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# Toward a Global Shareholder Society

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## TOWARD A GLOBAL SHAREHOLDER SOCIETY

ROBERT HOCKETT\*

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\* Associate Professor of Law, Cornell Law School. Many thanks to Jagdish Bhagwati, Jack Barceló, Christian Barry, Rich Edwards, Richard Freeman, Henry Hansmann, John Head, Daniel Markovits, Muna Ndulo, Thomas Pogge, Sanjay Reddy, Michael Reisman, Annelise Riles, John Roemer, John Taylor, Chantal Thomas, Joel Trachtman, Roberto Unger, participants at the Carnegie Council ("Carnegie") Symposium on Global Justice and Global Institutions, participants in the Cornell Symposium on Global Justice, participants in the American Society of Int'l Law (ASIL) Conference on Developing Countries and the WTO Legal System, participants in the Law and International Financial Institutions conference held at the University of Kansas, participants in the Clarke Center "Law in Context" Conference held at Cornell University, and workshops at the University of Minnesota Law School and Brooklyn Law School for helpful comment, criticism, and encouragement.

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) [hereinafter Hockett, *Institutional Fixes*]; Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720 (2006) [hereinafter Hockett, *Limits*]; Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion*, 36 METAPHILOSOPHY 93 (2005), reprinted in GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE 90 (Christian Barry & Thomas Pogge eds., 2006) [hereinafter Hockett, *Three Pillars*]; Robert Hockett, *From "Mission-Creep" to Gestalt-Switch: Justice, Finance, the IFIS, and Globalization's Intended Beneficiaries*, 37 GEO. WASH. INT'L L. REV. 167 (2005) [hereinafter Hockett, *Gestalt-Switch*]; Robert Hockett, *Just Insurance Through Global Macro-Hedging: Information, Distributive Equity, Efficiency, and New Markets for Systemic-Income-Risk-Pricing and Systemic-Income-Risk-Trading in a "New Economy,"* 25 U. PA. J. INT'L ECON. L. 107 (2004) [hereinafter Hockett, *Global Macro-Hedging*]; and Robert Hockett, *From Macro to Micro: "Mission Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153 (2002) [hereinafter Hockett, *Macro to Micro*].

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) [hereinafter Hockett, *Of ESOPs*]; Robert Hockett, *Why (Only) ESOPs?*, 12 STAN. J.L. BUS. & FIN. 84 (2006) [hereinafter Hockett, *Why ESOPs?*]; Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society,"* 79 S. CAL. L. REV. 45 (2005) [hereinafter Hockett, *Jeffersonian Republic*]; and Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005) [hereinafter Hockett, *Whose Ownership?*].

## ABSTRACT

With the American economy seemingly stalling, the global economy thereby imperiled, and another electoral campaign season well underway in the United States, the "outsourcing" of jobs from the developed to the developing world is again on the public agenda. Latest figures indicate not only that layoffs and claims for joblessness benefits are up in the United States, but also that the rate of American job-exportation has more than doubled since the last electoral cycle. This year's American political candidates have been quick to take note. In consequence, more than at any time since the early 1990s, continued American, and with it other developed economies', participation in the World Trade Organization and processes of global economic integration more generally appear to be up for grabs.

It is not clear, on reflection, how to regard these developments from a normative point of view. On the one hand, there seems no gainsaying the claim that the gradual removal of transnational trade and investment barriers has resulted in a more rapid economic growth worldwide. That growth appears to be lifting many once desperately poor persons out of their erstwhile penury. On the other hand, there is also no denying that global trade and investment liberalization are wreaking losses at least as conspicuous as the gains. Many, if not most, of the victims of globalization are those who until recently occupied positions much like those that are coming to be occupied by globalization's more sympathetic beneficiaries, and who climbed out of them via precisely such legislated standards as 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. This way the latter are directly benefited by the very processes that currently harm them. The method proposed is to adapt the familiar Employee Stock Ownership Plan, or "ESOP," to spread firm-shares not simply to current labor, but to outsourced and otherwise harmed "shadow" labor as well. The Article also proposes means of diversifying the portfolio risk that will face "OutsourceSOP" participants, and maps the supporting role apt to be played by such globalization-constitutive financial institutions as the IMF and the World Bank. In the long run, the Article urges,

we have here the makings of a grander ambition that all the world's inhabitants can jointly support—a "Global Shareholder Society."

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1. INTRODUCTION: THE QUANDARY OF ROBBED "PETER," PAID "PAUL," & OVERPAID "MARY"

With the American economy seemingly stalling, the global economy consequently imperiled, and another electoral campaign season well underway in the United States, the "outsourcing" of jobs from the developed to the developing world is again on the public agenda. The latest figures indicate not only that layoffs and claims for joblessness benefits are up in the United States, but also that the rate of American job-exportation has more than doubled since the last electoral cycle.<sup>1</sup> Corroborative data concerning resultant wage- and benefit-stagnation, as well as declining workplace health and safety standards, now abounds.<sup>2</sup> This year's American 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 U.S. political parties. These issues are also the stuff of now nightly jeremiads by popular news pundits on American cable news programs.<sup>3</sup> More than at

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<sup>1</sup> See *Morning Edition: Offshoring Doubles, But Political Focus on Retraining Workers*, (NPR radio broadcast Mar. 3, 2008) (discussing the phenomenon of increased offshoring of jobs coupled with political reactions to the increase), <http://www.npr.org/templates/story/story.php?storyId=87851332>.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., LOU DOBBS, *WAR ON THE MIDDLE CLASS: HOW THE GOVERNMENT, BIG BUSINESS, AND SPECIAL INTEREST GROUPS ARE WAGING WAR ON THE AMERICAN DREAM AND HOW TO FIGHT BACK* (2006) (examining the negative impact of special interest groups and other political organizations on the American middle class); LOU DOBBS, *EXPORTING AMERICA: WHY CORPORATE GREED IS SHIPPING AMERICAN JOBS OVERSEAS* (2004) (decrying the impact of free trade on the American middle class). May God forgive me for citing these but they do appear to be representative of a distinct and increasingly pronounced strain of the present day discourse on globalization.

any time since the early 1990s, it seems, continued American participation in the World Trade Organization (WTO), in the North American Free Trade Agreement (NAFTA), and in the processes of global economic integration more generally appear to be up for grabs. The United States is but one developed country in which public discourse is taking this turn.

It is not really clear, on reflection, how to regard these developments from a normative point of view. Slogans aside, global trade and investment liberalization present a genuine quandary to those who are serious about justice and human well-being. On the one hand, there is no gainsaying the claim that the gradual removal of transnational trade and investment barriers has been resulting in more rapid economic growth worldwide,<sup>4</sup> and that growth appears to be lifting many once desperately poor persons out of their erstwhile penury.<sup>5</sup> All of this seems to be happening, moreover, much in the way – pursuant, indeed, to the very dynamic – that students of political economy since the “classical” era of Smith, Ricardo, and Mill long have predicted: freely moving investment capital and purchase orders increasingly flow to those locales where they yield the highest returns on investment and expenditure. This flow of capital and purchase orders is raising the incomes of the once global poor, and is also lowering the prices of many goods and services for which everyone once paid much more.<sup>6</sup>

On the other hand, however, there is no denying that global trade and investment liberalization are wreaking losses at least as conspicuous as the gains: losses such as employment, declining incomes and workplace standards, and associated dislocations in the erstwhile “developed” economies.<sup>7</sup> Crucially, these losses do not accrue solely, mainly, or even noticeably, to complacent plutocratic rascals of the sort long since fingered by Smith and his “public choice” school descendants as being ever the principal

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<sup>4</sup> See generally Hockett, *Global Macro-Hedging*, *supra* headnote (suggesting solutions to systemic inequities in the new global economy).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> One even encounters discussion, not only of deindustrialization, but of backward movement along such venerable metrics of basic human development as health, education, and even literacy in the United States, for example. See, e.g., *id.* Hence, one presumes, the popularity of such phrases as “trading places,” used of the developed and developing economies.

advocates of “protectionist” policies of all stripes.<sup>8</sup> Rather, many, if not most, of the “victims” of globalization today seem to be those who until recently occupied positions much like those now coming to be occupied by globalization’s more sympathetic beneficiaries—and who indeed climbed *out* of their disadvantaged positions through precisely such legislated labor, health, and safety standards as offshoring firms now evade.<sup>9</sup>

It is precisely *this* that underwrites the quandary mentioned above. 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”? Symmetrically, what do we make of a status quo ante that kept faultless “Paul” in his poverty while benefiting faultless “Peter”? And finally, 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—what we might 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: this theory suggests that we seek means of commensurating the gains and the losses accruing 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—such as global GDP—then select policies best calculated to “maximize” it. One then labels policies that maximize aggregates of this sort “efficient,” yielding “more bang”—more aggregate benefit—for “the buck”—the same or lower cost. It is actually quite remarkable, on reflection, how many contributors to public discussion of globalization—and indeed of public policy more generally—adopt points of view of this general type.<sup>10</sup>

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<sup>8</sup> See generally Hockett, *Three Pillars*, *supra* headnote (discussing how the IMF, the World Bank, and the GATT/WTO can, and should, promote equal treatment and market completion).

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Hockett, *Limits*, *supra* headnote (reviewing and critiquing a treatise on international law that details the prominence of state actors in a global society). For more of the aforementioned “reflection,” see Hockett, *Three Pillars*, *supra* headnote; Hockett, *Gestalt-Switch*, *supra* headnote; Hockett, *Global Macro-Hedging*, *supra* headnote. See also Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179 (2005) [hereinafter Hockett, *The Deep Grammar of Distribution*] (examining common schemes within numerous distribution theories); Robert Hockett, *Taking Distribution Seriously* (Cornell Legal

It is exceedingly doubtful, however, 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 plausibly be expected to acquiesce in their “robbery” indefinitely, simply because some of the spoils assist “Pauls.” At least this seems so given the “Peters” own recent history of struggle to win wealth shares from less sympathetic and no more deserving rich “Marys,” who presently appear to be benefiting along with—and, crucially, even *more* than—the “Pauls” at the “Peters” expense.<sup>11</sup> Political developments underway in the United States and other developed economies, mentioned in the opening paragraphs above, appear to bear out this prudential prognostication.<sup>12</sup>

But even more importantly than prudential considerations here, as an ethical matter it would seem neither the “Peters” who have been robbed through no fault of their own, nor anyone else rightfully can accept, without alteration or emendation, a systematic transfer—a regressive redistribution—from hypothetically faultless “Peters” to undeserving “Marys.” At least that is so if the “Peters” are truly faultless and the “Marys” are truly “undeserving,” and if some workable, ameliorative alteration lies to hand.<sup>13</sup> If the antecedent conditions obtain—that is, if the “Peters” are faultless and the “Marys” are less than deserving and

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Stud. Res., Paper No. 08-004, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1108217](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108217) [hereinafter Hockett, *Taking Distribution Seriously*]; Robert Hockett, *The Impossibility of a Prescriptive Paretian* (Cornell Legal Stud. Res., Paper No. 06-027, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=930460](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930460); Robert Hockett, *Why Paretians Can't Prescribe: Preferences, Principles and Imperatives in Law and Policy* (Cornell Legal Stud. Res., Paper No. 08-028, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266270).

<sup>11</sup> See Hockett, *Three Pillars*, *supra* headnote (describing how the Bretton Woods institutions, particularly the World Bank, have fallen short of their potential to bring about a just world economic order); Hockett, *Global Macro-Hedging*, *supra* headnote, at 114 (setting forth proposals for “more just and efficient systemic income-risk-sharing” among employers and employees).

<sup>12</sup> So would the growing chorus of anti-WTO protests worldwide, and also the protectionist backlash of the 1930s—forebear to the postwar Bretton Woods institutions themselves. See Hockett, *Gestalt-Switch*, *supra* headnote (restating many criticisms of the Bretton Woods institutions and the failure of the global market to promote global economic justice).

<sup>13</sup> *Id.* (discussing the question of agency on the part of beneficiaries and victims of global markets, and proposing a role for international financial institutions to undertake in pursuit of distributive justice).



are merely the beneficiaries of windfalls—then transfers from the former to the latter are, simply, unjust. By definition, it is wrongful to tolerate, let alone foment, remediable injustice.

This Article accordingly aims to propose and discuss one possible method of remediation that seems open to us—all of us sharing the globe. It proposes that we add a bit of financial “irrigation” to the processes of global trade and investment liberalization. The object is a set of financial arrangements that re-channel some of the gains that those mentioned processes presently channel away from the “Peters” to already advantaged “Marys,” back to those recently and now seemingly again disadvantaged “Peters.” Insofar as they do so, they not only remediate injustice, thus realizing the end that this Article sets for them, but also realize this end 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.<sup>14</sup> Hence they seem optimally to accommodate both ethical and prudential desiderata.

We can think of this Article’s proposed arrangements as financial “bypass surgery,” so to speak—a bit of added arterial flow to afford globalization a healthier heart. If the metaphor is apt, 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, hence globalization which all of us who share the globe can get behind and endorse. Indeed, it will be more. For the particular arrangements proposed here are such as to make all of us part owners in all of the world’s largest—its globe-straddling—firms. They are such as to make of us a global shareholder society.

“Smoke and mirrors?” some might now be asking. Well, no: finance. Or more to the point: financial engineering. The key to solving both our ethical assessment dilemma and our current political stalemate over globalization is to channel some shares in

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<sup>14</sup> “Endowment dispositions” refers to certain behavioral-psychological tendencies that behavioral economists and legal scholars have in recent years documented extensively. I will elaborate, as well as endeavor to substantiate the claims I have just made. See *infra* Sections 3 and 4 (elaborating on “endowment dispositions” and the means by which distribution goals ought to be accomplished). See also Hockett, *Whose Ownership?*, *supra* headnote (exploring the theoretical structure of ownership in an equal-opportunity society).

“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 we can make “Peter” part-owner of the firm that has displaced or discarded him. That way everyone not only wins, but wins in a way that is just as immediately intuitively—i.e., endowment-psychologically<sup>15</sup>—as it is ethically attractive. Indeed it is a way that takes concrete and straightforward steps toward realizing a hope that seems implicitly to have underwritten countless denunciations of “globalization” since the dawn of the modern era over two centuries ago.<sup>16</sup> Such is the prospect this Article explores.

The Article proceeds, then, as follows: Section 2 first fleshes out in more detail who is meant here by “Peters,” “Pauls,” and “Marys,” as well as what is meant by “robbed,” “faultless,” “deserving,” and “undeserving” in characterizing these personages. This serves to sharpen the quandary to which this Introduction has been referring—the assessment dilemma. It also serves to highlight some premises that appear to underwrite that quandary—premises that empirical work can serve either partly or fully to corroborate or falsify.<sup>17</sup>

Section 3 then elaborates the structure of a familiar share-spreading prototype from which this Article’s proposal less familiarly, but straightforwardly, extends—the employee stock ownership plan, or ESOP. The ESOP, as it happens, is woefully inadequate to the task for which it was originally embraced by the United Kingdom Parliament and the United States Congress—the provision of income security to U.K. and U.S. laborers. However, the financial structure of the ESOP, and that structure’s resonance with a number of deep-seated justice intuitions and behavioral-

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<sup>15</sup> “Endowment psychology” here refers to such familiar “behaviouralist” heuristics as loss-aversion—interpretive dispositions with which the proposals herein make accommodation. See *infra* Section 3.

<sup>16</sup> See, e.g., AMIYA KUMAR BAGCHI, *PERILOUS PASSAGE: MANKIND AND THE GLOBAL ASCENDANCY OF CAPITAL* (2005) (challenging a Eurocentric view of economic history that minimizes the interests and activities of non-European players and portrays globalization as necessarily a zero-sum game).

<sup>17</sup> The proposal can accordingly be taken for conditional in nature: if the premises drawn out in Section 2 are correct—which may be plausible but there is no space here to do more than partly corroborate this assertion—then the proposal would seem attractive.

psychological dispositions of the sort mentioned above,<sup>18</sup> hold at least one strong attraction—they render the ESOP 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.

Sections 4 and 5 carry out the project of analogical extension just described in two steps. Section 4 shows how readily the ESOP form can be varied simply by varying the patronage relations which both essentially define and ethically underwrite it.<sup>19</sup> Section 5 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 this is right, then we have here an elegant means both of addressing the assessment dilemma with which our discussion here has opened, and of winning more stakeholders in, and supporters of, globalization than it seems apt to keep should today's trends continue.

Section 6 then briefly treats of the central coordinating role that the international financial institutions (IFIs) both can and should take in facilitating, and perhaps even administering, such programs as those proposed in Section 5.<sup>20</sup> For, Section 6 maintains, 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

<sup>18</sup> *Supra* note 11, and accompanying text.

<sup>19</sup> By "patronage" I mean simply a sustained mode of relation between persons and firms. See generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996) (enumerating different patterns of ownership of firms favored within different industries and nations); *infra* Section 4. In the case of ESOPs, labor is the salient form of patronage. But see *infra* Section 4 (arguing that there are other forms of patronage, including faultlessly lost employment on the part of those lacking in "retooling" opportunity).

<sup>20</sup> The principal IFIs we will consider are the International Monetary Fund ("Fund," IMF) and the International Bank for Reconstruction and Development ("World Bank," "Bank," IBRD). But much that Section 6 sets forth 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 apply to the Group of Eight (G8), the Organization for Economic Cooperation and Development (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*, *supra* headnote; *infra* Section 6.

Bretton Woods IFIs in particular—are designed in their globalization-complementary roles.<sup>21</sup> Indeed, Section 6 argues, 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.<sup>22</sup>

The Conclusion then briefly addresses anticipated objections and looks forward.

## 2. THE QUANDARY SHARPENED AND 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 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. These seem in turn 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 we might somewhat more preciously call “ethically exogenous resources.”<sup>23</sup> These are things nobody has produced and thus no one can claim

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<sup>21</sup> See Hockett, *Global Macro-Hedging*, *supra* headnote (exploring the intended role of the Bretton Woods IFIs).

<sup>22</sup> *Infra* Section 6 (arguing that the International Trade Organization’s envisioned role may be carried out by a reinvented IMF and World Bank). See also Hockett, *Macro to Micro*, *supra* headnote (defending the IMF’s departure from its stated mandate in dealing with Asian financial crises in the late 1990s).

<sup>23</sup> This is what I call them in the sources cited *supra* headnote. Some call them “luck,” some “advantage,” some “resources.” See, e.g., Hockett, *Three Pillars*, *supra* headnote, at 111. Another name for them that has been proposed 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 PETER DRUCKER, *THE PENSION FUND REVOLUTION* (1996).

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.<sup>24</sup>

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 we refer to accumulated knowledge, practical know-how, even the languages in which we generally think and through which we communicate.<sup>25</sup>

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, one suspects, tend implicitly to be viewed as what we are 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 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—all of us who share the globe, 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

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<sup>24</sup> Hillel Steiner has an evocative name for it, calling it the "global fund." See HILLEL STEINER, AN ESSAY ON RIGHTS 270 (1994).

<sup>25</sup> 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: THE SOCIAL DYNAMICS OF GLOBALIZATION (forthcoming from Yale University Press, 2008).

concern surely must include concern that persons bear access to the physical stuff of which successful, well-faring lives are built up.<sup>26</sup> 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 just mentioned must surely amount to concern for material equality: that is to say, equality of access to ethically exogenous resources and opportunity.<sup>27</sup> And *this*, one suspects, 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 to think intuitively 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. Hence we view all human beings as bearing equal claims to whatever resources are out there that nobody now living is actually creditable with having responsibly brought into existence.<sup>28</sup> This is just part of what it is, ethically speaking, for all of us who share the globe to regard one another as equally human, equally deserving of ethical regard, equal in justice. The first two assumptions are ethical-theoretic in nature. They are grounded in widely-shared principle, which do not appeal to “facts on the ground.”<sup>29</sup> The remaining assumptions, by contrast, involve empirical elements as well as theoretical ones.

The third assumption is that the endowment of global “stuff,” referred to per the first assumption, is not *actually* distributed equally in the pro rata manner described per the second assumption. It 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 or even cultural resources, where the continuing *in rem* jurisdiction or title is largely enshrined in

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<sup>26</sup> The claim here is not that such stuff is the sole “input” to well-faring, or “welfare,” but simply that these items are among such inputs—that physical items are one of the foundational aspects of human well-being or welfare.

<sup>27</sup> For more on this, see Hockett, *Taking Distribution Seriously*, *supra* note 10.

<sup>28</sup> “The Creator has bestowed this manna upon *all* of us,” one might say in a more venerable idiom.

<sup>29</sup> See Hockett, *The Deep Grammar of Distribution*, *supra* note 10 and Hockett, *Three Pillars*, *supra* headnote, for more on the near-universality of these ethical postulates.

international law.<sup>30</sup> Others are born into wealthy families whose familial wealth is protected—and nowadays decreasingly taxed—under domestic property, tort, and even constitutional legal arrangements.<sup>31</sup> Still other people are faultlessly born *without* such advantages, perhaps even born with severe handicaps, for which neither domestic nor international law require or afford compensation.<sup>32</sup>

Insofar as all of this is the case, there are people in the world with more than, as well as people in the world 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” circumstances. So runs the third implicit assumption.

Further specification of this third assumption yields the fourth assumption. One can partition all persons entitled to our equal ethical concern into four subclasses.<sup>33</sup> Call the first class the “Ones.” The “Ones” are 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, born in rich countries, or both. They simply are lucky, favored by accident or fortune relative to others, and often protected in their exclusive enjoyment of such favor by law.

Lest the point here be misunderstood, it is important to emphasize what is *not* being suggested. 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, even most, of a particular “One’s” surplus might be ethically regarded as properly, in justice,

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<sup>30</sup> See generally Hockett, *Limits*, *supra* headnote (reviewing a treatise on international law that discussed state actors and their strategies, and relative differences in the distribution of assets among individuals).

<sup>31</sup> *Id.*

<sup>32</sup> It could be argued that the U.N. 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.

<sup>33</sup> For some purposes, three would suffice; for others, five or more might be preferable. This will be developed later in the Article.

belonging to him. The point here is simply that not *all* of it does in the case of the “Ones” as a whole. Yet, some of these “Ones” have ethically exogenous holdings exceeding their pro rata entitlement.

The remaining classes of persons pursuant to the third assumption can quickly be characterized relative to the first. The second class, call them “Twos,” hold roughly their rightful pro rata shares—not substantially more and not substantially less. Then there is another class, “Threes,” who hold substantially, but perhaps not dramatically, less than their rightful pro rata shares. And finally there are those—the “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” (the reader could even call them “Fives”) might indeed be down near to “zero,” so to speak. Such “Fours” are deprived of sufficient basic resources required to sustain recognizably human lives.<sup>34</sup> 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, marked for death or profound suffering absent medical intervention.<sup>35</sup>

Thus runs the fourth assumption. It is simply that none of the just-defined classes—neither the “Ones,” “Twos,” “Threes,” nor “Fours”—are null.<sup>36</sup> To sum up, there are some who hold more than they have earned, others who hold more or less what they have earned, and still others who hold less than—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 experience our mentioned quandary tend to operate when thinking about global trade and investment liberalization. The fifth assumption is that the class of “Ones” is roughly coextensive with the class of significant residual claimants upon, and creditors of, business

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<sup>34</sup> A presently salient group of actual “Fours” (or even “Fives”) might be those confined to the refugee camps of Darfur, for example.

<sup>35</sup> 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 10 (analyzing the legal and policy aspects of distribution of social welfare).

<sup>36</sup> The “Twos” could drop out of the account without loss to the principal thrust of the argument, for reasons that will shortly become clear.



firms. The "Ones" 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.<sup>37</sup> A safe corollary assumption would be that significant portions of these people's portfolios are inherited or otherwise plausibly regarded as windfalls; but we will see that no such corollary is necessary to what this Article will be arguing.<sup>38</sup>

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. They are generally either white collar salary-earning, or union-scale blue collar wage-earning, workers for firms headquartered or substantially operating in countries with advanced economies. These people, particularly the high-waged and salary-earning, have for the most part been born into, and raised in, the generally 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.<sup>39</sup> They accordingly possess much in the way of well developed "human capital," "cultural capital," and "social capital."

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<sup>37</sup> For extensive empirical corroboration of this point, and graphic illustration of how comparatively few (in the neighborhood of five percent of) people hold so comparatively large percentage (over ninety) of corporate securities in the United States for example, see Hockett, *Of ESOPs*, *supra* headnote, at 897-912. Such figures, released annually by the U.S. Federal Reserve, among other compilers, might temper some of the more extravagant claims one sometimes hears in the States, to the effect that the United States is already possessed of an "equity culture." This Article, along with its predecessors cited above in the headnote, can accordingly be viewed in part as prompted by a hope to bring the United States, and the world economy more generally, into closer approximation to that ideal which some seem to think is already realized.

<sup>38</sup> 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*, Section 4; Hockett, *Of ESOPs?*, *supra* headnote, at 873-90 (discussing the concentrated nature of securities ownership in the United States).

<sup>39</sup> 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.

But they possess dramatically less than the “Ones” when it comes to inherited financial capital—creditor and ownership interests in firms.<sup>40</sup>

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, as well as subsistence agriculturists worldwide. The vast majority of these people, moreover, inhabit economically underdeveloped countries without much access to valuable material resources, inherited wealth, or even effective political, economic, and social infrastructures or educational and other institutions. “Social capital” and “cultural capital” are as scarce or as poorly distributed as is “natural capital” in the precincts inhabited by “Fours.” And so, in consequence, is “human capital” too.<sup>41</sup>

The seven assumptions just elaborated give rise to this Article’s opening quandary of Peter, Paul, and Mary. If the assumptions are at least partly correct, then global trade and investment liberalization will bear the following curious attributes. First, they will tend to most immediately 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.<sup>42</sup> And the benefits, realized largely because of the hiring of desperate “Fours” willing to work in unregulated environments for low wages, go

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<sup>40</sup> The assumption here would not rule out non-negligible stock-holding and bond-holding—direct, indirect, or beneficial—by “Twos” and “Threes.” The assumption simply argues 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*, Section 4; Hockett, *Of ESOPs?*, *supra* headnote, at 873–85.

<sup>41</sup> See Hockett, *Of ESOPs?*, *supra* headnote, at 873–85 (comparing the value of stocks held by “Ones” to the relatively low value of stocks held by “Twos” and “Threes”); see also Hockett, *Jeffersonian Republics*, *supra* headnote (promoting the ideals of an “ownership society”).

<sup>42</sup> See Hockett, *Three Pillars*, *supra* headnote (detailing how the IMF and the Bank worked towards equitable distribution in the aftermath of the Argentine and Asian financial crises); see also Hockett, *Global Macro-Hedging*, *supra* headnote (arguing that despite global market liberalization there is a disparity in profit distribution).

immediately to "Ones." If that is correct, then the "Ones" are those 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"—particularly those in 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 them in the developed jurisdictions,<sup>43</sup> the formerly salaried and higher-waged officers and other employees of these firms—"Twos" and "Threes"—begin to lose increments of salary, wage, and other benefits. And these latter were won, not many 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.<sup>44</sup> So the "Twos" and the "Threes" will be those labeled "Peters" in the Introduction. They now largely finance the gains realized by the "Pauls" and the "Marys."<sup>45</sup>

But if all of this is so, then it means that global trade and investment liberalization as presently conceived and executed are inherently ethically ambiguous, perhaps even altogether indeterminate. And it is precisely this ambiguity, it is hard not to suspect, that ultimately accounts for the difficulty described in the Introduction—the quandary that many of us worldwide tend to experience in attempting to determine whether globalization is a good thing, and thus what kinds of conditions, if any, should be superimposed upon any would-be continued, sustainable course of trade and investment liberalization.

Here, more precisely, is the fundamental problem: Insofar as it is possible to restrict comparison to "Ones" on the one hand and "Twos" and/or "Threes" on the other, simply leaving "Fours" out

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<sup>43</sup> 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 the latter course strengthens the force of the former course. *See id.*

<sup>44</sup> I am ignoring longer-term "rising tides lift all boats" type claims for the moment.

<sup>45</sup> *See generally* sources cited in *supra* headnote.

of account in a sort of ethical blind spot, there appears to be 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 and the relatively brief length of a working life.<sup>46</sup> If one fails to consider the "Fours" – that is, ignore the desperately poor, most of whom operate outside of the advanced economies – it seems pretty clear that globalization is altogether 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 over-endowed, the "Twos" are at best adequately endowed, and the "Threes" are under-endowed. So redistributing from the "Twos" and the "Threes" to the "Ones" yields a straightforward justice-loss.

It is tempting to suspect that many opponents of trade and investment liberalization, at least those who oppose it without any misgivings, think along these lines. Yet they may not consider the "Fours," who are often in an ethical blind spot, rendering it easy to suppose globalization to be unambiguously wrongful.<sup>47</sup>

Now, if by contrast, one restricts comparison to the "Twos" and/or "Threes" on the one hand and the "Fours" on the other, leaving the "Ones" out of account in the ethical blind spot, *then* one faces 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, as one might call it – 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." Looking again at the "Ones," this new distribution – which, again, is the hypothetically ethical equalization of ethically exogenous global "stuff" – will appear as a straightforward justice-gain.

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<sup>46</sup> See, e.g., Hockett, *Global Macro-Hedging*, *supra* headnote (discussing the effects of global market liberalization on the global economic order).

<sup>47</sup> It might also be argued, of course, that they ignore the lowering of prices, which benefits "everybody." This argument is weak 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.

Just as it is the "Fours" who appear to be forgotten by those who view globalization as unambiguously wrongful, so it seems to be "Ones" who are forgotten by those who view globalization as straightforwardly salutary—all those who say, simply, "think about all those desperate global poor who have jobs now." These people are of course partly right: one *should* be thinking about the desperate global poor—the "Fours." But the "Ones" are left out of the account in this case. Yet they can no more rightfully be left out of account in this case than can "Fours," if what ought to be all of the justice-accounting is to be complete. And this is, of course, the root of the assessment dilemma described in the Introduction.

If this is correct, then all who share the globe are faced with both a challenge of vision and, yet more urgently, a challenge of action. For if the just-proffered diagnosis is correct, then the only way to adequately and usefully address the quandary would seem to require a two-fold epistemic and programmatic approach. First, epistemically speaking, one must keep *all* relevant parties—the "Ones," "Twos," "Threes," and "Fours"—simultaneously in view when assessing, structuring, or rerouting the course of global trade and investment liberalization. Second, programmatically speaking, one must seek means of ensuring that "Ones" but not "Fours" *share the gains* wrought by the windfalls of trade and investment liberalization with "Twos" and, especially, "Threes."

Note that the second task is in a sense more urgent than the first. That is because, unless one can find means by which the "Ones" share their gains with the "Twos" and the "Threes," there seems no way of acting at all upon the first task. Successful resolution of the epistemic problem here, it seems, depends upon resolution of the practical problem. Until we discharge the second task, that is, it appears 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, while the assessment domain seems completable only by practical measures that actually link "Ones," "Twos," "Threes," and "Fours." Absent a practical linkage of all, either the "Ones" or the "Fours" are missing from one horn of our ethical dilemma. And there seems no way to determinately adjudicate, 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.”<sup>48</sup>

Unless, then, we design practical means of connecting global “Ones,” “Twos,” “Threes,” and Fours, in our ethical assessments we are effectively attempting to deal with a trivalent ethical problem by means of a two-variable formula.<sup>49</sup> Only by adding a variable does one render the problem soluble. And only in that way, accordingly, is it possible to ensure that globalization might constitute a straightforward ethical gain. The pressing normative-theoretical problem that is the assessment dilemma, that is, appears to be soluble only by practical means. One must embark on a project of institutional design.<sup>50</sup>

It is tempting to think, per this last observation, that there is some of the requisite “connective tubing” at hand. The institutions that must be designed are financial in nature. The task is one of financial engineering: financial engineering on behalf not simply of large firms in this case, but also on behalf of ordinary folk—“Twos” and “Threes”—as well. The remainder of this Article will undertake to unpack and elaborate upon that suggestion. The key is to start with a familiar means by which the United Kingdom and the United States already endeavor to make “capital” owners of “laborers,” to employ the classical terminology, and then to adapt the structure to our present purpose. This Article will do that in Sections 3 through 5. Section 6 will then seek to explain why the

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<sup>48</sup> 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.

<sup>49</sup> Trivalent because, for the purposes of assessing the transfers, “Twos” and “Threes” can be lumped together as those whose holding of the global endowment of ethically exogenous “stuff” is just about right. It is the “Ones” and the “Fours” who are the real “outliers”—those with much more and much less, respectively, of their pro rata entitlements. The “two-valued formulae,” then, are: “Ones” as compared to “Twos-and-Threes” in the case of those who unequivocally decry globalization, “Twos-and-Threes” as compared to “Fours” in the case of those who univocally defend it.

<sup>50</sup> 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 10. 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 is a species of what since Aristotle’s day we have called “practical reason.”

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 well over sixty-odd years ago.<sup>51</sup>

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

Intriguingly and indeed promisingly, 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—of employee benefit plans. In the United States, that is done via the Employee Retirement Income Security Act (“ERISA”).<sup>52</sup> Yet the ultimate aim, as ERISA’s full title suggests, has been mainly to encourage and protect investment for one limited purpose: retirement security.<sup>53</sup>

There is one partial exception, however: The employee stock ownership plan (“ESOP”), was originally designed, and continues to be advocated, at least partly as a means to foster the *pre*-retirement owning of firms by employees. For a number of reasons described elsewhere in the Article, and that many others have also explained, that is an over-modest aim.<sup>54</sup> But here the concern will be more with how the aim is affected, and why we seem willing to

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<sup>51</sup> This Article treats 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 Hockett, *Macro to Micro to “Mission Creep,” supra* headnote (discussing international schema created in response to global financial crises).

<sup>52</sup> Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. § 1001 (2000) *et seq.* [hereinafter cited by ERISA section number]. See also DRUCKER, *supra* note 23; JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* (The Found. Press, Inc. 1990) (discussing a variety of employment law topics, including ERISA). Here the discussion ignores 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.

<sup>53</sup> Congressional action culminating in the passage of ERISA was precipitated by the folding of the Studebaker corporation, which, bankruptcy proceedings subsequently discovered, had grossly underfunded, and indeed “raided,” its employee pension fund, leaving the suddenly unemployed pensioners doubly bereft. See LANGBEIN & WOLK, *supra* note 52, at 68–84. Those familiar with recent bankruptcies, particularly in the airline industry, might be tempted to say *plus ça change*.

<sup>54</sup> See Hockett, *Of ESOPs, supra* headnote, at 914–23 (arguing that ESOPs can be part of the method of distributing the benefits of globalization to all citizens).

affect it in the manner we do. For the mechanics and politics here would seem to be generalizable in ways that might benefit “Twos” and, especially, “Threes.” The plan here is to exploit that ability to be generalized below.

A preliminary terminological point before proceeding: in speaking of ESOPs (“Plans”), one can be speaking of any of several distinct but related species of financial arrangement.<sup>55</sup> All, as befits their shared name and as intimated above, aim to facilitate laborers’ acquisition of shares in the firms for which they work.<sup>56</sup> By far the most common such set of arrangements, however, and the one that this Article will thus engage, is the so-called “leveraged” ESOP.<sup>57</sup> This, as the qualifier suggests, is the plan that employs credit in the share-acquiring process.<sup>58</sup>

### 3.1 What They Do: Simple Mechanics and Spread

The leveraged ESOP works as follows:<sup>59</sup> The employing firm adopts an ESOP as a sponsored ERISA plan—more specifically, a defined contribution plan.<sup>60</sup> Like other ERISA plans, the ESOP takes the legal form of a trust.<sup>61</sup> It is a distinct, even if firm-

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<sup>55</sup> See JOSEPH RAPHAEL BLASI, *EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF?* 64–84 (1988) (briefly cataloguing ESOP types).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 68–78.

<sup>58</sup> The principal non-credit-employing ESOPs—so-called “non-leveraged ESOPs,” “tax-credit ESOPs” (“TRASOPs”), and “payroll ESOPs” (“PAYSOPs”)—are briefly elaborated *id.* at 64–84.

<sup>59</sup> 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).

<sup>60</sup> 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 retirement, 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.

<sup>61</sup> ERISA § 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 to them by the plan’s trustee. It is regrettably not clear, however, whether the trust protections offered employees by pension trusts are as fulsome as those offered to beneficiaries of other trusts. See, e.g., *In re WorldCom, Inc. ERISA Litigation*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003) (finding that ERISA defines “fiduciaries,”



sponsored and ultimately board-directed, entity formed to acquire and hold stock on behalf of employees. Its administrator, although named and directed by the sponsoring firm's board or a firm-chosen committee,<sup>62</sup> accordingly bears fiduciary obligations to those employees.<sup>63</sup>

To begin with, the trust borrows funds from a bank or other commercial lender partly in exchange for a promissory note.<sup>64</sup> It uses the funds to purchase stock issued by the sponsoring/employing firm at fair market value.<sup>65</sup> The loan proceeds accordingly pass through the ESOP to the sponsoring/employing firm itself—the firm finances it—and the stock is then held in trust on behalf of the employees. The firm guarantees repayment of the loan by the ESOP to the lender, and the stock held in the ESOP is itself pledged as security.

Over time the sponsoring/employing firm makes regular cash contributions to the ESOP, just as in any other kind of 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.<sup>66</sup> As the loan is thus paid down, stock held by the trust is steadily released from its loan-securing role to individual accounts maintained severally on behalf of the employee/beneficiaries.<sup>67</sup> The proportions in which it is

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"fiduciary functions," and "fiduciary duties" more narrowly than does common law trust doctrine). See also *infra* note 84 for cases regarding the fiduciary duty of ESOP trustees under ERISA.

<sup>62</sup> ERISA § 403(a)(1). A partial exception, which need not here detain us, is found at ERISA § 403(a)(2).

<sup>63</sup> ERISA § 404(a)(1).

<sup>64</sup> Only "partly" for reasons that will be made plain over the next several sentences.

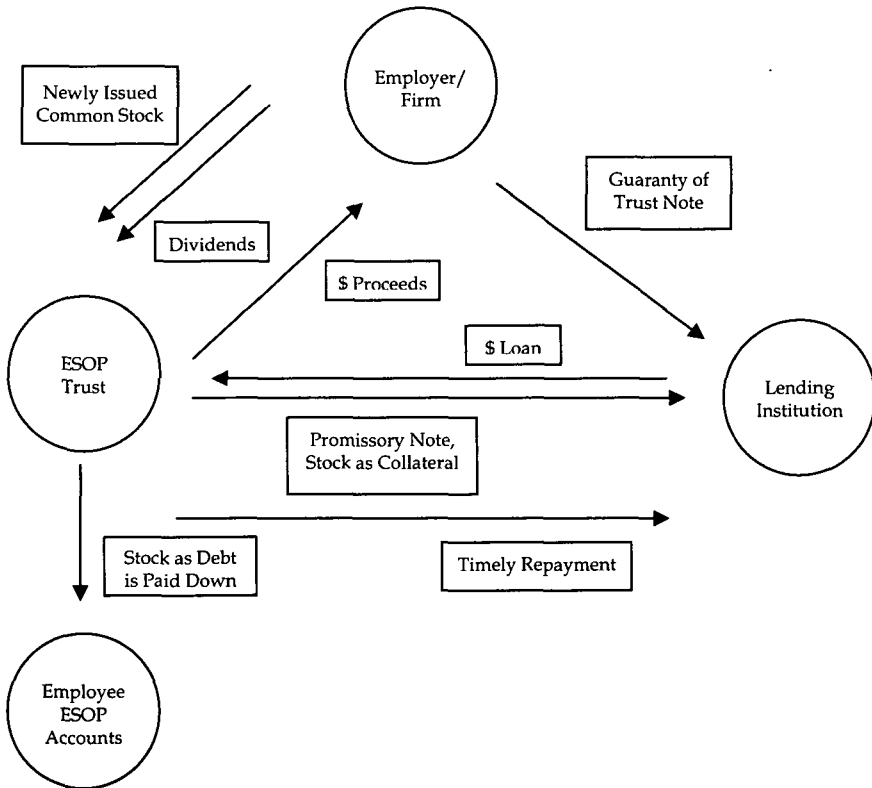
<sup>65</sup> Because the shares are purchased at fair market value, the purchase is sometimes misleadingly described by ESOP-proponents as an equity injection. In actuality, it is publicly subsidized debt financing, accompanied by a stock giveaway.

<sup>66</sup> 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. This dilutes the stake of previous owners—more on this presently.

<sup>67</sup> Typically the shares become transferable 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 will be shown presently. That is all significant when it comes to the question of just what "owning" should mean here, but it is not the subject of this Article. For more on that question, see Hockett, *Whose Ownership?*, *supra* headnote.

released to those accounts track the beneficiaries' labor-patronage of the sponsoring firm (their wages or salaries). Diagrammatically, things look like this:

FIGURE 1: FINANCIAL STRUCTURE OF A LEVERAGED ESOP ARRANGEMENT



Not surprisingly, in view of the arrangement's financial structure,<sup>68</sup> this all proves to work rather well as a method of getting more "capital into the hands of labor" (not to mention more debt financing to the firm, as will be shown presently). Some statistics are telling: By 1986, twelve years after ESOPs had gained congressional endorsement in ERISA, nearly five thousand firms

<sup>68</sup> 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 the government's role will show).

had adopted leveraged ESOP plans.<sup>69</sup> About twenty-five percent of those plans held more than twenty-five percent of the outstanding stock of their firms, and nearly two percent of them owned all such stock.<sup>70</sup> By 1990, over twelve million laborers—about ten percent of the workforce—in over ten thousand firms had come to participate in ESOPs.<sup>71</sup>

By the late 1990s, ESOPs were estimated to account for almost four percent of corporate equity-holding in the United States.<sup>72</sup> Moreover, the rate of ESOP growth, by this point had come to average between three hundred and six hundred new plans per year, accounting for between three hundred thousand and six hundred thousand new employee participants per year.<sup>73</sup> Some of the sponsoring firms over the past thirty years have been such familiar American stalwarts as Avis, Chicago Tribune, Delta, Federal Express, General Motors, Kraft, Maytag, Polaroid, Procter & Gamble, Quaker Oats, United Airlines, and Xerox.<sup>74</sup> Even

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<sup>69</sup> HANSMANN, *supra* note 19, at 105.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *id.* at 105 (describing the proliferation of ESOPs since the 1970s); Corey Rosen, *Employee Ownership: Performance, Prospects, and Promise*, in UNDERSTANDING EMPLOYEE OWNERSHIP 10–11, 20 (Corey Rosen & Karen M. Young eds., 1991) (listing firms that participate in ESOPs); Gianna Durson, *The Structure and Implementation of ESOPs in Public Companies*, in THE EXPANDING ROLE OF ESOPs IN PUBLIC COMPANIES 11, 23–27 (Karen M. Young ed., 1990) (listing additional firms that participate in ESOPs); DAVID P. ELLERMAN, THE DEMOCRATIC WORKER-OWNED FIRM 110 (1990) (noting the large numbers of ESOPs in the United States). ESOP-like structures have made significant headway in non-US jurisdictions as well. See Rosen, *supra* note 71, at 18–19 (discussing interest in, or attempts to implement, ESOPs in firms in other countries). A helpful catalogue of the 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 slightly less than half of employee-owned equity, and (b) the surprising number of firms on the list that are twenty or more percent employee-owned.

<sup>72</sup> See NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, STATISTICAL PROFILE OF EMPLOYEE OWNERSHIP (1997) (estimating 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. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Rosen, *supra* note 71, at 10–11, 20; Durson, *supra* note 71, at 23–27.

skeptics of ESOPs, and of the often eccentric financial pronouncements of the ESOP's inventor, Louis Kelso,<sup>75</sup> readily acknowledge their "rapid proliferation,"<sup>76</sup> hence concluding that "[s]omething is happening that requires attention."<sup>77</sup> But what is it that has been "happening," and why might it require attention? What do the telling statistics actually tell?

ESOP promoters historically 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. Louis Kelso stated that "the 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."<sup>78</sup> Similarly, Kelsonian acolyte Stuart Speiser asserted that "th[e] new capital . . . pay[s] for itself out of the increased profits flowing from expanded production."<sup>79</sup> And the reliably perky business journal, *Inc.*, wrote "there'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."<sup>80</sup>

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<sup>75</sup> Kelso routinely announced such putative discoveries as "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 (providing background on Kelso's ideas and writings). Economists do not appear to have found these discoveries compelling. It should be noted, however, that 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 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 79.

<sup>76</sup> HANSMANN, *supra* note 19, at 105.

<sup>77</sup> ELLERMAN, *supra* note 71, at 120 (emphasis omitted).

<sup>78</sup> LOUIS O. KELSO & PATRICIA HETTER KELSO, *DEMOCRACY AND ECONOMIC POWER* 62 (1986).

<sup>79</sup> STUART SPEISER, *A PIECE OF THE ACTION* 429 (1985) (emphasis added). See *supra* note 76 for more on this "pays for itself" locution.

<sup>80</sup> John Case, *A Company of Business People, INC.*, (Apr. 1993), <http://www.inc.com/magazine/19930401/3492.html> (discussing the growing interest in getting employees more involved in managing the business they work for).

But in fact the mentioned evidence is hardly “considerable” – at best it is thin and ambiguous.<sup>81</sup> 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 to be described presently. And the “several hundred percent greater efficiency,” (a quantity which, like wearily many Kelsonian magnitudes, is arrived at by unspecified means) is hardly “natural,” “economic,” or “financial” in any pre-legal or pre-political senses of those terms. For the real “Hidden Secret of [ESOPs’] 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, like many such benefits in the United States, through private channels.

### 3.2. *How They Do It: Private Channels, Public Benefits*

The most significant means through which private channels are brought into the public benefit are tax and ERISA advantages. These two factors, working in tandem, account both for the aforementioned “greater efficiency” of ESOPs as financing tools and for ESOP stock’s seeming 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. This Article will examine each in turn.

#### 3.2.1. *Tax Advantages*

Probably the most efficacious tax advantage that leveraged ESOPs uniquely confer upon sponsoring/employing/issuing firms is that the Internal Revenue Code allows firms to deduct contributions made to their plans. The firm may deduct those contributions, to an amount up to twenty-five percent of all compensation paid to a plan’s participants, from its taxable income.<sup>82</sup> That advantage works jointly with ERISA’s relaxation, in the case of ESOPs, of the now-customary mandatory-diversification understanding of the so-called “prudent investor”

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<sup>81</sup> See BLASI, *supra* note 55, at 25–27, 221–38 for plenary—and not unsympathetic—discussion of what evidence there is.

<sup>82</sup> I.R.C. § 404(a)(3)(A)(i)(I). ESOPs enjoy other tax advantages enjoyed by employee pensions more generally, most of which are noted below, but this Article’s focus will nevertheless be primarily upon what is unique to ESOPs.

standard to which employee pension trusts ordinarily are subject. In non-ESOP cases, ERISA requires that employee trusts be broadly invested; a plan will not typically be permitted to hold much of the sponsoring firm's equity.<sup>83</sup> ESOPs, however, are exempted from this standard,<sup>84</sup> 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.

The aforementioned "further financing"—the "purchase" of newly issued shares by the legally distinct trust for the employees—as noted, is leveraged. This simply means that the firm is effectively financing itself with debt while enjoying a publicly afforded tax break in return for affording employees new stock. As it happens, the lender *supplying* the leverage for ESOPs receives tax benefits too. Ordinarily, the lender's taxable income is the interest received on lent funds,<sup>85</sup> but on a loan to a leveraged ESOP, fifty percent of that interest historically has been excluded.<sup>86</sup> Thus 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.

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<sup>83</sup> ERISA § 404(a)(1)(C).

<sup>84</sup> 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) (finding that ESOP trustee had duty to act prudently with shares, even if that action went against a provision of the ESOP); Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) (holding that, because ERISA and ESOPs sometimes have competing goals, the actions of fiduciaries of ESOPs regarding shares will be subject to an abuse of discretion standard); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) (holding that courts will presume that ESOP fiduciaries' decisions to remain invested in employer stock is reasonable, although it may be challenged). 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).

<sup>85</sup> I.R.C. § 61(a)(4) (including "interest" in the general definition of gross income).

<sup>86</sup> I.R.C. § 133(a). *But see* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §§ 1602(a), 1602(c), I.R.C. § 164 (repealing the interest exclusion previously allowed under I.R.C. § 133(a) for all securities acquisition loans made after August 20, 1996, except for loans made pursuant to a binding written contract which was in effect before June 10, 1996).

There is more: ordinarily, dividends paid out to the holders of firms' shares are drawn from firms' after-tax incomes.<sup>87</sup> Dividends paid on the stock held in an ESOP, however, are deductible from taxable corporate income.<sup>88</sup> Capital gains reaped by the trust also go untaxed; they are deferred compensation.<sup>89</sup> The tax code also affords incentives to non-ESOP shareholders to transfer their shares to the ESOP. First, 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.<sup>90</sup> Second, fifty percent of the proceeds from sale of a sponsoring firm's stock to its ESOP are excludable from estate taxation.<sup>91</sup> 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.<sup>92</sup>

### 3.2.2. *Additional ERISA Advantages*

In addition to the just noted tax advantages, there are further ERISA 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 also from all so-called "parties in interest" – directors, officers, and principal shareholders.<sup>93</sup> ERISA, however, exempts ESOPs from that standard.<sup>94</sup> ESOPs also may *borrow* from such parties in interest in order to acquire employing firms' stock.<sup>95</sup>

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<sup>87</sup> This is true based on the revenue code's definition of corporate taxable "income." See I.R.C. § 311(a) (providing that a corporation may not deduct dividends from its gross income).

<sup>88</sup> I.R.C. § 404(k).

<sup>89</sup> I.R.C. § 501(a), (c), (d). This advantage is not unique to ESOPs as distinguished from other ERISA plans.

<sup>90</sup> I.R.C. § 1042(b)(1)–(2). Among the conditions are provisions stipulating 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.

<sup>91</sup> I.R.C. § 2057 (repealed 1989).

<sup>92</sup> I.R.C. § 2210 (repealed 1989).

<sup>93</sup> I.R.C. § 4975(c)(1)(A).

<sup>94</sup> 26 U.S.C. § 408(e).

<sup>95</sup> 26 U.S.C. § 408(b)(3), I.R.C. § 4975(d)(3).

### 3.2.3. Publicly Conferred Governance Advantages

There is more to the public benefit story than just tax and ERISA inducements. A cluster of *governance* advantages offered by ESOPs, in this case working through (publicly afforded) corporate and securities law, offer incumbent managers and otherwise satisfied shareholders<sup>96</sup> an added array of incentives. 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.<sup>97</sup> This decrease in voting power makes it more difficult for unsolicited would-be acquirers to assemble a controlling bloc of shares. Most importantly, the Delaware Chancery has held that this issuance legally *can* in fact be immediate, indeed even in express contemplation of an impending takeover bid.<sup>98</sup>

If new employee/owners reliable voting allies of would-be firm-acquirers, the ESOP's promise as a takeover defense would be attenuated. In actuality, however, new employee/owners do not ally themselves, interests-wise, with potential hostile acquirers. In any event, employee preferences scarcely matter because employee/beneficiaries rarely receive voting rights *ab initio*.<sup>99</sup> That

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<sup>96</sup> Including many newly owning employees, were they able to vote their shares (discussed *infra*).

<sup>97</sup> I say "nominally" independent here partly owing to several ESOP governance features to be noted presently, and partly owing to the role of the sponsoring firm's board in selecting and directing, indeed even functioning as, the ESOP trustee, see *infra* note 104.

<sup>98</sup> See *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 278, 290-91 (Del. Ch. 1989) (denying an injunction to halt the issuance of stock because the company's action was a good-faith, reasonable defense to a takeover). *But see* *NCR Corp. v. Am. Tel. & Tel. Co.*, 761 F. Supp. 475, 501-03 (S.D. Ohio 1991) (holding that the plan was unenforceable because the primary purpose of the ESOP was to thwart a takeover, not to provide for employees' retirement).

<sup>99</sup> A few details are 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 (GAO/PEMD-87-8 1986) ("... some of the stock held by ESOPs does not carry voting rights."). How can this be? Partition the class of ESOPs into those sponsored by closely held firms and those sponsored by publicly traded firms. 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 voting on "fundamental" transactions—matters which must, according to charter or applicable law, be decided by supermajorities of



in itself constitutes, of course, another incentive for ESOP-creation, an incentive enjoyed by the managers. ESOPs therefore provide yet another benefit: managers would not have to deal with dissatisfied shareholders, including employee shareholders. It is thus more than likely that the ESOP's utility in warding off takeovers and enhancing managerial freedom of action might also account in significant measure for ESOPs' proliferation. Utility itself, like the favorable tax and ERISA treatment, amounts to a public benefit. It is sanctioned and indeed affirmatively encouraged by both legislation and court decision.

### 3.2.4. *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.<sup>100</sup> A stylized scenario may a fortiori sharpen, supplement, and stylize how government favoring spurs the growth of ESOPs.

Assume, *arguendo*, that the financing of firms via ESOPs is not favored by the tax code, ERISA, or any other means, and that the same loan on the same terms can be otherwise obtained. Also assume that ESOPs offer no governance or takeover-avoidance advantages, and that employees do not temper their wage demands by dint of their ESOP benefit; their new shares are "all gravy." Lastly, suppose that the laborers' gradually growing "ownership" does not appreciably boost shop floor morale, nor does it consequently bolster productivity and firm profitability.

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outstanding shares voted. See I.R.C. §§ 409(e)(3), 401(a)(22) (including matters such as "approval or disapproval of any corporate merger or consolidation, recapitalization, reclassification, liquidation, dissolution, sale of substantially all assets of a trade or business, or such similar transaction as the Secretary may prescribe in regulations").

Next, consider the second subclass. While in the case of publicly held firms voting rights must be passed through to the employee/beneficiaries, it is so only in respect to stock actually *allocated* to employee accounts. See generally I.R.C. § 4975(e)(7) (defining ESOPs). Allocation, however, 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."

<sup>100</sup> I am by no means the first to suggest the importance of public support for the spread. See, e.g., BLASI, *supra* note 55, at 64–84 (cataloguing ESOP types and their benefits); HANSMANN, *supra* note 19 (noting the rapid expansion of ESOPs and their benefits for employees); ELLERMAN, *supra* note 71, at 110 (observing the significant impact of growing ESOPs).

Under these circumstances, what would happen in Figure 1, above? The firm, via the ESOP, would finance its projects by borrowing and repaying, while issuing new stock to employees who pay nothing. This would mean, however, that 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 would the latter not object?

It is tempting to think there are less proximate political answers—discussed momentarily—but the most immediate reason is that several of the foregoing suppositions do *not* obtain. There *are* considerable tax, ERISA, and governance advantages gained 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.<sup>101</sup>

Only the supposition that growing ownership fails to significantly impact productivity appears valid in light of extant evidence. Ergo, tax, ERISA, and governance advantages—the cluster of public benefits—enjoyed by ESOPs must surely be critical to their spread. Pre-ESOP shareholders, at least the less other-regarding ones,<sup>102</sup> are, notwithstanding their self-concern, *willing* to endure the dilution of their shares wrought by leveraged ESOP transactions. They are willing to do so precisely because the now much cheaper (due to favorable treatment by tax provisions and ERISA) debt-financed firm is sufficiently more valuable, in consequence, as to offset partly or wholly the dilution. To whatever degree those shareholders are not wholly compensated in this way, the control benefits imparted by ESOPs to management make up the difference; any dissatisfied shareholders are weakened by the court-sanctioned ESOP transactions.

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<sup>101</sup> For one thing, the evidence is scant. See ELLERMAN, *supra* note 71, at 90 (discussing trade-offs in political democracies), BLASI, *supra* note 55, at 263 (detailing the relationship between retained earnings and funding for ESOPs). 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 to them are, after all, deferred compensation which confers none of the consumption benefits of control. Additionally, they are undiversified investments. It would be far more sensible for employees willing to sacrifice pay for stock to insist upon voting and/or diversified stock. Hence, they would not offer any sacrifices sufficient to offset the dilution of their own firms' owners' stock.

<sup>102</sup> See *infra* Section 3.3. The other-regarding ones might partly be actuated by ideological/political motivations.

### 3.3. *Why We Like Them: Accounting for the Favor*

The (plausible) assumption that law-conferred tax, ERISA, and governance benefits constitute a, if not the, critical reason for ESOPs' proliferation, raises another question: Why is this public favoring of ESOPs *politically* accepted and even endorsed in the United States? Does the support not tamper with "natural" market forces, and is distortion of this sort not disfavored by many well-to-do Americans?<sup>103</sup> It is tempting to think that those who would seek to render global trade and investment liberalization more justly to all the world's inhabitants shall find the successes of ESOPs instructive. The mutually reinforcing ethical and endowment-psychological reasons appear to account for the United States' public and private favoring of ESOPs.

#### 3.3.1 *Core Values: Responsibility and 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 dispositions that are shared by a broad swath of Americans and, there is good reason to believe, persons worldwide.<sup>104</sup> Values-wise, most people are opportunity-egalitarian in their commitments.<sup>105</sup> We believe that what people have should ideally be traceable to equal initial holdings of such ethically exogenous resources—favours of fortune, of chance or mere circumstance, the global "stuff" of Section 1—as no one now living is responsible for having created. They believe that people's success should ideally be traceable to equal initial

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<sup>103</sup> Certainly some seem to think so. See, e.g., Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363, 363–64 (1990) (arguing that ESOPs do not efficiently achieve capital formation, wealth redistribution, and other goals); Richard L. Doernberg & Jonathan R. Macey, *ESOPs and Economic Distortion*, 23 HARV. J. LEGIS. 103, 103 (1986) (claiming that ESOPs cause inefficient market distortion due to overly strict regulations in ESOP legislation).

<sup>104</sup> For more on the invariance of these dispositions across cultures and subcultures, see, for example, Hockett, *The Deep Grammar of Distribution*, *supra* note 10, for a description of common intuitions of distributive justice, and Hockett, *Taking Distribution Seriously*, *supra* note 10, for a description of how the concept of distribution should be treated in law and economic literature.

<sup>105</sup> See Hockett, *Whose Ownership?*, *supra*, headnote, at 31–51 (arguing that most people support a norm of parity and fairness vis-à-vis government); Hockett, *Jeffersonian Republic*, *supra* headnote, at 57–68 (noting that it may now be possible to design an equal "ownership society" in agricultural, commercial, and industrial spheres); see also Hockett, *Three Pillars*, *supra* headnote, at 93 (describing the Bretton Woods Institutions as supportive of equality of opportunity).

holdings of ethically exogenous resources such as favors of fortune, chance, or mere circumstance, not to be dictated by the machinations of anyone presently living.<sup>106</sup> It is believed 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.<sup>107</sup>

It is tempting to think of access to value-adding opportunity—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.<sup>108</sup> Ethical intuitions such as these underwrite the first several assumptions, noted in Section 1, implicit in the thinking of many who find globalization ethically perplexing.

### 3.3.2. *Endowment Dispositions: Loss Aversion and “Handout” Aversion*

Endowment-psychological dispositions-wise, people are apt to experience some methods of redressing imbalances in the distribution of that aforementioned exogenous endowment as less discomfiting than others.<sup>109</sup> For example, individuals’ more instinctively self-regarding, less reflectively ethical selves, are prone to feel friendlier toward distributing apparently “new” resources to the presently under-endowed than toward “taking” already held resources from the over-endowed for redistributive purposes.<sup>110</sup> Those same less reflective selves will tend to regard a perceived “refraining from taking” from the under-endowed as preferable to a mere “giving” to the same.<sup>111</sup> Finally, individuals, in their more self-regarding moments, will generally be more

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<sup>106</sup> See sources cited *supra* note 105.

<sup>107</sup> See sources cited *supra* note 105.

<sup>108</sup> See sources cited *supra* note 105.

<sup>109</sup> See Hockett, *Whose Ownership?*, *supra* headnote, at 58–72, 80–87 (observing that most people support giving to the “have-nots,” though not necessarily at the expense of “haves”); Hockett, *Jeffersonian Republic*, *supra* headnote, at 73–83 (describing support in American political traditions for an “efficient equal-opportunity republic”).

<sup>110</sup> See sources cited *supra* note 109. 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. I am speaking of predisposed framings here rather than considered judgments.

<sup>111</sup> See sources cited *supra* note 109. Scare-quotes are used in a similar manner as those in the text accompanying the previous footnote.

amenable to any perceived “giving” to the degree that it can be plausibly framed as an earned *rewarding* of—hence as ethically endogenized, or *deserved by*—the recipient.<sup>112</sup>

Such are the “spoons full” of endowment-psychological “sugar,” that typically “make the medicine” of redressing justicial imbalance “go down.”<sup>113</sup> This is not a matter of “fooling ourselves” or the citizenry, or of acting with less than an honest transparency.<sup>114</sup> It is simply a matter of making deliberate accommodation, in the interest of acting justly, with those pre-reflective perceptual tendencies that most people, on reflection, recognize to be instinctively active in much of their pre-deliberative cognition. The apt comparison here would be to Ulysses, who, in contemplation of the sirens ahead, asked to be bound to the mast.<sup>115</sup>

### 3.3.3. *How the SOP Structure Conforms*

The leveraged ESOP coheres nicely with the values and dispositions just rehearsed. It spreads a basic endowment which is not difficult to view as being, at least in part or potential, ethically exogenous.<sup>116</sup> The leveraged ESOP spreads that endowment by distributing what can saliently, if nevertheless superficially, be viewed as “new” capital—newly issued shares in firms.<sup>117</sup> It does that partly in what resembles a return for reward-earning effort—labor patronage or work for the firm.<sup>118</sup> The leveraged ESOP encourages such private rewarding (on the part of lenders and

<sup>112</sup> See sources cited *supra* note 109.

<sup>113</sup> Apologies, of course, to Mary Poppins and her creators.

<sup>114</sup> Thanks to Joel Trachtman and Annelise Riles in particular for pressing me on this matter of transparency.

<sup>115</sup> Apologies this time to Homer; and to Jon Elster. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN THE SUBVERSION OF RATIONALITY* (1979).

<sup>116</sup> 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. See generally Hockett, *Whose Ownership?*, *supra* headnote, at 31–51 (describing different political perceptions about, and opinions on, the U.S. “ownership society”).

<sup>117</sup> “Superficially” in light of what was observed *supra*, Section 3.2.

<sup>118</sup> That is to say 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*, Sections 4, 5.

otherwise-diluted shareholders) largely by refraining from perceived taking (i.e., through tax breaks) rather than overt taking and giving.

The leveraged ESOP replicates, in piecemeal and only somewhat more convoluted fashion, the same strategies that the United States has employed most elegantly in connection with publicly facilitated home-spreading and education-spreading since the early- to mid-twentieth century.<sup>119</sup> 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.<sup>120</sup> There is also good evidence that both these and the federal education finance programs set in place over the 1960s and 1970s appealed to legislators and the public alike precisely because of their resonance with the values and dispositions just rehearsed.<sup>121</sup>

But then this raises a further question: might the idea of the leveraged ESOP itself be leveraged yet further, in a manner that links global “Ones,” “Twos,” “Threes,” and “Fours” in a manner enabling “Twos” and “Threes” to be compensated by “Ones” at no expense to “Fours”? Might the salience of the employment relation that appears to ethically underwrite the ESOP’s popularity carry over to more attenuated, even severed, employment relations? More ambitiously, might the ESOP be adapted in a manner that ultimately makes all global residents part-owners of most of the world economy’s large firms? It would seem that it might, and this Article now turns to that prospect.

#### 4. MORE SOPS FOR MORE PERSONS: ADAPTING THE STRUCTURE TO ADDITIONAL PATRONAGE FORMS

It should be remembered that labor with a firm—the employment relation—is an ethically salient patronage relation.<sup>122</sup>

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<sup>119</sup> See Hockett, *Jeffersonian Republic*, *supra* headnote, at 98-120, 143-53.

<sup>120</sup> *Id.* at 135-37.

<sup>121</sup> *Id.* at 98-120, 143-53.

<sup>122</sup> 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 19 (exploring different schemes for ownership of various firm types). However, my use of the concept of patronage will be somewhat more elastic than Hansmann’s—as it is perhaps intimated by my addition of the qualifier “ethically salient.” My understanding of the *term* will accordingly be a bit different as well. I do not believe, however, that my

Labor is an ongoing mode of relation between persons and firms,<sup>123</sup> and it is a mode of relation that appears to sanction the conferral of benefits upon persons.<sup>124</sup> It renders the latter apparently earning or deserving of the benefits bestowed upon labor through leveraged ESOP financing.<sup>125</sup> That was one upshot of Section 3.3 above.

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understanding and employment of the term will be incompatible with Hansmann's. See *supra* notes 111–12 for an example of my use of the term.

<sup>123</sup> 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—namely, selling to or purchasing from it—than I. See *supra* note 118. I think our distinct concerns with patronage are nonetheless compatible, however. 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 relations substitutes for magnitude of individual transaction.) Second, patronage relations, as potentially involving more than purchasing and selling alone, are implicit in Hansmann's own understanding of the term, because the occasional recourse to the broader relational concept of “supplying” figures prominently in Hansmann's treatment of stock-holders as financial capital suppliers. HANSMANN, *supra* note 19, at 12–16.

<sup>124</sup> 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.” HANSMANN, *supra* note 19, 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 incompatible with Hansmann's interest, is nonetheless distinct. The distinction accounts for my somewhat broadened understanding and employment of the concept of patronage. My concern is with patronage as a form of ongoing relation between persons and firms, such as can be viewed in part as the patron's consistent conferral of some manner of benefit upon the firm. This can in turn 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 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 at odds with Hansmann's efficiency-grounded basis for interest in the same; 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 Section will both make this plain and unpack more fully the ways in which patronage relations might be seen as ethically underwriting benefit-conferrals upon current non-owners within patronage classes.

<sup>125</sup> Please see the discussion in Section 3.3, *supra*, which suggests reasons why ESOPs are publicly favored.

Yet labor is but one way in which people continually relate themselves to firms. This raises an intriguing prospect: perhaps a new method might rely upon patronage relations in addition to, or that vary upon, the employment relation in order to warrant the public facilitation of share-spreading – in particular, to those called “Peters,” or “Twos” and “Threes” above. This Section proposes and assesses a few possibilities, meant to be suggestive rather than exhaustive. This Article will take a brief sequence of suggestive steps to approach the proposed plan.

#### 4.1. *A First, Simple Variant: Customer Stock Ownership Plans*

One conspicuous form of patronage, in some respects reminiscent of labor, is ongoing customer-ship.<sup>126</sup> Some firms from which customers purchase goods and services are the firms from which these customers *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 voluntary, but instead reflects a lack of available alternatives – the customer is held hostage, so to speak. And there are of course middling cases between the extremes, such as unthinking habit or ignorance of alternative supply sources. In all such cases, however, it is plausible that the relation is sufficiently salient, from an ethical point of view, as to warrant at least some degree of public facilitation for patrons to gradually come to own parts of the firms that they regularly patronize.<sup>127</sup>

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<sup>126</sup> 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 19, at 149–223 (detailing customer-owned industries and firm types).

<sup>127</sup> Again, sometimes this happens quite “naturally,” for reasons that appear to be rooted in the comparative efficiencies of governance and contracting. See source cited *supra* note 109. But the reasons for interest in an “ownership society” warrant 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* Section 3 (describing how ESOPs operate). Those same reasons presumably afford at least a preliminary answer to prospective objections rooted in the same normative source as familiar objections to disgorgement remedies in contract, owing to their inefficiently coupling purchases with investments in firms. See Hockett, sources cited *supra* headnote. 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 U.S. state.<sup>128</sup> People who live and work in the town see a lot of each other, and consequently come to feel a palpable sense of community. They feel this not only in relation to one to another, but also in relation to the relatively small number of retail establishments that sell to the townspeople. Buyers and sellers are thrown all together, feel “centrally isolated” together, and perhaps miss this feeling when they are away.

Then a remarkable new grocery store complex comes to this town.<sup>129</sup> Everyone talks about the new store, even showing it off to visitors and prospective new residents. They are as proud as they are pleased that at long last it has arrived.<sup>130</sup> Nearly everyone living or working within several miles of the town now purchases groceries at this complex, does dry cleaning there, does their banking there, and even leaves their children to be attended there while shopping. Things might develop and go on in this way for years. It is an ongoing, multi-faceted, relation.

Now suppose the recently floated American idea of an “ownership society” is found to be an attractive one, for any number of reasons,<sup>131</sup> and thus it is considered good public policy to encourage wider ownership of firms. In that circumstance, might it not be politically acceptable, even attractive, to encourage the voluntary spread of shares in this store (or its holding

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<sup>128</sup> 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 to a community-like neighborhood or sector of a large city, such as is commonly found in New York, Chicago, and Los Angeles. Yet please 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.

<sup>129</sup> 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.

<sup>130</sup> It is one of those towns that has difficulty attracting and keeping nationally or even regionally known merchant establishments.

<sup>131</sup> There are a variety of grounds upon, and the three principal American political traditions to which, the notion of an “ownership society” might be attractive. See generally Hockett, *Whose Ownership?*, *supra* headnote, at 5–78.

company) among the regular customers who live in community with, and partly organize their lives around, this store—just as it is in the case of employees? Of course it might.<sup>132</sup>

Consider a cognate example, applicable perhaps to not only smaller communities but also larger metropolitan areas or wider regions. There might be a product or service with increasing returns to scale. It is a “natural monopoly.”<sup>133</sup> Perhaps it is a transport system, an electrical power grid or a high-speed internet network—a public or publicly regulated utility. Customers of the firms that supply such products and services, whether identified by reference to towns, cities or larger regions serviced by these firms, might often find themselves more or less “stuck” with their suppliers. They have little choice but to patronize them. That is a large part of why they are regulated. But might the same rationale thus warrant facilitating the customers to gradually come to own these suppliers, at least in part? Surely customer hostage is *at least* as ethically salient a patronage-form as is more voluntary customer loyalty.

Were this line of thinking to be continued, it might be worthwhile to consider facilitating patrons’ acquisition of shares in the firms—the grocery store or the utility—in much the same way that share-acquisition in firms by employees is facilitated. Tax breaks could be granted to firms that issue shares to trusts whose beneficiaries gradually came to own legally what initially they would beneficially own. (Again, perhaps, as in the labor case, this would be in proportion to their patronage—e.g., amounts

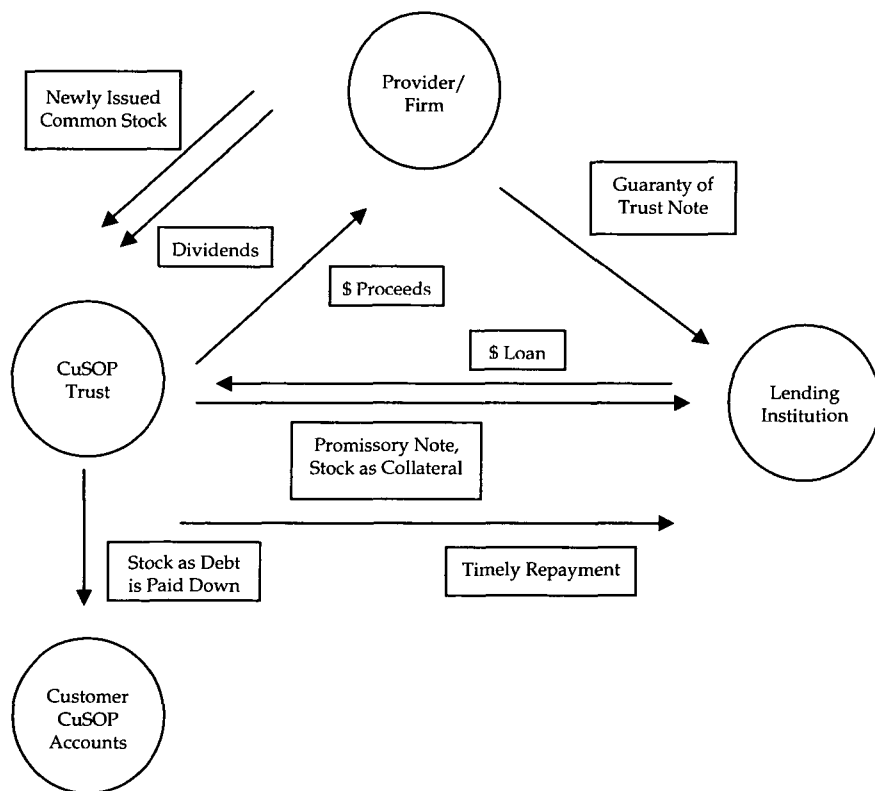
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<sup>132</sup> Of course it is not the case that facilitating ownership of local businesses will afford optimal diversification. After all, personal incomes and the incomes of town-sharing or region-sharing firms can to some extent co-vary—for example, in the case of local or regional slumps. But I ask that the reader bear with me a bit longer. The examples below show that diversification grows. Moreover, the 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* Section 3.3, concerning why the public is willing to subsidize ESOP expansion, and (b) to expand the hypotheses of this Article’s predecessor pieces, concerning why we have acted similarly to promote home-owning and the spread of higher education. Please note, for a discussion of the project of democratizing income-risk-sharing across localities and even across nations in a separate article, Hockett, *Global Macro-Hedging*, *supra* headnote at 212-56. These pieces read together aim to provide at least a rough template for how best to render society more “owning,” more risk-spread-efficient, and more just.

<sup>133</sup> In a way, so was the store in the previous example. Small towns support less competition among smallish suppliers than do cities.

purchased from the firms in place of wages earned working for firms.) In essence, then, the financial structure of the leveraged ESOP arrangement would be replicated. Only the particular patronage relation would change. It could be called a "Customer Stock Ownership Plan," or "CuSOP."<sup>134</sup> Imagine it thus:

FIGURE 2: INSTITUTIONAL/FINANCIAL STRUCTURE OF A CUSOP ARRANGEMENT



Of course, it would be different here relative to the ESOP as presently constituted, even apart from the differing patronage relation that ethically grounds it. For example, there is no federal "CRISA" for "customer benefit plans" in the way that there is an

<sup>134</sup> This SOP is not to be confused with the "consumer stock ownership plan" proposed by Kelso, which latter appears to be little more than a producer co-op. KELSO & KELSO, *supra* note 78, at 67-73.

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 stock-acquisition is currently facilitated 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—similar to that which public facilitation of ESOPs confers—would be warranted, could be advocated, and presumably would be politically embraced, on much the same grounds of ethically salient patronage.

#### 4.2. *A Second, Closer Variant: Rent-Recouping Stock Ownership Plans*

One more example draws yet closer to the plan proposed below 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 California coast, tar sands are found north of Canada, or some portion of the electromagnetic spectrum becomes usable in a way that it was not before. Sometimes no living person or group of persons can be credited with the discovery, or with the discovery’s full exploitability. But some person or persons often can be *partly* credited. In such cases, the “Western,” especially “American,” way of doing things is to permit private agents, generally firms, to exploit the new possibilities by essentially appropriating rents from them.<sup>135</sup> Some of the value of the new resources, from rents, should flow very quickly into private hands, even while not *all* of that value seems to be deserved by those parties.

What to do with the surplus? The “windfall profits” could be taxed, but that might resemble a kind of incremental taking,<sup>136</sup> and

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<sup>135</sup> The justification of appropriable rents for property rights appears to originate, at least in its canonical formulation, with Harold Demsetz. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967) (arguing that property rights are essential for markets to perform efficiently).

<sup>136</sup> This claim, associated with Richard Epstein, is of course hyperbolic. But one can readily grasp the intuition that underwrites it. For the hyperbole, see, for

the takings go to the government. Westerners, and especially Americans, do not seem to like that kind of taxation anymore.<sup>137</sup> At any rate, they do not 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.<sup>138</sup> Yet many people, Americans in particular, still like ownership – 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 authorized to exploit the new opportunities?

But this still leaves open the question of patronage. To whom should the shares be distributed? Is there some saliently or perceivably “natural” class of patrons whose beneficiary status would be as readily warranted as that of employees and long-term customers? After all, it would not be desirable to simply replace one class of windfall beneficiaries with another, as if it were at random. How, then, to think about this? It is tempting to suggest a sort of “sliding scale” here. And indeed this might be a nice way to gradually generalize the original ESOP idea to move incrementally in the direction of a broad global recognition that good citizenship and faultless wage or salary loss themselves constitute an ethically salient kind of patronage.<sup>139</sup>

For example, 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 “more proximate” to – as it were “more owned by” – their residents than by nonresidents.<sup>140</sup>

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example, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that many kinds of governmental takings, such as progressive and special taxes, may be unconstitutional under a broader interpretation of the Takings Clause).

<sup>137</sup> See, for example, *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.

<sup>138</sup> 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.

<sup>139</sup> This suggestion is taken up *infra* Section 6.

<sup>140</sup> Scare-quotes again indicate that I am attempting to express a pre-reflective manner of perception. I should note here that I am exceedingly uncomfortable with this particular perception, and find it to be a compromise with territorialist

Consequently, new oil found in Alaska might be perceived as being somehow more Alaskan than even American. And Alaskan citizens might accordingly be thought to stand in a somewhat—even if incrementally—closer patronage relation to any firm-granted rights to exploit new Alaskan oil reserves than are non-Alaskan Americans.<sup>141</sup> After all, Alaska itself is constitutionally permitted to tax firms that extract Alaskan oil reserves, even after the (federal) IRS has done so. So it must be the case that citizens of political units are somehow viewed as more privileged than noncitizens with respect to 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 with respect to magnesium nodules found off the coast of Washington, Oregon, and California; tar sands found north of Canada; and other resources found within the territorial

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psychological dispositions that are regrettable at best. But bear with me for a moment. Such primitive intuition like this underwrites the judgment that, for example, coal found between Canada and Mexico is “American” coal, rather than North American coal or “the coal of mankind.” While, ideally I would prefer to repudiate the intuition, if we are stuck with it then we may as well harness it to good purpose.

<sup>141</sup> In 1978 and 1980, voters’ initiatives were introduced to establish the Alaska General Stock Ownership Corporation (AGSOC), which would have provided Alaskan citizens with 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 Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2892 (1978) (noting the potential creation of a stock ownership corporation). 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 William Greider, *Alaska Inc: An Economic Experiment*, THE WASH. POST, Oct. 22, 1978, at A1 (describing the planned distribution of wealth from the energy development to Alaskan citizens). The Alaskan ballot measure nevertheless lost on a close popular vote (approximately 78,000 to 72,000). See, for example, the Alaskan state government’s website, Initiatives that Have Been on Alaska’s Ballots, <http://www.elections.alaska.gov/initbal.php> (last visited Oct 25, 2008) which lists Alaskan ballot initiatives since 1960; see also Elliot Jacobson, Senator Gravel Assumes Leadership of “People’s Lobby”<sup>1</sup>, 1 NATIONAL INITIATIVE FOR DEMOCRACY (2002), [http://www.ni4d.us/en/nin\\_1\\_5/](http://www.ni4d.us/en/nin_1_5/) (last visited Oct. 25, 2008) (discussing, in part, Senator Gravel’s involvement in the AGSOC proposal). Notwithstanding the failure of the ballot initiative, Alaska did adopt a cognate program. See *infra* note 144.

jurisdictions of other political units. Indeed, international law treats things much in this way on a nation-by-nation basis.<sup>142</sup>

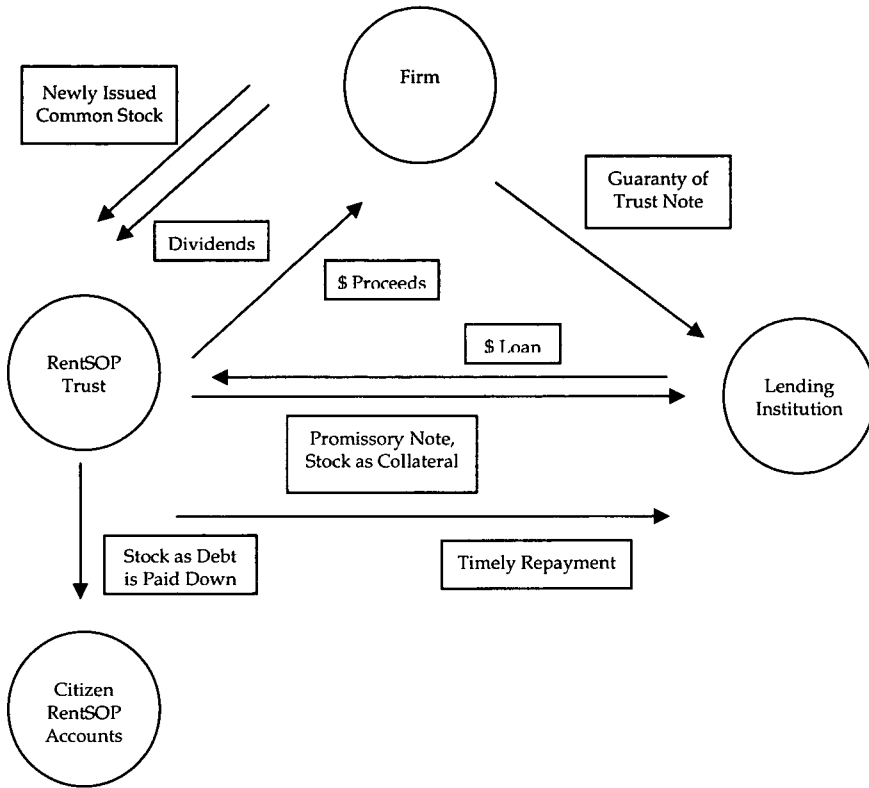
Now bring these patronage considerations together with the earlier rehearsed "windfall" considerations. Would it be too far a stretch to require, as a condition for granting the firm the rights to exploit the new resource, that the firm distribute shares in itself to the residents of any municipality or nation-state with which the new resource is widely perceived to be especially closely associated? (For example, 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 tax or other incentives might not be needed at all. Or how about this: tax and other incentives are *combined* with the "carrot" that is the prospective new resource exploitation itself, in a manner that lessens the former relative to what they were in the ESOP and CuSOP cases. This encourages both (a) the entry of firms to do the exploiting, and (b) those firms' spreading their shares—while being less expensively (to the public fisc). Call it a "RentSOP."<sup>143</sup> It might look like this:

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<sup>142</sup> See generally Hockett, *Limits*, *supra* headnote.

<sup>143</sup> 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, financially structured differently. See KELSO & KELSO, *supra* note 78, at 75–83, 88–92, 99–103. For a more general charitable interpretation and correction of Kelsonian "theories" and schemes, see Hockett, *Jeffersonian Republic*, *supra* headnote at 124–42.

FIGURE 3: INSTITUTIONAL/FINANCIAL STRUCTURE OF A RENTSOP ARRANGEMENT



This is the same diagram as Figures 1 and 2, with state or local citizens standing in as patrons instead of employees or customers. (So now the degree of patronage might track years of residence.)<sup>144</sup>

<sup>144</sup> The matter of crafting terms is ignored for present purposes so as to avoid conflict with court decisions overturning state laws burdening interstate travel, decided under the Commerce Clause of Article I, the Privileges and Immunities or Equal Protection Clauses of the Fourteenth Amendment, or some "penumbral emanation" from those or other provisions of the U.S. Constitution. In *Zobel v. Williams*, the Supreme Court rejected Alaskan 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 residence. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 618 (1969) (establishing a fundamental "right to travel"); *Edwards v.*



What is different, apart from the changed patronage 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). Of course, the loan made to the RentSOP trust might 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.<sup>145</sup> But all of that is neither here nor there for present purposes. The important point is that the firm still debt-finances itself on favorable terms in the interest of boosting its capacity to exploit the new resources, while also spreading ownership in itself—hence the benefits that accrue to its owners by dint of its access to the resources.

Note, by connecting the hope of maximizing both the number of possible beneficiaries and the number of firms that those beneficiaries might gradually partly own, the understanding of "local resource" can be readily broadened. That is to say, matters in this scenario are similarly situated as they were in connection with CuSOPs in Section 4.1 above, where candidates for RentSOPs can be proliferated.

The understanding of "local resource" might be broadened along at least two dimensions. First, it is possible to move outward from locality to region to nation or economic class, discussed above. Second, the understanding of "resource" itself can be broadened. As discussed in Section 2, it is not always a matter of found objects or substances, after all. A highly desired set of geographic coordinates, for example, 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

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California, 314 U.S. 160, 160 (1941) (declaring unconstitutional a law that prohibited residents from bringing non-resident "indigent persons" into the state).

<sup>145</sup> This is not just as a matter of capacity, but as a matter of law, as well. In the United States, for example, the Banking Code's lending limits could kick-in. See 12 U.S.C. § 84(a)(1) (2006) (limiting the amount that banks may loan at a given point or to a given individual). According to the code, the total outstanding non-fully-secured loans and credit extended by a national banking association to an individual, including a trust, must not exceed fifteen percent of that banking association's unimpaired capital and unimpaired surplus. 12 U.S.C. § 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.

desired spaces are rather like the “natural monopolists” considered in connection with CuSOPs above at Section 4.1. This is why the so-called “classical” economists, pioneers like Adam Smith, David Ricardo, and Henry George, were so suspicious of them.<sup>146</sup> But we need not be suspicious. Instead, the spaces’ voluntary sale and purchase at fair market value can be facilitated 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.<sup>147</sup> “Don’t get mad,” we might say, “get owning. Get the company.”<sup>148</sup>

Turning from the resource dimension to the locality dimension, looking at not only “locally located” resources but also more diffuse such resources—e.g., new portions of the electromagnetic spectrum—the patronage dimension can be expanded as well. There will then be more beneficiaries, meaning more potential

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<sup>146</sup> See, e.g. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 161–63 (R.H. Campbell, et al., ed., 1976) (describing rent as a monopoly price that remains independent of expenses laid out by the *rentier*); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 33–45 (Dent & Sons 1969) (arguing that *rentiers* are windfall beneficiaries of scarcity).

<sup>147</sup> HANSMANN, *supra* note 19 at 173–79 (suggesting a number of reasons for the absence of urban utility co-ops analogous to rural electrical co-ops, 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 whatever degree we might worry that *partial* ownership by customers is “not enough,” we can readily mitigate the worry by means familiar to other, existing utilities-ownership scenarios. Hence, rates can be regulated with a view to preventing price-discrimination as among classes of users. Similarly, any worry over the development of, for example, “absentee ownership” in the long run would seem to be mitigated by: (a) the fact that highly transient residents of a municipality likely will not come to acquire much in the way of shares; (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; and (c) the possibility of recourse to mere beneficial ownership by the new owners, legal ownership to remain with consumer trusts established for the purpose of retained legal ownership. Indeed, as Hansmann himself points out, some municipal utilities can readily be *likened* to cooperatives, since they are organized quite similarly. *Id.* at 177.

<sup>148</sup> 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 *I Liked the Slogan So Much. . .*, <http://news.bbc.co.uk/1/hi/uk/1357091.stm> (last visited Oct. 23, 2008) (describing the popular influence of powerful slogans).

owner-beneficiaries of the firm's privileged access. For example, imagine that the United States' Telecommunications Act of 1996<sup>149</sup> is amended to work somewhat differently than it actually has: Congress might not have authorized the FCC simply to *grant* existing broadcast companies new "advanced spectrum," without requiring payment.<sup>150</sup> 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.

#### 5. A SOP FOR PETER: GLOBAL STOCK OWNERSHIP PLANS

Return now to those whose plight occasions the concern of this article, Section 2's "Twos" and, especially, "Threes" — those who were 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 Section 3? Might one also view the income gains realized by "Ones" through globalization as a species of *rent* as discussed in Section 4? Certainly.

Consider the following: supposing per hypothesis, that "Peter" truly is "faultlessly disemployed" in consequence of global trade and investment liberalization because a more desperate "Paul" can work for less. Also suppose that "Peter" is aging, and hence is

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<sup>149</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 251 (2000)). For commentary on the Telecommunications Act and how it restructured telephone markets, see PETER W. HUBER ET AL., *THE TELECOMMUNICATIONS ACT OF 1996* (1996); 74 AM. JUR. 2d *Telecommunications* § 16 (2001) (describing the Telecommunications Act and how it restructured telephone markets).

<sup>150</sup> See 47 U.S.C. § 336(a) (2000) ("[T]he Commission . . . (1) should limit the initial eligibility for such licenses [for use of advanced spectrum] to persons that . . . 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 of a free spectrum for HDTV under the Act, 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).

truly unable to sufficiently “retool” himself 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.<sup>151</sup> The employer, and hence the “Marys” who own the employing firm, have shed him precisely in order to capture the surplus that is 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 extinguished, “Peter” is accordingly harmed by no fault of his own.

Now note that “Mary,” for her part, is no more ethically creditable than “Peter” is faultable. Mary has simply *inherited* a goodly portion of the firm-shares that she owns, or of the wealth she had expended to purchase them. The capital gains that will now 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 to do. Or perhaps the capital gains are a consequence of undue influence that “Marys” exercised upon legislators to enact precisely so they could circumvent hard-won salary and labor standards.<sup>152</sup> From “Marys’” perspective, therefore, they are windfalls at best, ill-gotten gains at worst. They are rents flowing her way, by virtue of little more than her exclusive possession of that which was given to her at birth. Ethically, they are at best on all fours with mineral deposits or petroleum reserves discovered beneath her inherited real estate holdings, at worst the proceeds of venal lobbying activity.<sup>153</sup>

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<sup>151</sup> I discuss such “retooling” costs, along with other determinants of “Peter’s” faultlessness, at length in Hockett, *Global Macro-Hedging*, *supra* headnote; Hockett, *Hamiltonian Means*, *supra* headnote; Hockett, *What Kinds of Stock Ownership Plans Should There Be?*, *supra* headnote.

<sup>152</sup> I do not think the more sinister characterization is true of the vast majority of “Marys.” But there seems to be some truth in the characterization insofar as it has made of *some* Marys with friends in today’s Washington, D.C., for example. One need only consider the 1996 Telecommunications Act noted above at Section 4 to get the idea (describing how lobbying can influence legislation).

<sup>153</sup> Telecommunications Act of 1996.

If these considerations are in order, then do not society's core values—its opportunity-egalitarian sense of justice as elaborated above at Sections 2 and 3.3—suggest we view “Mary” as properly bound to share some of her globalization-wrought, windfall gains with “Peter”? And would not “Mary,” in turn, as well as everyone per our endowment dispositions discussed in Section 3.3, 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. This is, however, simply another way of saying that it will amount to “Mary’s” sharing her globalization-wrought gains with those “Peters” who have been laid off by her globalization-benefitting firms. And as noted above at Section 3.3, sharing of this sort is much less likely to be experienced as “taking” and “redistributing” than as “taxing and spending.”

How, then, would a SOP configured in conformity with these observations be structured? In light of the sample SOP-variants described in Section 4, it is possible to describe potential models. The next subsections detail two such renditions—the first narrowly tailored, the second a bit more ambitious.

#### 5.1. *Compensating Lost Labor Patronage: Outsource Stock Ownership Plans*

Think of the first, more narrowly tailored rendition simply as a straightforward variation on the Rent-SOP. 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—analogue to the “citizens of Alaska” countenanced above in Section 4.2. One could also presumably employ the same means used to ascertain that “Peter” was disemployed owing to trade liberalization, and thus an appropriate beneficiary, to presently determine whether employees hard hit by trade liberalization are entitled to “adjustment relief.”<sup>154</sup>

Let years of employment with such firms serve as degrees of patronage—an ethical-intuitively attractive suggestion from “two angles,” in this case. It is not only true that more years laboring for

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<sup>154</sup> See Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107-210 §116, (codified as amended in scattered sections of 19 U.S.C.) (providing aid to workers adversely affected by increased importation).

the laying-off firm render the patronage relation appreciably “thicker” or “deeper.” This is something akin to the “loyalty” interpreted as ethically salient patronage in connection with CuSOPs in Section 4.1. It is also the case that by laboring for more years for the laying-off firm, “Peter” has less time to “retool” and find new employment.

One must also consider that “Peter” is not “disemployed” only to the benefit of compatriot “Marys” owning compatriot firms. After all, “Peter’s” firm might not simply “outsource” “Peter’s” labor. It might go out of business due to competition from foreign firms. Of course, those firms are held largely by foreign “Marys” – indeed, in many cases even foreign governments.<sup>155</sup> Moreover, since global investment has been liberalized at least as surely as – indeed, even more surely than – trade,<sup>156</sup> even domestic “Mary” for her part is likely unharmed. If well advised by investment consultants, she has long since dumped shares in “Peter’s” employer for shares in other firms altogether – both domestic and, increasingly, foreign.<sup>157</sup>

But if this is true, and the goal is to ensure that the “Marys” share gains quite generally with “Peters,” then the spreading of new shares in “disemploying” firms to their erstwhile, now laid off, employees simply will not suffice. How to do *that*? In order to diversify the holdings of “Peters” to render their capital incomes more secure and plug all other leaks, it is necessary to link “Peters” to “Marys” via more firms than one.

There are a number of options for establishing such links, no single one of which must be exclusive. One should accordingly resist the temptation to try to blueprint in detail every such possible means. Instead, consider simply what seems like a suggestive and promising multi-step general strategy: begin with healthy, continuing domestic firms that “outsource” their labor, because the patronage link between such firms and “Peters” is particularly ethically salient and heuristically compelling. Structure the plan, which will be called an “OutsourceSOP,” like the RentSOP discussed in Section 4.2:

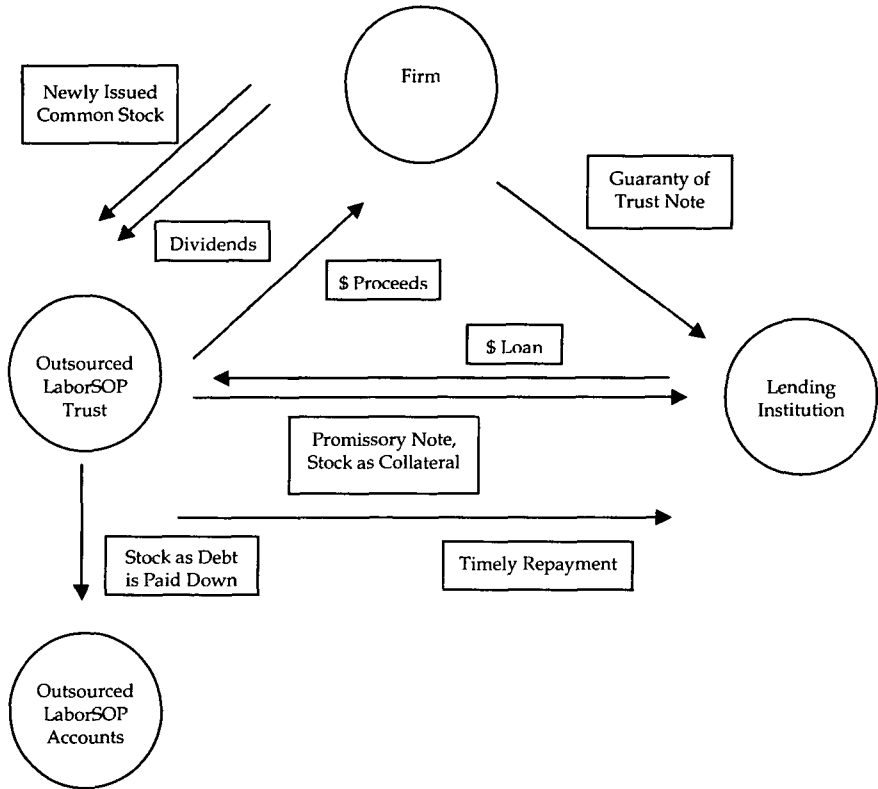
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<sup>155</sup> China, for example, and other governments control domestic enterprises by maintaining majority stakes there in.

<sup>156</sup> See Hockett, *Macro to Micro*, *supra* headnote.

<sup>157</sup> *Id.*

FIGURE 4: INSTITUTIONAL/FINANCIAL STRUCTURE OF AN  
OUTSOURCESOP ARRANGEMENT



The structure here is basically the same as that of 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. This is intuitively attractive both because the outsourced employee has invested more of his working life and “specific human capital” into the firm and, on the other hand, because the employee now has less to give to other prospective employers. Other than this and the changed patronage basis 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 their laid-off laborers. The important point for present purposes is that, just as

in the other SOP examples, the firm here finds itself debt-financing on favorable terms in the interest of boosting its capacity to exploit the newly exploitable resource. For example, the firm has an interest in exploiting 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 what of the foreign firms? Will they not be more difficult to rope-in to the scheme than domestic firms? Here things become a little more complicated, but not insurmountably so, 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, and use the proceeds to purchase shares in the same foreign firms, which would in turn be placed into SOP-styled “Peter accounts.” A cognate and perhaps more attractive (because non-taxing) means—though this would work more effectively with respect to primary issuances than to 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 as a consequence of the taxing method, and thus would be illicitly disadvantaged relative to domestic investment. If one were to develop a means of ensuring that it was only indeed “Marys” whom are being taxed—e.g., by taxing capital gains realized on foreign stock holdings only beyond some threshold—however, 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.<sup>158</sup>

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<sup>158</sup> 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 with the “Peters.” Lest you worry that the effect will nevertheless be the same, differing only 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. That is the loophole that I intend to close next.



That of course raises the other, cognate prospect just mentioned, amounting to yet another means by which to improve the relative justice-standings of "Marys" and "Peters." Trade and investment liberalization could be conditioned 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?

### 5.2. *Going Transnational: "Global Citizen" Stock Ownership Plans*

Pursue that last line of thought for a moment and connect it with the aforementioned matter of the "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. Link it up also to the yet larger matter of income security and its relation to investment diversification more generally. Might it be possible to develop either a national or, more ambitiously, multinational *compact* pursuant to which all "Peters" nationwide or indeed 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 the idea at least for a moment.

It seems plausible to suggest that citizenship itself is a kind of patronage, even if it is "thinner" than most other forms. It is an ongoing relation that 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 society at large.

Most people, surely feel that they owe a "hand up" to those who share our core values, obey 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, worth, and 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 Sections 2 and 3.3.<sup>159</sup>

Surely few will disagree with these truths, which not only Americans seem to hold “self-evident.”<sup>160</sup> What people do sometimes disagree about are the empirics of actual responsibility—the comparative degrees to which chance and choice have determined particular citizens’ particular outcomes. Practical means of disentangling these intermingling “inputs” to citizens’ “wealth functions” are proposed elsewhere.<sup>161</sup> For present purposes it will do simply to recall what was discussed above at Section 3.3. In summary, Section 3.3 proposed that (a) the more innocent a prospective beneficiary of a share-spreading program, the less well-endowed that beneficiary already is, and (b) 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. It is easier in such cases to view public action as vindicating equal opportunity rather than simply doling handouts. This is even truer when public augmentation takes the form of tax breaks.<sup>162</sup>

In this light, one could describe a 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. One could begin by targeting those who benefit their country or the global polity through something akin to the United States’ AmeriCorps services. One could even think about instituting, perhaps through the U.N., the World Bank, or some coalition of such institutions, something like a “WorldCorps.”<sup>163</sup>

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<sup>159</sup> See, e.g., sources cited *supra* headnote. See also Section 3.3., *supra* (noting the universality of equality norms).

<sup>160</sup> See Hockett, *Whose Ownership?*, *supra* headnote at 29–56. That is where I endeavor to locate an 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 (linking the concepts justice and efficiency); see generally Hockett, *The Deep Grammar of Distribution*, *supra* note 10. 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, in THOMAS JEFFERSON: WRITINGS 19 (Merril D. Peterson ed., 1984).

<sup>161</sup> See Hockett, *Whose Ownership?*, *supra* headnote at 36–51.

<sup>162</sup> See *supra* Section III.C.

<sup>163</sup> The United States’ first large-scale post-Homesteading era education-

Government could readily ensure that beneficiaries meet these criteria—criteria which will reflect and define the form of patronage that people believe ethically to underwrite the benefit.<sup>164</sup> And one could financially structure the arrangement so as to ensure that beneficiaries benefit only by working.

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 Section 3. Such a trust might be called, for example, 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 done in the U.K.<sup>165</sup> These individual CitSOP accounts could be administered as was envisaged in connection with the "USA" accounts proposed in the late 1990s by President Clinton, 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.<sup>166</sup>

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spreading—hence, "human capital" spreading—programs began with veterans as beneficiaries. Hockett, *Hamiltonian Means*, *supra* headnote at 144–46. It would be fitting to recognize other forms of service in similar ways.

<sup>164</sup> 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 *id.* at 97.

<sup>165</sup> I refer to Prime Minister Blair's Child Trust Fund—or more popularly, "baby bonds"—a plan implemented in 2001. See *Blair Banks On Baby Savings Scheme*, BBC NEWS, Apr. 27, 2001, [http://news.bbc.co.uk/1/hi/uk\\_politics/1297324.stm](http://news.bbc.co.uk/1/hi/uk_politics/1297324.stm). Former Senator Bob Kerrey of Nebraska proposed something similar in the United States at the turn of the past century. His were called "KidSave Accounts." See *Idea of the Week: KidSave*, DEMOCRATIC LEADERSHIP COUNCIL, Oct. 13, 2000, [http://www.dlc.org/ndol\\_ci.cfm?contentid=2372&kaid=131&subid=207](http://www.dlc.org/ndol_ci.cfm?contentid=2372&kaid=131&subid=207).

<sup>166</sup> President Clinton proposed "universal savings accounts," or "USAs," 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 generally JOHN MAYNARD KEYNES, *HOW TO PAY FOR THE WAR* (1940) (describing Keynes's visionary and, as it turned out, prophetic proposal); *President Clinton Introduces Universal Savings Accounts*, INVESTMENT COMPANY INSTITUTE, Apr. 16, 1999, available at [http://www.ici.org/issues/ret/arc-leg/99\\_pres\\_usas.html](http://www.ici.org/issues/ret/arc-leg/99_pres_usas.html); Press Release, The White House, Office of the Press Secretary, President Clinton Announces USA Accounts, (Apr. 14, 1999), available at <http://clinton4.nara.gov/WH/New/html/19990414-3020.html>; Pamela Perun, *Matching Private Savings with Federal Dollars*, URBAN INSTITUTE, Nov. 1, 1999, <http://www.urban.org/publications/309272.html> (evaluating the effectiveness of Clinton's USA Account proposals); RON GEBHARDTSHAUER, AMERICAN ACADEMY OF ACTUARIES,

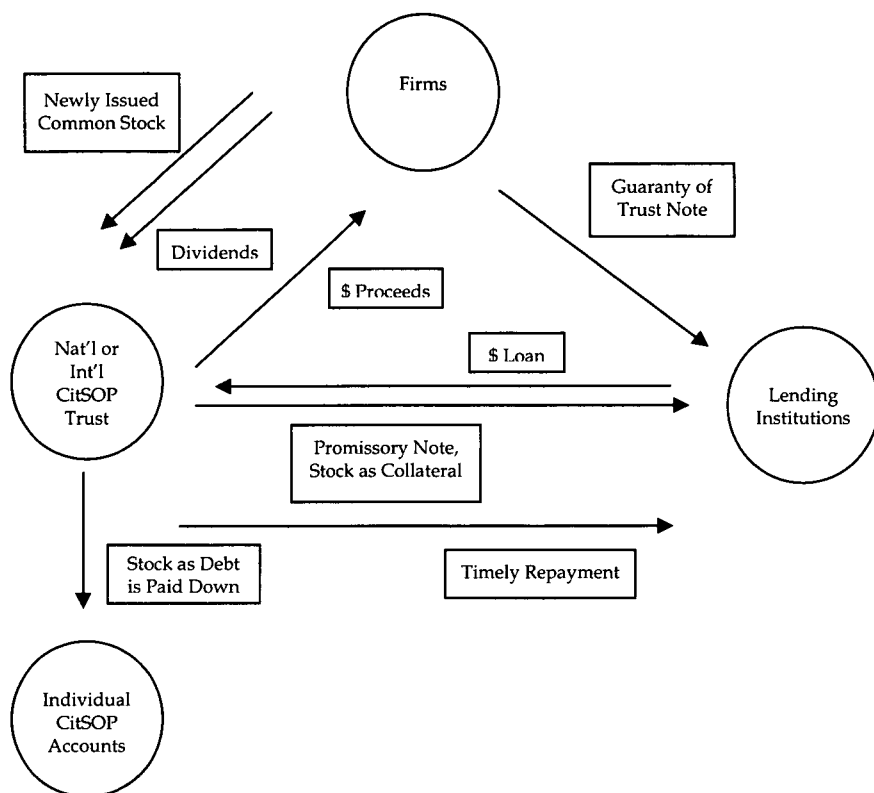
Let the national or multinational CitSOP trust borrow from lending institutions just as firms' ESOP trusts do, and let them use the proceeds of the loans to purchase newly issued, dividend-yielding common stock from firms. Grant participating firms and lending institutions, in turn, more or less the 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 collateral<sup>167</sup> 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:

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USA ACCOUNTS, <http://www.actuary.org/pdf/pension/usaccounts.pdf> (reviewing the advantages and disadvantages of the Universal Savings Accounts); WhiteHouse.gov, Strengthening Social Security for Future Generations, <http://www.whitehouse.gov/infocus/social-security> (affirming the importance of reforming Social Security); *Bush Pushes Private Accounts*, CBS NEWS, May 4, 2005, [http://www.cbsnews.com/stories/2005/05/04/politics/main692991.shtml?source=search\\_story](http://www.cbsnews.com/stories/2005/05/04/politics/main692991.shtml?source=search_story) (advocating the idea that private investment accounts created from Social Security payroll taxes is the best approach). On Keynes's role in designing the Fund, see, for example, Hockett, *Mission Creep*, *supra* headnote.

<sup>167</sup> Though, of course, this also might be deemed unnecessary in the United States 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 ("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 Risk-Based Capital Guidelines, 12 C.F.R. pt.3 app. A (2008).

FIGURE 5: INSTITUTIONAL/FINANCIAL STRUCTURE OF A CITSOP ARRANGEMENT



This diagram mirrors Figure 1 (or 2 or 3 or 4) again, with some differing persons and entities—apart from issuing firms and lenders—involved, in light of the distinct form of patronage being rewarded. The only complications found here and not in the previous figures (in the ESOP, CuSOP, RentSOP and OutsourceSOP cases) concern how precisely the salient patronage form is to be defined. For example, if one begins 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 tenure 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—just as one's U.S. Social Security or cognate national

pension benefit elsewhere (for example, Chile<sup>168</sup>) rises with time spent at work.

One might also stratify patronage *subtypes* in this case, such that law-abiding citizenship alone entitles the beneficiary to some basic minimum of stock released per quarter, national 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 opportunity deficits are of concern, one might “needs test” one or more of the benefits here, perhaps applying a graduated discount factor to entitled benefits as personal wealth rises.<sup>169</sup> One would then consider “disemployment” by an “outsourcing” firm itself to constitute such a need, in effect growing the CitSOP directly out of the OutsourceSOP. In such a case, one would presumably verify eligibility by means similar to those employed presently in connection with statutory “adjustment relief.”<sup>170</sup>

There are many variations and gradations to consider and evaluate, as the aim here is to establish the plausibility and attractiveness of the general idea rather than to lock into one particular blueprint. The important points for present purposes, then, are more fundamental in nature: The first is 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 can be envisaged. The second point is that it can do so while conferring benefits in a manner that both (a) spreads firm ownership, and (b) does so by means that respect both people’s core values *and* their *endowment* sensibilities as rehearsed above in Section 3.3.

The third point is that trade and investment liberalization may be conditioned upon participation by other nations in multilateral programs which require only well-to-do “Marys,” not erstwhile

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<sup>168</sup> For a good sampling of the aims, ambitions and operations of various national pension programs, see, for example, *THE ECONOMICS OF PENSIONS: PRINCIPLES, POLICIES, AND INTERNATIONAL EXPERIENCE* (Salvador Valdes-Prieto ed., 1997)

<sup>169</sup> 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 U.S. Supplemental Security Income’s abstention from needs testing.

<sup>170</sup> See *supra* note 137 and accompanying text (discussing adjustment relief through taxation).

penurious "Pauls," to share the surpluses they derive from globalizations with recently and faultlessly "outsourced" "Peters." Continued globalization could thus be conditioned upon everyone gaining.

And finally the fourth point, which will be treated more thoroughly in the following subsection, is that the national or international CitSOP idea fans out naturally into a broader consideration that deserves a bit more discussion: 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 to render our compensated "Peter's" new capital form as *secure* as "Mary's"?

### 5.3. *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 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. These factors include, for example, the number of different corporate firms that the particular beneficiary regularly patronized as a customer (voluntarily, involuntarily or in between), the number of such rent-extracting firms in more or less close proximity to where the beneficiary lived, or the number of firms—typically only one—for which the beneficiary labored. How, then, might one design SOP-like or SOP-complementing arrangements that optimally diversify holdings among all SOP beneficiaries irrespective of SOP-type?

Once again, a variety of methods might be employed. Consider two very simple, exemplary models. The first model might appropriately be called the "SOP Mutual." Various SOP trusts would convey their primary issuer stock holdings to an intermediary, which in return would convey shares in itself of

equal value to the trusts.<sup>171</sup> The intermediary (and now secondary issuer) would be, in effect, a mutual fund whose (initial) members were SOP trusts.<sup>172</sup> 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:

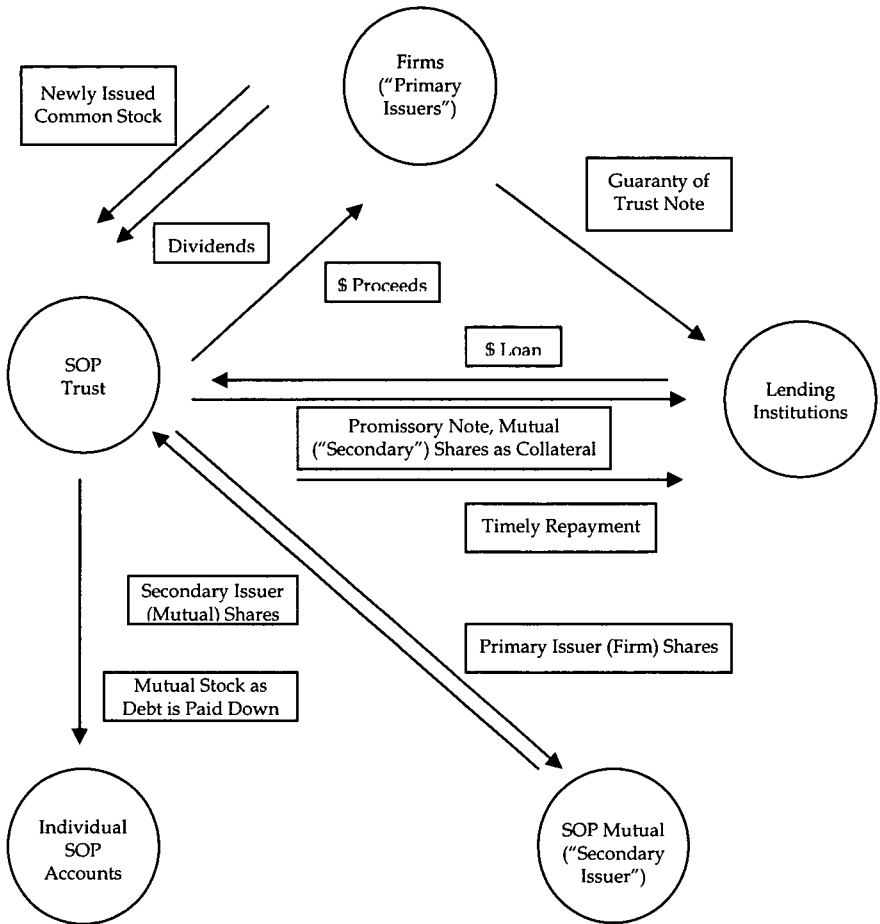
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<sup>171</sup> See generally TOM COPELAND ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 131-297 (3d ed. 2000) (describing cash flow valuation). Individual issuer shares would be valued as are any issuer's—by “the market” in the case of publicly valued firms, pursuant to the “cashflow” method in the case of closely held firms. *Id.* 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.

<sup>172</sup> This would also hold true for 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.<sup>173</sup> And the more SOP types and SOPs, of course, the greater the degree of diversity, hence the lesser quantum of value at risk, that would be faced by SOP beneficiaries—or “Peters.” Such a hybrid approach would yield the “best of both worlds,” so

<sup>173</sup> For example, were an insufficient variety of firm types participating in CitSOP arrangements.

to speak. It would both foster patronage relations between persons and firms—since benefits ride upon such relations—and dissipate the income-risk that attends patronage-concentration.

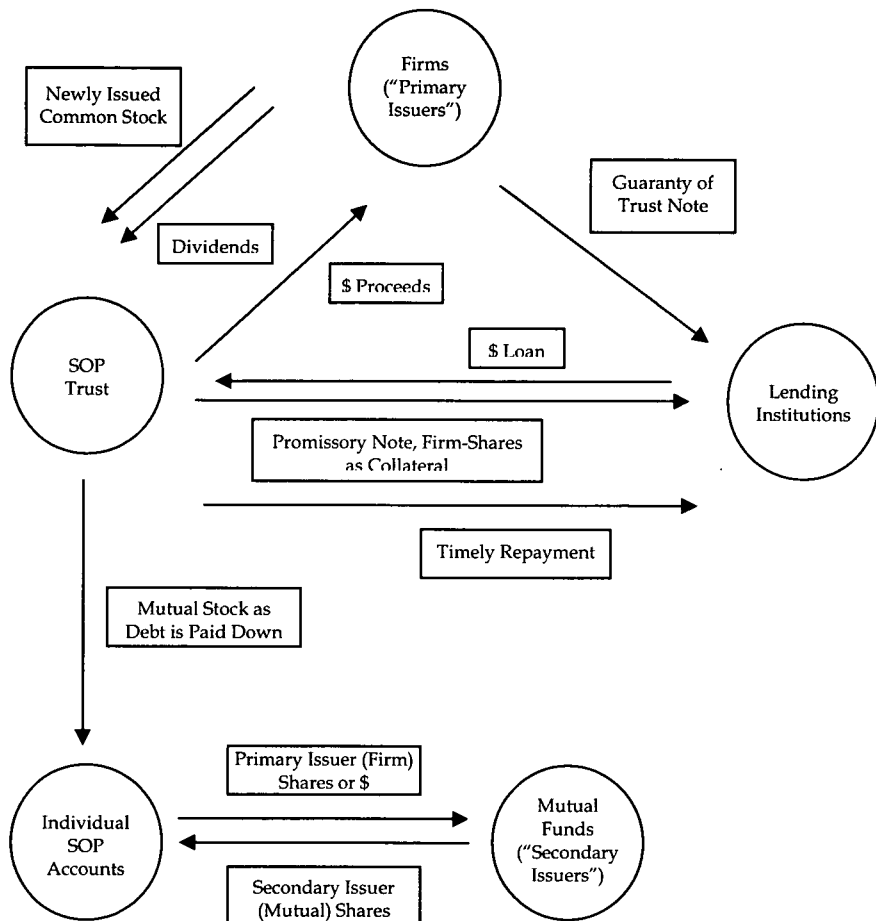
An advantage of the SOP Mutual model is that it enables SOP beneficiaries—not to mention lenders whose loans are collateralized by SOP Trust-held stocks—to reap the benefits of diversification even before they become legal, as distinguished from beneficial, owners. If, however, it became necessary to forgo that advantage for some reason, it would be possible to mutualize at the individual beneficiary level rather than at the SOP Trust level. One might, for example, condition qualification for the SOP benefit upon the agreement of beneficiaries to diversify their holdings for some period of time. Alternatively, one might tax gains differently upon individually owned primary issues and secondary (mutual) stock. What seems more likely is a gradually growing degree of financial understanding enjoyed by citizens holding gradually growing portfolios of securities<sup>174</sup> that presumably would prompt SOP beneficiaries to better diversify their legally owned holdings. Government 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:

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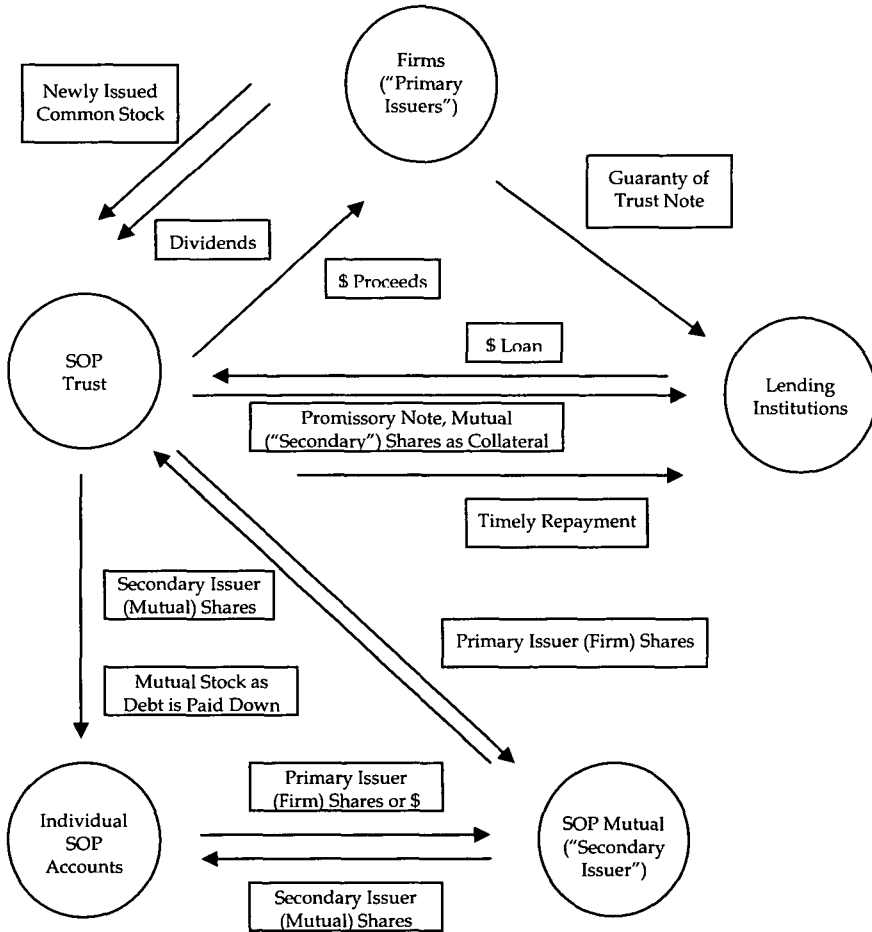
<sup>174</sup> We might even subsidize or require—the latter perhaps in the form of benefit conditionality—some baseline degree of financial counseling, as we do in the case of our federal home- and education-finance programs. See Hockett, *Jeffersonian Republic*, *supra* headnote, at 112, 151 (comparing federal home and education financing assistance).

FIGURE 7: INSTITUTIONAL/FINANCIAL STRUCTURE OF A SOP WITH PRIVATELY ACHIEVED DIVERSIFICATION



And one 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



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

## 6. A ROLE FOR THE INTERNATIONAL FINANCIAL INSTITUTIONS AND THE NEW INTERNATIONAL FINANCIAL ARCHITECTURE

Everything described and discussed in Section 5 implicates the International Financial Institutions (IFIs) and the "New International Financial Architecture" that they have been busily constructing since the mid-1940s.<sup>175</sup> 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 *which* IFIs should play a role – will rest largely on the structure and institutionalization of a system of OutsourceSOP arrangements, CitSOP arrangements, or both. This Article has thus far repeatedly abstained from committing to any one way of proceeding with these arrangements, in view of its exploratory, "thought-experimenting" nature.

Perhaps the best way to think about the role of the IFIs in a manner that coheres with this Article's purposes, then, is to divide the inquiry into two stages. The first stage will note a few reasons 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 envisaged for the IFIs, and (b) delimit how we can more specifically envisage those roles themselves. In the second stage, this Article will sketch out the role of the IFIs a bit more specifically. This paper, however, will aim to do so in broad enough outline as to remain appropriately open to the plurality of options presented by the "thought experimenting" done in Section 5.

### 6.1. *How the IFIs are Constitutionally Implicated*

The proposals envisaged in Section 5 are all, at their most basic, *financial* in nature. They are also designed with a view to better apportioning the benefits and burdens of globalization. The central idea is to spread ethically exogenous benefits and burdens more equitably, in keeping with core opportunity-egalitarian values as laid out in Sections 2 and 3.3. The aim is also to do so, in keeping with methods-constraining endowment dispositions as briefly rehearsed in Section 3.3, via the mechanisms through which

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<sup>175</sup> More on this history *infra*, text accompanying notes 179–85. See generally Hockett, *Macro to Micro*, *supra* headnote; Hockett, *Global Macro-Hedging*, *supra* headnote.

globalization-benefited business firms finance themselves. By tax-break-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 is 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. 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 Section 5 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.<sup>176</sup> What is meant by “emerging mandate” here? Well, two things—one fairly broad, the other more narrow in sweep. Broadly speaking, the IFIs' legally mandated and pragmatically necessary role is to facilitate sustainable global economic integration. More specifically, it is to do so from that integration process's specifically financial nodes.<sup>177</sup> This is, of course, a complex and evolving mandate, not least because global financial markets and practices themselves are both highly complex and now rapidly evolving.<sup>178</sup>

Now this mandate originally involved the IMF in overseeing and maintaining the global currency regime upon which product market integration depended.<sup>179</sup> It involved the IBRD in financing postwar reconstruction and new infrastructure development, both directly and indirectly.<sup>180</sup> 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 ongoing global financial market monitoring roles, as well as its comparatively recent domestic structural adjustments, have been steadily transforming it into a critical determinant of the

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<sup>176</sup> See generally sources cited *supra* headnote, para. 2. See also *infra* notes 177–97.

<sup>177</sup> See generally Hockett, *Macro to Micro*, *supra* headnote.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> “Indirectly” by effectively encouraging private lending in addition to supplying funds directly. See *id.*; Hockett, *Three Pillars*, *supra* headnote.

legal and regulatory infrastructures not only of cross-border financial transactions, but unavoidably of domestic financial arrangements as well.<sup>181</sup> The Bank, for its part, has come increasingly—and again, unavoidably—to treat domestic pension and social insurance arrangements as critical components of the infrastructures that must be formed for steady economic development.<sup>182</sup>

All of these developments were, at least in broad outline, both foreseeable and indeed foreseen during the founding era of the IFIs in the mid-1940s. Thus, they were legally provided for in the constitutive documents, acts, and shared understandings from which the institutions grew.<sup>183</sup> The founders recognized, and actively sought, the gradual integration of world product and service markets. They promoted this integration in the interests of greater prosperity among, and closer integration between national societies themselves.<sup>184</sup> Accordingly, they also saw the need for a pragmatically adjustable role for international collaboration in the realms of finance and its regulation, partly because financial services themselves engage in trade. More importantly, finance, financial markets, and financial products are critically determinative of the operation, integration, and stable sustainable growth of markets generally.<sup>185</sup>

Now it would seem that the prospects considered just above in Section 5 fall quite squarely within this same province, both as a prudential and as an ethical matter. Prudentially speaking, and as noted in Section 1, global trade and investment liberalization

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<sup>181</sup> See Hockett, *Macro to Micro*, *supra* headnote, at 156–57 (detailing how and why the International Monetary Fund has moved from focusing solely on strictly macro-economic concerns to also involving issues such as domestic bankruptcy laws, corporate policies, and political governance); see also Hockett, *Gestalt-Switch*, *supra* headnote (illustrating potential ways that IFIs could benefit individuals instead of just macro-economic actors).

<sup>182</sup> See Hockett, *Macro to Micro*, *supra* headnote, at 191 (noting changes in the Bank's system of assessment of necessary economic infrastructure); see also Hockett, *Three Pillars*, *supra* headnote, at 121 (supporting the IMF and the Bank in their recognition of effective social-insurance programs following the Asian Financial Crisis and the Argentine meltdown).

<sup>183</sup> See Hockett, *Macro to Micro*, *supra* headnote, at 177–89 (analyzing the IMF's Articles of Agreement).

<sup>184</sup> *Id.* at 162 (describing how “relations between aggregate wealth, trade, and money” gave rise to IFIs).

<sup>185</sup> See generally Hockett, *Macro to Micro*, *supra* headnote (suggesting that the IMF's focus on domestic markets is actually in line with the founders' original goals).

appear 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. If the process of global economic integration is to continue, and we are to avoid backsliding into a 1930s-style retrenchment, then we should increase the number of stakeholders among those who are growing both more disenfranchised and more disenchanting.

Sections 3 through 5 suggest that one ethically attractive and intuitively satisfying means of making more stakeholders is creating more shareholders within the very firms that now benefit by globalization. This kind of stake is of course financial, in that shares are financial assets and the proposed means for spreading these shares are financial as well. So both in respect of ends—sustaining continued global market integration by better spreading its financial benefits—and in respect of financial engineering means—the proposals above clearly implicate the IFIs' developing mandates. Generally, this is what is meant by asserting that the IFIs are implicated by this Article's proposals.

What is meant specifically? As argued elsewhere, the proper roles of the IFIs in facilitating sustainable global economic integration can be helpfully schematized as falling within any of four quadrants formed by two axes.<sup>186</sup> The first axis runs between so-called "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 "programs."<sup>187</sup>

The second axis runs between what are well individuated as "opportunity" and "risk." These amount to the financial faces of globalization's aforementioned "benefits" and "burdens," respectively.<sup>188</sup> This axis is rooted, not in the IFIs' enabling treaties, but simply in the functional roles played by finance in human affairs.<sup>189</sup> And the IFIs' mandates are best interpreted as charges to

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<sup>186</sup> See generally Hockett, *Gestalt-Switch*, *supra* headnote (suggesting ways that IFIs could benefit individuals instead of just macro-economic actors).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> 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 IFIs to adopt policies encouraging and facilitating state programs that not only increase opportunity and decrease risk, but that also work specifically to *spread* what this Article has called “ethically exogenous” opportunity and risk.<sup>190</sup>

The program/policy and opportunity/risk axes form four quadrants according to which many opportunity and risk spreading state programs, encouraged and facilitated by specific IFI policies, can be classified.<sup>191</sup> For example, land reform, basic health, literacy, and education programs carried out within states are, of course, ethically exogenous opportunity-spreading programs. The Bank in particular has developed policies in favor of encouraging and indeed facilitating such programs.<sup>192</sup> The Fund’s and the Bank’s developing interests in eradicating corruption and even in fostering democracy, both in governments and in corporate governance, can likewise be so interpreted.<sup>193</sup> Social insurance programs run by states amount to ethically exogenous risk-spreading programs. And the IFIs’ recent attentions to “social safety nets” amount to IFI policy developments along these lines.<sup>194</sup> Additional market-based programs are proposed in other venues.<sup>195</sup>

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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* (forthcoming 2008).

<sup>190</sup> *See* Hockett, *Gestalt-Switch*, *supra* headnote, at 193 (suggesting that IFIs could work to achieve global distributive justice by harnessing international financial markets); Hockett, *Three Pillars*, *supra* headnote (supporting the IMF and the Bank in their recognition of effective social-insurance programs following the Asian financial crisis and the Argentine meltdown).

<sup>191</sup> Hockett, *Three Pillars*, *supra* headnote. *See also* Hockett, *Global Macro-Hedging*, *supra* headnote (arguing that profit distribution remains inequitable despite increasing globalization, and suggesting and evaluating methods to change this); Robert Hockett, *Gaming as Microinsurance* (2008) (unpublished manuscript on file with author).

<sup>192</sup> *See* Hockett, *Gestalt-Switch*, *supra* headnote, at 195 (describing the Bank’s facilitation of state programs for project development).

<sup>193</sup> *Id.* at 195–96.

<sup>194</sup> *Id.*

<sup>195</sup> *See* Hockett, *Gestalt-Switch*, *supra* headnote.

Where do the SOP suggestions of Section 5 fit in? To a degree, they straddle the boundaries, occupying portions of all four quadrants, which renders them especially good candidates for IFI concern. It means they are cognizable by the IFIs from all vantage-points of their mandates. These observations are perhaps most obvious with respect to the opportunity/risk axis, where the straddle is conceptually inevitable (this will be shown in a moment). On the other hand, with respect to the program/policy axis, the straddle is specifically contingent upon the pending decision after Section 5 as to how things should proceed. Accordingly, it is best to briefly review the opportunity/risk axis, leaving the matter of program and policy to a fuller consideration in Section 6.2.

An opportunity and risk straddle in the case of the SOP plans of Section 5 means that spreading shares in globalization-benefited firms to faultless outsourced “Peters” includes *both* ethically exogenous risk *and* ethically exogenous opportunity. Peter no longer needs to bear this risk—which is, again, by hypothesis ethically exogenous<sup>196</sup>—alone. The risk to people like Peter—who might, when too old fully to retool, unforeseeably lose income in consequence of 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 to Peter by Mary, who has benefited by luck and must share some of her windfall gains. So the presently concentrated burdens wrought by globalization are diluted and spread out, as are the concentrated 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 they are young enough to be able to employ the new skills. Share-spreading of this sort also is *ethically exogenous* opportunity-

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<sup>196</sup> That is what we mean in calling him “faultless.” See *supra*, Sections 2, 3.3.

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 in Section 5 facilitate the sharing of ethically exogenous opportunity and risk across persons in a manner that both increases the number of stakeholders in, and decreases the injustices wrought by, global economic integration. It is precisely the sort of mission shown elsewhere to fall well within the bailiwick of proper IFI concern.<sup>197</sup>

But now, *what form* of IFI concern? How is the concern to be manifest? Are the SOP arrangements described in Section 5 best viewed as a state "program," which IFIs should adopt "policies" to encourage and perhaps facilitate? Or are we instead considering the sort of program that either must, or should, be administered by some transnational institution or institutions, including one or more of the IFIs? That question requires consideration of precisely what role the IFIs are apt to play in any global SOPs program. It is tempting to suggest that "path dependence," determined in part by already existent analogical precedent and in part by an already developing institutional backdrop, is fitting to play an influential role.

### 6.2. *How IFIs are Programmatically Implicated*

There seems no question that the IFIs both (a) have good reason, and (b) are authorized, to take interest in the prospect of a global SOPs program. Hence the principal remaining question is what form that interest should take. Given the particular interests at stake and the institutional environment already in place, it seems likely that the principal role for the IFIs will be: first, inventive and advocative; second, coordinative; and third, monitory. The remainder of this Section will explain these roles and their likelihood. However, in keeping with the more "thought-experimenting" aims of this Article, the prospect that IFI involvement might take some other shape should be left open.

First, then, the IFIs 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

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<sup>197</sup> See generally Hockett, *Gestalt-Switch*, *supra* headnote; Hockett, *Three Pillars*, *supra* headnote.

jurisdictions in a manner encouraging safe participation and diversification of holdings by SOP beneficiaries. 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, the aim is to convey not just expository ordering, but also literal programmatically temporal ordering. The order of exposition is not only heuristically natural, but also replicates the optimal *sequencing* of IFI involvement in any global SOP’s agenda.

But why should the IFIs design or advocate here at all? Do individual member states – particularly those with substantial populations of “Peters” – not already face sufficient incentives to institute systems of OutsourceSOPs and even CitSOPs? After all, their “Peters” are unjustly deprived of work opportunities by outsourcing, made possible by their treaties. It is their function to facilitate exogenous opportunity and risk sharing among their own citizens. What need is there for the IFIs to “incentivize,” then?

Furthermore, are states, in addition to being already adequately incentivized, also capable of *implementing* SOP programs on their own, state by state? States themselves must 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 Section 5. Moreover, it is presumably states that will have to determine what citizens qualify for the benefit, as is currently the case with more familiar adjustment assistance.<sup>198</sup> Finally, there is already an extensive infrastructure of bank trust departments and investment companies – mutual funds in particular – that seem most likely to supply the SOP-requisite trust accounts,<sup>199</sup> and these operate under domestic regulatory arrangements.

The reply to all of these questions and observations is, of course, yes. States’ preexisting incentives and capabilities to implement their own SOP programs are helpful because that means that they can begin designing and instituting such programs

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<sup>198</sup> See *supra* note 141, and accompanying text.

<sup>199</sup> We are not apt to wish to “reinvent the wheel” here.

as these to render globalization more unambiguously good for their citizenries, *without* having to wait for *others* to do so.<sup>200</sup> Furthermore, states will play a critical role, per familiar principles of subsidiarity, even in any eventual *global* SOPs infrastructure.<sup>201</sup> Nevertheless, complications arise which militate in favor of IFI entry.

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 Section 5. That is so both for the justice- and prudence-based reasons laid out in Sections 2 and 3.3, and for the more globalization-specific reasons discussed above in Section 6.1. "More" is straightforwardly "better."<sup>202</sup> Additionally, the IFIs, whose first mission is to facilitate precisely such continued globalization, bear a natural interest in encouraging members to do domestically what is necessary to further that transnational purpose. This is precisely why they encourage, as noted above in 6.1, the development of "social safety nets" such as OutsourceSOP and CitSOP.

Furthermore, within some polities, "Marys" might be as influential as "Peters," if not more so. Their perceived self-interests might not in all cases be "enlightened." Moreover, many "Peters" in many jurisdictions might believe that their only remedy from continued outsourcing is to push back against globalization itself. They might not realize that there are more direct and more carefully tailored, less globalization-threatening means of addressing their justified complaints that don't "throw the baby out with the bathwater."

Accordingly, while the IFIs set or influence the agenda within polities where "everyone gains," the Section 5 SOP solution has not yet been achieved or gone mainstream. But by adding a salutary voice within polities, and moreover, by adding an *impartial, transnational* voice, the IFIs can play a critical role in the

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<sup>200</sup> Hence my proposals in Hockett, *Of ESOPs*, *supra* headnote at 885-97 (arguing that an ESOP is a "tentative, but incomplete" step towards disseminating the benefits of globalization to all citizens).

<sup>201</sup> *Id.*

<sup>202</sup> See generally Hockett, *Whose Ownership?*, *supra* headnote (detailing "straightforward betterness"); Robert Hockett, *Market Completeness, Market Neutrality, and Ethically Cognizable Efficiency: An Ordinal Equivalence Theorem* (2008) (unpublished manuscript on file with author) (formalizing the proof of this claim).

popularizing and spreading of SOP programs worldwide. Again, that in turn will facilitate the stable and steady continuance of equitably distributed market-integration to which the IFIs are, so to speak, constitutionally committed.<sup>203</sup>

It also bears emphasis that some of the assumptions embedded in the questions introduced in the present discussion require more nuance to avoid being misleading. And this takes us directly to the second role that the IFIs will likely play in connection with the instituting of any global SOPs program that moves beyond mere advocating.

Here, then, is the proverbial rub: national governments may encourage actual tax breaks or require conditional SOP-financing by firms. They will also, in all likelihood, monitor beneficiary status claimants of SOP programs, with a view to those claimants' bona fide "*faultlessly* outsourced" status. Finally, 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-à-vis* the financing of firms and the operating of financial intermediaries increasingly affects persons residing beyond their borders.<sup>204</sup>

General Motors, Microsoft, and Unisys, for example, are not owned solely by American "Marys." Nor are Daimler, Phillips, or Unilever owned solely by Europeans, nor are Toyota and Sony exclusively owned by Japanese. Firms increasingly offer and sell their shares worldwide. Additionally, savings and investment portfolios increasingly are held across borders.<sup>205</sup> This means, among other things, that what a particular state encourages or requires of firms under its jurisdiction increasingly affects non-nationals as well as nationals.

That in turn means that *non-national* "Marys" over whom a government lacks jurisdiction might feel differently than *national*

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<sup>203</sup> That is to say, by their enabling treaties, whose mandates as enshrined in their constitutive documents.

<sup>204</sup> See, e.g., HAL SCOTT, INTERNATIONAL FINANCE 863–85 (13th ed., 2006) (evaluating the increased demand for international solutions in an increasingly dependent world).

<sup>205</sup> *Id.* at 17 (proving that cross-border savings and investment has increased dramatically).

"Marys" about having to share gains with national "Peters" – especially if it is easier for national "Peters" to gain beneficiary status than the "Peters" in "Mary's" own nation. It *also* means that nationally and non-nationally located *firms* can fare differently as "Marys" "vote with their feet" and move their investment moneys. Differential faring of this sort is inimical to the ideals of global market integration. What is more, differences in treatment of primary-issuing firms and financial intermediaries nation-by-nation discourage global diversification of holdings. Such diversification is a necessary predicate to optimal asset security among the world's shareholders.

Presumably, we need not continue with this line of observations for present purposes. The idea seems clear enough: for a global SOPs plan to be widely experienced, be appreciated as fair, and to work optimally, it will have to treat all global "Peters" and "Marys" as similarly and impartially as possible. That means that there is a role for impartial international organizations to coordinate efforts among nations in order to harmonize substantive standards and procedural implementation. Of course, this is yet another role that the IFIs – especially the IMF now – already play.<sup>206</sup>

Insofar as globalization is truly a global community project, and insofar as this project implicates something like a global SOPs program to smooth and thus underwrite the project's continuance, it calls for *coordinative* assistance given such programs by the same institutions that assist in coordinating the *other* policies, programs and processes of global integration. In the present context, that means the IFIs. 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 also constitute natural forums for coordinating, which includes the coordinating of substantive standards, implementary, and operational strategies, and the like. With respect to the SOP form of global social insurance, they will do what they already do with respect to global finance – *regulatory* architecture.<sup>207</sup> This takes us

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<sup>206</sup> See generally Hockett, *Three Pillars*, *supra* headnote, at 105 (describing the IFIs' role in balancing the concerns of equal treatment and market optimization).

<sup>207</sup> See generally Hockett, *Whose Ownership?*, *supra* headnote (detailing the interactions between social insurance and financial regulation); ROBERT HOCKETT, FINANCE, FINANCIAL INSTITUTIONS, AND FINANCIAL REGULATION (forthcoming 2008).

straight to the third and final “phase” of 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 coordinating regulation.<sup>208</sup> 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. At times, some of these people 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. 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.<sup>209</sup>

It is precisely because of the special vulnerability of inexpert clients, the systemic effects on the wider economy and thus uninvolved third parties, and the high money stakes that many traditionally anti-regulatory, politically “conservative” personages now recognize the need for at least *financial* regulation.<sup>210</sup> Together with the need to coordinate regulatory strategies in a world whose financial markets are now integrated even while regulation remains national and polycentric, these reasons underwrite the role of the IFIs in researching, developing, and facilitating the smooth operation of the global finance-regulatory architecture.

One can 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 varying amounts, 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-

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<sup>208</sup> See generally Hockett, *Macro to Micro*, *supra* headnote.

<sup>209</sup> For a particularly recent example, witness the 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.

<sup>210</sup> See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET 577-78* (3rd ed., 2003) (asserting that, even under the Reagan administration and its generally more anti-regulatory position, the SEC experienced a “staggering” increase its in workload).



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 will be a straightforward extension of—or rather, an augmentation of—what probably is 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 as the global financial system qua system. When we get there, of course, things will look much as they do now, “only more so.”

#### 7. CONCLUSION: OUR COMING GLOBAL SHAREHOLDER SOCIETY

A good bit of ground has been covered here, doubtless more than enough to warrant leaving off for the present. Perhaps ironically, however, these issues have only begun to be addressed. 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 sent visionary world leaders like Maynard Keynes and Harry White, in the mid-1940s, upon the course ultimately taken.<sup>211</sup> 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 also its most *unjustly* disadvantaged people.

But global market integration is also occasioning losses—including unjust losses. Until we get serious about developing means to address these, the world is apt not only to remain less just than it could be, but also to fall prey to backsliding in the unsatisfactory direction from whence we have but recently come.<sup>212</sup> It seems clear that the best means of addressing these losses—“best” as measured both against our motivating core ideals and

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<sup>211</sup> See Hockett, *Macro to Micro*, *supra* headnote, at 165–68 (discussing the proposals of Keynes and White and the resulting Bretton Woods institutions).

<sup>212</sup> Two words come to mind here: “Smoot-Hawley.”

against our feasibility-constraining endowment sensibilities discussed above in Sections 2 and 3.3 – are financial in nature.

It also seems clear that, just as globalization is a global project, so is the project of rendering globalization more just and sustainable. It is a project in which global institutions must play a critical role. Because 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.

The precise contours of these roles will ride in part upon the contours of the programs ultimately devised. But I hope 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 this succeed: it will be the attainment of 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. The foundations will be laid for a global society in which *all* 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.

Like it or not, everyone is a global stakeholder. The idea of this Article is to make this inescapable stakeholding not only more bearable, but more just and indeed even fulfilling, by making everyone global shareholders as well.

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