severe handicaps for which neither domestic nor international norms backed by force of law require or afford compensation.²⁵

²² “The Creator has bestowed this manna upon all of us, equally,” one might say in a more venerable idiom.

²³ See generally Robert Hockett, *Limits of Their World*, supra, headnote.

²⁴ Id.

²⁵ It could be argued that the UN Universal Declaration of Human Rights, and more strongly the International Covenant on Economic, Social, and Cultural Rights enshrine such norms. But thus far neither the Declaration nor the Covenant appear to have been widely read – or at any rate vindicated by state action – in so fulsome a manner. See id. It is to be hoped – and advocated – that matters on this score will change.

Insofar as all of this is the case, there are people with more than, and people with less than, their apparently rightful pro rata shares of the ethically exogenous global endowment per the first two assumptions. Hence there is a gap between our ethical “ought” intuitions and our present day “is” impressions. So runs the third implicit assumption.

The fourth assumption amounts to a further specification of the third. It is that we can partition the class of all persons entitled to our equal ethical concern into the following four subclasses: Call the first class the “Ones.” These are all those who, per the second and third assumptions, hold more than their ethically required pro rata shares. They hold more than what they actually bear rights to hold, per the second assumption, of the ethically exogenous “stuff.” Perhaps they are born to rich families, in rich countries, or both. They are lucky, favored by accident or fortune.

Lest I be misunderstood here, let me pause to emphasize something that I am *not* suggesting. To be sure, much – even very much – of any given One’s surplus over the equal resource baseline might owe to his own laudably responsible, value-additive efforts. Hence much of a particular One’s surplus might be ethically regardable as properly belonging to him. The point here is simply that not *all* of it does in the case of the Ones as a whole. There are some very fortunate people.

The remaining classes I have in mind are quickly characterizable relative to the first. So, the second class I’ll call the “Twos.” Twos hold more or less *precisely* their rightful pro rata shares – not substantially more and not substantially less. Then there is another class, call them “Threes,” who hold substantially, but perhaps not dramatically less than their rightful pro rata shares.

And finally there are those I shall call “Fours,” who hold *much* less than their rightful shares of the global endowment. If born into and confined to particularly arid environments or violent and impoverished ghettos or enclosed refugee camps, some Fours (we could even call them “Fives”) might indeed be down near to “zero,” so to speak.²⁶ And if born with severe handicaps they might even be thought – depending upon whether we account genetically transmitted “human resources” among the world’s ethically exogenous resources – to be “negatively” endowed.²⁷

Thus runs the fourth assumption. It is simply that none of the just-defined classes – neither the Ones, Twos, Threes, or Fours – is null.²⁸ There are some who hold more than they’ve earned, others who hold more or less precisely what they have earned, and still others who hold less than – and in some cases dramatically less than – that which in fairness they rightfully deserve.

Finally, there appear to be three further, more quickly characterizable assumptions under which many who think about global trade- and investment-liberalization tend to operate. So the fifth assumption is that the class of Ones is roughly coextensive with the class of significant residual claimants on, and creditors of, business firms. The Ones, that is, largely coincide with the class of large-scale shareholders and holders of high-valued quantities of debt securities issued by firms. They are, by and large, substantial owners of and lenders to firms.²⁹ A safe corollary assumption, then, would be that significant

²⁶ A presently salient group of actual Fours (or even “Fives”) might be those confined to the refugee camps of Darfur, for example.

²⁷ Insofar as handicaps are genetic and undeserved, it seems sensible to think of them as resource-deficits in this sense. See Hockett, *Taking Distribution Seriously*, supra note 11.

²⁸ The Twos could drop out of the account without loss to the principal thrust of the argument, for reasons that will shortly become clear.

²⁹ For extensive empirical corroboration of this point, see Hockett, *What Kinds of Stock Ownership Plans?*, supra, headnote at 897-912.

portions of these peoples' portfolios are inherited or otherwise plausibly regarded as windfalls; but we'll see that no such corollary is necessary to what I'll be arguing.³⁰

The sixth and related assumption is that the classes of Twos and Threes, together, are roughly coextensive with the class of minimal-shareholding or non-shareholding, but either white collar salary-earning or union-scale blue collar wage-earning, officers or laborers for firms headquartered mainly in countries possessed of advanced economies. These people, particularly the high-waged and salary-earning among them, have for the most part been born into, and grown to maturity in, the more or less nurturing environments of well-to-do households and neighborhoods. They have also enjoyed access to good educations, healthy environments, and well functioning societies, this assumption would run.³¹ They accordingly possess much in the way of well developed "human capital," "cultural capital," and "social capital." But they possess dramatically less than the Ones when it comes to inherited financial capital – creditor and ownership interests in firms.³²

The seventh, final and again related assumption is that the class of Fours (even "Fives," if such there be) is roughly coextensive with the class of *very* low-wage earners, often or persistently unemployed, and subsistence agriculturers. By far the greater part of these people, moreover, inhabit economically underdeveloped countries without access to

³⁰ There is substantial statistical evidence to the effect that the overwhelmingly greater part of corporate securities – both equity and debt instruments – held by Americans is inherited. *See infra*, Part III; also *id.*

³¹ Again the point here is not that there are not many people who have lacked in some of these advantages and nevertheless made successes of their lives. The point is simply that there are many who have built such successes on the basis of good background conditions but little if any inherited business capital.

³² The assumption here would not rule out non-negligible stock-holding and bond-holding – either direct, indirect or beneficial – by Twos and Threes. It is simply to the effect that these groups' ownership and creditor stakes are very much less than are those of the Ones. For empirical corroboration of this suspicion, as well as specification of what "direct," "indirect" and "beneficial" firm-owning are, please see *infra*, Part III; and Hockett, *id.*

much in the way of valuable material resources, inherited wealth, or even effective political, economic, and social infrastructures or educational and other institutions. “Social capita,” and “cultural capital,” we might say, are as scarce or as maldistributed as is “natural” capital in the precincts inhabited by Fours. And so, in consequence, is “human capital” too.³³

Now here is the sense in which the seven assumptions just elaborated give rise to the quandary of Peter, Paul and Mary with which I opened this Article: If the assumptions are more or less correct or at least partly correct, then global trade and investment liberalization will bear the following curious attributes: First, they will tend most immediately to benefit the Ones and the Fours – in particular, the Fours in those economically lesser developed jurisdictions where, by hypothesis, most of the Fours live. For the firms owned and lent to by Ones are the first beneficiaries of trade and investment liberalization.³⁴ And the benefits, realized largely by the hiring of desperate Fours willing to work in unregulated environments for low wages, go immediately to Ones. If that is correct, then the Ones are those whom I called the “Marys” in the Introduction, and the Fours are the paid “Pauls.”

Second, if the assumptions are correct, trade and investment liberalization will tend to benefit the Ones and the Fours at the immediate *expense* of the Twos and the Threes – in particular, those in the economically well developed jurisdictions where, by hypothesis, most of the Twos and Threes live. For as firms realize growing profits by avoiding the labor, environmental, and other regulatory standards that once constrained

³³ See *id.* Also Hockett, *Hamiltonian Means*, *supra*, headnote.

³⁴ See Hockett, *Three Potential Pillars*, *supra*, headnote. Also Hockett, *Global Macro-Hedging*, *supra*, headnote.

them in the developed jurisdictions,³⁵ then the following fact obtains: The formerly salaried and higher-waged officers and other employees of these firms – Twos and Threes – lose increments of salary, wage, and other benefits. And these latter were won decades ago through precisely such domestic labor and employee benefit legislation as globalization now enables the firms – and the Ones who own and finance them – to evade.³⁶ So the Twos and Threes will be those whom I labeled “Peters” in the Introduction. They now largely finance the gains realized by the Pauls and the Marys.³⁷

But now if all of this is so, then it means that global trade and investment liberalization as presently conceived and executed are inherently afflicted with an acute ethical ambiguity, if not a full-blown indeterminacy. And it is precisely this ambiguity, I think, that ultimately accounts for the difficulty described in the Introduction – the quandary that many of us tend to experience in attempting to determine whether globalization is a good thing or not, and thus what kinds of conditions, if any, should be imposed upon continued trade and investment liberalization.

Here, more precisely, is what I mean: Insofar as we are able plausibly to restrict comparison to Ones on the one hand, Twos and/or Threes on the other, simply leaving Fours out of account in a sort of ethical blindspot, there is a straightforward ethical loss in the case of global trade and investment liberalization. At least that is so in the short term, and probably it is so for the long term as well in view of individuals’ “retooling” costs

³⁵ It would happen, of course, in any of several familiar ways: Firms in the developed world would outsource or threaten to outsource to less regulated jurisdictions. Firms in the developing and less regulated world, for their parts, would export to the once-regulated developed world, and would do so cheaply by dint of the costs saved via non-regulation. And of course the latter course strengthens the force of the former course. See *id.*

³⁶ I am ignoring longer-term “rising tides lift all boats” type claims for the moment.

³⁷ See sources cited *supra*, note 34.

and the relatively brief length of a working life.³⁸ If we fail to consider the Fours, that is – if we ignore the desperately poor, most of whom operate outside of the advanced economies – it seems pretty clear that globalization is a bad thing. For we are benefiting the Ones at the expense of the Twos and the Threes. And by hypothesis, per the assumptions elaborated above, the Ones are already overendowed, the Twos are at best adequately endowed, and the Threes are underendowed. So redistributing from the Twos and the Threes to the Ones yields a straightforward justice-loss. I suspect that many opponents of trade and investment liberalization, at least those who oppose it without any misgivings, think along these lines. It is the Fours who are obscured, in their thinking, by an ethical blindspot.³⁹

Now if, by contrast, we restrict comparison to the Twos and/or Threes on the one hand, the Fours on the other, leaving the *Ones* out of account in the ethical blindspot, *then* we face the prospect of an unambiguous sort of justice *gain* wrought by global trade and investment liberalization. For the “degree” of global injustice – the justice-shortfall, so to speak – can be viewed in this case as now being partly made up. Ethically exogenous global “stuff” is more nearly equalized between Twos, Threes, and Fours; whereas before, the Twos were by dint of mere luck better off than the Threes, who by dint of mere luck were better off than the Fours. And if we’ve forgotten about the Ones, this greater degree of equalization – which, again, is equalization only of that which by

³⁸ See, e.g., Hockett, Global Macro-Hedging, *supra*, headnote.

³⁹ It might also be argued, of course, that they ignore the lowering of prices, which benefits “everybody.” I don’t think that’s a very good argument, though – precisely *because* “everyone” benefits in this sense. The benefit here is quite thinly spread, whereas the harms that these people are concerned about are quite thickly concentrated – on precisely the wrong people. He who loses his income and cannot retool is not consoled by the fact that his poisonous toothpaste or his child’s toxic toy now will cost pennies less.

hypothesis is ethically required to be equalized, ethically exogenous global “stuff” – will perforce be viewed as a straightforward justice-gain.

Now it seems to me that it is indeed the Ones whom we tend to forget when those who advocate or defend global trade and investment liberalization say, “Well, think about all those desperate global poor.” These people are of course partly right: *We should* be thinking about the desperate global poor – those I’ve been calling the Fours. But the *Ones* are left *out* of our account in this case, and they shouldn’t be if our justice-accounting is to be complete.

On the other hand, by contrast, people also are right when they say, in effect, “Well, what about the local Threes, who would be Fours had it not been for the gains we have made in regulatory development, in labor legislation, and the like since only the late 19th and early 20th centuries in the “developed” countries? *They* should not be left out of our account either.” And of course *these* people *also* are right. And the fact that *both* sides are right in respect of their distinct, but incomplete and non-coextensive constituencies, while both sides are *wrong* in respect of the those spheres when considered together, is the cause of the quandary. It is the root of the assessment dilemma.

Now, if I am right about this, then we are faced both with a challenge of vision and, yet more urgently, a challenge of action. For if my diagnosis is correct, then the only way adequately to address the quandary seems to be: First, to keep *all* relevant parties – the Ones, Twos, Threes *and* Fours – simultaneously in view when assessing and structuring global trade and investment liberalization. And second, to seek means of

ensuring that Ones but not Fours share the gains wrought by trade and investment liberalization with Twos and, especially, Threes.

Note that the second task is in a sense yet more urgent than the first. That is because, unless we can find means by which Ones share their gains with the Twos and the Threes, there seems no way of acting upon the first task. That is to say, unless we discharge the second task, we shall never escape the assessment dilemma. For the latter amounts to a case of ethical indeterminacy wrought by incomplete specification of the assessment domain: Either the Ones or the Fours are missing from any horn of the dilemma. And there just seems to be no way to judge, under the aspect of justice, when a justice gain wrought by transfers from Twos or Threes to Fours is swamped by a justice loss wrought by simultaneous transfers from Twos or Threes to Ones.⁴⁰

Unless, then, we design practical means of connecting global Ones to global Twos and Threes, we are effectively attempting to deal with a trivalent ethical problem by means of a two-variable formula. Only by adding a variable do we render the problem soluble. And only in that way, accordingly, do we ensure that globalization might constitute a straightforward ethical gain. Our pressing normative-theoretical problem that is the assessment dilemma, that is, appears to soluble only by practical means. We must embark on a project of institutional design.⁴¹

Now I think, per this last observation, that we do have the requisite “connective tubing” at hand. The institutions that we must design are financial in nature. Ours is a

⁴⁰ One might seek to escape the prescriptive indeterminacy by falling back upon a maximizing rule, of course, as countenanced above in the Introduction; but then one will have relinquished the effort to conform one’s prescriptions to what is distributively *just*.

⁴¹ The fuller significance of institutional design as means of more adequately addressing normative-theoretical problems is discussed fully in Hockett, *Taking Distribution Seriously*, *supra*, note 11. This role of the practical in solving even theoretical problems should not be surprising when it is normative theory that is under consideration. For normative theory is always at bottom about action. Normative theory, that is, is a species of what since Aristotle’s day we have called “practical reason.”

task of financial engineering: financial engineering on behalf not simply of large firms in this case, but on behalf of ordinary folk now – Twos and Threes – as well. In the remainder of this Article, then, I’ll undertake to schematize what I have in mind here. The key is to start with a familiar means by which the UK and US already endeavor to make “capital”-owners of “laborers,” to employ the classical terminology, and then to adapt the structure to our present purpose. I’ll do that in Parts II through IV. Then in Part V I’ll seek to explain why the proposal amounts to an ideal means by which the Bretton Woods IFIs can play precisely that WTO-complementary role which the founders of all three institutions envisaged now well over 60-odd years ago.⁴²

II. A SUGGESTIVE BUT INCOMPLETE PROTOTYPE: THE EMPLOYEE STOCK OWNERSHIP PLAN

Intriguingly, Americans and Britons have made some tentative efforts at making capital-owners of laborers. The principal means up to now has been the public favoring – mainly the tax-favoring, we’ll see – of employee benefit plans. In the US, that is done via the Employee Retirement Income Security Act, or ERISA.⁴³ 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.⁴⁴

⁴² I am course treating the WTO as the embodiment, more or less, of what the Bretton Woods founders envisaged for the then planned ITO, which had to wait 50 years for its effective implementation. See generally Robert Hockett, *From Macro to Micro to “Mission Creep,”* 41 COLUM. J. TRANSNAT’L L. 153 (2002).

⁴³ Employee Retirement Income Security Act of 1974, codified at 29 USCS § 1001 *et seq.* (sections hereinafter cited by ERISA section number). See also DRUCKER, *supra* note 24; and LANGBEIN & WOLK, *infra* note 97. I ignore here such proposals as that to diminish or even eliminate capital gains taxation. Such proposals appear to be aimed at – and doubtless would have the effect of – more rewarding of those who already own than fostering wider ownership.

⁴⁴ Congressional action culminating in the passage of ERISA was precipitated by the folding of the Studebaker corporation, which, it was subsequently discovered during bankruptcy proceedings, had grossly underfunded, and indeed “raided,” its employee pension fund, leaving the suddenly unemployed pensioners doubly bereft. See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT

There is one partial exception, however: The employee stock ownership plan, or 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. For a number of reasons that I describe elsewhere and that many others as well have explained, that is an over-modest aim.⁴⁵ But here I shall be 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 appear to be generalizable in ways that might benefit all of those whom I have been calling “Twos” and, especially, “Threes.” I plan to exploit that generalizability below.

A preliminary terminological point before we proceed: In speaking of ESOPs (or “Plans”), one can be speaking of any of several distinct, cognate kinds of financial arrangement.⁴⁶ 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.⁴⁷ By far the most common such set of arrangements, however, and the one that will engage us here, is the so-called “leveraged” ESOP.⁴⁸ This, as the qualifier suggests, is the plan that employs credit in the share-acquiring process.⁴⁹

LAW 68-84 (3rd ed., 2000). Those familiar with recent bankruptcies, particularly in the airline industry, might be tempted to say plus ça change.

⁴⁵ See Hockett, *What Kinds of Stock Ownership Plans?*, *supra*, headnote, at 914-24.

⁴⁶ See JOSEPH R. BLASI, *EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF?* 64-84 (1988) for a brief cataloguing of ESOP types.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ The principal non-credit-employing ESOPs – so-called “nonleveraged ESOPs,” “tax-credit ESOPs (aka “TRASOPs”) and “payroll ESOPs” (aka “PAYSOPs”) – are briefly elaborated in BLASI, *id.*

A. What They Do: Simple Mechanics and Spread

Here is what the leveraged ESOP does⁵⁰: The employing firm adopts an ESOP as a sponsored ERISA plan – a defined contribution plan.⁵¹ Like other ERISA plans, the ESOP takes the legal form of a trust.⁵² It is a distinct, even if firm-sponsored and ultimately board-directed, entity formed to acquire and hold stock on behalf of employees. Its administrator, though named and directed by the sponsoring firm’s board or a committee named thereby,⁵³ accordingly bears fiduciary obligations to those employees.⁵⁴

Now partly in exchange for a promissory note, the trust borrows funds from a bank or some other commercial lender.⁵⁵ It uses those funds to purchase stock issued by the sponsoring/employing firm at fair market value.⁵⁶ The loan proceeds accordingly pass through the ESOP to the sponsoring/employing firm itself – they finance it, we’ll see – and the stock is then held in trust on behalf of the employees. The firm guarantees

⁵⁰ The transactions which follow are related, in slightly differing order and somewhat less detail, in EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 121-22 (3d ed. 1987).

⁵¹ ERISA § 407(d)(6). Defined contribution, or “DC” plans are to be distinguished from so-called “defined benefit” or “DB” plans. The former prescribe a schedule of payments made into an account for the benefit of the employee, who in turn bears both “upside” gains and “downside” losses realized by her investment portfolio over time. DB plans, by contrast, prescribe payments made out to the employee upon her retiring, and the employing firm – or the insurance company from whom the firm purchases annuities on behalf of its employee beneficiaries – in effect bears the aforementioned upside gains and downside losses realized by the fund out of which payments are made.

⁵² ERISA §§ 404(a)(1), 403(a). The idea, of course, is both to insulate funds earmarked for employees from the other financial operations of the firm, and to afford the employee beneficiaries the benefit of fiduciary obligations owed them by the plan’s trustee. 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 (S.D.N.Y. 2003) (finding that ERISA defines “fiduciaries,” “fiduciary functions” and “fiduciary duties” more narrowly than does common law trust doctrine). *See also* note 87, *supra*.

⁵³ ERISA § 403(a)(1). A partial exception, which need not here detain us, is found at ERISA § 403(a)(2).

⁵⁴ ERISA § 404(a)(1).

⁵⁵ I say “partly” for reasons that will be made plain over the next several sentences.

⁵⁶ Because the shares are purchased at fair market value, the purchase is sometimes misleadingly described by ESOP-proponents as an equity-injection. We’ll see that what actually happens is publicly subsidized debt finance accompanied by a stock giveaway.

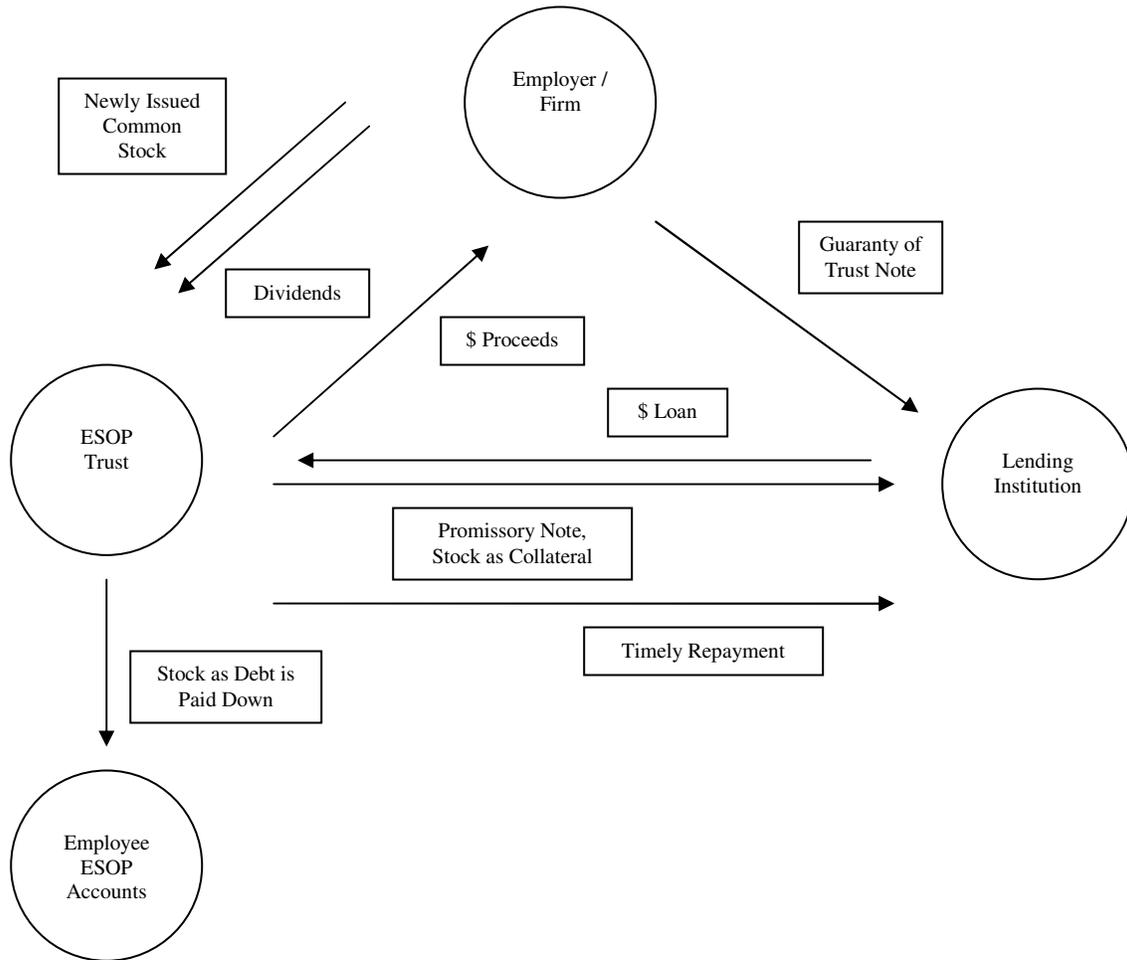
repayment of the loan by the ESOP to the lender, and the stock held in the ESOP is itself pledged as security.

Now over time, the sponsoring/employing firm makes cash contributions to the ESOP, just as it would do in connection with any defined contribution plan. In this case the contributions are used by the ESOP to amortize the loan originally used to purchase the sponsoring/employing firm's shares.⁵⁷ 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.⁵⁸ It is released to those accounts in proportions that track the beneficiaries' labor-patronage of the firm (their wages or salaries). Diagrammatically:

⁵⁷ So the sponsoring/employing firm is, in effect, both borrowing and paying back on behalf of employees for the purchase of its own stock – it gives out partial ownership of itself as an employee benefit. There's the dilution (of previous owners), more on which presently.

⁵⁸ Typically the shares become saleable or redeemable only upon retirement or exit of the firm, and typically the firm buys them back. There are voting restrictions (even to the vanishing point) as well, as we'll see presently. That is all significant when it comes to the question of just what "owning" should mean here; but this isn't our question in this Article. See Hockett, *Whose Ownership?*, *supra* headnote, for more on that question.

Figure 1: Institutional/Financial Structure of a Leveraged ESOP Arrangement



Now not surprisingly, in view of the arrangement’s financial structure,⁵⁹ this all proves to work rather well as a method of getting more “capital into the hands of labor” (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.⁶⁰ About twenty-five percent of those plans held more than twenty-five percent of the outstanding stock of their firms,

⁵⁹ With one possible – though minimal – caveat to be 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.

⁶⁰ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 105 (1996).

and nearly two percent of them owned all such stock.⁶¹ By 1990, over twelve million laborers – about 10% of the workforce – in over ten thousand firms had come to participate in ESOPs.⁶²

By the late 1990s, ESOPs were estimated to account for just under four percent of corporate equity-holding in the United States.⁶³ The rate of ESOP growth, moreover, by this point 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.⁶⁴ Among sponsoring firms over the past thirty years have been such American stalwarts as Avis, the Chicago Tribune, Delta, Federal Express, General Motors, Kraft, Maytag, Polaroid, Procter & Gamble, Quaker Oats, United Airlines and Xerox.⁶⁵ Even skeptics of ESOPs, and of the oft-seemingly “crackpot” financial pronouncements of the ESOP’s inventor, Louis Kelso,⁶⁶ readily acknowledge their “rapid proliferation,”⁶⁷ hence

⁶¹ *Id.*

⁶² *See, e.g.*, HANSMANN, *supra* note 60 at 105; UNDERSTANDING EMPLOYEE OWNERSHIP 10-11, 20 (Corey Rosen & Karen M. Young eds., 1991); THE EXPANDING ROLE OF ESOPs IN PUBLIC COMPANIES 23-27 (Karen M. Young ed., 1990); DAVID P. ELLERMAN, THE DEMOCRATIC WORKER-OWNED FIRM 110 (1990). ESOP-like structures have made significant headway in non-US jurisdictions as well. *See* Rosen & Young, *op. cit.*, and ELLERMAN, *op. cit.* A helpful catalogue of the one thousand largest firms with more than four percent 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 is nonetheless suggestive in light both of (a) ESOPs’ accounting for just shy of half of employee-owned equity, and (b) the surprising number of firms on the list that are twenty or more percent employee-owned.

⁶³ *See* NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, STATISTICAL PROFILE OF EMPLOYEE OWNERSHIP (1997). The Center estimates that nine percent of equity is employee-owned, with profit-sharing, 401(k) and stock option plans accounting for the non-ESOP balance. It should be noted that about four percent of ESOPs are estimated to be terminated each year. NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, *op. cit.*

⁶⁴ *Id.*

⁶⁵ Rosen & Young, *supra* note 60; Young, *supra* note 62.

⁶⁶ Kelso routinely announced such putative discoveries as that “Say’s Law” is being “violated” in modern capitalist economies, that contemporary economists remain wedded to the labor theory of value, and that there are “two factors” that enter into production – capital and labor – with the first of those accounting for an ever-growing share of value-added. *See generally* Hockett, *Hamiltonian Means*, *supra* headnote at 124-42. Economists do not appear to have found these discoveries compelling. I should perhaps not be as “snarky” as I might here seem, however. Kelso’s motives, energy and inventiveness, as distinguished from his sallies into theory, were nothing if not worthy of praise. And he was a lawyer and

that “[s]omething is happening that requires attention.”⁶⁸ 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.”⁶⁹ And Kelsonian acolyte Stuart Speiser: “Th[e] new capital . . . *pay[s] for itself* out of the increased profits flowing from expanded production.”⁷⁰ And the ever-perky 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.”⁷¹

But in fact the mentioned evidence is hardly “considerable”: At best it is thin and ambiguous.⁷² 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/or capital gains that attend ESOP stock would dependably pay off the term loans without help of the kind we shall presently describe. And the “several hundred percent greater

investment banker, not an academic theorist, typically pitching his advocacy to legislators and the general public rather than fellow-theorists. *See generally* Speiser, *infra* note 52.

⁶⁷ HANSMANN, *supra* note 60 at 105.

⁶⁸ ELLERMAN, *supra* note 60 at 120, emphasis omitted.

⁶⁹ LOUIS O. KELSO & PATRICIA HETTER KELSO, DEMOCRACY AND ECONOMIC POWER 62 (1986).

⁷⁰ STUART SPEISER, A PIECE OF THE ACTION 429 (1985), emphasis supplied. *See infra* note 75 for more on this “pays for itself” locution.

⁷¹ John Case, *A Company of Business People*, INC., April, 1993, at 79.

⁷² *See* BLASI, *supra* note 57, at 25-27, 221-38 (1988) for plenary – and not unsympathetic – discussion of what evidence there is.

efficiency,” which quantity incidentally is, like many Kelsonian magnitudes, arrived at by altogether unspecified means, is hardly “natural,” “economic” or “financial” in any pre-legal or pre-political senses of the terms. For the real “Hidden Secret of [EOPS’] 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 They Do It: Private Channels, Public Benefits

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

1. Tax Advantages

Probably the most efficacious tax advantage that leveraged ESOPs uniquely confer upon sponsoring/employing/issuing firms comes via the Revenue Code’s permitting them to deduct contributions made to their plans. The firm may deduct those, to an amount up to twenty-five percent of all compensation paid a plan’s participants, from its taxable income.⁷³ That advantage works jointly with ERISA’s relaxing, in the case of ESOPs, the now customary mandatory-diversification understanding of the so-called “prudent investor” standard to which employee pension trusts ordinarily are subject: In non-ESOP cases, ERISA requires that employee trusts be broadly invested; a

⁷³ IRC § 404. ESOPs enjoy other tax advantages enjoyed by employee pensions more generally, most of which are noted below, but our focus will nevertheless be primarily upon what is unique to ESOPs.

plan will not typically be permitted to hold much of the sponsoring firm's equity.⁷⁴ But ESOPs are exempted from this standard,⁷⁵ 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 doing so, 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.⁷⁶ But on a loan to a leveraged ESOP, fifty percent of that interest historically has been excluded.⁷⁷ So in effect, the legislated favors conferred upon ESOPs amount to significantly government-subsidized debt-financing of ESOP-sponsoring firms, in a manner intended to encourage those firms to make partial firm-owners of firm-employees.

But wait, there is more: Ordinarily, dividends paid out to the holders of firms' shares are drawn from firms' after-tax incomes.⁷⁸ Dividends paid on the stock held in an

⁷⁴ ERISA § 404(a)(1)(C).

⁷⁵ ERISA § 404(a)(2). At least that is ordinarily the case. 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., *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997); *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). It should also be pointed out that any other assets in which the ESOP might invest remain subject to the general diversification requirement. ERISA § 404(a)(1).

⁷⁶ IRC § 61(a)(4) (including "interest" in the general definition of gross income).

⁷⁷ IRC § 133(a). *But see* Small Business Job Protection Act § § 1602(a), 1602(c) (repealing the interest exclusion previously allowed under IRC § 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).

⁷⁸ This is true "by definition," so to speak – the revenue code's definition of corporate taxable "income." See IRC § 311(a) (providing that a corporation may not deduct dividends from its gross income).

ESOP, however, are deductible from taxable corporate income.⁷⁹ Capital gains reaped by the trust also go untaxed; they're deferred compensation.⁸⁰ 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 in the sponsoring firm who sells shares to the ESOP may defer any taxable gain that she gleans through the sale.⁸¹ For another thing, fifty percent of the proceeds from sale of a sponsoring firm's stock to its ESOP are excludable from estate taxation.⁸² 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.⁸³

2. Additional ERISA Advantages

There are further *ERISA* advantages, in addition to the just noted tax advantages, designed to encourage ESOP share-acquisitions from non-ESOP 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.⁸⁴ But *ERISA* exempts ESOPs from that standard.⁸⁵ And ESOPs also may *borrow* from such parties in interest in order to acquire employing firm stock.⁸⁶

⁷⁹ IRC § 404(k).

⁸⁰ IRC §§ 501(a), (c), (d). This advantage is not unique to ESOPs as distinguished from other *ERISA* plans.

⁸¹ IRC § 1042. Among the conditions are that proceeds of the sale must be reinvested within one year in a domestic corporation, and that after the sale the ESOP will own at least thirty percent of the sponsoring firm's shares.

⁸² IRC § 2057.

⁸³ IRC § 2210.

⁸⁴ IRC § 4975.

⁸⁵ ERISA § 408(e).

⁸⁶ ERISA § 408(b)(3), IRC § 4975(d)(3).

3. Publicly Conferred Governance Advantages

There is yet more to our 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 shareholders⁸⁷ 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.⁸⁸ 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, indeed even in express contemplation of an impending takeover bid. Thus has held the Delaware Chancery.⁸⁹

Were new employee/owners reliable voting allies of would-be firm-acquirers, of course, the ESOP's promise as a takeover defense would be attenuated. But as it happens the new employee/owners are not, interest-wise, reliable such allies at all; indeed quite the contrary. 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.⁹⁰ That itself constitutes, of course, another incentive for

⁸⁷ Including many newly owning employees, were they able to vote their shares. More on this "were they" presently.

⁸⁸ I say "nominally" independent here partly owing to the role of the sponsoring firm's board in selecting and directing, indeed even functioning as, the ESOP trustee – *see* note 104, *supra* – and partly owing several ESOP governance features to be noted presently.

⁸⁹ *See Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 278 (Del.Ch., 1989). But see *NCR Corp. v. American Telephone & Telegraph Co.*, 761 F.Supp. 475 (S.D. Ohio 1991).

⁹⁰ A few details will be in order here. Most stock held by ESOPs considered in aggregate is nonvoting stock: The median ESOP holds ten percent of its sponsoring firm's shares, but only five percent of that firm's voting rights. *See* U.S. GOVERNMENT ACCOUNTING OFFICE, EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP 39-40 (1986). How can this be? First partition the class of ESOPs into those sponsored by closely held, and those sponsored by publicly traded, firms. Now consider the first of those subclasses: With little exception, closely held sponsoring firms enjoy all applicable ESOP tax benefits even if their ESOPs do not pass acquired stock voting rights through to employee/beneficiaries. The only exception is in respect of voting as to "fundamental" transactions – matters which must, according to charter or applicable law, be

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.⁹¹ 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

decided by supermajorities of outstanding shares voted. IRC §§ 409(e)(3), 401(a)(22). Next the second subclass: While in the case of publicly held firms voting rights must in fact be passed through to the employee/beneficiaries, that is so only in respect of stock actually *allocated* to employee accounts. IRC § 4975(e)(7). But the allocation occurs only gradually as the original loan is amortized. Note also that this lack of control rights ought to give pause to those who would see in the current “ESOP revolution” any real harbinger of an incipient “workplace democracy.” The aptness to ESOPs in particular, of the concerns raised by Professor Alexander in connection with contemporary pension practice more generally, is perhaps troublingly ironic. *See Alexander, supra* note 62 *passim*.

⁹¹ I by no means the first to suggest the importance of public support for the spread. *See, e.g.,* BLASI, *supra* note 57; HANSMANN, *supra* note 60; ELLERMAN, *supra* note 60; and sources cited *infra*, note 97.

growing “ownership” 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 aforemade 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.⁹²

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. 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

⁹² For one thing, the evidence is scant. See ELLERMAN, *supra* note 60, at 90; BLASI, *supra* note 57, at 263. Perhaps more importantly, as a theoretical matter it seems highly unlikely that rational employees would be willing to reduce their wages sufficiently to offset the dilution. The diluting shares issued them are, after all, deferred compensation. And as we'll see they confer none of the consumption benefits of control. And finally, of course, they are undiversified investments. It would be far more sensible for employees who were willing to sacrifice pay for stock to insist upon voting, and/or diversified stock, hence not to offer any sacrifices sufficient to offset the dilution of their own firms' owners' stock.

other-regarding ones,⁹³ 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 what ever 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 We Like Them: Accounting for the Favor

So now assuming, plausibly it seems, that law-conferred tax, ERISA and governance benefits constitute a, if not the, critical reason for ESOPs' proliferating, we are faced with another question: Why is this public favoring of ESOPs *politically* accepted in the US? Doesn't the support tamper with "natural" market forces, and isn't distortion of this sort disfavored?⁹⁴ I think it is here that we – or at any rate those who would seek to render global trade and investment liberalization more unalloyedly just – shall find the successes of ESOPs instructive. For there are mutually reinforcing ideological and endowment-psychological reasons that appear to account for the US's public favoring of ESOPs, and even indeed for the private favoring of ESOPs as well.

1. Core Values: Responsibility & Equal Opportunity

The key to the ESOP's political success probably lies in its giving expression to a cluster of interlinked ethical-cum-political values and endowment-psychological

⁹³ The other-regarding ones might partly be actuated by the ideological/political motivations that we shall discuss presently.

⁹⁴ Certainly some seem to think so. *See, e.g.,* Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363 (1990); Richard L. Doernberg & Jonathan R. Macey, *ESOPs and Economic Distortion*, 23 HARV. J. LEGIS. 103 (1986).

dispositions that are shared by a broad swathe of Americans and, I suspect, persons worldwide.⁹⁵ Values-wise, we are by and large opportunity-egalitarian in our commitments:⁹⁶ We believe that what people have should ideally be traceable to equal initial holdings of such ethically exogenous resources – favors of fortune, of chance or mere circumstance, the global “stuff” of Part I – as no one now living is responsible for having created.⁹⁷ 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.⁹⁸

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 should ideally enjoy access.⁹⁹ Ethical intuitions such as these, I conjecture, underwrite the first several assumptions that I noted in Part I, to be implicit in the thinking of many of us who find globalization ethically perplexing.

2. Endowment Dispositions: Loss Aversion & “Handout” Aversion

Endowment-psychological dispositions-wise, we are apt to experience some methods of redressing *imbalances* in the distribution of that aforementioned exogenous endowment as less discomfiting than others.¹⁰⁰ So, for example, our more self-regarding, less altruistic selves are apt to be friendlier toward distributing perceivedly “new”

⁹⁵ For more on the invariance of these dispositions across cultures and subcultures, see, e.g., Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179 (2005); also Hockett, *Taking Distribution Seriously*, *supra*, headnote.

⁹⁶ See Hockett, *Whose Ownership?*, *supra*, headnote at 31-51, *Hamiltonian Means*, *supra*, headnote at 57-68. Also Hockett, *Three Potential Pillars*, *supra*, headnote.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Hockett, *Whose Ownership?*, *supra* headnote at 58-72, 80-87; Hockett, *Hamiltonian Means*, *supra*, headnote at 73-83.

resources to the presently underendowed, than toward “taking” already held resources for redistributive purposes.¹⁰¹ Those same selves will regard a perceived “refraining from taking” from the underendowed as preferable to a mere “giving” to the same.¹⁰² 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.¹⁰³

3. How the SOP Structure Conforms

The leveraged ESOP coheres rather nicely with these values and dispositions. It spreads a basic endowment which it is not difficult to view as being, at least in part or potential, ethically exogenous.¹⁰⁴ It spreads that endowment by distributing what can saliently, if nevertheless superficially, be viewed as “new” capital – newly issued shares in firms.¹⁰⁵ It does that partly in what resembles a return for reward-earning effort – labor patronage or work for the firm.¹⁰⁶ And it encourages private such rewarding (on the part of lenders and otherwise-diluted shareholders) largely by refraining from perceived taking (i.e., through tax breaks) rather than transparent taking and giving.

¹⁰¹ *Id.* I employ scare-quotes here to register the fact that the “newness” and “taking” in question are experienced as such pre-reflectively, as their proceeding from cognitive dispositions would suggest. We are speaking of predisposed framings here rather than considered judgments.

¹⁰² *Id.* Similar remarks hold of the scare-quotes here as of those in the text accompanying the previous footnote.

¹⁰³ *Id.*

¹⁰⁴ It is in part or potential ethically exogenous in two senses, one trivial, the other less so. First, one must use it responsibly in order to derive “utility” from it; it is a kind of resource. Second and less trivially, the quantum of this resource that one has is at least in part – and sometimes indeed in significant part – the product of fortune or fate rather than effort. One can hold less than another simply by dint of having been born to the wrong parents, so to speak. See generally Hockett, *Whose Ownership?*, *supra* headnote, at 31-51.

¹⁰⁵ “Superficially” in light of what we saw *supra*, Part II.B.

¹⁰⁶ That is to say that it is viewed as an “employee benefit,” as something predicated upon lengthy labor-patronage for – a kind of “loyalty to” – the firm. More on this *infra*, Parts III, IV.

In a way, then, the leveraged ESOP replicates, in piecemeal and somewhat more convoluted fashion, the same strategies that the US has employed more elegantly in connection with publicly facilitated home-spreading and education-spreading since the early-mid-twentieth century.¹⁰⁷ And this appears to be no accident. For there is considerable historical evidence suggesting that the ESOP was expressly inspired by the federal home finance programs set in place over the 1930s and 1940s.¹⁰⁸ There is also good evidence to the effect that both these and the federal education finance programs set in place over the 1960s and 1970s were found appealing to legislators and public alike precisely in owing to their resonance with the values and dispositions just rehearsed.¹⁰⁹

But then *this* raises a *further* question: Might the idea of the leveraged ESOP itself be leveraged yet further, in a manner that enables those whose incomes are disrupted by trade and investment liberalization to be readily compensated? Might the salience of the employment relation that appears ethically to underwrite the ESOP's popularity carry-over to more attenuated, even severed, employment relations? I think that it might, and to that prospect I now turn.

III. MORE SOPs FOR MORE CITIZENS: ADAPTING THE STRUCTURE TO ADDITIONAL PATRONAGE FORMS

Let's begin by reminding ourselves that labor with a firm – the employment relation – is an ethically salient patronage relation:¹¹⁰ It is an ongoing mode of relation

¹⁰⁷ See Hockett, *Hamiltonian Means*, *supra* headnote, at 98-120, 143-53.

¹⁰⁸ See Hockett, *Hamiltonian Means*, *supra* headnote, at 135-37.

¹⁰⁹ See Hockett, *Hamiltonian Means*, *supra* headnote, at 98-120, 143-53.

¹¹⁰ So far as I have been able to determine, the only scholar who has devoted much discussion to the relations between patronage and firm ownership is Hansmann. See HANSMANN, *supra* note 60, *passim*. 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 bit different as well. I do not believe, however, that my understanding and employment of the term will be incompatible with Hansmann's. More on this *infra* notes 111 and 112.

between persons and firms.¹¹¹ And it is a mode of relation that appears to afford sanction to the conferral of benefits upon persons.¹¹² It renders the latter apparently earning or deserving of the benefits bestowed upon labor through leveraged ESOP financing.¹¹³ That was one upshot of Part II.C above.

Yet labor is also *but one* way in which people relate themselves ongoingly to firms. And this raises an intriguing prospect: Perhaps we might rely upon patronage relations additional to, or that vary upon, the employment relation in order to warrant the public facilitation of share-spreading – in particular, to those we have called “Peters,” or “Twos” and “Threes” above. This Part proposes and assesses a few possibilities, meant

¹¹¹ Hansmann appears to be less explicitly concerned with the “ongoingness” of patronage relations, while being more explicitly concerned with a particular species of relating to the firm – viz., selling to or purchasing from it – than I. See *infra* note 112. 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, I think patronage relations as potentially involving more than purchasing and selling alone to be implicit in Hansmann’s own understanding of the term, as evidenced by Hansmann’s occasional recourse to the broader relational concept of “supplying,” which figures prominently in his treatment of stock-holders as financial capital suppliers. See HANSMANN, *id.* at 12.

¹¹² 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.” *Id.* at 12. Much of the thrust of Hansmann’s often astonishingly insightful monograph is devoted to showing both (a) that it is typically a particular class of patrons which owns most of the firms operating within a particular industry, and (b) why it is that the particular classes which tend to own in particular industries end up being the more efficient owners. My interest in this Article, though not, I think, incompatible with Hansmann’s interest, is nonetheless distinct; and 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” in the sense described *supra*, note 169. 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, I believe, will both make this plain and unpack more fully the ways in which patronage relations might be seen ethically to underwrite benefit-conferrals upon current non-owners within patronage classes.

¹¹³ Please see the discussion in Part II.C, *supra*, which suggests reasons why we publicly favor ESOPs.

to be suggestive rather than exhaustive. The idea is to approach the particular plan I wish to propose by a brief sequence of suggestive steps.

A. A First, Simple Variant: Customer Stock Ownership Plans

One conspicuous form of patronage in some respects reminiscent of labor is ongoing customership.¹¹⁴ 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 the 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 salient, 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.¹¹⁵

¹¹⁴ Indeed, in some industries customers constitute the most efficient class of firm-owners. Examples are the farm supply industry, in which consumer cooperatives constitute an oft-encountered firm form; rural electricity, in which customer cooperatives again figure prominently; clubs that afford their members high-status “associative goods,” which again tend to be owned by their members; and urban housing, in which housing cooperatives figure prominently. *See generally* HANSMANN, *supra* note 60, at 147-223.

¹¹⁵ Again, sometimes this happens quite “naturally,” for reasons that appear to be rooted in the comparative efficiencies of governance and contracting. *See supra*, note 112. But the reasons for interest in an “ownership society” warrant our considering the fostering of ownership even where it does not quite “naturally” arise, which of course seems to be what has occurred in the case of ESOP proliferation. *See supra*, Part II. Those same reasons presumably afford at least a preliminary answer to prospective objections rooted in the same normative source as are familiar objections to disgorgement remedies in contract owing to their inefficiently coupling purchases from with investments in firms. *See* Hockett, sources cited *supra* headnote. And thank you to Daniel Markovits for pressing me here.

Consider a homespun example: There might be a small university town centrally located, hence perhaps geographically isolated, in a large US state.¹¹⁶ People who live and work in the town see a lot of each other, and 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 “centrally isolated” together, perhaps even miss this feeling when they’re away.

Now a marvelous new grocery store complex comes to this town.¹¹⁷ Everyone talks about the new store, even showing it off to visitors and prospective new residents. They’re as proud as they are pleased, that at long last it’s arrived.¹¹⁸ Nearly everyone living or working within several miles of the town now purchases 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 transacting. Things might develop and go on in this way for years. That’s an ongoing, many-faceted relation.

Now suppose that we found the recently floated American idea of an “ownership society” to be an attractive one, for any number of reasons,¹¹⁹ and so thought that it might make for good public policy to encourage wider ownership of firms. In that

¹¹⁶ I am thinking of Ithaca, NY, where I live. But there are countless similarly situated locales, not all of them university towns and not all of them as relatively isolated as Ithaca. Indeed this example might also be plausibly applied, say, to a community-like neighborhood or sector of a large city, such as is commonly found in New York, Chicago, and Los Angeles. Please also bear in mind that the example following this one will make no reference to community-like towns at all. All examples in this Article are meant to be illustrative and suggestive, even to spur additional visualizations; they do not purport to be exclusive or exhaustive.

¹¹⁷ I am alluding to Wegman’s in Ithaca NY, a store about which many indeed speak with pride. This firm is not publicly traded, so I am asking that the reader pretend that it is.

¹¹⁸ It’s one of those towns that has difficulty attracting and keeping nationally, and even regionally known merchant establishments.

¹¹⁹ I consider the variety of grounds upon, and the three principal American political traditions to which, the notion of an “ownership society” might be attractive in Hockett, *Whose Ownership?*, *supra* headnote, at 5-78.

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 the regular customers who live in community with and partly organize their lives around it, just as we do in the case of employees? We certainly might.¹²⁰

Consider a cognate example, applicable perhaps 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.”¹²¹ Perhaps it’s a transport system, an electrical power grid or highspeed 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, might often find themselves more or less “stuck” with 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 customer hostagehood is *at least* as ethically salient a patronage-form as is more voluntary customer loyalty, isn’t it?

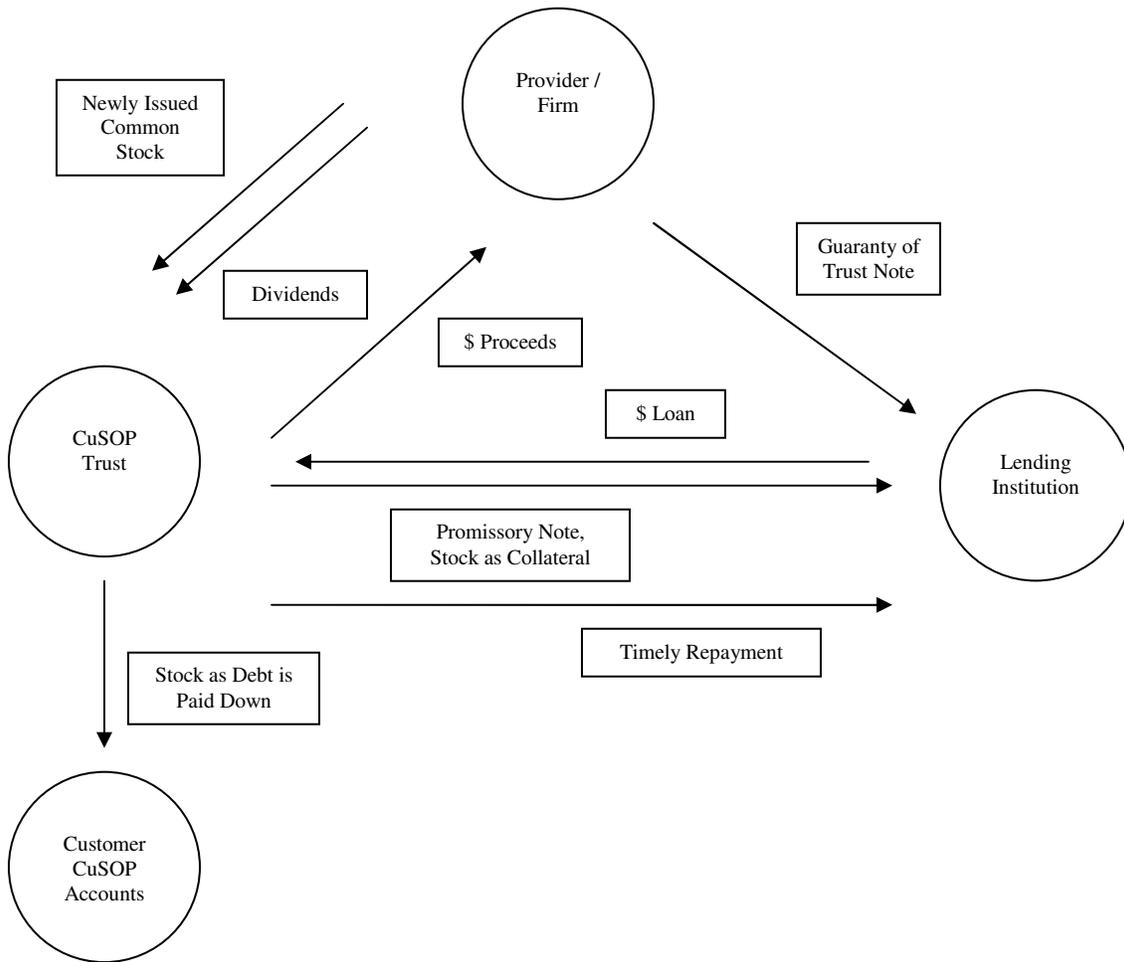
¹²⁰ It is of course not the case that facilitating ownership of local businesses will afford optimal diversification. After all, personal incomes and the incomes of town-sharing or region-sharing firms can to some extent co-vary – in the case, for example, of local or regional slumps. But I ask that the reader bear with me a bit longer. As examples proliferate below we shall see that diversification grows. Moreover, our aim here is to make use of patronage relations as ethically salient grounds for public action facilitating ownership, pursuant both (a) to the hypothesis posited *supra*, Part II.C, concerning why the public is willing to subsidize ESOP expansion, and (b) to the further elaboration of that hypothesis in this Article’s predecessor pieces, concerning why we have acted similarly to promote home-owning and higher education spreading in the way that we have done. Finally, please note that I have already addressed the project of democratizing income-risk-sharing across localities and even across nations in a separate article: *See* Hockett, *Macro-Hedging*, *supra* headnote at 212-56. My hope is that all of these pieces together afford at least a rough template for how best to render our society more “owning,” more risk-spread-efficient and more just.

¹²¹ In a way, of course, so was the store in the previous example. Small towns support less competition among smallish suppliers than do cities.

Were we to endorse this line of thinking, then we might well 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 way we facilitate share-acquisition in firms by employees. We might tax-break-assist firms in debt-financing themselves, in exchange for their issuing shares to trusts whose beneficiaries gradually came legally to own what initially they would beneficially own. (Again, perhaps, as in the labor case, in proportion to their patronage – e.g., amounts purchased from the firms in place of wages earned working for firms.) In essence, then, we would just replicate the financial structure of the leveraged ESOP arrangement. Only the particular patronage relation would change. We might call it a “Customer Stock Ownership Plan,” or “CuSOP.”¹²² Imagine it thus:

¹²² This SOP is not to be confused with a “consumer stock ownership plan” proposed by Kelso, which latter appears to be little more than a producer coop. See KELS0 & KELS0, *supra* note 57 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 it 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 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 legislatively replicated to facilitate stock-acquisition by long-term customers – loyal customers, hostage customers, or “in-between” customers. And the

public benefit that such 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 much the same grounds: the grounds of ethically salient patronage.

B. A Second, Closer Variant: Rent-Recouping Stock Ownership Plans

Let's try another one, one that draws us yet closer to the plan that I wish to propose for those "Twos" and "Threes" disproportionately harmed by global trade and investment liberalization: Sometimes new resources are discovered. Petroleum reserves are found in Alaska, newly exploitable minerals are found in beds of magnesium nodules just off the coast, some portion of the electromagnetic spectrum becomes usable in a way that it was not before, etc. Sometimes no living person or group of persons is creditable with the discovery, or with the discovery's full exploitability. But some such person or persons often can be *partly* so credited. And the "Western" and, especially, "American" way of doing things in any event is to permit private agents – generally firms – to exploit the new possibilities – to appropriate rents from them.¹²³ 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,¹²⁴ and the takings go to the government.

¹²³ 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. PAP. & PROC. 347 (1967).

¹²⁴ Legally speaking this claim, associated with Richard Epstein, is of course hyperbolic. But one can readily grasp the intuition that underwrites it. For the hyperbole, *see, e.g.*, RICHARD A. EPSTEIN, *TAKINGS: THE CONSTITUTION AND THE POWER OF EMINENT DOMAIN* (1985).

Westerners, and especially Americans, don't seem to like that kind of thing any more.¹²⁵ At any rate they don't find it as palatable as they once did, perhaps because they are less trusting of the users of the takings – “the government” – than they once were.¹²⁶ But Americans in particular still like ownership – they like that very much, in fact – and they are aware that by definition nobody has earned a windfall. So why not widen the distribution of shares in the firms that are authorized 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” class of patrons whose beneficiary status would be as readily warranted as that of employees and long-term customers? After all, we would presumably not wish simply to replace one class of windfall beneficiaries with another, as it were at random. How, then, to think about this? I think 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 global recognition that good citizenship and faultless wage or salary loss themselves constitute an ethically salient kind of patronage.¹²⁷

Let's 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 legally

¹²⁵ See, e.g., EPSTEIN, *id.*, for a representative screed. See also MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005), for a morbidly fascinating, documentary account of the exploitation of citizen cognitive error by champions of the tax-evading well-to-do.

¹²⁶ I employ scare-quotes here because I am simply conveying, rather than participating in, that attitude pursuant to which some view the government as an alien force rather than an agent of collective action. Perhaps the current iteration of this line of hostile thinking all began with the disillusionments of the 1960s, which seem to have fed directly into the populist “tax revolts” of the 1970s, out of which so much of current rightward-leaning ideology seems to have grown.

¹²⁷ This suggestion is taken up *infra*, Part V.

“more proximate” to – as it were “more owned by” – their residents than by nonresidents.¹²⁸ So, for example, new oil found in Alaska might be perceived as being somehow, somewhat 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.¹²⁹ Alaska itself is constitutionally permitted, after all, to tax firms that extract Alaskan oil reserves, even after the (federal) IRS has done so. 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 to these “Alaskan” observations might hold true in respect of magnesium

¹²⁸ Scare-quotes again indicate that I am attempting to give expression to a pre-reflective manner of perception. I should note here that I am exceedingly uncomfortable with this particular perception, and experience resort to it to be a compromise with territorialist psychological dispositions that are regrettable at best. But bear with me for a moment. Some such primitive intuition as this 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,” for example. Ideally I’d prefer to repudiate the intuition, but if we’re stuck with it then we may as well harness it to good purpose.

¹²⁹ In 1978 and 1980, voters’ initiatives were introduced to establish the Alaska General Stock Ownership Corporation (AGSOC), which would have provided Alaskan citizens ownership interests in the Alaska Oil Pipeline. Pursuant to a tentative agreement with the British Petroleum Company, the latter was to sell its interest in the Alaska Pipeline to AGSOC. AGSOC would have enjoyed the backing of state credit to borrow. Under federal matching legislation – 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 Title VI, Revenue Act of 1978, 92 Stat. 2885 (1978). The AGSOC plan also would have prohibited any one individual from taking ownership of more than ten shares, in order to prevent concentrated ownership. See *Alaska, Inc., an Economic Experiment; Senator’s Plan Would Distribute State’s New Wealth to Citizens; Alaska Inc., an Experiment in Distributing New Wealth*, THE WASHINGTON POST, October 22, 1978, Sunday, Final Edition. The Alaskan ballot measure nevertheless lost on a close popular vote (approximately 78,000 to 72,000). See, e.g., the Alaskan state government website, available at <http://www.gov.state.ak.us/lrgov/elections/initbal.htm>; and the National Institute of Democracy website, available at <http://www.ni4d.us/people/gravel2.htm>. Notwithstanding the failure of the ballot initiative, Alaska did adopt a cognate program. See *infra*, note 141.

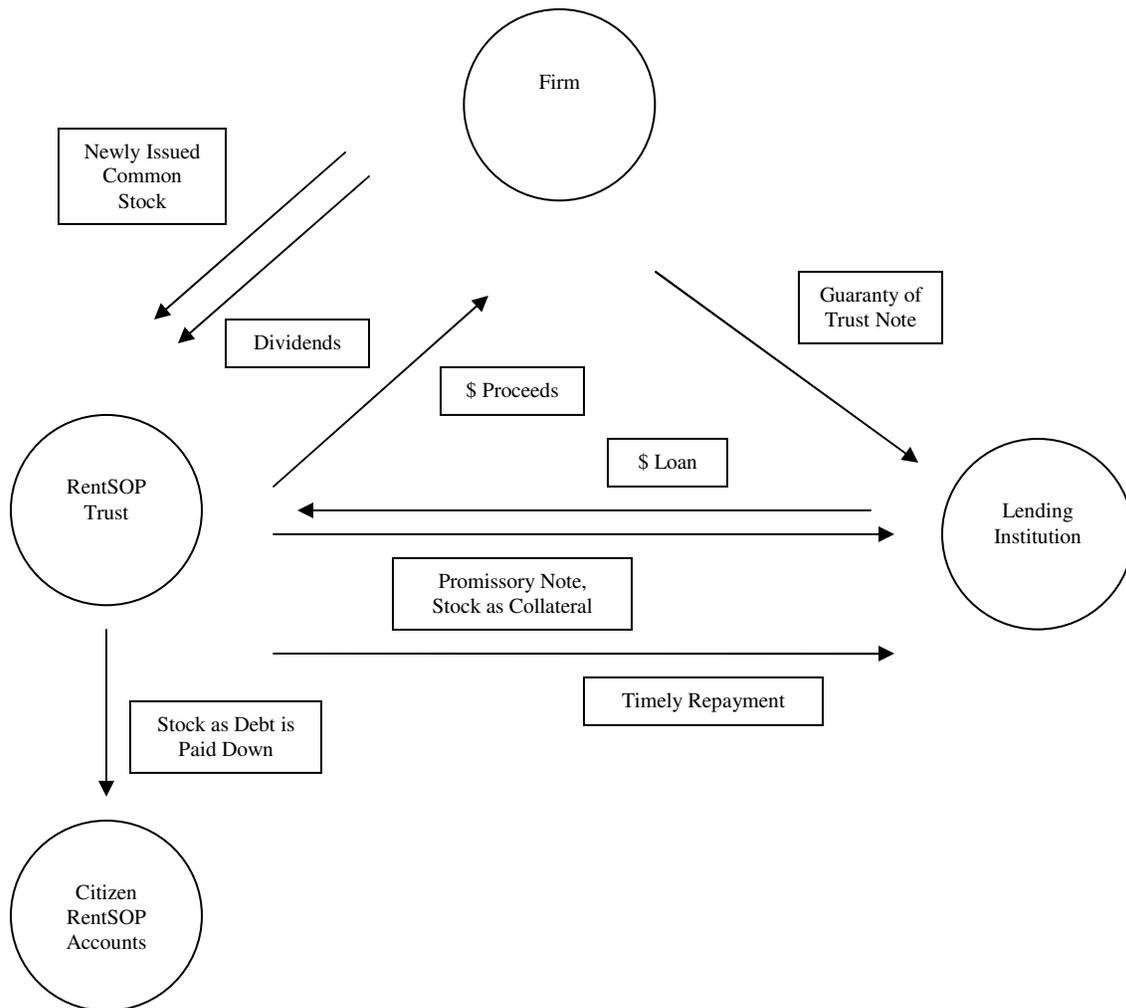
nodules found off the coast of Washington, Oregon and California. And international law of course treats things much in this way on a nation by nation basis.¹³⁰

Now bring these patronage considerations together with the earlier rehearsed “windfall” considerations. Would it be too far a stretch to require, as a condition for granting the rights to exploit the new resource to the firm, 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? (E.g., residents of any municipality or state that currently might tax the enterprise that exploits the resources?) Note that if the answer is “no, it would not be a stretch,” 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 less expensively (to the public fisc) encourage both (a) the entry of firms to do the exploiting, and (b) those firms’ spreading their shares. Call it a “RentSOP.”¹³¹ It might look like this:

¹³⁰ See Hockett, *Limits of Their World*, *supra*, headnote.

¹³¹ This is not to be confused with Kelso’s proposed “RECOPs,” “GSOPs” or “COMCOPs,” which, though apparently geared toward spreading ownership of some firms cognate with those under consideration here, are both (a) argued for on entirely different – indeed, puzzling grounds, and more importantly (b) presumably for that reason, differently financial-structured. See KELSO & KELSO, *supra* note 57 at 99-103, 75-83, 88-92. For a more general charitable interpretation and correction of Kelsonian “theories” and schemes, see Hockett, *Hamiltonian Means*, *supra* headnote 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. (So now the degree of patronage might track years of residence.¹³²) What is different, apart from the

¹³² I ignore, for present purposes, the matter of crafting terms so as to avoid conflict with court decisions overturning interstate-travel-burdening state laws, decided under the Commerce Clause of Article I of, the Privileges and Immunities or Equal Protection Clauses of the Fourteenth Amendment to, or some “penumbral emanation” from those or other provisions of the U.S. Constitution. In *Zobel v. Williams*, the Supreme Court rejected Alaska legislation that awarded pipeline dividends to state residents based on the duration of their residence up to the point at which distributions began. 457 U.S. 55, 64 (1982). But allowing the number of shares distributed thenceforth *to grow* with years of residence would *not* seem to be constitutionally offensive so long as one could begin to accumulate shares immediately upon taking up

changed patronage basis here 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 possibly in this case unlike the ESOP and CuSOP cases it would be too large for any one lender to make.¹³³ But all of that is, again, for present purposes neither here nor there. The important point presently is that the firm still finds itself debt-financing itself on favorable terms in the interest of boosting its capacity to exploit the newly exploitable resources, and spreading ownership in itself – hence the benefits that accrue to its owners by dint of its access to the resources – in the process.

Now note, in connection with our hope 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’s to say, are as they were in connection with CuSOPs in III.A above – candidates for RentSOPs can be proliferated.

We might broaden our understanding of “local resource” along at least two dimensions. For one thing, we can move outward from locality to region to nation or economic class – a prospect that we shall consider presently. For another thing, we can plausibly broaden our understanding of “resource” itself. For it isn’t always a matter of

residence. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

¹³³ Not just as a matter of capacity, but as a matter of law as well; the Bank Code’s lending limits could kick-in. *See* 12 USCS § 84. (12 USCS § 84 (a)(1) requires that total outstanding non-fully-secured loans and credit extended by a national banking association to an individual, including a trust, not exceed fifteen percent of that banking association’s unimpaired capital and unimpaired surplus. 12 USCS § 84 (a)(2) additionally requires that total outstanding fully-secured loans and credit extensions made by a national banking association not exceed *ten* percent of the association’s unimpaired capital and unimpaired surplus.)

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 III.A. That’s why the so-called “classical” economists, pioneers like Adam Smith and David Ricardo, were so suspicious of them.¹³⁴ But we needn’t be suspicious. We can facilitate the spaces’ voluntary sale and purchase 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 resource-extractors, in Figure 3 just above.¹³⁵ “Don’t get mad,” we might say, “get owning – get the company.”¹³⁶

Turning from the resource dimension to the locality dimension, if we move outward from seemingly “locally located” resources to more diffuse such resources –

¹³⁴ See, e.g., ADAM SMITH, 1 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 161-63 (Edwin Cannan ed., 1976) (rent as a monopoly price, not consequent on any expense laid out by the *rentier*); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 33-45 (Dent & Sons ed., 1987) (same, *rentiers* as windfall beneficiaries of scarcity).

¹³⁵ Hansmann, in HANSMANN, *supra* note 60 at 173-79, suggests a number of reasons for the absence of urban utility coops analogous to rural electrical coops, among them the comparative transience of urban dwellers relative to rural dwellers and conflicts of interest among disparate classes of prospective urban owners. 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, so far as I can see, stand in the way of publicly facilitated partial ownership of *corporate* utilities by their customers. Moreover, to what ever 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 user; 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 (*id.*, at 177), some municipal utilities can readily be *likened* to cooperatives, organized, as they are, quite similarly.

¹³⁶ A variation, perhaps, on the 1979 Remington electric razor advertisement, in which Victor Kiam averred, “I liked it so much, I bought the company.” See <http://news.bbc.co.uk/1/hi/uk/1357091.stm>.

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-beneficiaries of the firm’s privileged access. So we might imagine, say, that the US’s Telecommunications Act of 1996¹³⁷ is amended to work somewhat differently than it actually has done: Congress might not have authorized the FCC simply to *grant* existing broadcast companies new “advanced spectrum,” without requiring payment therefor.¹³⁸ Instead it might have established a sort of “national RentSOP” on behalf of all citizens, and then offered 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 extension from the more “locally located” RentSOP idea; it would also amount to a convenient bridge to a yet more universal SOP still.

IV. A SOP FOR PETER: GLOBAL STOCK OWNERSHIP PLANS

All right, let’s turn now to those whose plight occasions our concern in this Article, Part I’s “Twos” and, especially, “Threes” – those whom we also called “Peters.” Might we not view their heightened labor income risk as a particularly poignant variation on the employment relation itself which ethically underwrites the ESOP, as discussed in

¹³⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 USCS § 251 *et seq.* For commentary, see PETER W. HUBER *et al*, THE TELECOMMUNICATIONS ACT OF 1996 (1996); and 74 Am. Jur. 2d Telecommunications § 16.

¹³⁸ See 47 USCS § 336(a) (“[T]he Commission . . . should limit the initial eligibility for such licenses [for use of advanced spectrum] to persons that (1) are licensed to operate a television broadcast station or hold a permit to construct such a station . . . 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).

Part II? And might we not also view the income gains realized by “Ones” through globalization as a species of *rent* as discussed in Part III? I think that we might.

For consider: We are supposing, per hypothesis, that Peter truly is “faultlessly” disemployed in consequence of global trade and investment liberalization – because more desperate Paul can work for less. We are also supposing that Peter is aging hence truly unable to “retool” himself sufficiently fully as to recover all of his lost income through new forms of employment. When these suppositions are borne out, Peter bears a particularly poignant, and indeed ethically salient, relation to his erstwhile employer.¹³⁹ The latter, and hence the “Marys” who own the employing firm, have shed him precisely *in order* to capture the surplus that’s generated by paying less in the form of wages and regulatory compliance to the more desperate “Pauls.” Peter’s labor patronage in this case has effectively been replaced with a sort of “shadow,” or “ghost” labor patronage: His erstwhile relation is extinguished, and Peter accordingly harmed owing to no fault of his own.

Now note that Mary, for her part, is no more ethically creditable than Peter is faultable: For again, by hypothesis, Mary has simply *inherited* a goodly portion of the firm-shares that she owns, or of the wealth she’d expended to purchase them. And the capital gains that now will accrue to those shares in consequence of global trade and investment liberalization are no more the result of her value-adding effort than were those that accrued to her by dint of her being born into wealth. They are the consequence of changes in the global legal environment, with which most Marys had nothing whatever to do. From Mary’s perspective, therefore, they are windfalls. They are rents flowing her

¹³⁹ I discuss such “retooling” costs, along with other determinants of Peter’s faultlessness, at length in *Global Macro-Hedging, Hamiltonian Means*, and *What Kinds of Stock Ownership Plans Should There Be?*, *supra* headnote.

way, in virtue of no more than her exclusive possession of that which was given her at birth. Ethically, they're on all fours with mineral deposits or petroleum reserves discovered beneath her inherited real estate holdings.

Now, if these considerations are in order, then do not our core values – our opportunity-egalitarian sense of justice as elaborated above at Parts I and II.C – suggest that we view Mary as properly bound to share some of her globalization-wrought, windfall gains with Peter? And won't Mary, in turn, as well as the rest of us, per our endowment dispositions discussed in II.C, view the most readily palatable means of *facilitating* that gain-sharing as that involving the issuance of new shares, by the globalization-benefiting and Peter-disemploying firms, to Peter? Of course, that will dilute the value of Mary's shares in the firm. But this is simply another way of saying that it will amount to Mary's sharing her globalization-wrought gains with those Peters whom her globalization-benefiting firms have laid off. And as we noted above at II.C, sharing of this sort is much less likely to be experienced as “taking” and “redistributing” than are “taxing and spending.”

How, then, would a SOP configured in conformity to these observations be structured? Well, in light of the sample SOP-variants laid out in Part III, I'll wager it's easy to visualize now. I'll sketch two renditions of it, one narrowly tailored, the other a bit more ambitious.

A. Compensating Lost Labor Patronage: Outsource Stock Ownership Plans

Think of the first, most narrowly tailored rendition simply as a straightforward variation on the Rent-SOP itself described just above. Treat new access to global intermediate product, capital and labor markets as the “resource.” Treat those who are

disemployed by firms *accessing* those newly opened markets as the natural constituents – analogues to the “citizens of Alaska” countenanced above in III.B. We can presumably employ the same means for determining that Peter was indeed disemployed owing to trade liberalization, and thus an appropriate beneficiary, that we employ currently in determining whether employees hard hit by trade liberalization are entitled to “adjustment relief.”¹⁴⁰

Let years of employment with such firms serve as degrees of patronage – an ethical-intuitively attractive suggestion from “two angles,” as it were, in this case: For not only is it the case that more years laboring for the laying-off firm render the patronage relation appreciably “thicker” or “deeper” – something akin to the “loyalty” that we interpreted as ethically salient patronage in connection with CuSOPs in III.A. It’s also the case that more years’ labor with the laying-off firm mean less time for Peter to “retool” and find new employment.

All right, so far so good, I take it. But now here is something that perhaps I have not unobjectionably left out: It isn’t the case that Peter is disemployed only to the benefit of compatriot Marys owning compatriot firms, is it? After all, Peter’s firm might not simply “outsource” Peter’s labor. It might go out of business, being out-competed by foreign firms. Those firms are held largely by foreign Marys, of course – indeed, in some cases even foreign governments.¹⁴¹ Moreover, since global investment has been liberalized at least as surely as – indeed, even more surely than – trade,¹⁴² even domestic Mary for her part is likely unharmed: If well advised by investment consultants, she has

¹⁴⁰ See Trade Adjustment Assistance Act and rules promulgated thereunder, available at <http://www.doleta.gov/>.

¹⁴¹ China, for example, and other governments that control domestic enterprises by maintaining majority stakes there in.

¹⁴² See Hockett, *Macro to Micro to “Mission Creep,”* supra, headnote.

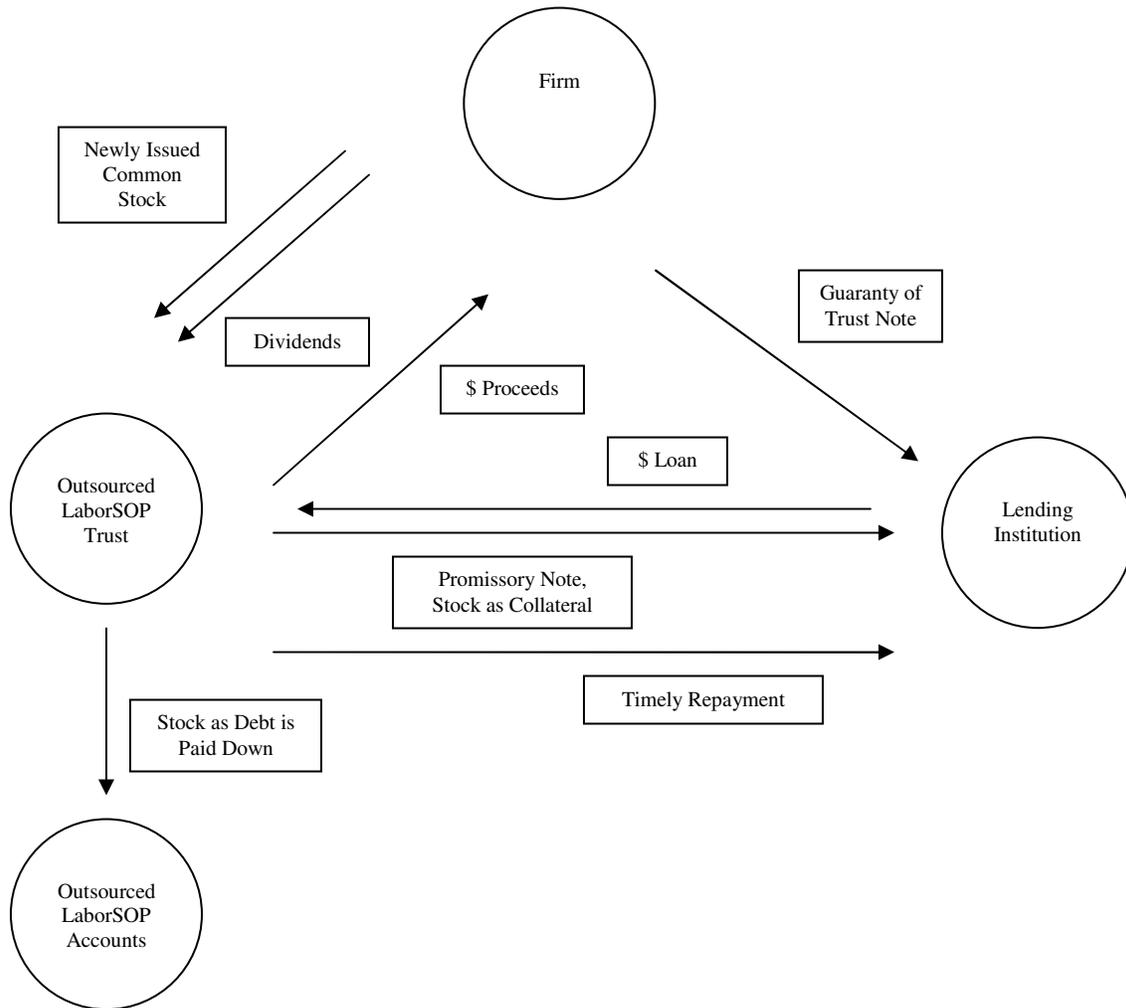
long since dumped shares in Peter's employer for shares in other firms altogether – both domestic and, increasingly, foreign.¹⁴³

But if all of this is so, then it presumably will not suffice, if our goal is to ensure that the Marys share gains quite generally with Peters, simply to spread new shares in disemploying firms to their erstwhile, now laid off employees. To plug all the leaks, so to speak, as well as to diversify holdings by Peters more generally and thus render their capital incomes more secure, we shall want to link Peters to Marys via more firms than one. How to do *that*?

I think that there are a number of options here, no one of which need be *the* one. I'll accordingly resist the temptation to try to blueprint in detail every such possible means, and instead shall sketch simply what I think is a suggestive and promising multi-step general strategy. First, then, because the patronage link between Peters and healthy, continuing domestic firms that “outsource” their labor is particularly ethically salient and heuristically compelling, begin with those. Set things up, that is to say, again rather as we did in the RentSOP case above in III.B, now calling it something like, say, an “OutsourceSOP”:

¹⁴³ Id.

Figure 4: Institutional/Financial Structure of an OutsourceSOP Arrangement



Once again, of course, we find the same basic structure here as is found in Figures 1, 2 and 3 above, with disemployed laborers rather than ongoing employees, customers or “Alaskans” now standing in as our salient class of patrons. The *degree* of patronage, however, will again track years of employment just as in the ESOP – which seems intuitively attractive both because the outsourced employee has invested more of his working life and “specific human capital” into the firm and, flipside-wise, because he’s got less to give now to other prospective employers. Other than this and the changed

patronage basis here ethically grounding the public benefit, the only new wrinkle is simply that the benefits afforded to outsourcing *firms* by the public – in the form, inter alia, of negotiated trade and investment liberalization agreements – are conditioned upon share-spreading by the firms to the laborers they lay off. The important point for present purposes is that, just as in the other SOP examples, the firm in this case still finds itself debt-financing on favorable terms in the interest of boosting its capacity to exploit the newly exploitable resource that is a newly opened set of global markets, and spreading ownership in itself – hence the benefits that accrue to its owners by dint of its access to those markets – in the process.

But now, how about the foreign firms? Won't they be more difficult to rope-in to the scheme than domestic firms? Well, here things become a little more complicated, but not all that much once we think about it. Indeed the *principal* “complication” is simply that there are *multiple* means of doing justice to Peter. One means would be simply to tax Marys with large holdings in foreign firms, the proceeds to be used to purchase shares in the same foreign firms, to be placed into SOP-styled “Peter accounts.” A cognate and perhaps more attractive (because non-taxing) means – though this would work more effectively in respect of primary issuances than of purchases on the secondary market – would be to condition *investment* liberalization (the continued absence of capital controls) upon foreign firms' issuing a certain amount of new stock to such “Peter accounts” per increment of stock acquired by compatriot Marys.

Of course, foreign firms might be expected to protest that investment in themselves by Marys would be rendered less attractive in consequence of the taxing method, and thus would be illicitly disadvantaged relative to domestic investment. But if

we were to develop means of ensuring that it was only indeed “Marys” whom we were thus taxing – e.g., by taxing capital gains realized on foreign stock holdings only beyond some threshold – this would simply amount to the unethical demand that Marys be permitted unjustly to benefit at the expense of innocent Peters. Moreover, investments by Marys in firms that abide by labor, environmental and other standards equivalent to those observed by domestic firms could be exempted.¹⁴⁴

That of course raises the other, cognate prospect I just mentioned, amounting to yet another means by which to improve the relative justice-standings of Mary and Peter: Why not condition trade and investment liberalization themselves upon *all* benefiting firms’ financing themselves at least in part through the SOP structure to enable *all* Peters to share in the gains realized by Marys? That is to say, why not “go national” or indeed “global” with the full “OutsourceSOP” program itself? That will take us to a second rendition I have in mind here.

B. Going Global: “Global Citizen” Stock Ownership Plans

Let’s pursue that last line of thought for a moment. While at it, let’s link it up with the earlier mentioned matter of Marys who disinvest from globalization-damaged, Peter-disemploying firms in order to reinvest not abroad, but in other domestic firms to whose production processes Peter’s long-developed firm- or sector-specific human capital is not suited. Let’s also link it up to the yet larger matter of income security and its relation to investment diversification more generally: Might we not develop either a

¹⁴⁴ Note that this is not the same thing as conditioning trade liberalization upon trading partners’ subjecting their firms to the same labor, environmental and other regulatory standards as those to which domestic firms are subjected. It is only to require that Marys who exploit such differentials share the gains that they realize thereby with the Peters. Lest you worry that the effect will nevertheless be the same, only differing in degree rather than kind by dint of the Marys’ then turning to invest more in domestic firms that also do not employ Peter, please read on. For I aim next to close that loophole as well.

national or, more ambitiously, multinational *compact* pursuant to which all “Peters” nationwide or worldwide benefit through something like the SOP structure in return for their “playing by the rules” or perhaps affording some other form of national or international service? This might ring a bit grandiose at present, but please bear with me a moment.

Here, more precisely, is what I have in mind: It seems to me plausible to suggest that citizenship itself is a kind of patronage, even if “thinner” than most other forms. It is an ongoing relation such as can warrant, in some cases, the public conferral of at least some kinds of benefit. At any rate “*good* citizenship” would seem so, such that everyone who “plays by the rules,” “works hard” or perhaps provides some kind of ongoing public service, can be said to deserve some solicitude, perhaps even the guarantee of some “basic minimum,” from us all, would it not?

Surely we all as a group, in a sense, feel we owe a “hand up” to those among us who share our core values, obey all our laws, seek useful employment and are nonetheless “down” by the workings of fortune not 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. And those commitments all 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 as suggested above in the Introduction and Parts I and II.C.¹⁴⁵

¹⁴⁵ See, e.g., Hockett, sources cited *supra* headnote. Also *supra*, Part II.C.

I don't believe anyone will disagree with these truths – which not only Americans seem to hold “self-evident.”¹⁴⁶ What we do sometimes disagree about are the empirics of actual responsibility – the comparative degrees to which chance and choice have determined particular citizens' outcomes. I linger at some length upon practical means of disentangling these intermingling “inputs” to citizens' “wealth functions” elsewhere.¹⁴⁷ For present purposes, however, it will do simply to recall what we reminded ourselves of above at II.C: Namely, that (a) the more innocent a prospective beneficiary of a share-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. The easier in such case it is to view public action as vindicating equal opportunity rather than simply doling out “hand-outs.” And that is all the more so when public augmentation takes the form of tax breaks.¹⁴⁸

In that light, it would seem that we might try a yet more generalized 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. We might begin by targeting those who benefit their country or the global polity through something akin to AmeriCorps services. We might indeed think about instituting, perhaps through the UN, something

¹⁴⁶ See Hockett, *Whose Ownership?*, *supra* headnote at 29-56 for support. That is where I endeavor to locate and overlapping consensus among our dominant political traditions – a consensus that converges upon a shared ideal I label that of an “efficient equal-opportunity republic.” See also Hockett, *Global Macro-Hedging*, *supra* headnote at 142-73; and Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179 (2005). The “self-evidence” remark, of course, alludes to THOMAS JEFFERSON, *A Declaration by the Representatives of the United States of America, in General Congress Assembled*, July 4, 1776, reprinted in THOMAS JEFFERSON: WRITINGS 19 (Martin E. Segal ed., 1984).

¹⁴⁷ See Hockett, *Whose Ownership?*, *supra* headnote at 36-51.

¹⁴⁸ See *supra*, Part III.C.

like a “WorldCorps.”¹⁴⁹ We can readily ensure that beneficiaries meet these criteria – criteria which will reflect and in effect define the form of patronage that we believe ethically to underwrite the benefit.¹⁵⁰ And we can financially structure the arrangement so as to ensure that beneficiaries benefit only by working, rather as happens in the case of the ESOP.

Here is how: First, establish a national or multinational trust, a sort of cross between various nations’ national pension trusts and the humbler ESOP trust schematized at Part II. We might call this trust something like, say, the national or international “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 has recently been begun in the UK.¹⁵¹ These individual CitSOP accounts could be administered rather as was envisaged in connection with the “USA” accounts proposed in the late 1990s by President Clinton of the US, or the Social Security “personal accounts” proposed somewhat more recently, or even the accounts proposed by the IMF’s own co-designer, Lord Keynes, nearly 70 years ago.¹⁵²

¹⁴⁹ The US’s first large-scale post-Homesteading era education-spreading – hence, “human capital” spreading – programs began with veterans as beneficiaries. Hockett, *Hamiltonian Means*, *supra* headnote at 144-46. How fitting it would be, to recognize other forms of service in similar ways.

¹⁵⁰ Note that we do this already with federal home finance and higher education assistance. We employ both financial need criteria and law-abidingness criteria. See Hockett, *Hamiltonian Means*, *supra* headnote at 97.

¹⁵¹ I refer to Prime Minister Blair’s Child Trust Fund – or more popularly, “baby bonds” – plan implemented in 2001. See http://news.bbc.co.uk/1/hi/uk_politics/1297324.stm. Former Senator Bob Kerrey of Nebraska proposed something similar States’-side at the turn of the past century. His were called “KidSave Accounts.” See http://www.dlc.org/ndol_ci.cfm?contentid=2372&kaid=131&subid=207.

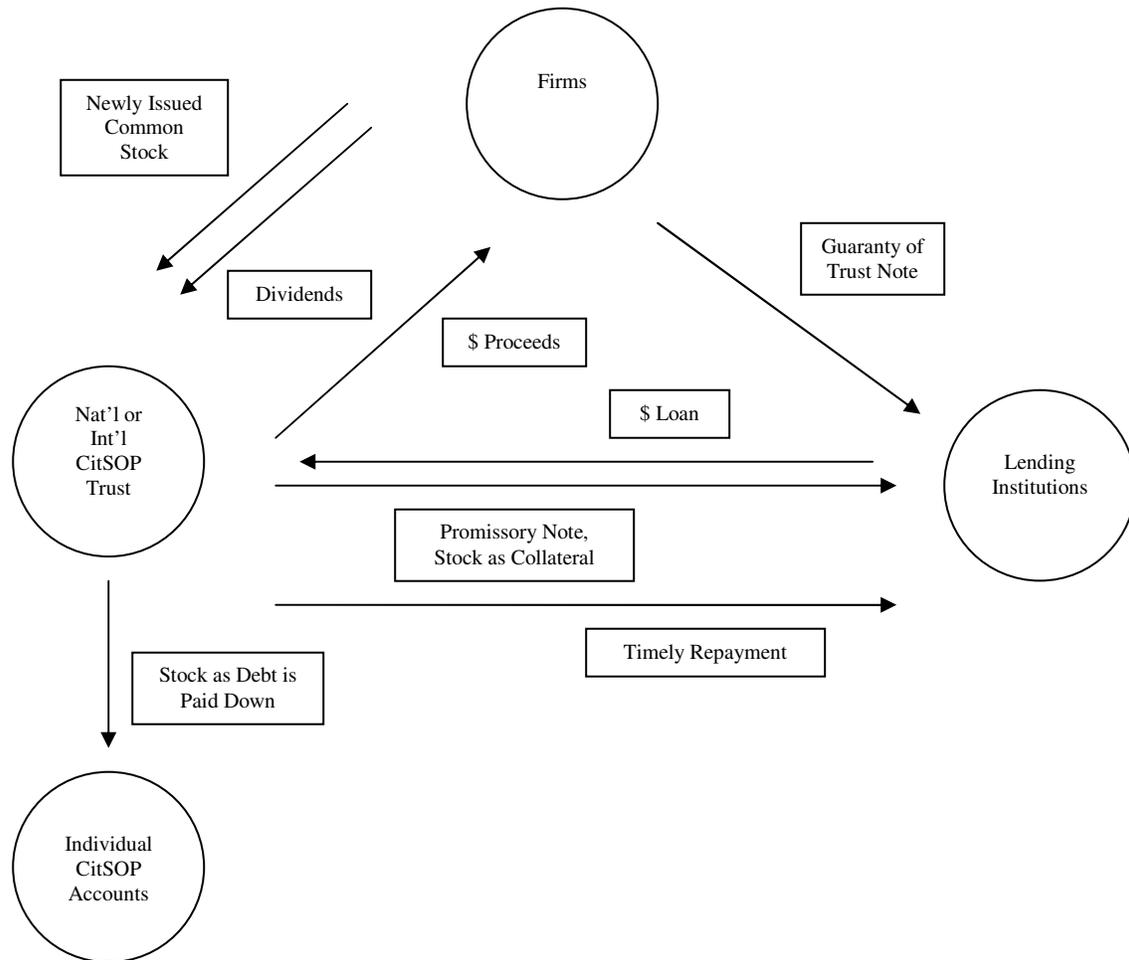
¹⁵² President Clinton proposed “universal savings accounts,” or “USA”s, in 1999. A similar structure of private accounts, now without government income support, figured into George W. Bush’s 2005 “State of the Union” address. See, e.g., http://www.ici.org/issues/ret/arc-leg/99_pres_usas.html; <http://clinton4.nara.gov/WH/New/html/19990414-3020.html>; <http://www.urban.org/publications/309272.html>; <http://www.actuary.org/pdf/pension/usaccounts.pdf#search='usa%20accounts'>;

Now, let the national or multinational 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 US ESOP arrangements. Let the national or international CitSOP trusts, in turn, pledge the purchased stock as collateral¹⁵³ 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 something like this:

<http://www.whitehouse.gov/infocus/social-security/>;
<http://www.cbsnews.com/stories/2005/05/04/politics/main692991.shtml>. For Keynes's visionary and, as it turned out, prophetic proposal, see JOHN MAYNARD KEYNES, HOW TO PAY FOR THE WAR (1940). On Keynes's role in designing the Fund, see, e.g., Hockett, *Mission Creep*, supra, headnote.

¹⁵³ Though of course this also might be deemed unnecessary in, e.g., the US in view of the full faith and credit enjoyed by a federal institution. Indeed, even were the trust to function as a government sponsored entity (a GSE), it would in effect be viewed as being fully 80% as credit-worthy as the federal government itself for purposes of bank capital adequacy regulation. See 12 CFR Pt. 3, App.A.

Figure 5: Institutional/Financial Structure of a CitSOP Arrangement



This looks familiar. It's Figure 1 (or 2 or 3 or 4) again, save again with some 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, RentSOP and OutsourceSOP cases) have to do with how precisely we decide to define the salient patronage form. Hence, for example, if we begin with national or multinational 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 her 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 citizenship – rather as one’s US Social Security or cognate national pension benefit elsewhere (e.g., Chile¹⁵⁴) rises with time spent at work.

We might also, of course, 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 or international service of one sort entitles her to some amount more, national or international service of another sort entitles her to a yet larger increment more, and so on. Finally, insofar as it is opportunity deficits that have activated our concern, we might – but also might not – “needs test” one or more of the benefits here, perhaps applying a graduated discount factor to entitled benefits as personal wealth rises.¹⁵⁵ Were we to do that, we might consider disemployment by an “outsourcing” firm itself to constitute such a need, in effect growing the CitSOP directly out of the OutsourceSOP. (In such case again we would presumably verify eligibility by means similar to those employed presently in connection with statutory “adjustment relief.”¹⁵⁶)

There are of course many variations and gradations that we can consider and experiment with in all of this, for again the aim here is to establish the plausibility and attractiveness of the general idea rather than to lock us in to one particular blueprint. The important points for present purposes, then, are more fundamental in nature: The first is

¹⁵⁴ For a good sampling of the aims, ambitions and operations of various national pension programs, see, e.g., THE ECONOMICS OF PENSIONS: PRINCIPLES, POLICIES, AND INTERNATIONAL EXPERIENCE (Salvador Valdes-Prieto ed., 1997).

¹⁵⁵ A limiting case, then, might be that of the offspring of wealthy families, who perhaps would not qualify for any benefit of this particular (CitSOP) sort. It might, however, on the other hand be deemed preferable not to needs test at all, on more or less the same political popularity grounds as ground the US SSI’s abstention from needs testing.

¹⁵⁶ See supra note 139 and accompanying text.

that the basic model *can* perspicuously accommodate any form of patronage – any form of ethically deserving status such as might politically sanction benefit conferral – that we envisage. The second point is that it can do so while enabling us to confer the benefit in a manner that both (a) spreads firm-ownership, and (b) does so by means that respect both our core values *and* our *endowment* sensibilities as rehearsed above in II.C.

The third point is that we can, though we need not, in one way or another either wholly or partly condition trade and investment liberalization upon participation by other nations in some such multilateral program as this, which requires only already well-to-do Marys, not erstwhile penurious Pauls, to share the surpluses that they glean in consequence of globalization with recently and faultlessly “outsourced” Peters. (We can condition continued globalization, that is to say, upon *everyone’s* truly gaining.)

And finally the fourth point, to which I turn now in a bit more detail, is that the national or international CitSOP idea fans naturally out into a broader consideration that deserves a bit more play: I mean the fact that the Peters who elicit our concern, possessing as they generally do only one, comparatively undiversifiable form of capital – “human capital” – are inherently subject to more income risk than are the Marys, whose firm-share-holdings are readily diversified. Might we work, then, to render our compensated Peter’s new capital form as *secure* as is Mary’s?

C. Addressing the Risks of Ownership: Portfolio-Diversifying SOP Mutuals

One particular advantage enjoyed by the CitSOP idea that is not enjoyed to the same degree by the CuSOP, RentSOP and single firm OutsourceSOP ideas is the automaticity of the CitSOP’s *diversification* of acquired stocks. If a broad variety of firms nationally or transnationally were to participate in the CitSOP program,

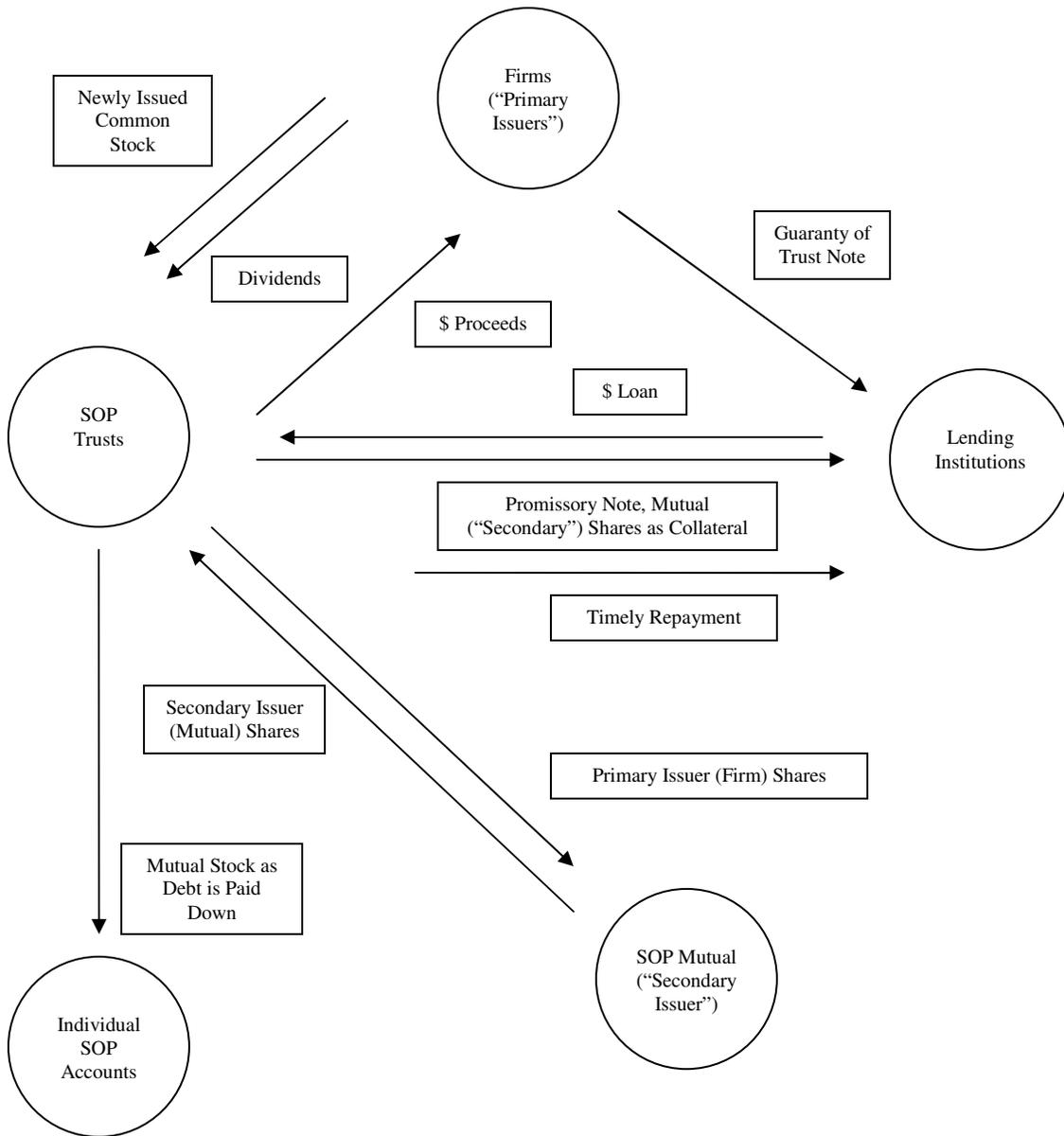
beneficiaries could perforce receive shares in a broad array of firms. In the earlier-rehearsed CuSOP, RentSOP and OutsourceSOP cases, by contrast, diversification would ride upon more accidental factors – viz., the number of different corporate firms that the particular beneficiary regularly patronized as customer (voluntarily, involuntarily or in between), the number of such rent-extracting firms in more or less close proximity to which the beneficiary lived, or the number of firms – typically but one – for which the beneficiary labored. How, then, in more detail might we design SOP-like or SOP-complementing arrangements that might optimally diversity holdings among all SOP beneficiaries irrespective of SOP-type?

I think once again that a variety of methods might be employed. I'll model two very simple, exemplary cases here. The first model might be called that of 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.¹⁵⁷ The intermediary (and now secondary issuer) would be, in effect, a mutual fund whose (initial) members were SOP trusts.¹⁵⁸ Subsequently the SOP trusts would, rather than gradually releasing sponsoring issuers' securities to their beneficiaries' individual accounts over time, release SOP Mutual shares instead. Shares of the latter sort also would serve, where shares collateralize loans used for the purchase of primary issuer stock, in place of the latter as collateral. Diagrammatically, then, things would look thus:

¹⁵⁷ 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" in the case of publicly valued firms, pursuant to the "cashflow" method in the case of closely held firms. *See generally* TOM COPELAND ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 131-297 (3d ed., 2000). I ignore here the question of means of avoiding imprecisions occasioned by market fluctuations, accounting indeterminacies, etc., as there seem to be no difficulties specific to the present case and not already dealt with by familiar means in other investment company contexts.

¹⁵⁸ And, as we'll see in a moment, SOP trust beneficiaries.

Figure 6: Institutional/Financial Structure of a SOP with SOP Mutual Arrangement



It is worth noting here that the SOP Trusts participating in SOP Mutual arrangements could be of all types – ESOPs, CuSOPs, RentSOPs, OutsourceSOPs, even CitSOPs were there good reason.¹⁵⁹ And the more SOP types and SOPs, of course, the

¹⁵⁹ For example, were an insufficient variety of firm types participating in CitSOP arrangements.

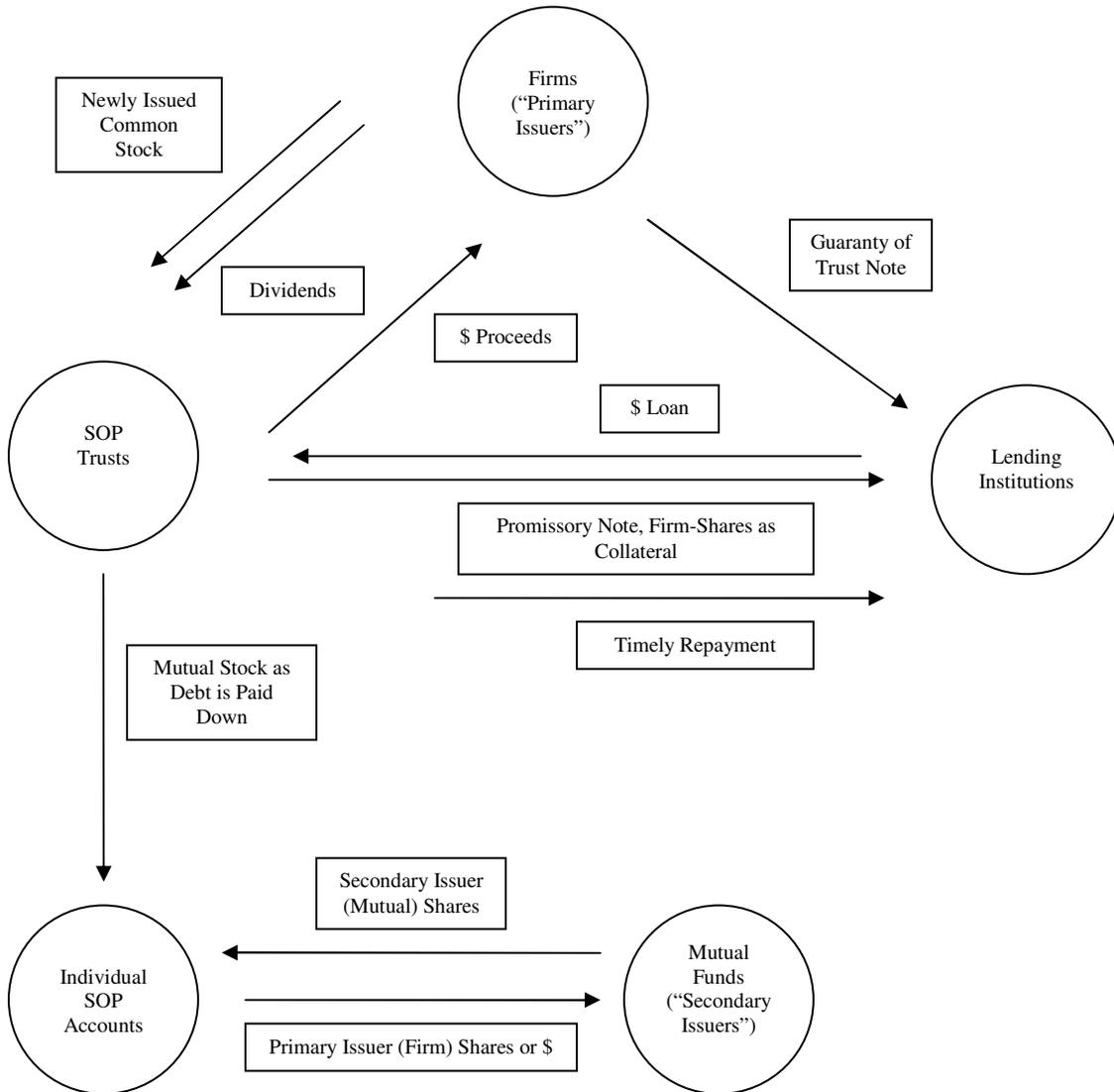
greater the degree of diversity, hence the lesser quantum of value at risk, that would be faced by our SOP beneficiaries – our “Peters.” We might then have here a bit of the “best of both worlds,” so to speak. We would be both fostering patronage relations between persons and firms – since benefits ride upon such relations – and dissipating the income-risk that attends patronage-concentration.

An advantage of the SOP Mutual model is that it enables SOP beneficiaries – not to mention such lenders as whose loans are collateralized by SOP Trust-held stocks – to reap the benefits of diversification even before they become legal as distinguished from beneficial owners. If, however, we found that we had or we 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 agreement 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 securities¹⁶⁰ presumably would of itself prompt our SOP beneficiaries better to diversify their legally owned holdings. We might even provide, facilitate or otherwise encourage the provision of such counseling.

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:

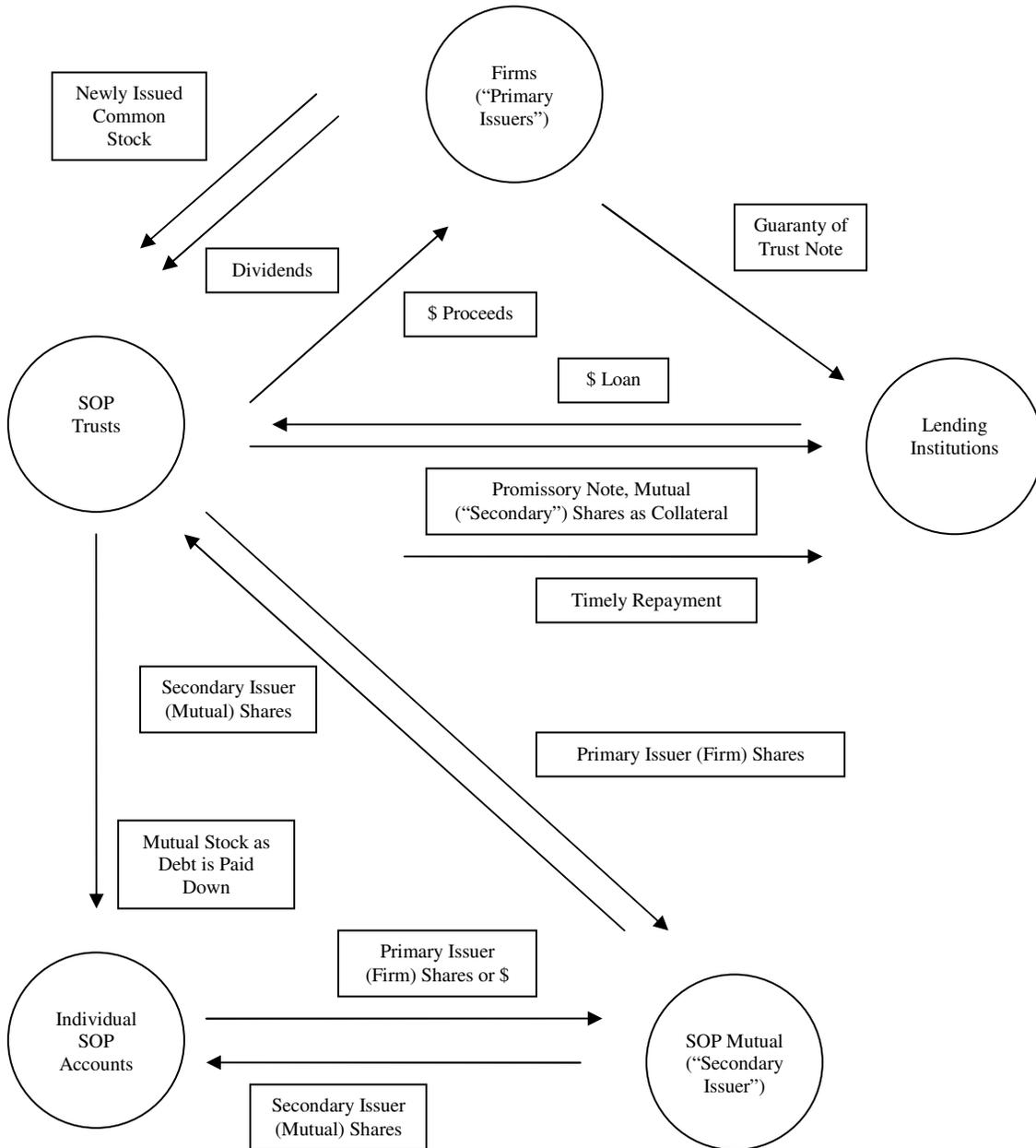
¹⁶⁰ We might even subsidize or require – the latter perhaps in the form of benefit conditionality – some baseline degree of financial counseling, as we do in the case of our federal home- and education-finance programs. See Hockett, *Hamiltonian Means*, *supra* headnote at 112, 151.

Figure 7: Institutional/Financial Structure of a SOP with Arrangement with Diversification Achieved Privately



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

Figure 8: 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 growingly owning citizens even while rewarding their multiple ongoing patronage relations with a perhaps somewhat lesser variety of firms.

V. A ROLE FOR THE INTERNATIONAL FINANCIAL INSTITUTIONS AND THE NEW INTERNATIONAL FINANCIAL ARCHITECTURE

Everything I have attempted to picture and think-through in Part IV implicates the International Financial Institutions (IFIs) and the “New International Financial Architecture” that they have been busily constructing since the mid-1940s.¹⁶¹ A possible problem at this juncture, however, is that it does not implicate them solely in one way. What role or roles the IFIs should play – and indeed what roles *which* IFIs should play – will ride largely on how we determine to structure and institute a system of OutsourceSOP arrangements, CitSOP arrangements, or both. And I’ve repeatedly abstained from committing to any one way of proceeding with these arrangements, in view of the exploratory, “thought-experimenting” nature of the present Article.

Perhaps the best way to think about the role of the IFIs in a manner that coheres with our present purposes, then, is to divide the inquiry into two stages. In the first stage I’ll say a bit of a general nature as to why and how the IFIs are implicated. For what can be said here will both (a) be applicable to any particular role or set of roles we envisage for the IFIs, and (b) delimit how we can more specifically envisage those roles themselves. In the second stage, then, I’ll sketch the role of the IFIs’ a bit more specifically. But I’ll still do so in broad enough outline as to remain appropriately open to the plurality of options presented by the “thought experimenting” done in Part IV.

A. *How They are Constitutionally Implicated*

The proposals envisaged in Part IV are all, at their most basic, *financial* in nature. They are also designed with a view to better apportioning the benefits and burdens of

¹⁶¹ More on this history *infra*, and in Hockett, *Macro to Micro to “Mission Creep,”* *supra*, headnote; and Hockett, *Global Macro-Hedging,* *supra*, headnote.

globalization. The central idea is to spread what I have called ethically exogenous benefits and burdens more equitably, in keeping with our core opportunity-egalitarian values as laid out in Parts I and II.C. The aim is also to do so, in keeping with our methods-constraining endowment dispositions as briefly rehearsed in II.C, via the mechanisms through which globalization-benefited business firms finance themselves. By taxbreak-assisting corporate debt-finance in return for corporate share-spreading – which of course is financial capital-spreading – or by conditioning firms’ receipt of rent-like benefits – such as those occasioned by globalization – upon share-spreading, the SOP plans do something that’s just as financial as it is ethically and intuitively attractive: They harness finance and globalization themselves to spread globalization’s own financial benefits more widely. And the benefits themselves, to repeat, are as financial in nature as could be: They are corporate securities.

Now precisely for these reasons, the suggestions made in Part IV fall squarely within what I have argued in a number of other venues to comprise the emerging mandate of the principal IFIs – the Bretton Woods institutions in particular.¹⁶² What do I mean by “emerging mandate” here? I mean two things, one fairly broad, the other more narrow in sweep. What I mean broadly is that the IFIs’ legally mandated and pragmatically necessary role is, at its most generally characterized, to facilitate sustainable global economic integration. More specifically, it is to do so from that integration process’s specifically financial nodes.¹⁶³ This is, of course, a complex and evolving mandate, not

¹⁶² See articles cited *supra* in headnote, second paragraph. More specific cites to particular articles will follow.

¹⁶³ See Hockett, *Mission Creep*, *supra*, headnote.

least because global financial markets and practices themselves are both highly complex and now rapidly evolving.¹⁶⁴

Now this mandate originally involved the IMF in overseeing and maintaining the global currency regime upon which product market integration depended.¹⁶⁵ It involved the IBRD in financing postwar reconstruction and new infrastructure development, both directly and indirectly.¹⁶⁶ Since the 1970s, 1980s and, especially, the later 1990s, the mandate has steadily come to involve rather more for all of the IFIs. And that has been largely in owing precisely to the IFIs' – and indeed globalization's – *successes* in carrying out the mandates' earlier stages.

The Fund's comparatively recent domestic structural adjustment and global financial market monitoring roles, for example, have been steadily transforming it into a critical determinant of the legal and regulatory infrastructures not only of cross-border financial transactions, but unavoidably of domestic financial arrangements as well.¹⁶⁷ The Bank, for its part, has come increasingly – and again, it would seem, unavoidably – to treat domestic pension and social insurance arrangements as critical components of the infrastructures that must be developed in order for economic development itself to continue steadily.¹⁶⁸

All of these developments were, at least in broad outline, both foreseeable and indeed foreseen during the IFIs' founding era in the mid 1940s. And so they were legally provided for in the constitutive documents, acts and shared understandings from which

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ “Indirectly” by effectively encouraging private lending in addition to supplying funds directly. See *id.* Also Hockett, *Three Pillars*, *supra*, headnote.

¹⁶⁷ See Hockett, *Mission Creep*, *id.* Also Hockett, *Gestalt-Switch*, *supra*, headnote.

¹⁶⁸ Id. Also Hockett, *Three Pillars*, *supra*, headnote.

the institutions grew.¹⁶⁹ The founders recognized, and in fact actively sought, the gradual integration of world product and service markets. They did so in the interest of both greater prosperity among, and closer integration between, national societies themselves.¹⁷⁰ They accordingly also saw need of a pragmatically adjustable role for international collaboration in the realm of finance and its regulation. That was so partly because financial services are themselves among the services that trade. Yet more importantly, it was because finance, financial markets and financial products are critically determinative of the operation, integration and stably sustainable growth of markets more generally.¹⁷¹

Now the prospects considered in Part IV just above, I believe, fall quite squarely within this same province, both as a prudential and as an ethical matter. Prudentially speaking, global trade and investment liberalization seem to have entered more turbulent political waters in the last decade or so. The process's perceived "losers" have been growing more numerous, more vocal, or both. And it seems they are beginning to be heard and heeded – not just by activists and agitators, but by leaders and legislators as well. Indeed, the two leading candidates now for the Democratic Party nomination for the Presidency of the U.S. are both actively challenging the WTO and NAFTA. Popular cable television commentators are not far behind – indeed they seem well ahead of – this curve.¹⁷² If the process of global economic integration is to continue and we are to avoid backsliding into a 1930s-style retrenchment, then, we'll do well to find means of making

¹⁶⁹ Id.

¹⁷⁰ Id. The perceived economic roots of the war were of course very much before their minds.

¹⁷¹ See id., especially *Mission Creep*.

¹⁷² See, e.g., sources cited supra, note 2.

more stakeholders among those who are currently growing both more disenfranchised and more disenchanted.

I have suggested over the course of Parts II through IV that one ethically attractive and intuitively satisfying means of making more stakeholders would be the making of more shareholders – holders of shares in the very firms that now benefit by globalization. This form of stake is of course financial itself, in that shares are financial assets par excellence. And the means I’m proposing for spreading these shares are financial as well. So both in respect of ends – sustaining continued global market integration by better spreading such integration’s financial benefits – and in respect of means – financial engineering means – what I suggest here looks clearly to implicate the IFIs’ developing mandates.

This is what I mean, then, “more broadly” in saying the IFIs are implicated by what I’m proposing. What do I mean more narrowly? I mean this: As I have noted elsewhere, the IFIs’ proper roles in facilitating sustainable global economic integration can be helpfully schematized as falling within any of four quadrants formed by two axes.¹⁷³ The first axis is that running between what we can call “programs” and “policies.” This divide is rooted in the structures of the IFIs’ enabling treaties themselves. It principally involves the IFIs in developing “policies” to encourage and facilitate particular kinds of member state “program.”¹⁷⁴

The second axis is that running between what I individuate as “opportunity” and “risk.” These amount to the financial faces, respectively, of globalization’s

¹⁷³ See Hockett, *Gestalt-Switch*, supra, headnote.

¹⁷⁴ Id.

aforementioned “benefits” and “burdens.”¹⁷⁵ This axis is rooted, not in the IFI’s enabling treaties, but simply in the functional roles played by finance in human affairs.¹⁷⁶ And the IFIs’ mandates are best interpreted as charges to the IFIs to adopt policies which encourage and facilitate state programs that not only increase opportunity and decrease risk, but that work specifically to *spread* what I have here been calling “ethically exogenous” opportunity and risk.¹⁷⁷

The program/policy and opportunity/risk axes form four quadrants according to which we can readily classify and interpret a great many opportunity- and risk-spreading state programs encouraged and facilitated by specific IFI policies.¹⁷⁸ So, for example, land reform, basic health, literacy and education programs carried out within states are of course ethically exogenous opportunity spreading programs. And the Bank in particular has developed policies in favor of encouraging and indeed facilitating such programs.¹⁷⁹ The Fund’s and the Bank’s developing interest in eradicating corruption and even in fostering democracy, both in governments and in firm governance, can likewise be so interpreted.¹⁸⁰ Social insurance programs run by states, of course, amount to ethically exogenous risk spreading programs. And the IFIs’ recent attentions to “social safety

¹⁷⁵ Id.

¹⁷⁶ On the benefit side, finance amounts to opportunity in the quite literal sense that it enables people through the exercise of diligence to “make real” their potentially value-adding ideas. In effect, this is precisely what micro-loans, small business loans, corporate finance and venture capital finance all amount to. On the burden side, finance amounts to a means of trading, sharing, or more thinly spreading what would otherwise be thickly concentrated risk. This of course is one reason why insurance companies are considered to be financial institutions. It is also, of course, quite clearly observed not only in derivative and other hedging markets, but even in the more garden variety corporate securities markets themselves, a principal role of which is to assist firms’ owners in diversifying their investments and thus lessening their financial risks. See generally ROBERT HOCKETT, *CASES AND MATERIALS ON FINANCE, FINANCIAL INSTITUTIONS AND FINANCIAL REGULATION* (Thompson-West, 2008).

¹⁷⁷ Hockett, *Gestalt-Switch*, supra, headnote; and Hockett, *Three Pillars*, supra, headnote.

¹⁷⁸ Id. Also Hockett, *Macro-Hedging*, supra, headnote; and Robert Hockett, *Gaming as Microinsurance* (working paper, on file with author, 2008).

¹⁷⁹ See Hockett, *Gestalt-Switch*, supra, headnote.

¹⁸⁰ Id.

nets” amount to IFI policy developments along these lines.¹⁸¹ And I have been proposing additional, market-based such programs in other venues.¹⁸²

Where, then, do the SOP suggestions of Part IV fit in here? Well, to a degree they straddle the boundaries, occupying portions of all four quadrants. That would seem to render them especially good candidates for IFI concern. For it means they’re cognizable by the IFI’s from all vantage-points of their mandates. These observations are perhaps most obvious in respect of the opportunity/risk axis, where the straddle is, in a sense, conceptually inevitable. (I’ll say why in a moment.) In respect of the program/policy axis, on the other hand, the straddle is contingent: It is contingent, specifically, upon our pending decision post-Part IV as to how we wish to proceed. I’ll accordingly say just a bit here about the opportunity/risk axis, leaving the matter of program and policy to a fuller consideration of how best to proceed below, in Subpart B.

What I mean in speaking of an opportunity and risk straddle in the case of the SOP plans of Part IV here is fairly simple: It is that spreading shares in globalization-benefited firms to faultless outsourced Peters is to spread *both* ethically exogenous risk *and* ethically exogenous opportunity. It is to spread such risk because Peter no longer need bear this risk – which is, again, by hypothesis ethically exogenous¹⁸³ – alone. The risk to people like Peter – who might, when too old fully to retool, unforeseeably lose income in consequence of the sudden hiring of desperate Pauls who can work for much lower pay in much poorer countries with much lower costs of living – is now mitigated. It is mitigated by compensation paid Peter by Mary, who has benefited by luck and is now made to share some of her windfall gains. So the presently concentrated burdens

¹⁸¹ Id.

¹⁸² See supra, note 178.

¹⁸³ That’s what we mean in calling him “faultless.” See supra, Parts I, II.C.

wrought by globalization are de-concentrated. They are spread. And they are spread precisely by spreading a hitherto *likewise* concentrated *benefit* – the windfall gains gleaned by Mary.

The aforementioned benefit spreading, which here takes the form of share-spreading, also amounts to a form of ethically exogenous *opportunity*-spreading. It is opportunity-spreading in the straightforward sense that to own shares in firms which benefit by globalization is to own shares in future profits. Peters will glean future dividends, capital gains, or both, which they would not have gleaned before. They might even use some of these to finance “retooling” of themselves through vocational training, if young enough to be able to employ the new skills. Share-spreading of this sort also is *ethically exogenous* opportunity-spreading. It is so in the straightforward sense that it is financed, in effect, by recouping some of the windfall gains gleaned by the Marys.

The SOP structures described over Part IV, then, amount to means of facilitating the sharing across persons of ethically exogenous opportunity and risk. The sharing accordingly occurs in a manner that both increases the number of stakeholders in, and decreases the injustices wrought by, global economic integration. It is therefore precisely the sort of thing I’ve shown elsewhere to fall well within the bailiwick of proper IFI concern.¹⁸⁴

But now, *what form* of concern? How is the concern to be manifest? Are the SOP arrangements described in Part IV best viewed as primarily a matter of state “program,” which IFIs should adopt “policies” to encourage and perhaps facilitate? Or are we instead here considering the sort of program that either must, or at any rate would

¹⁸⁴ See Hockett, *Gestalt-Switch*, *supra*, headnote; and Hockett, *Three Potential Pillars*, *supra*, headnote.

best be, itself administered by some transnational institution or institutions, including one or more of the IFIs? That question takes us straight to more direct consideration of precisely what role the IFIs are apt to play in any global SOPs program. And here I incline to think “path dependence,” determined in part by already existent analogical precedent and in part by an already developing institutional backdrop, is apt to play an influential role.

B. How They Are Programmatically Implicated

There seems no question, then, but that the IFIs both (a) have good reason, and (b) are authorized, to take interest in the prospect of a global SOPs program. Hence our principal remaining question is what form that interest should take. Given the particular interests at stake and the institutional environment already in place, I suspect that the principal role for the IFIs will be: First, inventive and advocative; second, coordinative; and third, monitory. In the remainder of this Part I’ll explain what I mean here and why I believe it most likely. But I shall also, in keeping with the more aims of this Article, expressly leave open the prospect that IFI involvement might take some other shape.

The IFIs, then, first should undertake to design, and urge their members domestically to initiate, OutsourceSOPs and perhaps even CitSOPs as well. Second, they should propose, host and facilitate international cooperation in coordinating SOP policies across jurisdictions, in a manner encouraging safe participation and diversification of holdings by SOP beneficiaries. And third, the IFIs should add, to their already active surveillance agendas, the regulation and monitoring of SOP trusts. They should do this with a view to protecting beneficiaries and third parties from familiar forms of

exploitation and expropriation by opportunistic fiduciaries, pursuant to their now accustomed role in facilitating coordinated finance-regulatory policies worldwide.

In employing ordinal – “first,” “second,” “third” – terminology here, I intend to convey more than merely expository ordering. I mean literal, programmatically temporal ordering as well. That is to say, I think the order of exposition not only heuristically natural, but also to replicate that of the optimal *sequencing* of IFI involvement in any global SOPs agenda. I’ll explain why as I proceed in explaining my position here.

First as to design and advocacy: It might of course be wondered why the IFIs need design or advocate here at all. Do individual member states – particularly those with substantial populations of those I have been calling “Peters” – not face sufficient incentive already to institute systems of OutsourceSOPs and even CitSOPs? After all, it is their Peters who are unjustly deprived of work opportunities by outsourcing. It is their treaties that are making this possible. And it is their function to facilitate exogenous opportunity and risk sharing among their own citizens. What need for the IFIs to “incentivize,” then?

Furthermore, are states not, in addition to being already adequately incentivized, also perfectly capable of *implementing* SOP programs on their own, state by state? For again, after all, it is for them themselves to encourage SOP financing on the part of firms by trimming their *tax* take from firms that do so, or by conditioning trade liberalization on share issuance to outsourced employees as described in Part IV. Moreover, it is presumably they who will have to determine who among their citizenries qualifies for the benefit, as is currently the case with more familiar adjustment assistance.¹⁸⁵ And finally, there is already an extensive infrastructure of bank trust departments and investment

¹⁸⁵ See *supra*, note 140, and accompanying text.

companies – mutual funds in particular – that seem most likely to supply the SOP-requisite trust accounts;¹⁸⁶ and these operate under domestic regulatory arrangements.

The reply to all of these questions and observations is of course yes. And that is quite helpful to know for at least one reason we can immediately concede: Namely, that states can begin designing and instituting such programs as these to render globalization more unambiguously good for their citizenries, without having to wait for *others* to do so.¹⁸⁷ And, that they'll play a critical role, per familiar principles of subsidiarity, even in any eventual *global* SOPs infrastructure.¹⁸⁸ Nevertheless, things are more complicated than I have thus far suggested in a number of respects. And it is precisely these complications that constitute the principal points of needed entry for the IFIs.

For one thing, most simply and generally, it will be much better for the cause of sustainable *globalization* for *all* states with sizable populations of Peters to design and institute SOP-type arrangements of the kind sketched above in Part IV. That is so both for the justice- and prudence-based reasons laid out in Parts I and II.C, and for the more globalization-specific reasons discussed just above in V.A. “More” is straightforwardly “better” where just distribution is concerned.¹⁸⁹ And the IFIs, whose first mission is to facilitate precisely such continued globalization as mentioned, bear a natural interest in encouraging members to do domestically what is necessary to further that transnational purpose. This is indeed precisely why they encourage, as noted above in V.A, the

¹⁸⁶ We're not apt to wish to “reinvent the wheel” here.

¹⁸⁷ Hence my proposals in Hockett, *What Kinds of Stock Ownership Plans?*, supra, headnote.

¹⁸⁸ We might even analogize, here, to the federal/state “partnerships” familiar to child health care programs in the US. See *id.*

¹⁸⁹ For more on the straightforward betterness I have in mind here, see Hockett, *Whose Ownership?*, supra, headnote. For a formal proof of the claim, see Robert Hockett, *Market Completeness, Market Neutrality, and Ethically Cognizable Efficiency: An Ordinal Equivalence Theorem* (working paper, 2008, on file with author).

development of “social safety nets” such as the OutsourceSOP and CitSOP would themselves partly constitute.

Furthermore, within some polities Marys might be as influential as Peters, if not indeed moreso. And their perceived self-interests might not be what most of us would call “enlightened.” Moreover, many Peters in many jurisdictions might well believe that their only remedy from continued outsourcing is to push back against globalization itself. They might not realize, that is, that there are more direct and more carefully tailored, less globalization-threatening and “baby out with the bathwater” means of addressing their justified complaints.

The IFIs can accordingly serve a most useful agenda-setting or –influencing role within polities where our “everyone gains,” Part IV SOP solution has not yet been hit upon or gone mainstream. By adding a salutary voice within polities, then, and moreover by adding an *impartial, transnational* voice, the IFIs can play a critical role in the popularizing and spreading of SOP programs worldwide. That, again, in turn will facilitate the stable and steady continuance of distributively just market-integration to which the IFIs are, so to speak, constitutionally committed.¹⁹⁰

It also bears emphasis that some of the assumptions embedded in the questions with which I introduced the present discussion require more nuance. At least that is so if the questions are not to be misleading. And this takes us directly to the second, more than merely advocative role that the IFIs appear likely to play in connection with the instituting of any global SOPs program.

¹⁹⁰ That is to say, by dint of their mandates as enshrined in their constitutive documents – their enabling treaties.

Here, then, is the proverbial rub: It is true enough that national governments might be doing the actual taxbreak-encouraging or conditional requiring of SOP-financing by firms. And it is true that they'll also in all likelihood be doing the monitoring of claimants to beneficiary status of SOP programs, with a view to those claimants' bona fide "*faultlessly* outsourced" status. Finally, it also is true that there is already an extensive, privately provided infrastructure of bank trust departments and investment companies in place – an infrastructure apt to be utilized in the creation of SOP trust accounts and SOP beneficiary accounts. *But*, owing to the success of IFI-facilitated global financial market integration *itself*, what individual *states* do vis a vis the financing of firms and the operating of financial intermediaries increasingly affects persons residing *beyond* their borders.¹⁹¹

General Motors, Microsoft, Unisys, etc. are not owned solely by American Marys. Nor are Daimler, Phillips or Unilever owned solely by Europeans, or Toyota and Sony by Japanese. Firms increasingly offer and sell their shares worldwide. And the holding of savings and investment portfolios, too, increasingly happens across borders.¹⁹² This all means, among other things, that what a particular state encourages or requires firms over which it has jurisdiction to do increasingly affects non-nationals as well as nationals.

And that in turn means, not only that *non-national* Marys over whom a government lacks jurisdiction might feel differently than *national* Marys about having to share gains with national Peters – especially if it is easier for national Peters to gain beneficiary status than, say, Mary's nation's Peters: It *also* means that nationally and non-nationally located *firms* can fare differently according as Marys "vote with their feet"

¹⁹¹ See, e.g., Hal Scott, INTERNATIONAL FINANCE 863-88 (14th ed., 2006).

¹⁹² *Id.*

– their investment moneys. Differential faring of this sort would be inimical to the ideals of global market integration. What is more, differences in treatment of primary-issuing firms and financial intermediaries nation by nation would tend to discourage global diversification of holdings. And such diversification is a necessary predicate to optimal asset security among the world’s shareholders.

I trust that I need not continue with this line of observation. You get the idea: For a global SOPs plan to be widely experienced and appreciated as fair and to work optimally, it will have to treat all global Peters and Marys as close to alike and impartially as possible. That means that there is a role for impartial international organizations to coordinate efforts among nations, to harmonize substantive standards and procedural implementation. And this is, of course, yet another role that the IFIs – especially the IMF now – already play.¹⁹³

Insofar as globalization is truly a global community project, then, and insofar as this project implicates something like a global SOPs program to smoothen and thus underwrite the project’s continuance, it calls for *coordinative* assistance given such programs by the same institutions as assist with coordinating the *other* policies, programs and processes of global integration. In the present context, that means the IFIs. So, in addition to advocating the coordinated adoption of SOP programs by member states, and supporting the design and fine-tuning of such programs through their research and related expertise, the IFIs will do something else: They will constitute natural fora for the coordinating itself – the coordinating of substantive standards, implementary and operational strategies, and the like. They’ll be doing in respect of the SOP form of global social insurance, that is, precisely what they do now already in respect of global finance-

¹⁹³ See Hockett, *Three Potential Pillars*, supra headnote.

regulatory architecture.¹⁹⁴ This takes us straight to the third, final “phase” of what I think the most likely course of sequenced IFI involvement.

Perhaps above all else, the kind of coordinating that many of the IFIs and especially the IMF do now is the coordinating of regulation.¹⁹⁵ The financial services industry, as we have long known, is particularly vulnerable to occasional outbreaks of mutually reinforcing hyper-speculative and opportunistic behavior on the part both of fiduciaries and of others who trade on their own accounts. All of these are people some of whom sometimes find the temptation to make a quick buck, typically through sophisticated means not readily detectable even by experienced regulators let alone uninformed, inexpert clients, difficult to resist. And when such things happen, not only can innocent parties’ life savings be wiped out with little more than a keystroke or two, but systemic third party effects can be devastating as well.¹⁹⁶

It is precisely for these reasons – the special vulnerability of inexpert clients, the systemic effects on the wider economy and thus uninvolved third parties, and the high money stakes – that even many traditionally anti-regulatory, politically “conservative” personages recognize the need for at least *financial* regulation.¹⁹⁷ Such reasons also, together with the need to coordinate regulatory strategies in a world whose financial markets are now integrated even while regulation remains national and polycentric,

¹⁹⁴ This complementarity of social insurance and financial regulation is treated more fulsomely in ROBERT HOCKETT, *WHOSE OWNERSHIP? WHICH SOCIETY?* (under contract, Oxford University Press), and ROBERT HOCKETT, *FINANCE, FINANCIAL INSTITUTIONS, AND FINANCIAL REGULATION* (forthcoming, Thomson-West 2008).

¹⁹⁵ See Hockett, *Mission Creep*, *supra*, headnote.

¹⁹⁶ Witness, by way of particularly recent example, current turmoil across financial markets generally rooted in the particular decisions of a few overeager subprime mortgage lenders several years ago. Such examples can of course be proliferated from decade to decade.

¹⁹⁷ Even Ronald Reagan, the fellow who brought you “government is not the solution, government is the problem,” is said to have extolled the virtues of the SEC. See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* vii (2d ed., 2006).

underwrite the role of the IFIs in researching, developing and facilitating the smooth operation of the global finance-regulatory architecture.

You see where this is going: A global *SOPs* program would make substantial shareholders of a vastly large number of people worldwide. *Firms* worldwide will increasingly come to be owned, in varyingly sized parts, by virtually all of the world's adult inhabitants. Their shares will be held and managed by financial intermediaries, which will accordingly hold power and face temptations of kinds quite familiar but on a scale vastly larger than before. A global shareholder society will also be a global risk-bearing society: A society of persons at risk of financial predation. To build such a society, in the end, is worth the risk; but only insofar as the risk can be mitigated along lines developed by domestic authorities over the past fifty years or so.

The final role of the IFIs in connection with any global *SOPs* program, then, will be a straightforward extension of – or rather, augmentation of – what probably is by this point their best known role: In a world that increasingly comes to look like a global shareholder society – in which national citizens transnationally hold shares in transnational firms in accounts with transnationally operating financial intermediaries – the IFIs will have to assist national regulators in *protecting* their shareholder citizens, as well, therefore, as the global financial system qua system. When we get there, of course, things will look much as they do now, “only moreso.” Likewise, methinks, the IFIs.

CONCLUSION: OUR FORTHCOMING GLOBAL SHAREHOLDER SOCIETY

We have covered a good bit of ground here, doubtless more than enough to warrant leaving off for the present. Perhaps ironically, however, we have only just

begun. For as mentioned a number of times already over the course of this Article, the aim has been more exploratory than flatly advocative.

The processes of global market integration have been remarkably successful to date, particularly when measured against the backdrop of those world conditions that embarked visionary world leaders like Maynard Keynes and Harry White, in the mid 1940s, upon the course that's now ours.¹⁹⁸ Those processes also have brought many benefits to many people, and continue to do so – including not only many of the world's hitherto most disadvantaged people, but indeed also its most *unjustly* disadvantaged people at that.

But global market integration also is occasioning losses – including, again, unjust losses – as well. Until we get serious about developing means of addressing these, the world is apt not only to remain less just than it could be, but also to lie prey to backsliding in the unsatisfactory direction from whence we've but recently come.¹⁹⁹ It seems clear that the best means of addressing these losses – “best” as measured both against our motivating core ideals and against our feasibility-constraining endowment sensibilities as discussed above in Parts I and II.C – are financial in nature.

It also seems clear that, just as the project of globalization is a global project, so is the project of rendering globalization more just and sustainable a global project. It is a project in which global institutions must play a critical role. And since it is preeminently a financial project, it is a project in which our global financial institutions and global financial architecture in particular will play a critical role.

¹⁹⁸ See Hockett, *Macro to Micro to “Mission Creep,”* supra headnote.

¹⁹⁹ Two words for you here: “Smoot-Hawley.”

The precise contours of these roles will of course ride in part on the contours of the programs we ultimately devise. But I hope in the foregoing pages at least to have sketched out a plausible direction in which that devising might proceed. By way of a last, parting thought for the moment, think of what it will mean should we succeed: We will have attained to a goal that has long been the dream not only of internationalists, but even of more domestically oriented advocates of a just and sustainable economic order. We will have laid the foundations for a global society *all* of whose members partake, as part-owners, of the means by which prosperity is generated. There will be no more need of division between classes. Nor will there be need of “protectionist” resurgences or Seattle-style riots. “Globalization” will again be embraceable by idealists, not just by “offshoring” entrepreneurs in search of extractable surplus.

We all of us long have been, like it or not, global stakeholders. I believe we shall all make that inescapable stakeholding not only more bearable, but more just and indeed more fulfilling, by making ourselves global shareholders as well.