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What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs and “Ownership Societies”

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Article Abstract

What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs and “Ownership Societies”

Robert Hockett

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

This Article, the third in a trio of pieces devoted to fleshing out what a contemporary OS consistent with American values, endowment psychology and legal tradition would be, seeks to fill-in that gap. First it shows that there is indeed a gap to be filled – that firm-owning remains nowhere near as widespread as home- and human capital-owning. Next the Article shows that the Employee Stock Ownership Plan (ESOP) can be viewed as a tentative first step toward filling that gap. Indeed the ESOP, not accidentally, partly replicates our home- and education-spreading programs – but does so in what appears to be needlessly piecemeal, suboptimal fashion.

The ESOP is widely observed to concentrate income-risk, which an OS should spread. Yet more importantly, this Article argues, the ESOP is needlessly unambitious: It confines itself to labor patronage as the sole desert base upon which the reward that is share-spreading is predicated, and to tax-break-assisted firm borrowing as the sole credit base upon which leveraged financing is grounded. But there are many more forms of patronage than labor, and many more bases of credit than share-issuing firms, that we can exploit to complete an OS.

The Article accordingly generalizes from the ESOP along two salient dimensions – the patronage and credit dimensions – in order to complete SOP-financing’s replication of our federal home- and higher education-finance programs. It first proposes a number of analogues to the ESOP grounded upon non-labor patronage forms, then a “capital mortgage” financing program that is the full analogue to our present-day methods of home- and higher education-finance.

Our fuller OS, the Article concludes, is a “three-legged stool” that awaits our completing its third leg.
What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs and “Ownership Societies”

ROBERT HOCKETT*

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INTRODUCTION: OUR THREE-LEGGED STOOL’S MISSING LEG

The phrase “ownership society” exerts a peculiar allure. Those who employ it appear to be genuinely invoking, even promising, something. This “something” is not quite distinct: It shimmers ahead, so to speak, as if over a desert horizon. Yet somehow we’re sure nonetheless that it’s there and is wonderful, if we can but reach it. But what stirring state is this that each of us yearns for and most of us lack, which all of us fleetingly glimpse and might have if we’d seek it together? Is it anything more than a mirage?

It seems to have something to do with freedom – with material freedom and therefore with bounded, accountable freedom: “joint and several” freedom. We picture a

1 I do not say this as one who finds much allure in recent “tax relief” or “Social Security reform” proposals sometimes associated with the phrase. (A conspicuous summation of such associating can be found at http://www.whitehouse.gov/news/releases/2004/08/20040809-9.html.)

coordinated array of mutually delimited personal autarkies and risk-independencies. We’re drawn to this picture’s implicit promise – of ownership’s right of control over some basic minimum that each of us needs and can live on productively. And we’re drawn by its nod to a modest, contained self-sufficiency, its regard for the grace of “a gracious plenty.” For we know that it’s fitting to leave “enough and as good” for our fellows as that which we take, from the store of such resources as none of us has produced.\(^3\) And we sense it is proper, to work all together to ensure that such allotments – and the responsible freedom that they can secure – will ever be here to be had by us all. It is a sustainable “society” of owners we picture, after all, not a fantasy island or Robinson Crusoe world.\(^4\)

Once, when nearly all we required could be had from the land, and there was rather more land than we needed, we began to build such an “ownership society.”\(^5\) We just spread the land, in graciously sized parcels, to all who by working could render it freedom that is exercised through control over resources. That freedom is “bounded” and “accountable” because all of us bear equal moral claims upon such resources as we have not ourselves created. I intend “joint and several freedom” here to suggest a conceptual complement to joint and several liability – the idea that we would each have it and all have it, the “amount” that each severally has being a straightforward fraction of the total that jointly is shared.

\(^3\) The “enough and as good” qualification has come to be labeled “the Lockean proviso,” stemming as it does from Locke’s Second Treatise of Government. \textit{See John Locke, Two Treatises of Government} 288 (Peter Laslett ed., 1988). \textit{See also Robert Nozick, Anarchy, State, and Utopia} 174-82 (1974) (coining the term “Lockean proviso” and offering a would-be Paretian “update” of the proviso whereby appropriation of resources is deemed ethically permissible if those consequently excluded from access to the appropriated resources are nonetheless rendered no worse off than they otherwise would have been).

\(^4\) Perhaps it is something like James Meade’s “property owning democracy” that we are after, the image of which figures briefly, before disappearing, in Rawls. \textit{See J. E. Meade, Efficiency, Equality and the Ownership of Property} (1964); \textit{John Rawls, A Theory of Justice} 242 (Rev’d ed., 1999). Or perhaps it is something like that which was envisaged by Meade’s contemporary compatriots, the “Distributist” contributors to early-20th Century Catholic social thought. \textit{See, e.g., Hilaire Belloc, The Servile State} (1912); \textit{G. K. Chesterton, The Outline of Sanity} (1927).

\(^5\) This began with early American land policy, then “took off” in earnest during the early 1860s with the Homestead and Land Grant Acts. I endeavor to trace and interpret these efforts in another predecessor article, the sequel to that cited supra, note 2. \textit{See Robert Hockett, A Jeffersonian Republic by Hamiltonian Means}, 79 So. Cal. L. Rev. 45 (2005) (hereinafter “Hamiltonian Means”).
productive and live on it. We spread the know-how required to do that as well: Some of the land endowed free-access schools of “agricultural extension.” These resources – land and land-grounded “human capital,” along with a few rudimentary implements and mutual insurance arrangements – were all that we had to spread widely to realize a then-modern, prosperous republic of owners. We called it “homesteading;” but really it was high-yielding “farmsteading” and farm-grounded “schoolsteading.”

Then the land ran out. And so did the land’s capacity, when spread in small parcels, to satisfy our ever developing wants: It became no longer possible to give land without taking land. And an agrarian “yeoman” republic could no longer be an opulent or modern republic in any event. So we turned to another public resource apart from the land, one that could seemingly be given without taking. We used public credit – “full faith and credit.” We harnessed belief in a shared future, as embodied in a government that we counted our agent, to spread homesteads’ homes and human capital – houses and higher (no longer just agricultural) education. But we have not yet recovered

6 Not surprisingly, there is some disagreement over the degree to which the Homestead and Land Grant Acts contributed to the spread of farms and the growth of agricultural productivity in the later 19th Century. Compare, e.g., ALAN F. ZUNDEL, DECLARATIONS OF DEPENDENCY: THE CIVIC REPUBLICAN TRADITION IN U.S. POVERTY POLICY 23-42 (2000) to ROBERT DAHL, AN INTRODUCTION TO ECONOMIC DEMOCRACY 71-72 (1985), and to Terry L. Anderson & Peter J. Hill, Cowboys and Contracts, 31 J. LEGAL STUD. 489 506-13 (2002). See generally Hockett, Whose Ownership?, supra note 2, at 80-81. We need not, of course, attempt any final adjudication here. It also bears noting, perhaps, that even were critics unambiguously correct, our tendency to idealize the period would itself be revelatory of some “deep” feature of our desires and ideals.

7 Of course we took land for homesteading too. But sadly we took it from people we did not count as rights-bearing people. On the political significance of public giving that does not appear to require taking, please see Hockett, Whose Ownership?, supra note 2, at 80-81.

8 And “faith,” “credit” as credere, are the words here. We served as ultimate guarantor. Hockett, Hamiltonian Means, supra note 5 at 93.
homesteads’ nonhuman capital.\textsuperscript{9} We have yet to find and spread a counterpart to that, an analogue to the productive land itself. What is the analogue?

The analogue, I think, must be business capital – shares in firms.\textsuperscript{10} That is what now plays the role parceled land and plows did. If the phrase “ownership society” is to designate anything at all in our time – much less get off the ground, so to speak – we must surely get serious about spreading shares in firms.\textsuperscript{11} But how to do that?

Simple taking and giving probably are not in the cards. Perhaps they never were.\textsuperscript{12} But happily, it seems, they have never been needed. For did we not note just above, that when the land finally ran out we began publicly spreading the private owning of homes and “human capital” by other means? We collectively mobilized, guaranteed and “securitized” individually (and productively) used credit.\textsuperscript{13} Might we not spread firm-shares the same way? Indeed, in a way, that is what we do now, in modest and piecemeal fashion. Or so we shall presently see.\textsuperscript{14} So perhaps we need only extend our ambition.

\begin{itemize}
\item \textsuperscript{9} Hockett, \textit{Hamiltonian Means}, supra note 5, at 95.
\item \textsuperscript{10} I find this thought hard to escape. If I am simply misguided I’ll be grateful to be put right.
\item \textsuperscript{11} The sense in and degree to which we have not yet been serious about such share-spreading is discussed further infra, Part I.
\item \textsuperscript{12} But see supra note 7.
\item \textsuperscript{13} See Hockett, \textit{Hamiltonian Means}, supra note 5, at 93.
\item \textsuperscript{14} See Part II, infra. This Article treats principally of ESOPs as present means. Another present – and again piecemeal – means is the public encouragement of new and “small” business formation. I think that these efforts are laudable, but not enough. Why I think ESOPs inadequate will emerge in this Article, in particular at Part III. Why \textit{small business encouragement} is inadequate I’ll treat of in a subsequent Article. The short answer is that small business encouragement is analogous less to 19th Century land-spreading than it is, say, to 16th Century exploration-financing. It is terribly important and much to be praised, but also too speculative a public venture upon which entirely to ground a stable, sustainable “ownership society.” It also bears noting that up to the present ownership stakes in non-publicly-traded companies – sole proprietorships, partnerships of all kinds, subchapter S corporations and limited liability companies – are concentrated among Americans situated in the top decile of income and wealth. See Brian
\end{itemize}
But now here’s the rub: We have avoided the appearance of “taking” and “giving” in the home-spread, school-spread, and piecemeal stock-spread cases by exploiting a fact that’s peculiar to those cases: The beneficiary must labor to pay down the debt and make her investment pay off. Where it’s a home we have helped her to purchase, she has toiled to pay down the mortgage and maintain the premises. That secures the premises’ value, in order that they might appreciate even as the debt itself amortizes. Where it’s education we’ve spread, our beneficiary has worked at her studies and built up “human assets.” Then she has toiled at her job, which pays all the more in virtue of the schooling itself, to pay down her loans. So value-additive toil and remunerative employment have been key to our latterday ownership-spread’s actuarial and political successes. But then, what to do when the last thing to be spread – a share in employing firms themselves – is itself counseled precisely because the employment is not always there to be had?

The Employee Stock Ownership Plan (ESOP), I suspect, offers a glimpse of our answer, but is not itself our answer. It hints at our answer because, as in the home-spread, and education-spread cases, it employs the credit-augmenting strategy and ties benefit to toil. And it spreads shares in firms – our hypothesized primary analogue to homesteading’s land. But it is not our full answer also because it ties benefit to toil – to toil that’s not always there to be had. And it concentrates risk: Beneficiaries derive

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15 See Hockett, Hamiltonian Means, supra note 5, at 96.

16 See Hockett, Hamiltonian Means, supra note 5, at 153.

capital and labor incomes from the same source. Is there some way to have what is good here while avoiding what is not?

Yes. Or so I am tempted to think. The key, I suspect, is to fix on two facts: First, that the ESOP rests more heavily upon single firms’ credit than on the public’s much greater full faith and credit. Second, that employment is but one form of such firm-patronage as can ethically warrant the reward that is ownership. So the ESOP is piecemeal indeed as a business capital analogue to public-credit-fueled, private home- and education-spreading. If we step farther out along both aforementioned dimensions – the credit and patronage dimensions – we might generalize the ESOP into a method of business capital-spreading on par with our present-day home- and education-spreading. Then our “ownership society” might again stand on three legs; it will be complete in the way that it began to be when there was land enough and when land was enough.

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

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

Part III then turns to the deficiencies of ESOPs as share-spreading engines of a completed American “ownership society.” These deficiencies are associated with the two aforenoted “dimensions” – those of credit and patronage. The ESOP relies principally upon firm credit as frontline guarantor of individual stock-purchasers’ credit. That both (a) unduly limits individuals’ stock-purchasing credit, and (b) necessitates more

\[\text{21 Please see first several footnotes to Part I, infra.}\]
\[\text{22 At least pre-retirement. See Parts I and II, infra, on the significance of this caveat. In brief, our concern here is with building an “ownership society” that citizens might partake of over more than the final ten years or so of their lives.}\]
potentially objectionable dilution of existing shareholders and taxpayers than appears to be socially necessary. The ESOP also relies solely upon the employment relation as ultimate patronage form warranting benefit-conferral. That unduly limits the range of stock-purchasing possibilities, and accordingly both exacerbates the dilution problem and concentrates precisely that risk which a comprehensive “ownership society” should diversify.\textsuperscript{23}

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

Part V proceeds to the second “dimension,” that of credit. The aim here is to indicate, mechanically, how we might generalize from the ESOP idea by using beneficiary credit and the public’s full faith and credit, instead of just firms’ tax-break-assisted credit, to underwrite stock-acquisition by non-owning citizens. That is what we have done in the cases of home-spreading and education-spreading, we’ll see; and there

\textsuperscript{23} Please see \textit{supra}, note 15.
seems no reason in (financial) theory why we could not do the same in the case of stock-spreading. There might, however, be somewhat more poignant, endowment-psychology-rooted political obstacles in this case. And so we shall find the patronage discussion of Part IV helpful in conceiving conditions – “strings” – that might be attached, hence afford public warrant, to the benefits conferred by any “Capital Mortgage Finance” program.

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

I. THE MEASURE OF OUR SHORTFALL: PATTERNS OF SECURITIES-HOLDING IN CONTEMPORARY AMERICA

I hope that anyone who has read the present Article’s two companion pieces will find the prospect of a completed “ownership society,” hence the prospect of publicly facilitated stock-spreading, at least provisionally attractive. Provided that these are indeed prospects rather than faits accompli, there are grounds for that hope. For it would be difficult to examine, as related in the second of those companion pieces, the means by which we have worked publicly to facilitate home-spreading and higher-education-spreading without marveling at two of those means’ features in particular: First, their sheer financial ingenuity. Second, the ways in which their shared financial form both respects and gives expression to core American values and endowment dispositions. And while marveling so, one is naturally tempted to ask whether the same means might not be adapted to stock-spreading, in a manner that might supply the missing leg to that “three-legged stool” which would constitute a completed American ownership society – a society in which all participate in a responsible material freedom.
It might also be wondered, however – at least by some – whether the mentioned “third leg” has not already been supplied. For there seems a tendency among at least some well-to-do Americans to suppose that the U.S. already approximates to something like an “equity culture” or, say, a “shareholder society.”24 Our securities markets are deep and liquid. News outlets continuously report stock-index performances. Pop investment advisors appear regularly on television and radio programs, as well as maintaining websites, where they share investment strategies with presumably broad audiences of share-holding viewers and listeners.25 Some of the same personages, along with others, write books that sell widely.26 And all of it scarce wonder, we might suppose: For we even are directly told, point blank, that “half of us own stock.”27 And since many of the “other half” either are children or are retirees for whom bond- and other asset-holding makes more risk-sense than would stock-holding, it might then seem


25 Consider, e.g., The Motley Fool, who regularly turn up on radio talkshows and maintain their own website: http://www.fool.com/. Consider also Marketplace, the syndicated public radio program, who also maintain a website: http://marketplace.publicradio.org/. And of course consider the venerable public television programs Wall Street Week with Louis Rukeyser, then Louis Rukeyser’s Wall Street, which had popular until Mr. Rukeyser’s departure from the first then recent retirement from the second; see Nat Ives, “Wall Street Week,” A PBS Staple, Will Go Off the Air in June, N.Y. TIMES, March 24, 2005, at http://www.nytimes.com/2005/03/24/business/media/24pbs.html?ei=5088&en=b8340d014a2ae113&amp;ex=1269320400&amp;adxnnl=1&amp;partner=rssnyt&amp;adxnnlx=1111723761-jvUO6FRcqrLmeYg+YE/MQ.

26 See, e.g., DAVID GARDNER & TOM GARDNER, THE MOTLEY FOOL INVESTMENT GUIDE: HOW THE FOOL BEATS WALL STREET’S WISE MEN AND HOW YOU CAN TOO (2001); BOB FROELICH & SUZE ORMAN, WHERE THE MONEY IS: HOW TO SPOT KEY TRENDS AND MAKE INVESTMENT PROFITS (2001); PETER LYNCH, BEATING THE STREET: HOW TO USE WHAT YOU ALREADY KNOW TO MAKE MONEY IN THE MARKET (2000); JAMES K. GLASSMAN & KEVIN HASSETT, DOW 36,000: THE NEW STRATEGY FOR PROFITING FROM THE COMING RISE IN THE STOCK MARKET (2000). This is truly a minimal sampling.

natural to conclude, from the “half of us” figure, that firm-owning already is spread just as optimally as are home-owning and higher-educated “human capital”-owning.

But that “natural” conclusion, it turns out, is false. And the observations just related that might seem to warrant the conclusion are all, in potential, quite grossly misleading. For it is one thing for many to own some stock. It would be quite another for many to own significant amounts of stock. And it would be yet more to claim that many owned large, independence-conferring and participation-fostering blocks of stock. A tiny few, we shall see, own blocks like that. And few indeed own significant amounts of stock, or of other financial assets with significant present value for that matter, at all.28

First I consider stock-holding irrespective of whether it be “direct,” “indirect” or “beneficial.”29 Then I track ownership patterns under those classifications separately.30

28 I confine myself principally to stock-owning in this Article, setting other financial assets off to the side. A brief explanation is in order: Were we interested in the owning of securities and other financial assets primarily in view of the firm-participation and -governance rights that such owning might confer (please see infra notes 30, 62, 142), it would be obvious why we should restrict our attention to equity securities and ignore other forms of financial asset: only the former confer voting rights upon their bearers. But I restrict attention to equities even while granting that an “ownership society” should be interested in spreading securities and other assets on grounds additional to firm-participation and -governance grounds, including income-independence grounds (again see infra notes 30, 62, 142). I do so for two reasons: First, with the exception of one comparatively small class of Americans who are not our principal concern here, most who own corporate equities at all own other kinds of financial asset to a much lesser (and indeed more maldistributed) extent, meaning that holdings of the other kind do not substantially offset the shortfall in stock-owning. Second, the aforementioned small exceptional class of Americans – those who are wealthy, retired, or nearing retirement – principally comprises people who simply (and in the latter two cases recently) have exchanged equities for less volatile securities in express recognition that they are nearing the ends of their lives. See generally SEC. INDUS. ASS'N, 2005 SECURITIES INDUSTRY FACT BOOK 66-67 (Grace Toto ed., 2005) (Median household holding liquid financial assets beyond cash holds 37% of those assets in equities, 11 % in bonds). See also Bucks et al., supra note 14 at A1, A10-A19 (showing distributions of household financial assets among bank accounts, bonds, stocks, life insurance and other categories over 2001-2004, broken down by household income-quintile, which distributions are more skewed even than those of equity securities).

29 The distinctions between categories will become plain as we proceed. Briefly, “direct” owning is holding of title to securities in the firm that issues the securities. “Indirect” owning is the holding of title to shares in a firm which itself in turn holds title to securities issued by the “indirectly” owned firm. And “beneficial” owning is simply one’s legal beneficiary status in relation to a trust, managed by another (a trustee, of course), which holds title to securities issued by the “beneficially” owned firm. More on the significance of the distinctions, for our purposes, infra.
A. Direct, Indirect & Beneficial Holding Combined

It is true that “most” or nearly most Americans – either directly, indirectly, beneficially or in some combination of those forms – own at least “some” shares in firms. According to the Investment Company Institute and the Securities Industry Association, that could be said of about 52.7 million American households representing some 84.3 million adults in 2002. And that amounted to nearly 52% of American households. But we must qualify these statistics in two important ways, one potentially troubling, the other determinately so.

The potentially troubling qualification comes via the Federal Reserve’s most recent triennial survey of American family finances, released about one week before the time of this writing. According to the Fed’s figures, the statistics cited in the previous paragraph turn out to represent the peak of a trend begun over ten years ago – a trend in the direction of gradually growing percentages of households owning stock in one form or another. This trend now has begun to reverse itself: Since 2002, it seems, “the fraction of families holding any . . . stock [has fallen] 3.3 percentage points, to 48.6

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30 My reason for this division of the discussion is rooted in the discussion of the predecessor articles. Briefly, it is that ownership-spreading resonates with several American valutational traditions – what I call, with I think little if any idiosyncrasy, the Civic Republican, Classical Liberal, and Pragmatic Consequentialist traditions. All three traditions, and especially the first two, value the independence that owning confers upon owners. But the first of the traditions also conspicuously values the manner of responsible civic engagement – participation – that owning encourages. In respect of firm-owning, accordingly, the Civic Republican strand of the American valutational tradition will favor direct owning over indirect owning, and both of these over mere “beneficial” owning.

31 INV. CO. INST. & SEC. INDUS. ASS’N, supra note 26 at 15.


33 See Bucks et al., supra note 14.

34 Id. at A19.
percent, a level apparently last reached some time between the 1995 and 1998 surveys.”35
In this same period, moreover, “the overall median value of direct and indirect stock
holdings [has] dropped 33.8 percent.”36 So we must not conclude from all of the rosy late
1990s chatter encountered in the popular media even that “half” of us own shares in firms
any longer, particularly if present apparent trends continue. For purposes of this Article,
however, I shall by and large ignore the more recent bad news. For what seems rather
more important is that even in that peak year for the widespreadness of stock-owning in
the U.S., we were very far from constituting anything like a meaningful “equity culture:”

So much for the potentially troubling qualification to the “half of us own stock”
statistic. The determinately troubling – and much more significant – qualification is this:
Even a moderately careful perusal of available data reveals that we have never, as yet,
come anywhere near to constituting a meaningful “ownership society” where firm-shares
are concerned. For, irrespective of the (only marginally) varying percentage of
Americans who have owned “some” stock since data on this question has been available,
the total distribution of stocks, tracked share by share, has never yet failed to be highly
skewed.37 It has been substantially more so, in fact, even than that of most other assets,
such as homes.38 It has also been substantially more so than that of (non-dividend)
income, long widely observed to be highly concentrated in the U.S. as compared to other

35 Id. at A19.
36 Id. at A19.
37 See, e.g., Mihir A. Desai et al., Taxation and the Evolution of Aggregate Corporate Ownership
Concentration 34-36, Tables 1 and 2 (National Bureau of Economic Research, Working Paper 11469, June
2005). Also data recorded in remainder of this Part.
38 MISHEL ET AL., supra note 31, at 286. Also Bucks et al., supra note 14, at A22.
jurisdictions. And these facts hold true even when we take direct, indirect and
beneficial securities-holding all into account. “Let’s do the numbers:” A few figures and
graphics prove telling:40

In 2001, the top 0.5% of stock-owning households in the United States held
25.6% of all shares.41 The bottom 80% held only 10.7%.42 The distribution,
unsurprisingly, remains quite concentrated at the top end when tracked by dollar value;
and the dollar value of most Americans’ holdings, when they hold anything, is
remarkably low: In 2001, the top 1% (in net worth terms) of households in America who
owned any stock at all had on average $3,568,40043 invested either directly, indirectly or
beneficially in stocks.44 The comparable figure for the next 9% of stock-owning
households was $512,300.45 For the next 10% it was $131,000.46 For the next 20% it

39 See, e.g., Desai et al., supra note 37, at 34-36, Tables 1 and 2. (Over years 1929-2000, top
centile of Americans receive about 13.15% of non-dividend income on average, yet receive dividend
income ranging from 30-64% of all such reported, averaging near 50%).

40 Listeners to Marketplace, cited supra note 25, will recognize this “doing the numbers” line.

41 MISHEL ET AL., supra note 31 at 287.

42 Id. From 1929-2000, the bottom 80% held closer to 22%, meaning that are doing worse than we
have done on average since the Great Crash. See Desai et al., supra note 32 at 36, Table 2. Desai et al.
reveal another interesting result – viz., that corporate ownership concentration systematically reverse-
correlates with tax progressivity, as originally postulated first by Means, then by Berle and Means. See
Desai et al., op. cit. at 1 passim (“highly progressive income taxes . . . associated with . . . sharp increase in
the diffusion of ownership”). See also Gardiner C. Means, The Diffusion of Stock Ownership in the United
States, 44 Q. J. ECON. 561 (1930); ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION
AND PRIVATE PROPERTY (1932). The tax-cutting strand of the ideology of some ownership society
advocates, it seems, is at crossed purposes with the “ownership society” strand.

43 All monetary figures are calculated in constant 1995 dollars.

44 MISHEL ET AL., supra note 31 at 289.

45 Id. at 289.

46 Id. at 289.
was $41,300. The middle 20% had $12,000 on average invested either directly, indirectly or beneficially. And the bottom 40% of stock-owning households had a mere $1,800. (We are still ignoring, recall, the roughly half of Americans who hold no equity securities in any manner.) While “the average” stock-owning American household, then, had $106,000 invested in stock either directly, indirectly or beneficially, it would be illicit to suppose that a significant number of American households held portfolios with anything near that value in view of the distribution just catalogued.

Graph 1 makes the point pictorially. It illustrates the total distribution of stock holdings by stock-holding American wealth class in 2001. Perhaps the most starkly striking fact visible here is that, while the wealthiest 10% of American households owning any stock at all – those represented by the first two columns – directly, indirectly or beneficially held approximately 76.9% of all stocks, the least wealthy 40% – those represented by the last column alone – held (in the same manners) only about 0.7%:

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47 Id. at 289.

48 Id. at 289.

49 Id. at 289.

50 Id. at 289.

51 What I mean by “wealth class” will be apparent from the breakdown of the graph. I mean, in net worth terms, the top one percent, the next nine percent, the next twenty percent, the next twenty percent below that, then the bottom 40 percent.

52 Id. at 290.
Graph 1: Securities Holdings Tracked by Top 1%, 9%, 10%, 20%, Middle 20% and Bottom 40% American Stock-Holding Wealth Classes, 2001
If we divide classes up evenly, say into quintiles, then the skew in our distribution becomes both more transparent and more dramatic: The first three vertical bars in Graph 1 have to be stacked into one bar, while the last bar has to be subdivided into two yet shorter bars. Things then look like this:

**Graph 2: Securities Holdings Tracked by Stock-Holding American Household Wealth Quintile, 2001**
That’s pretty telling. But we can say more: In 2002, nearly half of all equity investors (and remember again that this class itself comprises but half of Americans generally) held equity assets valued at less than $50,000.53 Over half of these in turn held assets valued

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53 INV. CO. INST. & SEC. INDUS. ASS'N, supra note 26, at 6. Each of the following several percentages (apart from the first – the 14% figure) should of course be divided approximately in half in
at less than $25,000. Over half of those held assets valued at less than $10,000. And only 7% held equity assets valued at $500,000 or more. Table 1 provides a fuller and more detailed breakdown. It shows what percentage of equity investors (again, a universe comprising but half of Americans in the first place) owned stock portfolios from $0 to $1,000,000 or more, tracked by $10,000, then $15,000, then $25,000 and finally yet larger increments, in 2002.

Table 1: Distribution of Equity Portfolios Tracked by Increments

<table>
<thead>
<tr>
<th>Portfolio Value</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $10,000</td>
<td>14%</td>
</tr>
<tr>
<td>$10,000 - $24,999</td>
<td>11%</td>
</tr>
<tr>
<td>$25,000 - $49,999</td>
<td>24%</td>
</tr>
<tr>
<td>$50,000 - $74,999</td>
<td>15%</td>
</tr>
<tr>
<td>$75,000 - $99,999</td>
<td>7%</td>
</tr>
<tr>
<td>$100,000 - $249,999</td>
<td>15%</td>
</tr>
<tr>
<td>$250,000 - $499,999</td>
<td>7%</td>
</tr>
</tbody>
</table>

In order to calculate what percentage of the population at large holds portfolios of the associated values. (If we include a “null portfolio” for those holding no securities at all, we should add 50% to the 14% figure, to reflect the fact that 64% of Americans hold either no stock at all or stock valued at less than $10,000.) I trust that the average scholarly reader will appreciate how truly small is the value of even that $50,000 portfolio which 75% of Americans do not have.

54 Id.
55 Id.
56 Id.
57 Id. at 6. The growing increments simply reflect the dramatic nature of the skew found in Graphs 1 and 2; the table would grow very long indeed were it to remain with $10,000 increments, and by far most of the length would of course be represented by a tiny fraction of Americans – the very wealthy ones. Also please note again that things have not improved on the score that I am tracking here, according to the Fed’s latest data: Indeed they appear in most respects to have worsened. See Bucks et al., supra note 14, at A10-A19.
B. Direct versus Indirect & Beneficial Holding

The distribution of undifferentiated stockholding as just portrayed should give pause to those who believe that the U.S. constitutes an “equity culture” already.58 But things become yet more problematic when we differentiate stockholding with a view to whether the U.S. constitutes a literal “firm-ownership society.”59 For we can usefully distinguish, for some purposes, among the direct, indirect and “beneficial” owning of securities.60 To the degree that we are interested in securities-holding solely in virtue of its capacity to confer a degree of income-independence upon the holder, the distinction (like that between equities and other financial or readily liquidated assets61) is presumably without difference. To the degree that we might be interested in securities-holding in virtue of the habits of responsible owning and shared governance that it might engender, however, the distinction will take on importance.62 (So, of course, will that

<table>
<thead>
<tr>
<th>$500,000 - $999,999</th>
<th>4%</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,000,000 or more</td>
<td>3%</td>
</tr>
<tr>
<td>mean</td>
<td>$171,000</td>
</tr>
<tr>
<td>median</td>
<td>$50,000</td>
</tr>
</tbody>
</table>

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58 By “undifferentiated” I mean simply those who hold any stock at all, whether directly, indirectly or beneficially. See supra, note 28, on the distinctions among those three classifications.

59 Taking ownership now to include, as it is typically defined to include, rights to control such as we expect to accompany rights to residual earnings.

60 See supra, note 28, on the distinctions among these classifications.

61 See supra note 27.

62 Adherents to the Civic Republican tradition of American political thought, for example, might take interest in securities holding for this reason. See note 28, supra, and note 142, infra. See also Gregory S. Alexander, Pensions and Passivity, 56 LAW & CONTEMPORARY PROBLEMS 111 (1993). See generally
between equity-holding and other forms of financial-asset-holding in this circumstance.63) People with the latter interest – call them “Civic Republicans,” as distinguished from “Classical Liberals” and “Pragmatic Consequentialists”64 – are likely both to think of “owning” in “controlling” or “governing” terms, and in consequence to find present patterns of American securities holding yet more dispiriting even than they have appeared up to now in this Part.

The direct owning of firm-shares by American households is particularly rare.65 In 2001, only 21.3% of American households directly held any stock at all.66 By contrast, 47.7% of households indirectly or beneficially held at least some stock (subject to the distribution patterns just discussed above at Part I.A).67 Most households that owned stock directly also owned stock indirectly or beneficially - 80.3% of them, in fact.68 Only 17.1% of all American households held stock both directly and indirectly.69


64 I take the terms from Hockett, Whose Ownership?, supra note 2 at 5-28, where I employ them to designate what I identify as the three dominant traditions of American political self-understanding, then endeavor to identify a range of overlapping consensus among those traditions with a view to forging a unitary ideological template upon which to construct a politically stable “ownership society.” See also notes 28 and 62, supra, and note 142, infra.

65 I ignore here the owning of nonpublic firms. See notes 14 and 27, supra. It happens that the owning of nonpublic firms is rare too, as a statistical matter. See Bucks et al., supra note 27, at A22. Yet even were this not so, more owning of public firms, even by owners of nonpublic firms, would be counseled by the diversification considerations discussed infra, Part III.

66 MISHEL ET AL., supra note 31 at 288.

67 Id. at 288. Please bear in mind the distribution described in the previous subpart supra, Part I.A.

68 Id. at 288.
Much indirect holding of securities by Americans is effected through investment companies, typically mutual funds. American investors on average hold much more stock (indirectly) in mutual funds than (directly) in non-investment-company issuers: Fully 89% of undifferentiated equity investors (again, that’s only half of Americans generally) owned stock in mutual funds in 2002, while 49% owned non-investment-company issuing firms’ shares directly.\textsuperscript{70} Fully 51.5% of American equity investors held \textit{only} mutual fund shares.\textsuperscript{71} Eleven percent held only individual stock.\textsuperscript{72} And 37.5% of held both individual stock and mutual fund stock.\textsuperscript{73}

Another principal vehicle through which indirect securities-holding is effected is the retirement or pension plan. Indeed, this seems to be the most significant form of Americans’ indirect holding or “beneficial owning” of stock, in terms of sheer numbers of “owners.”\textsuperscript{74} About 33.2 million Americans held (or beneficially owned) stock through some employer plan in January, 2002.\textsuperscript{75} The comparable number for holding through mutual funds was somewhat smaller: Only 28.7 million Americans held stock indirectly though mutual funds outside of employer plans in 2002.\textsuperscript{76}

\textsuperscript{69} \textit{Id.} at 288.

\textsuperscript{70} \textit{INV. CO. INST. & SEC. INDUS. ASS'N}, \textit{supra} note 26, at 4.

\textsuperscript{71} \textit{Id.} at 5.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} Indeed sufficiently significant to have prompted Peter Drucker somewhat hyperbolically to refer to an “unseen revolution” through which “pension fund socialism” had come to America. \textit{See DRUCKER, supra} note 24.

\textsuperscript{75} \textit{Id.} at 4.

\textsuperscript{76} \textit{Id.} at 4.
Percentage-wise, nearly half of indirect stock-owning (or beneficial owning) appears to be effected through employer plans: About 48% of American households owning equities at all in 2002 initially acquired their stocks indirectly through employer plans.\(^77\) About 44% initially purchased stock outside of these plans, and 8% initially acquired stock both inside and outside of employer plans in the same year.\(^78\) The majority of all American equity investors (again, \textit{not} of all \textit{Americans}) held at least some stock through employer plans in 2002 – 66% – while only 17% held some stock directly as well as through an employer plan.\(^79\)

The significant role played by employer plans in indirect or beneficial stock-holding by Americans raises more than just the governance concerns that might trouble Civic Republicans. It also raises risk and diversification concerns that might trouble anyone caring about the reliability of incomes – concerns we shall revisit in detail at Part III below. Of the 8.8 million households, representing 12.3 million adult individuals, who held or beneficially owned stock through employee plans in 2002, about 51% “owned” only \textit{employer} stock through their plans.\(^80\) Only about 28% owned only non-employer stock.\(^81\) And only about 21% owned both employer and non-employer stock through their plans.\(^82\) Fully 65\% of investors holding individual stock through employer plans in 2002 held only one or two separate stocks through such plans; only 16\% owned

\(^{77}\) Id. at 4.

\(^{78}\) Id. at 4.

\(^{79}\) Id. at 4.

\(^{80}\) Id. at 65. The scare quotes round “owned” owe to the lack of control rights attaching to “beneficial owning.” \textit{See} note 70, \textit{supra}.

\(^{81}\) Id. at 65.

\(^{82}\) Id. at 65.
6 stocks or more. The median number of stocks held was one; the mean was four. (The median number of years that this group owned stock through employer plans was 10 years.)

Apart from governance and risk-concentration concerns, it bears noting that stock-holding through employee plans, though it represents a very large portion of all American equities-owning, nonetheless is quite small when calculated in person-by-person terms: The median value of investors’ individual stock portfolios held through employer plans was $25,000 in 2002, as compared to $30,000 in 1999. The mean value of such portfolios was $150,000 in 2002, as compared to $105,000 in 1999. Among investors holding only employer stock through their employer plans, the median value of such “portfolios” was $17,500 in 2002; the mean value was $86,700. The median value of investors' stock mutual fund portfolios held through employer plans was $30,000,

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83 Id. at 70.

84 Id. at 70. It is perhaps worth noting that a want of diversity also afflicts the direct owning of stock by most Americans who own in this way. According to the Fed, of those households that owned stock directly at all in 2004, 34.6% held the stock in but one firm, 59.5% held the stock in three or fewer firms, and only 9.5% held the stock in fifteen or more firms. Moreover, for 37.1% of these direct holders, at least one of the firms in which shares were directly owned employed either the head of the household or that person’s spouse or partner. See Bucks et al., supra note 14, at A15.

85 Id. at 70.

86 Id at 71.

87 Id. at 71.

88 Id at 71. The scare-quotes around “portfolios” are meant to convey that a portfolio that includes but one firm’s securities is a degenerate case.
which typically was invested in three mutual funds.\(^{89}\) The mean value of these portfolios was $84,100.\(^{90}\)

We could proliferate figures like this \textit{ad libitum}.\(^{91}\) But there seems little need. The point should by this point be plain: Negligibly few Americans directly, indirectly or beneficially own sufficient securities as to be income-secure before reaching retirement.\(^{92}\)

Not many more hold sufficient securities to be income-secure even upon retirement, absent significant public assistance in the form of post-retirement income-support through Social Security and Medicare.\(^{93}\) And far, far fewer hold equities directly in such manner as to afford opportunities to participate meaningfully in the governance of firms.

In sum, then, we simply are nowhere near, in the realm of firm-owning, where we are in the realm of home-owning or remunerative “human capital” owning.\(^{94}\) And even in the latter, of course, there is more to be done.\(^{95}\) If we are to be truly serious about

\(^{89}\) \textit{Id} at 88.

\(^{90}\) \textit{Id.} at 88. For those who worry over the degree to which what stock-owning there is in America is either indirect or beneficial in nature, additional worry might be occasioned by such “beneficial indirect” owning as is noted here. On the other hand, the greater mean and median values of such portfolios, presumably stemming from their diversification advantages, should afford some solace. There is of course some inherent tension between the goals of income security and governance, just as “exit” and “voice,” risk-avoidance and commitment generally represent alternatives rather than partners.

\(^{91}\) \textit{See, e.g.}, Bucks et al., \textit{supra} note 14, where much more in the way of statistics along these lines can be found. This, recall, is the recently released Fed report.

\(^{92}\) Consider again the dollar figures assayed above at Subpart I.A, in particular the $50,000 one. \textit{See also} notes 27 and 52, \textit{supra}.

\(^{93}\) Consider the same figures just noted, at note 83, once again.

\(^{94}\) \textit{See} Hockett, \textit{Hamiltonian Means}, \textit{supra} note 5 at 116-17, 153 on how much more widely distributed these assets are now, after the implementation of federal credit-augmenting strategies of the kind described infra, Part V, than they were prior to federal involvement. The present Article is of course predicated in part on the prospect that the same basic strategy might be employed to similar effect in spreading firm-shares.

\(^{95}\) \textit{See} MISHEL ET AL., \textit{supra} note 31, at 293. \textit{See also} Robert Hockett, \textit{Asset-Spreading Among the Poor: Past Efforts, Usable Lessons and Future Prospects} (working draft, on file with author).
becoming an “ownership society,” then – a society of responsible, participating and materially autonomous owner-citizens rather than just a society in which some people own some things – we shall have to become more serious about firm-ownership-spreading than we have thus far managed. We shall have, perhaps, to do with shares something like what we have done with homes and higher educations.

II. A MODEST FIRST STEP TOWARD REDRESS: ESOPs – WHAT THEY DO, HOW THEY DO IT & WHY WE SEEM TO LIKE THEM

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

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

97 Congressional action culminating in the passage of ERISA was precipitated by the folding of the Studebaker corporation, which, it was subsequently discovered during bankruptcy proceedings, had grossly underfunded, and indeed “raided,” its employee pension fund, leaving the suddenly unemployed pensioners doubly bereft. See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 68-84 (3rd ed., 2000). Those familiar with recent bankruptcies, particularly in the airline industry, might be tempted to say plus ça change.
might benefit all Americans. And I plan to exploit that generalizability in Parts IV and V in the interest of completing our “ownership society.”

A preliminary terminological point before we proceed: In speaking of ESOPs (or “plans”), one can be speaking of any of several distinct, cognate kinds of financial arrangement. All, as befits their shared name and as intimated above, are meant to facilitate laborers’ acquisition of shares in the firms for which they work. By far the most common such set of arrangements, however, and the one that will engage us here, is the “leveraged” ESOP. This, as the qualifier suggests, is the plan that employs credit in the share-acquiring process.

**A. What: Simple Mechanics and Spread**

Here is what the leveraged ESOP does: The employing firm adopts an ESOP as a sponsored ERISA plan – a defined contribution plan. Like other ERISA plans, the

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99 Id.

100 Id.

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

102 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).

103 ERISA § 407(d)(6). Defined contribution, or “DC” plans are to be distinguished from so-called “defined benefit” or “DB” plans. The former prescribe a schedule of payments made into an account for the benefit of the employee, who in turn bears both “upside” gains and “downside” losses realized by her investment portfolio over time. DB plans, by contrast, prescribe payments made out to the employee upon her retiring, and the employing firm – or the insurance company from whom the firm purchases annuities on behalf of its employee beneficiaries – in effect bears the aforementioned upside gains and downside losses realized by the fund out of which payments are made.
ESOP takes the legal form of a trust.\textsuperscript{104} It is a distinct, even if firm-sponsored and ultimately board-directed, entity formed to acquire and hold stock on behalf of employees. Its administrator, though named and directed by the sponsoring firm’s board or a committee named thereby,\textsuperscript{105} accordingly bears fiduciary obligations to those employees.\textsuperscript{106}

Now partly in exchange for a promissory note, the trust borrows funds from a bank or some other commercial lender.\textsuperscript{107} It uses those funds to purchase stock issued by the sponsoring/employing firm at fair market value.\textsuperscript{108} The loan proceeds accordingly pass through the ESOP to the sponsoring/employing firm itself – they finance it, we’ll see – and the stock is then held in trust on behalf of the employees. The firm guarantees repayment of the loan by the ESOP to the lender, and the stock held in the ESOP is itself pledged as security.

Now over time, the sponsoring/employing firm makes cash contributions to the ESOP, just as it would do in connection with any defined contribution plan. In this case the contributions are used by the ESOP to amortize the loan originally used to purchase

\textsuperscript{104} ERISA §§ 404(a)(1), 403(a). The idea, of course, is both to insulate funds earmarked for employees from the other financial operations of the firm, and to afford the employee beneficiaries the benefit of fiduciary obligations owed them by the plan’s trustee. It is regrettably not clear, however, that the trust protections offered employees by pension trusts are as fulsome as those offered beneficiaries of other trusts. See, e.g., \textit{In re WorldCom, Inc.}, 263 F.Supp.2d 745 (S.D.N.Y. 2003) (finding that ERISA defines “fiduciaries,” “fiduciary functions” and “fiduciary duties” more narrowly than does common law trust doctrine). See also note 87, supra.

\textsuperscript{105} ERISA § 403(a)(1). A partial exception, which need not here detain us, is found at ERISA § 403(a)(2).

\textsuperscript{106} ERISA § 404(a)(1).

\textsuperscript{107} I say “partly” for reasons that will be made plain over the next several sentences.

\textsuperscript{108} Because the shares are purchased at fair market value, the purchase is sometimes misleadingly described by ESOP-proponents as an equity-injection. We’ll see that what actually happens is publicly subsidized debt finance accompanied by a stock giveaway.
the sponsoring/employing firm’s shares.\textsuperscript{109} As the loan is paid down, stock held by the trust is gradually released from its loan-securing role, to individual accounts maintained severally on behalf of the employee/beneficiaries.\textsuperscript{110} It is released to those accounts in proportions that track the beneficiaries’ labor-patronage of the firm (their wages or salaries). Diagramatically:

\textsuperscript{109} So the sponsoring/employing firm is, in effect, both borrowing and paying back on behalf of employees for the purchase of its own stock – it gives out partial ownership of itself as an employee benefit. There’s the dilution (of previous owners), more on which presently.

\textsuperscript{110} Typically the shares become saleable or redeemable only upon retirement or exit of the firm, and typically the firm buys them back. There are voting restrictions (even to the vanishing point) as well, as we’ll see presently. That is all significant when it comes to the question of just what “owning” should mean here; but this isn’t our question in this Article. See Hockett, \textit{Whose Ownership?}, supra note 2, for more on that question. See also note 143, infra.
Now not surprisingly, in view of the arrangement’s financial structure,\footnote{With one possible – though minimal – caveat to be noted below, the employee/beneficiaries neither pay nor pledge anything. The firm, in effect, does it all. Or nearly all, as we’ll see when we turn to the government’s role.} this all turns out to work rather well as a method of getting more “capital” to “labor” (and this is not yet to mention: more debt financing to the firm). Some statistics are again telling: By 1986, twelve years after ESOPs had attained congressional endorsement in ERISA, nearly five thousand firms had adopted plans.\footnote{\textit{See Henry Hansmann, The Ownership of Enterprise} 105 (1996).} 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.113 By 1990, over twelve million
laborers – about 10% of the workforce – in over ten thousand firms had come to
participate in ESOPs.114

By the late 1990s, ESOPs were estimated to account for just under four percent of
corporate equity-holding in the United States.115 The rate of ESOP growth, moreover, by
this point had come to average between three- and six-hundred new plans per year,
accounting for between three- and six-hundred-thousand new employee participants per
year.116 Among sponsoring firms over the past thirty years have been such American
stalwarts as Avis, the Chicago Tribune, Delta, Federal Express, General Motors, Kraft,
Maytag, Polaroid, Procter & Gamble, Quaker Oats, United Airlines and Xerox.117 Even
skeptics of ESOPs, and of the oft-seemingly “crackpot” financial pronouncements of the

113 Id.

114 See, e.g., HANSMANN, supra note 112 at 105; UNDERSTANDING EMPLOYEE OWNERSHIP 10-11,20 (Corey Rosen & Karen M. Young eds., 1991); THE EXPANDING ROLE OF ESOPS IN PUBLIC COMPANIES 23-27 (Karen M. Young ed., 1990); DAVID P. ELLERMAN, THE DEMOCRATIC WORKER-OWNED FIRM 110 (1990). ESOP-like structures have made significant headway in non-US jurisdictions as well. See Rosen & Young, op. cit., and ELLERMAN, op. cit. A helpful catalogue of the one thousand largest firms with more than four percent employee ownership is found in JOSEPH RAPHAEL BLASI & DOUGLAS LYNN KRUSE, THE NEW OWNERS 257-301 (1991). The catalogue does not disaggregate employee ownership by ESOP, profit-sharing, 401(k) and option plans, but is nonetheless suggestive in light both of (a) ESOPs’ accounting for just shy of half of employee-owned equity, and (b) the surprising number of firms on the list that are twenty or more percent employee-owned.

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

116 Id.

117 Rosen & Young, supra note 114; Young, supra note 114.
ESOP’s inventor, Louis Kelso, readily acknowledge their “rapid proliferation,” hence that “[s]omething is happening that requires attention.” But what is it that is happening, and why might it require attention? What do the telling statistics actually tell?

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

[118] Kelso routinely announced such putative discoveries as that “Say’s Law” is being “violated” in modern capitalist economies, that contemporary economists remain wedded to the labor theory of value, and that there are “two factors” that enter into production – capital and labor – with the first of those accounting for an ever-growing share of value-added. See generally Hockett, Hamiltonian Means, supra note 5, at 124-42. Economists do not appear to have found these discoveries compelling. I should perhaps not be as “snarky” as I might here seem, however. Kelso’s motives, energy and inventiveness, as distinguished from his sallies into theory, were nothing if not worthy of praise. And he was a lawyer and 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 122.

[119] HANSMANN, supra note 112 at 105.

[120] ELLERMAN, supra note 114 at 120, emphasis omitted.


[122] STUART SPEISER, A PIECE OF THE ACTION 429 (1985), emphasis supplied. See infra note 246 for more on this “pays for itself” locution.
creating companies of businesspeople, of owners, has become a kind of Hidden Secret of Success in the American marketplace.”

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

B. How: Private Channels, Public Benefits

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

1. Tax Advantages

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Probably the most efficacious tax advantage that leveraged ESOPs uniquely confer upon sponsoring/employing/issuing firms comes via the Revenue Code’s permitting them to deduct contributions made to their plans. The firm may deduct those, to an amount up to twenty-five percent of all compensation paid a plan’s participants, from its taxable income.\(^{125}\) That advantage works jointly with ERISA’s relaxing, in the case of ESOPs, the now customary mandatory-diversification understanding of the “prudent investor” standard to which employee pension trusts ordinarily are subject: In non-ESOP cases, of course, ERISA requires that employee trusts be broadly invested; a plan will not typically be permitted to hold very much of the sponsoring firm’s equity.\(^{126}\) But ESOPs are exempted from this standard,\(^{127}\) meaning that the firm that sponsors a leveraged ESOP can both take the cake and keep the penny: It enjoys the tax favor bestowed upon contributions to its plans, by further financing itself through new share issuance.

Now the aforementioned “further financing” – the “purchase” of newly issued shares by the legally distinct trust for the employees – as noted, is “leveraged.” But that simply means that the firm is effectively financing itself with debt while enjoying a publicly afforded tax break in doing so, in return for affording employees new stock. And, as it happens, the lender supplying the “leverage” for ESOPs is tax-favored too:

\(^{125}\) IRC § 404. ESOPs enjoy other tax advantages enjoyed by employee pensions more generally, most of which are noted below, but our focus will nevertheless be primarily upon what is unique to ESOPs.

\(^{126}\) ERISA § 404(a)(1)(C).

\(^{127}\) ERISA § 404(a)(2). At least that is ordinarily the case. Courts have in some instances agreed with the Department of Labor that there can be circumstances in which the prudent investor standard would require the ESOP trustee to refrain from purchasing employer stock. See, e.g., *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997); *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). It should also be pointed out that any other assets in which the ESOP might invest remain subject to the general diversification requirement. ERISA § 404(a)(1).
Ordinarily, its taxable income is the interest received on lent funds. But on a loan to a leveraged ESOP, fifty percent of that interest historically has been excluded. So in effect, the legislated favors conferred upon ESOPs amount to significantly government-subsidized debt-financing of ESOP-sponsoring firms, in a manner intended to encourage those firms to make partial firm-owners of firm-employees.

But wait, there’s more: Ordinarily, dividends paid out to the holders of firms’ shares are drawn from firms’ after-tax incomes. Dividends paid on the stock held in an ESOP, however, are deductible from taxable corporate income. Capital gains reaped by the trust also go untaxed; they’re deferred compensation. The tax code also affords incentives to non-ESOP shareholders to transfer their shares to the ESOP: For one thing, under specified conditions a shareholder in the sponsoring firm who sells shares to the ESOP may defer any taxable gain that she gleans through the sale. For another thing, fifty percent of the proceeds from sale of a sponsoring firm’s stock to its ESOP are excludable from estate taxation. And finally, a decedent’s estate may avoid tax-

128 IRC § 61(a)(4) (including “interest” in the general definition of gross income).

129 IRC § 133(a). But see Small Business Job Protection Act §§ 1602(a), 1602(c) (repealing the interest exclusion previously allowed under IRC § 133(a) for all securities acquisition loans made after August 20, 1996, except for loans made pursuant to a binding written contract which was in effect before June 10, 1996).

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

131 IRC § 404(k).

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

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

134 IRC § 2057.
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.\footnote{IRC § 2210.}

\section*{2. Additional ERISA Advantages}

There are further \textit{ERISA} advantages, in addition to the just noted tax advantages, designed to encourage ESOP share-acquisitions from non-ESOP shareholders in the sponsoring firm: Pension plans ordinarily are barred from purchasing sponsoring firms’ shares not only from the sponsoring firms themselves, but from all “parties in interest” – directors, officers and principal shareholders.\footnote{IRC § 4975.} But \textit{ERISA} exempts ESOPs from that standard.\footnote{ERISA § 408(e).} And ESOPs also may \textit{borrow} from such parties in interest in order to acquire employing firm stock.\footnote{ERISA § 408(b)(3), IRC § 4975(d)(3).}

\section*{3. Publicly Conferred Governance Advantages}

There is yet more to our public benefit story than just tax and \textit{ERISA} inducement. A cluster of \textit{governance} advantages offered by ESOPs, in this case working through (once again publicly afforded) corporate and securities law, offers incumbent managers and otherwise satisfied shareholders\footnote{Including many newly owning employees, were they able to vote their shares. More on this “were they” presently.} an added array of incentives: First, the firm’s immediate issuance of new shares to a nominally independent, “third party” ESOP dilutes

\footnote{IRC § 2210.}
\footnote{IRC § 4975.}
\footnote{ERISA § 408(e).}
\footnote{ERISA § 408(b)(3), IRC § 4975(d)(3).}
more than the monetary value of older shares; it dilutes older shares’ voting power as well.\textsuperscript{140} That makes it harder for unsolicited would-be acquirers to assemble a controlling bloc of shares. And this issuance legally \textit{can} in fact be “immediate,” indeed even in express contemplation of an impending takeover bid. Thus has held the Delaware Chancery.\textsuperscript{141}

Were new employee/owners reliable voting allies of would-be firm-acquirers, of course, the ESOP’s promise as a takeover defense would be attenuated. But as it happens the new employee/owners are not, interest-wise, reliable such allies at all; indeed quite the contrary. And employee preferences scarcely matter in these cases in any event, for the new employee/beneficiaries of leveraged ESOPs do not typically receive voting rights, at least not right away.\textsuperscript{142} That itself constitutes, of course, another incentive for ESOP-creation, an incentive enjoyed by the managers: ESOPs work to free managers’ hands from such dissatisfied shareholders – including any employee shareholders – as

\begin{footnotesize}
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\item \textsuperscript{140} I say “nominally” independent here partly owing to the role of the sponsoring firm’s board in selecting and directing, indeed even functioning as, the ESOP trustee – see note 104, \textit{supra} – and partly owing several ESOP governance features to be noted presently.
\item \textsuperscript{142} A few details will be in order here. Most stock held by ESOPs considered in aggregate is nonvoting stock: The median ESOP holds ten percent of its sponsoring firm’s shares, but only five percent of that firm’s voting rights. See \textit{U.S. Government Accounting Office, Employee Stock Ownership Plans: Benefits and Costs of ESOP Tax Incentives for Broadening Stock Ownership} 39-40 (1986). How can this be? First partition the class of ESOPs into those sponsored by closely held, and those sponsored by publicly traded, firms. Now consider the first of those subclasses: With little exception, closely held sponsoring firms enjoy all applicable ESOP tax benefits even if their ESOPs do not pass acquired stock voting rights through to employee/beneficiaries. The only exception is in respect of voting as to “fundamental” transactions – matters which must, according to charter or applicable law, be decided by supermajorities of outstanding shares voted. IRC §§ 409(e)(3), 401(a)(22). Next the second subclass: While in the case of publicly held firms voting rights must in fact be passed through to the employee/beneficiaries, that is so only in respect of stock actually \textit{allocated} to employee accounts. IRC § 4975(e)(7). But the allocation occurs only gradually as the original loan is amortized. Note also that this lack of control rights ought to give pause to those who would see in the current “ESOP revolution” any real harbinger of an incipient “workplace democracy.” The aptness to ESOPs in particular, of the concerns raised by Professor Alexander in connection with contemporary pension practice more generally, is perhaps troublingly ironic. See Alexander, \textit{supra} note 62 \textit{passim}.
\end{itemize}
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there might be. So it seems more than likely that the ESOP’s utility in warding off
takeovers, and its strengthening managerial hands, also might account in significant
measure for ESOPs’ proliferation. And that utility itself, again, like the favorable tax and
ERISA treatment, amounts to a public benefit. It is sanctioned and indeed affirmatively
encouraged by legislation and court decision alike.

4. Bringing It All Together: A Telling Counterfactual

It surely cannot be objectionable, then, to suggest that the legislative and judicial
favoring of ESOPs – hence ESOPs’ amounting to a public benefit – might be playing a
role in their spread.143 But we quickly can sharpen, as well as supplement, the point here
by appeal to a stylized scenario: We’ll suppose there is no tax- or ERISA-favoring of
finance of the firm through the ESOP; the same loan on the same terms can be had by
other means. We’ll also assume that ESOPs offer no governance or takeover-avoidance
advantages. We’ll further suppose that employees do not temper their wage demands by
dint of their ESOP benefit; their new shares are “all gravy.” And finally we’ll suppose
that our laborers’ gradually growing “ownership” does not appreciably boost shopfloor
morale hence productivity and firm-profitability. Under these circumstances, what is
happening in Figure 1, above? It’s pretty clear: The firm, via the ESOP, is financing its
projects by borrowing and repaying, and while at it just happens to be issuing new stock
to employees who pay nothing. But that means the value of pre-ESOP shares is diluted
by the value of the newly issued ESOP shares, with no offsetting advantages enjoyed by
the pre-ESOP shareholders. Why don’t the latter object?

143 I am far from the first to suggest the importance of public support for the spread. See, e.g.,
BLASI, supra note 98; HANSMANN, supra note 112; ELLERMAN, supra note 114; and sources cited infra,
ote note 146.
There are less proximate political answers, I believe, to which we shall turn in a moment. But the more immediate reason of course is that several of the aforemade suppositions, as we have seen, do not obtain. There are considerable tax, ERISA, and governance advantages gleaned through ESOPs. There is also some evidence that employees do temper wage demands in view of the ESOP benefit – that there might even be an “implicit bargain” to this effect – but this can be no more than a small part of the story. Only the supposition that growing ownership fails to make much difference to productivity appears, in the light of what evidence we have, to be by and large correct. So the tax, ERISA and governance advantages – the cluster of public benefits – enjoyed by ESOPs must surely be critical to their spread. Pre-ESOP shareholders, at least the less other-regarding ones, are willing to endure the dilution of their shares wrought by leveraged ESOP transactions. And they are willing to do so precisely because the now much more cheaply (because tax- and ERISA-favoredly) debt-financed firm is sufficiently more valuable, in consequence, as wholly or partly to offset the dilution. And to what ever degree those shareholders are not wholly compensated in this way, the control benefits imparted by ESOPs to management make up the difference; any dissatisfied shareholders are weakened by the court-sanctioned ESOP transactions.

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144 For one thing, the evidence is scant. See Ellerman, supra note 114, at 90; Blasi, supra note 98, at 263. Perhaps more importantly, as a theoretical matter it seems highly unlikely that rational employees would be willing to reduce their wages sufficiently to offset the dilution. The diluting shares issued them are, after all, deferred compensation. And as we’ll see they confer none of the consumption benefits of control. And finally, of course, they are undiversified investments. It would be far more sensible for employees who were willing to sacrifice pay for stock to insist upon voting, and/or diversified stock, hence not to offer any sacrifices sufficient to offset the dilution of their own firms’ owners’ stock.

145 The other-regarding ones might partly be actuated by the ideological/political motivations that we shall discuss presently.
C. Why: Accounting for the Favor

So now assuming, plausibly it seems, that law-conferred tax, ERISA and governance benefits constitute a, if not the, critical reason for ESOPs’ proliferating, we are faced with another question: Why is this public favoring of ESOPs politically accepted? Doesn’t the support tamper with “natural” market forces, and isn’t distortion of this sort disfavored? I think it is here that we – or at any rate those who suspect that a completed American “ownership society” will have to spread business capital as it has spread homes and higher educations – shall find the successes of ESOPs instructive. For there are mutually reinforcing ideological and endowment-psychological reasons that appear to account for the public favoring of ESOPs, and even indeed for the private favoring of ESOPs as well.

1. Core Values

The key to the ESOP’s political success probably lies in its giving expression to a cluster of interlinked legal-cum-political values and endowment-psychological dispositions that are shared by a broad swathe of Americans. Values-wise, we are most of us “responsibility-tracing,” or “luck-,” egalitarians: We believe that what people have should ideally be traceable to equal initial holdings of such ethically exogenous resources and opportunities – favors of fortune, of chance or mere circumstance – as no

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

one now living is responsible for having created. And we believe that departures from that baseline ideally would be the product of value-additive or -detractive effort – of choice not chance – for which people are responsible. It is tempting to think of access to value-adding opportunity – hence to business capital as well as to dwelling space and basic “human capital” – as part of that ethically exogenous endowment to which all should ideally enjoy equal access.

2. Endowment Dispositions

Endowment-psychological dispositions-wise, we are apt to experience some methods of redressing imbalances in the distribution of that aforementioned exogenous endowment as less discomfiting than others. So, for example, our more self-regarding, less altruistic selves are apt to be friendlier toward distributing perceivedly “new” resources to the presently underendowed, than toward “taking” already held resources for redistributive purposes. Those same selves will regard a perceived “refraining from taking” from the underendowed as preferable to a mere “giving” to the same. And finally, the self-regarding will be more amenable to any “giving” to the degree that it can be framed more as a rewarding – hence as ethically endogenized, i.e. “earned” or “deserved” by the recipient.

148 Id.
149 Id.
150 Id.
151 See Hockett, sources cited supra notes 2 at 58-72, 80-87, 5 at 73-83.
152 Id.
153 Id.
154 Id.
3. How the SOP Structure Conforms

The leveraged ESOP coheres rather nicely with these values and dispositions. It spreads a basic endowment – access to productive nonhuman capital, that modern-day analogue to the Homesteading and Land-Grant era’s land – which it is not difficult to view as being, at least in part or potential, ethically exogenous.\(^{155}\) It spreads that endowment by distributing what can saliently, if nonetheless superficially, be viewed as “new” capital – newly issued shares in firms.\(^{156}\) It does that partly in what resembles a return for reward-earning effort – labor patronage or work for the firm.\(^{157}\) And it encourages private such rewarding (on the part of lenders and otherwise-diluted shareholders) largely by refraining from perceived taking (i.e., through tax breaks) rather than transparent taking and giving.

In a way, then, the leveraged ESOP replicates, in piecemeal and somewhat more convoluted fashion, the same strategies that we have employed more elegantly in connection with publicly facilitated home-spreading and education-spreading since the early-mid-twentieth century.\(^{158}\) And this, I am confident, is no accident. Indeed there is considerable historical evidence suggesting that the ESOP was expressly inspired by the

\(^{155}\) It is in part or potential ethically exogenous in two senses, one trivial, the other less so. First, one must use it responsibly in order to derive “utility” from it; it is a kind of resource. Second and less trivially, the quantum of this resource that one has is at least in part – and sometimes indeed in significant part – the product of fortune or fate rather than effort. One can hold less than another simply by dint of having been born to the wrong parents, so to speak. See generally Hockett, Whose Ownership?, supra note 2, at 31-51.

\(^{156}\) “Superficially” in light of what we saw supra, Part II.B.

\(^{157}\) That is to say that it is viewed as an “employee benefit,” as something predicated upon lengthy labor-patronage for – a kind of “loyalty to” – the firm. More on this infra, Part IV.

\(^{158}\) See Hockett, Hamiltonian Means, supra note 5, at 98-120, 143-53. Also Part V.B, infra.
federal home finance programs set in place over the 1930s and 1940s. There is also good evidence to the effect that both these and the federal education finance programs set in place over the 1960s and 1970s were found appealing to legislators and public alike precisely in owing to their resonance with the values and dispositions just rehearsed. But then this raises a further question: Is the leveraged ESOP the complete business capital analogue to our contemporary home- and education-spreading programs? Is the “three-legged stool” of a completed “ownership society” now well on the way toward being built thanks to the spread of the ESOP?

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

Notwithstanding its admirable respect for and resonance with the values and endowment sensibilities rehearsed in II.C, the ESOP falls very far short of a full business capital analogue to our home- and higher education-spreading programs. This is so for a few simple reasons, some quite familiar, others perhaps less so. We can run through them quickly, setting the stage in so doing for new SOP-types that we shall see boast the same – and yet greater – benefits as the ESOP while shedding the latter’s limitations.

A. Income Risk Concentration

Begin with the limitations, at least one of which is familiar. The first (and most familiar) inadequacy of ESOPs is their concentrating income risk among beneficiaries. ESOP promoters tout ESOPs as affording their beneficiaries a “second income,” a chance to be “capitalists” as well as “laborers.” That in turn affords workers, we’re told, a “piece

159 See Hockett, Hamiltonian Means, supra note 5, at 135-37.

160 See Hockett, Hamiltonian Means, supra note 5, at 98-120, 143-53.
of the action,” a chance to get in on “the stock market boom,” hence to realize capital

gains such as have tended to rise much of late.\textsuperscript{161} The “second income” also, the ESOP’s

inventor has in effect told us, will bring workers’ earnings into closer proportional

alignment with the relative contributions made by capital and labor as aggregate factors

of production in any advanced economy.\textsuperscript{162}

All of this is true enough so far as it goes. But it does not go very far. For the

problem is that, “second income” though the capital income might be, it nonetheless

issues from the same source as the labor income – from the individual employing firm. If

one of our reasons for taking interest in ESOPs, as potential firm-spreading engines of a

completed American “ownership society,” is that they spread the contemporary analogue

to 19\textsuperscript{th} Century Homesteading’s sustenance-yielding land, then presumably we shall want

what ESOPs spread to be as close as it can be to being as secure a sustenance-yielder as

was land. But the capital incomes thrown off by firms are hardly more secure than the

labor incomes paid out by firms.\textsuperscript{163} Certainly they are not as much more secure as they

might be; and they are of course no more secure if the labor itself is not there to be had.

\textbf{B. Business Cycles, Downsizing, Outsourcing, Human Capital Lock-in &
Long-Term Unemployment}

That last observation points to a second, though of course cognate, weakness of

ESOPs. The fact is that one reason for our interest in sources of income additional to

\textsuperscript{161} See SPEISER, supra note 122 at 392; Kelso & Kelso, supra note 120, at 65-68. See also Jeffrey N. Gordon, Employees, Pensions and the New Economic Order, 97 COLUM. L. REV. 1519 (1997).

\textsuperscript{162} This is, in essence, my “charitable reformulation” of Kelso’s oftentimes puzzling “theoretical” pronouncements. See generally Hockett, Hamiltonian Means, supra note 5, at 124-30, esp. 126 note 239.

\textsuperscript{163} To some degree they are, of course, in that “downsizing” short of full bankruptcy and liquidation sheds laborers, not shareholders. But the basic point is not thereby significantly diminished in significance.
labor is precisely that labor is not always there to be had. Jobs, firms, job-descriptions and even entire industries come and go.164 “Downsizing” and global “outsourcing” regularly disemploy labor, sometimes for lengthy periods. Regular macroeconomic slumps do the same. Often, moreover, prospective laborers have developed their “human capital” in manners specific to particular industries, job-types and even firms.165 It can be difficult, then – particularly for older workers – to “retool” for new firms or tasks.166 In the event of long term troughs in the business cycle, many workers indeed can be left in that cold.167 It is far from optimal, then, to condition the benefit that is stock-spreading upon labor alone, when it is in part precisely the possible absence of employment opportunity at times that accounts for our interest in stock-spreading in the first place.

A related point here, from an opportunity cost point of view, is that reliable “second incomes” presumably would buttress aggregate consumer demand in the event of downturns in the business cycle. That would lessen the amplitude of troughs in the cycle and presumably thereby keep more people employed, for longer.168 So there is affirmative, not merely negative, reason to diversify reliable sources of income among citizens. But “reliable” here, as elsewhere, will again ride on diversification. So again it is best not to restrict a worker’s capital income to the same source as her labor income.

164 See Hockett, Global Macro-Hedging, supra note 17 at 174-82 and sources cited therein, on this and the following several sentences.

165 Id.

166 Id.


168 It would afford, that is to say, what we might call a manner of “automatic Keynesianism.” See Hockett, Hamiltonian Means, supra note 5 at 129.
C. It Exploits Only One Form of Patronage

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

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

First, labor for a firm is far from the only sort of activity that might be perceived as affording warrant to publicly encouraged firm-share-spreading. People patronize, and in some cases even are potentially expropriated by, firms in any number of ways. There are long-term customers whom we call “loyal,” suggesting that sometimes people endow firms with their trust or the benefit of their habits. There are firms that enjoy increasing returns or reap other kinds of rents, suggesting that sometimes people might even less voluntarily confer unrecouped benefits upon firms. And there even are people who confer benefits upon all of the rest of us through their national service, or who suffer disadvantages through no fault of their own hence who are arguably compensable in justice.
All of this suggests that we might employ citizen attributes – “desert bases,” we might call them\(^{169}\) – additional to firm-labor expenditure as means of ethically underwriting the benefit that is publicly augmented firm-spreading. In so far as that is the case, the ESOP, relying as it does solely upon firm-labor as basis, appears needlessly hamstrung indeed. Part IV, below, accordingly assesses ESOP-analogues predicated upon more than just labor relations.

**D. It Exploits Only One Source of Credit**

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

These additional credit-types and enhancements figure quite prominently and effectively in our federal home- and education-finance programs.\textsuperscript{170} Those programs have long since their inceptions come to constitute the two “legs” we now have in place for that “three-legged stool” that a completed American “ownership society” would be. But this suggests, in yet another way, that the ESOP sets our sights much too low when it comes to capital-spreading. Part V, below, accordingly considers what it would be to generalize federal home- and education-finance policy to the case of nonhuman capital shares.

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

\textbf{IV. MORE SOPs FOR THE DESERVING: ADAPTING THE STRUCTURE TO OTHER PATRONAGE FORMS}

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

\textsuperscript{170} See Part V.B, \textit{infra}. Fuller accounts can be found in Hockett, \textit{Hamiltonian Means}, supra note 5, at 104-20, 146-53.
Begin by observing that labor with a firm – the employment relation – is an ethically salient patronage relation.\(^{171}\) It is an ongoing relational mode between persons and firms.\(^{172}\) And it is a relation that appears to afford sanction to the conferral of benefits upon persons.\(^{173}\) It renders the latter apparently “earning” or “deserving” of the benefits bestowed upon labor through leveraged ESOP financing.\(^{174}\) That was one upshot of Part I.C above.

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\(^{171}\) 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 HANSAMANN, supra note 112, passim. My employment of the concept will be somewhat different from Hansmann’s, however – as is indicated by my addition of the qualifier “ethically salient” – and my understanding of the term will accordingly be somewhat different as well. They will not, however, be incompatible with Hansmann’s. For more on this, see notes 172 and 173, infra.

\(^{172}\) Hansmann appears to be less explicitly concerned with the “ongoingness” of patronage relations, while being more explicitly concerned with a particular species of relating to the firm – viz., selling to or purchasing from it – than I. See note 173, infra. I think our distinct concerns with patronage nonetheless compatible, however. For, first, my concern with the possible ethical salience of patronage naturally lends itself to an emphasis upon longer-term relations, at least among those who purchase from or contribute to firms in small increments per transaction. (Duration of relating substitutes for magnitude or individual transaction.) And, second, I think patronage relations as something more than purchasing and selling alone are implicit even in Hansmann’s own understanding of the term, as evidenced by Hansmann’s own frequent recourse to the broader relational concept of “supplying,” which figures prominently in his treatment of stock-holders as financial capital suppliers. See HANSAMANN, id. at 12.

\(^{173}\) Hansmann defines “patrons” as “persons who transact with a firm either as purchasers of the firm’s products or as sellers to the firm of supplies, labor, or other factors of production.” Id. at 12. Much of the thrust of Hansmann’s insightful monograph is devoted to showing both (a) that it is typically a particular class of patrons which owns most of the firms operating within a particular industry, and (b) why it is that the particular classes which tend to own in particular industries end up being the more efficient owners. My interest in this Article, though not, I think, incompatible with Hansmann’s interest, is nonetheless distinct, and the distinction accounts for my somewhat broadened understanding and employment of the concept of patronage. My concern is with patronage as a form of ongoing relation between persons and firms such as can be viewed in part as the patron’s consistent conferral of some manner of benefit upon the firm, such as in turn can engage our willingness to view the patron’s coming to own a share of the firm as ethically unobjectionable – as something better than a mere “handout.” That is to say that my angle on patronage here is as a “desert basis” in the sense described supra, note 169. I do not believe that this basis for interest in patronage places me in any way at odds with Hansmann’s efficiency-grounded basis for interest in the same. For I do not here suggest that firms should be owned by patrons of a different kind than those that he views as the more efficient owners of firms in particular industries. Rather, I simply propose that more patrons within the class be added to the rosters of owners. The remainder of this Part, I believe, will both make this plain and unpack more fully the ways in which patronage relations might be seen ethically to underwrite benefit-conferrals upon current non-owners within patronage classes.

\(^{174}\) Please see the discussion in Part II.C, supra, which suggests reasons why we publicly favor ESOPs.
Yet labor is also but one way in which people relate themselves ongoingly to firms. And from the point of view of Part III, it is a problematical mode for purposes of completing an “ownership society.” For if we piggy-back the public benefit of encouraged ownership-spreading upon labor with the very firms whose shares are to be spread, then we forgo one of the principal benefits that afford reasons for finding owning attractive: owning’s capacity to diversify income risk, and to substitute for labor when labor’s not there to be had.\(^{175}\)

But this raises an intriguing prospect: Perhaps we might rely upon patronage relations additional to the employment relation in order to warrant the public facilitation of ownership-spreading, relations that do not concentrate or suboptimally diversify risk to incomes. This Part proposes and assesses a few possibilities. No one of these possibilities need cover all of the ground that we wish to cover. It will suffice if all of them together, layered progressively atop one another as in the case of a map that attains to more detail as overlay upon overlay is gradually laid over it, afford significantly more coverage than we thus far have managed. And the fact that just about everyone patronizes more firms via each of the modes now to be discussed than s/he patronizes via the employment relation affords hope as well – hope that we might indeed diversify each person’s capital ownings.

A. Customer Stock Ownership Plans

\(^{175}\) Again, diversifying such risk is one of the very reasons, I think, that we find the notion of an “ownership society” alluring. Responsible independence.
One conspicuous form of patronage reminiscent of labor is ongoing customership. Some firms from which we purchase goods and services are firms from which we regularly purchase them. In some cases that consistency is attributable to something like “customer loyalty” – an investment of trust, rather than labor, in the firm. In other cases the “loyalty” is perhaps not what we should call voluntary, but reflects a lack of available alternatives – our being held hostage, so to speak. And there are of course middling cases between those extremes – unthinking habit or ignorance of alternative supply sources, for example. In all such cases, however, we can plausibly imagine the relation to be sufficiently salient, from an ethical point of view, as to warrant some degree of public facilitation of patrons’ gradually coming to own parts of the firms that they regularly patronize.

Consider a homespun example: There might be a small university town centrally located, hence perhaps somewhat geographically isolated, in a large U.S. state. People who live and work in the town see a lot of each other over time, and have come to feel a

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176 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 102, at 147-223.

177 Again, sometimes this happens quite “naturally,” for reasons that appear to be rooted in the comparative efficiencies of governance and contracting. See note 164, supra. But the reasons for interest in an “ownership society” warrant our considering the fostering of ownership even where it does not quite “naturally” arise, which of course seems to be what has occurred in the case of ESOP proliferation. See Part II, supra.

178 I am of course thinking of Ithaca, NY, where I live. But there are countless similarly situated locales, not all of them university towns and not all of them as relatively isolated as Ithaca. Indeed this example might also be plausibly applied, say, to a community-like neighborhood or sector of a large city, such as is commonly found in New York, Chicago, and Los Angeles. Please also bear in mind that the example following this one will make no reference to community-like towns at all. All examples in this Article are meant to be illustrative and suggestive, even to spur additional visualizations; they do not purport to be exclusive or exhaustive.
palpable sense of community in consequence. They feel this not only in relation one to another, but even in relation to the relatively small number of retail establishments that sell to the townspeople. Buyers and sellers are thrown all together, even feel somewhat “centrally isolated” together, perhaps even miss this feeling when sometimes they visit one or another of the large, coastal cities five or so hours’ drive away.

Now a marvelous new grocery store complex might come to this town.\textsuperscript{179} Everyone talks about this new store, even showing it off to visitors and prospective new residents. Nearly everyone living or working within several miles of the town might purchase their groceries at this store, leave and pick up their dry cleaning there, do their banking there, even leave their children to be attended there while engaging in the aforementioned transactions. Things might go on this way for years. That’s an ongoing, many-faceted relation. Now suppose that we found the idea of an “ownership society” to be an attractive one, for any number of reasons,\textsuperscript{180} hence thought that it might make for good public policy to encourage wider holdings of firms. In that circumstance, might we not find it politically acceptable, indeed affirmatively attractive, to work to encourage the voluntary spread of shares in this store or its holding company among all of the regular customers who live in community with and partly organize their lives around it, just as we do in the case of employees? We certainly might.\textsuperscript{181}

\textsuperscript{179} I am of course alluding to Wegman’s in Ithaca NY. This firm is not publicly traded, so I am asking that the reader pretend that it is.

\textsuperscript{180} I consider the variety of grounds upon, and the three principal American political traditions to which, the notion of an “ownership society” might be attractive in Hockett, Whose Ownership?, supra note 2, at 5-78.

\textsuperscript{181} It is of course not the case that facilitating ownership of local businesses will afford optimal diversification. After all, personal incomes and the incomes of town-sharing or region-sharing firms can to some extent co-vary – in the case, for example, of local or regional slumps. But I ask that the reader bear with me a bit longer. As examples proliferate below we shall see that diversification grows. Moreover, our
Consider a cognate example, one perhaps applicable to larger metropolitan areas or regions now in addition to smaller communities: There might be a product or service the supply of which enjoys increasing returns. It is a “natural monopoly.” Perhaps it’s a transport system, an electrical power grid or highspeed internet network – a public or publicly regulated utility. Customers of the “firms” that supply such products and services, whether identified by reference to towns, cities or larger regions serviced by these firms, often might find themselves more or less “stuck” with their suppliers. They have little choice but to patronize them. That’s a large part of why we regulate them. But might the same rationale not then warrant our facilitating the customers’ gradually coming to own them, at least in part? Isn’t customer hostagehood at least as ethically salient a patronage-form as customer loyalty?

Were we to answer “yes” to the last two questions, then we might well decide it worthwhile to consider facilitating the acquisition of shares in the firms – the grocery store or the utility – by their patrons in much the same way that we facilitate share-acquisition in firms by employees. We might tax-break-assist firms in debt-financing themselves, in exchange for their issuing shares to trusts whose beneficiaries gradually came legally to own what initially they would beneficially own. (Again, perhaps, in proportion to their patronage – e.g., amounts purchased from the firms.) In essence, then,

aim here is to make use of patronage relations as ethically salient grounds for public action facilitating ownership, pursuant both (a) to the hypothesis posited supra, Part II.C, concerning why the public is willing to subsidize ESOP expansion, and (b) to the further elaboration of that hypothesis in this Article’s predecessor pieces, concerning why we have acted similarly to promote home-owning and higher education spreading in the way that we have done. Finally, please note that I have already addressed the project of democratizing income-risk-sharing across localities and even across nations in a separate article: See Hockett, *Macro-Hedging*, supra note 17 at 212-56. My hope is that all of these pieces together afford at least a rough template for how best to render our society more “owning,” more risk-spread-efficient and more just.

182 In a way, of course, so was the store in the previous example. Small towns support less competition among smallish suppliers than do cities.
we would just replicate the financial structure of the leveraged ESOP arrangement. Only
the particular patronage relation would change. We might call it a “Customer Stock
Ownership Plan,” or “CuSOP.” Imagine it thus:

Figure 2: Institutional/Financial Structure of a CuSOP Arrangement

Of course some things even apart from the differing patronage relation that
ethically grounds it would be different here relative to the ESOP as presently constituted.

There is no, say, federal “CRISA” for “customer benefit plans,” for example, in the way
that there is an ERISA structure upon which ESOP programs partly are built. Nor,

183 This SOP is not to be confused with a “consumer stock ownership plan” proposed by Kelso.
See KELSO & KELSO, supra note 121 at 67-73.
accordingly, does the revenue code currently include any provisions that might “incentivize” firm-financing through CuSOPs as it does in the case of ESOPs. But that is all beside the point. The point is that all of the means by which we currently facilitate stock-acquisition by employees could be replicated to facilitate stock-acquisition by long-term customers – loyal customers, hostage customers, or “in-between” customers. We could legislate to replicate, all with a view to making owners of long-term customers as we do for long-term employees. And the public benefit that this legislation would effectively confer – like that which public ESOP facilitation confers – would be warranted, could be advocated, and presumably would be politically embraced, on essentially the same grounds: the grounds of ethically salient patronage.

CuSOPs might even enjoy broader public support than do ESOPs, in fact, on patronage grounds. For, in contrast to the case of ESOPs, we could facilitate share-acquiring via CuSOPs by any given long-term customer from any number of firms – even far-flung firms – that she regularly patronized. Everyone bearing long-term customer-patronage relations to \( x \) number of firms would gradually become a part-owner of those very \( x \) firms. ESOPs do this for employees only in respect of the smaller number of firms – often but one – for which the employee labors. If more people stand to benefit, and if they stand to do so by acquiring stakes in more than one firm each, we might expect more popular support.

B. Resource or Rent-Recouping Stock Ownership Plans

Let’s try another one. Sometimes new resources are discovered. Petroleum reserves are found in Alaska, newly exploitable minerals are found in magnesium nodules just off of the coast, some portion of the electromagnetic spectrum becomes
usable in a way that it was not before. Sometimes no particular living person or group of persons is to be fully credited with the discovery, or with the discovery’s full exploitability. But some such person or persons often can plausibly be partly so credited. And our way of doing things in any event is to permit private agents – generally firms – to exploit the new possibilities – to appropriate “rents” from them.\footnote{The appropriable rents justification for property rights appears to originate with Harold Demsetz, \textit{Toward a Theory of Property Rights}, 57 AM. ECON. REV. PAP. & PROC. 347 (1967).} So we want some of the value of the new resources – rents – to flow very quickly into private hands, even while not \textit{all} of that value seems to be \textit{deserved} by those parties.

What should we do with the surplus? We might “windfall profits” tax it, but that might resemble a kind of incremental “taking,”\footnote{Legally speaking this claim, associated with Richard Epstein, is of course hyperbolic. But one can readily grasp the intuition that underwrites it. For the hyperbole, see, \textit{e.g.}, RICHARD A. EPSTEIN, \textsc{Takings: The Constitution and the Power of Eminent Domain} (1985).} and the takings go to the government. We don’t seem to like that kind of thing any more.\footnote{See, \textit{e.g.}, EPSTEIN, \textit{id.}, for a representative screed. \textit{See also} MICHAEL J. GRAETZ & IAN SHAPIRO, \textsc{Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth} (2005), for a morbidly fascinating, indeed chilling, documentary account of the exploitation of citizen cognitive error by champions of the tax-evading wealthy.} At any rate we don’t find it as palatable as we once did, perhaps because we are less trusting of the users of the takings – “the government” – than we once were.\footnote{Perhaps it 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 Republican Party ideology seems to have grown.} But we still like ownership – we like that very much, in fact – and we are aware that by definition nobody has earned a windfall. So why not widen the distribution of shares in the firms that we authorize to exploit the new opportunities?

\footnotetext[1]{The appropriable rents justification for property rights appears to originate with Harold Demsetz, \textit{Toward a Theory of Property Rights}, 57 AM. ECON. REV. PAP. & PROC. 347 (1967).}

\footnotetext[2]{Legally speaking this claim, associated with Richard Epstein, is of course hyperbolic. But one can readily grasp the intuition that underwrites it. For the hyperbole, see, \textit{e.g.}, RICHARD A. EPSTEIN, \textsc{Takings: The Constitution and the Power of Eminent Domain} (1985).}

\footnotetext[3]{See, \textit{e.g.}, EPSTEIN, \textit{id.}, for a representative screed. \textit{See also} MICHAEL J. GRAETZ & IAN SHAPIRO, \textsc{Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth} (2005), for a morbidly fascinating, indeed chilling, documentary account of the exploitation of citizen cognitive error by champions of the tax-evading wealthy.}

\footnotetext[4]{Perhaps it 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 Republican Party ideology seems to have grown.}
So far, so good. But this still leaves open the question of patronage. To whom should the shares be distributed? Is there some “natural,” salient class of patrons whose beneficiary status would be as readily warranted as that of employees and long-term customers? After all, we presumably would not wish simply to replace one class of windfall beneficiaries with another, as it were at random. How, then, to think about the matter? I think that we might employ a sort of “sliding scale” here. And indeed this might be a nice way gradually to generalize the original ESOP idea all the way out, so to speak – i.e., to move incrementally in the direction of broad public recognition that good citizenship itself is a kind of patronage.

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

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188 I am exceedingly uncomfortable with this idea, and find it to be a compromise with psychological dispositions that are regrettable at best. But bear with me for a moment. Some such primitive intuition as this seems to underwrite the judgment that coal found between Canada and Mexico is “American” coal, rather than North American coal or “the coal of mankind,” for example. Ideally I’d prefer to repudiate the intuition, but if we’re stuck with it then we may as well harness it to good purpose.

189 In 1978 and 1980, voters’ initiatives were introduced to establish the Alaska General Stock Ownership Corporation (AGSOC), which would have provided Alaskan citizens ownership interests in the Alaska Oil Pipeline. Pursuant to a tentative agreement with the British Petroleum Company, the latter was to sell its interest in the Alaska Pipeline to AGSOC. AGSOC would have enjoyed the backing of state credit to borrow. Under federal matching legislation – specifically, Subchapter U of Chapter 1 under
Alaskan oil reserves, even after the federal IRS has done so. So it must be the case that we view the citizens of political units as being somehow more privileged than noncitizens in respect of the benefits brought by the resources that are found and exploited within the geographic boundaries of those units. Cognate observations to these “Alaskan” observations might hold true in respect of magnesium nodules found off the coast of Washington, Oregon and California. And so on.

Now let us bring these patronage considerations together with the earlier rehearsed “windfall” considerations. Would it be too far a stretch to require, as a condition for granting the rights to exploit the new resource to the firm, that the firm distribute shares in itself to the residents of any municipality or state with which the new resource is widely perceived to be especially closely associated? (E.g., residents of any municipality or state that currently might tax the enterprise that exploits the resources?) Note that if the answer is “no, it would not be a stretch,” then we might not have to bother with tax or other incentives at all. Or how about this: We combine tax and other incentives with the “carrot” that is the prospective new resource exploitation itself, in a manner that enables us to lessen the former relative to what they were in the ESOP and CuSOP cases. We thereby less expensively (to the public fisc) “incentivize” both the

entry of firms to do the exploiting and those firms’ spreading their shares. Call it a “RentSOP.”\textsuperscript{190} It might look like this:

\textbf{Figure 3: Institutional/Financial Structure of a RentSOP Arrangement}

![Diagram of institutional/financial structure of a RentSOP arrangement]

That’s right. This is the same diagram as Figures 1 and 2, with state or local citizens standing in as patrons now instead of employees or customers. (So now the

\textsuperscript{190} 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 different grounds, and more importantly (b) presumably for that reason, differently financial-structured. \textit{See} KELSO & KELSO, \textit{supra} note 121 at 99-103, 75-83, 88-92. For a more general charitable interpretation and correction of Kelsonian “theories” and schemes, \textit{see} Hockett, \textit{Hamiltonian Means}, \textit{supra} note 5 at 124-42.
degree of patronage might track years of residence.\(^{191}\) What is different, apart from the changed patronage basis here ethically grounding the public benefit, is simply that the tax and other benefits afforded by the public are less than before, since the exploitation rights are themselves a benefit. (That is entailed by the “windfall” considerations.) The loan made to the RentSOP trust might have to be participated as well; possibly it would be too large for any one lender to make.\(^{192}\) But all of that is, again, for present purposed neither here nor there. The important point is that the firm still finds itself debt-financing itself on favorable terms in the interest of boosting its capacity to exploit the newly exploitable resources, and spreading ownership in itself in the process.

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

\(^{191}\) I ignore, for present purposes, the matter of crafting terms so as to avoid conflict with court decisions overturning interstate-travel-burdening state laws, decided under the Commerce Clause of Article I of, the Privileges and Immunities or Equal Protection Clauses of the Fourteenth Amendment to, or some “penumbral emanation” from those or other provisions of the U.S. Constitution. In Zobel v. Williams, the Supreme Court rejected Alaska legislation that awarded pipeline dividends to state residents based on the duration of their residence up to the point at which distributions began. 457 U.S. 55, 64 (1982). But allowing the number of shares distributed thenceforth to grow with years of residence would not seem to be constitutionally offensive so long as one could begin to accumulate shares immediately upon taking up residence. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941).

\(^{192}\) Not just as a matter of capacity, but as a matter of law as well; the Bank Code’s lending limits could kick-in. See 12 USCS § 84. (12 USCS § 84 (a)(1) requires that total outstanding non-fully-secured loans and credit extended by a national banking association to an individual, including a trust, not exceed fifteen percent of that banking association’s unimpaired capital and unimpaired surplus. 12 USCS § 84 (a)(2) additionally requires that total outstanding fully-secured loans and credit extensions made by a national banking association not exceed ten percent of the association’s unimpaired capital and unimpaired surplus.)
We might broaden our understanding of “local resource” along at least two dimensions. For one thing, we can move outward from “locality” to “region” to “nation” – a prospect that I shall consider presently. For another thing, we can plausibly broaden our understanding of “resource” itself. For it isn’t always a matter of found objects or substances, after all. Might not a highly desired set of geographic coordinates count as well – say, a “prime location” upon which some highly remunerative piece of commercial real estate stands? It certainly might. That’s a paradigmatic case, in fact, of “rent.” And rentiers who hold exclusionary rights to highly desired spaces are rather like the “natural monopolists” considered in connection with CSOPs above at Part IV.A. That’s why the “classical economists,” people like Adam Smith and David Ricardo, were so suspicious of them. But we needn’t be suspicious. We can facilitate the spaces’ voluntary sale and purchase at fair market value instead, by broad classes of locals, simply by treating the spaces like oil reserves or magnesium nodules, and the firms that operate them like resource-extractors, in Figure 3 just above. “Don’t get mad,” we might say, “get owning – get the company.”

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194 Hansmann, in HANSMANN, supra note 114 at 173-79, suggests a number of reasons for the absence of urban utility coops analogous to rural electrical coops, among them the comparative transience of urban dwellers relative to rural dwellers and conflicts of interest among disparate classes of prospective urban owners. While such phenomena presumably account in part for the absence of spontaneously generated (sorry – pun foreseen but not intended) urban utility cooperatives, they do not, so far as I can see, stand in the way of publicly facilitated partial ownership of corporate utilities by their customers. Moreover, to what ever degree we might worry that partial ownership by customers is “not enough,” we can readily mitigate the worry by means familiar to other, existing utilities-ownership scenarios. Hence, rates can be regulated with a view to preventing price-discrimination as among classes of user; and any worry over the development of, say, “absentee ownership” in the long run would seem to be mitigated or mitigable by (a) the fact that highly transient residents of a municipality likely will not come to acquire much in the way of shares in any event, (b) the possibility of recourse to required redemption – indeed, we might even arrange to have transients trade their erstwhile utilities’ shares for shares in utilities located in their new locales, with the utilities themselves in turn exchanging the shares, or at worst (c) the possibility
Turning from the “resource” dimension to the “locality” dimension, if we move outward from seemingly “locally located” resources to more diffuse such resources—e.g., new portions of the electromagnetic spectrum—we can move outward along the patronage dimension as well. We’ll thereby draw in more beneficiaries, more potential owner-citizens. So we might imagine, say, that the Telecommunications Act of 1996\textsuperscript{196} is amended to work somewhat differently than it actually has done: Congress might not authorize the FCC simply to grant existing broadcast companies new “advanced spectrum,” without requiring payment therefor.\textsuperscript{197} Instead it might establish a sort of “national RentSOP” on behalf of all citizens, and then offer the combined inducement of occupancy over the HD bandwidths and some (diminished) tax incentives to get the firms to spread shares in themselves to the citizenry. That would not only be a readily intuited extension from the more “locally located” RentSOP idea; it would also amount to a convenient bridge to the most universal SOP of all.

\textsuperscript{195} 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 \url{http://news.bbc.co.uk/1/hi/uk/1357091.stm}.


\textsuperscript{197} See 47 USCS § 336(a) (“[T]he Commission . . . should limit the initial eligibility for such licenses [for use of advanced spectrum] to persons that (1) are licensed to operate a television broadcast station or hold a permit to construct such a station . . . and (2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.”). For a discussion of the FCC’s grant, under the Act, of a free spectrum for HDTV, see Matthew Spitzer, Dean Krattenmaker’s Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996, 29 Conn. L. Rev. 353, 365-67 (1996).
C. Citizen Stock Ownership Plans

Isn’t citizenship itself a kind of patronage\(^{198}\) – an ongoing relation such as can warrant, in some cases, the public conferral of some kinds of benefit? At any rate isn’t good citizenship so, such that everyone who “plays by the rules,” or perhaps provides some kind of national service, can be said to deserve some solicitude, maybe the guarantee of some “basic minimum,” from us all? Don’t we all as a group, in a sense, feel we owe a “hand up” to those among us who share our core values, obey all our laws, and are nonetheless “down” by the workings of fortune not fault? Isn’t that what our oft-invoked commitments to equal justice, equal worth, and equal dignity commit us to, at the very least? And don’t our means of publicly spreading home-ownership and “human capital” (education) give expression to precisely those commitments – commitments that jointly add up, not to a guaranteed equality of citizens’ ultimate outcomes, of course, since outcomes impound efforts as well as opportunities, but at least to equality of real opportunity?\(^{199}\)

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\(^{198}\) Even if, in a liberal polity as that toward which our own approximates, an attenuated or “thin” kind of patronage. The degree to which citizenship as a form of patronage is thin might track the degree to which the polity’s “theory of the good” is thin. A polity that acknowledges “the priority of the right over the good,” see RAWLS, supra note 4 at 27-28, will be a polity which, qua polity, maintains but a “thin” theory of the good, see RAWLS, id. at 347-50, reserving “thicker” conceptions of what it is to lead a good life to citizens as individual “life-planning” agents. Citizenship itself accordingly would be but minimally defined, in bare justice terms; and claims to basic resource minima would be rooted in the basic justice to which every citizen is entitled as a citizen. To the degree that a polity departs from the minimal liberal ideal, however – e.g., in the direction of a “civic republic” whose citizens deliberately share certain “thicker” values additional to that of justice (e.g., the values of shared participation and deliberation themselves, even notwithstanding the wishes of some not be take part of deliberate) – the form of patronage to which citizenship itself amounts will correspondingly grow “thicker.” Being a citizen will involve more close relating with and value-sharing with ones fellow citizens qua citizens. And it might then activate concerns we hold on behalf of others which are grounded more in fellow-feeling now as well as in bare justice. For more on the degree to which the American polity appears to incorporate civic republican as well as classical liberal values, see Hockett, Whose Ownership?, supra note 2 at 5-24.

\(^{199}\) See, e.g., Hockett, sources cited supra notes 2, 5, 17 and 147.
I don’t believe anyone will disagree with these truths – which we do indeed appear to hold “self-evident.” What we do sometimes disagree about are the empirics of actual responsibility – the comparative degrees to which chance and choice have determined particular citizens’ outcomes. I linger at some length upon practical means of disentangling these intermingling “inputs” to citizens’ “wealth functions” in the first of the present Article’s two companion pieces. That Article is devoted to working out a consistent set of political-ethical, legal and psychological foundations, consonant with American tradition, for a comprehensive American “ownership society.” For present purposes, however, it will do simply to recall what we reminded ourselves of just above at II.C – that (a) the younger the prospective beneficiary of an ownership-spreading program, (b) the less well endowed that beneficiary already is, and (c) the more readily viewed as an “ethically exogenous resource” or “material opportunity” – upon which the beneficiary must expend effort in order to transform it into personally experienced “utility” – a spread item is, the easier it is to perceive publicly augmented spreading as a redress of ill-fortune, as vindicating equal opportunity rather than simply giving “handouts.” And that is all the more so when public augmentation takes the form of tax breaks.


201 See Hockett, Whose Ownership?, supra note 2 at 36-51.

202 See Part II.C, supra.
In that light, it would seem that we might try yet another variation on the ESOP, this one geared toward benefiting those in particular who are young, lacking in resources, or good citizens who play by the rules. (We might begin by targeting those who benefit their country through military, AmeriCorps, or similar service.\(^{203}\)) We can readily ensure that beneficiaries meet these criteria – criteria which will reflect and in effect define the form of patronage that we believe ethically to underwrite the benefit.\(^{204}\) And we can financially structure the arrangement so as to ensure that beneficiaries benefit only by working, rather as happens in the case of the ESOP. Here is how:

First, establish a national trust, a sort of cross between the national Social Security trust and the humbler ESOP trust described at Part II. We might call this trust something like, say, the national “Citizen Stock Ownership Plan” or “CitSOP” Trust. Second, open individual “citizen trusts” or “-accounts” for every citizen – perhaps upon each citizen’s reaching adulthood (in the “accounts” case), or perhaps at birth (in the “trusts” case) as has recently been begun in the U.K.\(^{205}\) These individual “CitSOP” accounts could be administered rather as was envisaged in connection with the “USA” accounts proposed in the late 1990s, or the Social Security “personal accounts” proposed somewhat more recently.\(^{206}\)

\(^{203}\) Our first large-scale post-Homesteading era education-spreading programs began with veterans as beneficiaries. Hockett, Hamiltonian Means, supra note 5 at 144-46.

\(^{204}\) Note that we do this already with federal home finance and higher education assistance. We employ both financial need criteria and law-abidingness criteria. See Hockett, Hamiltonian Means, supra note 5 at 97.

\(^{205}\) I refer to Prime Minister Blair’s Child Trust Fund – or more popularly, “baby bonds” – plan implemented in 2001. See http://news.bbc.co.uk/1/hi/uk_politics/1297324.stm. Former Senator Bob Kerrey of Nebraska proposed something similar States’-side at the turn of the past century. His were called “KidSave Accounts.” See http://www.dlc.org/ndol_ci.cfm?contentid=2372&kaid=131&subid=207.

\(^{206}\) President Clinton proposed “universal savings accounts,” or “USA”s, in 1999. A similar structure of private accounts, now without government income support, figured into George W. Bush’s
Now, let the national CitSOP Trust borrow from lending institutions just as firms’ ESOP trusts do, and let them use the proceeds of the loans to purchase newly issued, dividend-yielding common stock from firms. Grant participating firms and lending institutions, in turn, more or less the same tax incentives as they are afforded in connection with ESOP arrangements. Let the national CitSOP trust, in turn, pledge the purchased stock as collateral\(^2\) and steadily pay down the debts to the lenders out of, say, the tax revenue brought in from participating firms. Let the full set of arrangements, in short, look like this:

\(^2\) Though of course this also might be deemed unnecessary in view of the full faith and credit enjoyed by a federal institution. Indeed, even were the trust to function as a government sponsored entity (a GSE), it would in effect be viewed as being fully 80% as credit-worthy as the federal government itself for purposes of bank capital adequacy regulation. See 12 CFR Pt. 3, App.A.
Yes, it’s Figure 1 (or 2 or 3) again, save again with differing persons and entities – apart from issuing firms and lenders – involved, once more in light of the distinct form of patronage that we are rewarding. The only complications found here but not there (in the ESOP, CuSOP and RentSOP cases) have to do with how precisely we decide to define the salient patronage form. Hence, for example, if we begin with national service of some sort as the salient patronage form, then the amount of stock released over time to the individual beneficiary’s CitSOP account will track her hours or weeks or years of service. If, on the other hand, law-abiding citizenship itself is the patronage category,
then stock amounts will rise simply with years of age – rather as one’s Social Security benefit rises with time spent at work.

We might also, of course, stratify patronage subtypes in this case, such that law-abiding citizenship alone entitles the beneficiary to some basic minimum of stock released per quarter, national service of one sort entitles her to some amount more, national service of another sort entitles her to a yet larger increment more, and so on. Finally, insofar as it is opportunity deficits that have activated our concern, we might – but also might not – “needs test” one or more of the benefits here, perhaps applying a graduated discount factor to entitled benefits as personal wealth rises.208

There are many variations and gradations we might consider and experiment with in all of this. But the important points for present purposes are more fundamental in nature: The first is that the basic model can perspicuously accommodate any form of patronage – any form of deserving status such as might ethically warrant benefit conferral – that we envisage. The second is that it can do so while enabling us to confer the benefit in a manner that both (a) broadens firm-ownership, and (b) does so by means that respect our core values and endowment sensibilities. That means that the model can be adapted quite flexibly so as to maximize the number of people who benefit while both respecting and indeed giving expression to the core values and sensibilities rehearsed above at II.C, which account for our publicly favoring ESOPs, not to mention our home- and education-spreading programs.209

208 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 SSI’s abstention from needs testing.

209 More on the latter, again, infra, Part V.B.
D. Portfolio-Diversifying “Meta” Stock Ownership Plans

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

A variety of methods can be employed. I’ll model two very simple, exemplary cases. The first model might be called that of the “SOP Mutual.” Various SOP trusts would convey their primary issuer stock holdings to an intermediary, which in return would convey shares in itself of equal value to the trusts. The intermediary (and now “secondary issuer”) would be, in effect, a mutual fund whose (initial) members were SOP

\[\text{Fund shares would be valued as are any mutual fund’s shares. Individual issuer shares would be valued as are any issuer’s – by “the market” in the case of publicly valued firms, pursuant to the “cashflow” method in the case of closely held firms. See generally Tom Copeland et al., Valuation: Measuring and Managing the Value of Companies 131-297 (3d ed., 2000). I ignore here the question of means of avoiding imprecisions occasioned by market fluctuations, accounting indeterminacies, etc., as there seem to be no difficulties specific to the present case and not already dealt with by familiar means in other investment company contexts.}\]
trusts.\textsuperscript{211} Subsequently the SOP trusts would, rather than gradually releasing sponsoring issuers’ securities to their beneficiaries’ individual accounts over time, release SOP Mutual shares instead. And shares of the latter sort also would serve, where shares collateralize loans used for the purchase of primary issuer stock, in place of the latter as collateral. Diagramatically, then, things would look thus:

\textsuperscript{211} And, as we’ll see in a moment, SOP trust beneficiaries.
It seems worth noting here that the SOP Trusts participating in SOP Mutual arrangements could be of all types – ESOPs, CuSOPs, RentSOPs, even CitSOPs were there good reason.\textsuperscript{212} And the more SOP types and SOPs, of course, the greater the

\textsuperscript{212} For example, were an insufficient variety of firm types participating in CitSOP arrangements.
degree of diversity, hence the lesser quantum of value at risk, that would be faced by our SOP beneficiaries. We might then have here a bit of the “best of both worlds,” so to speak. We would be both fostering patronage relations between persons and firms – since benefits ride upon such relations – and dissipating the income-risk that attends patronage-concentration.

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

In any event, 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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213 We might even subsidize or require – the latter perhaps in the form of benefit conditionality – some baseline degree of financial counseling, as we do in the case of our federal home- and education-finance programs. See Hockett, Hamiltonian Means, supra note 5 at 112, 151.
And we might imagine, of course, ordinary mutual funds serving both in their current capacities and as SOP Mutuals:
There seems no reason, then, why we might not achieve optimal diversification among our growingly owning citizens even while rewarding their multiple ongoing patronage relations with a perhaps somewhat lesser variety of firms.
V. ADVANCING ALONG THE CREDIT DIMENSION: FULL FAITH & CREDIT, SECURITIZATION, AND “CAPITAL MORTGAGING”

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

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

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

First, insofar as the tax breaks are essential inducements to the lending and share-conveying transactions that constitute the SOP transaction, share-spreading is limited by the amount of the government’s tax-take that remains to be cut. Once all the clothing is shed, so to speak, there is no way to cool oneself further without changing the external temperature. That opens the question whether there might be some means, still consistent with our core values and endowment sensibilities as briefly rehearsed at II.C, by which to turn on the fan or the air conditioner, so to speak. Might we lower not only the temperature as maintained by ourselves (our warm clothing), but also as maintained by external forces (the surrounding air)? Might we facilitate more share-spreading by not simply conditionally refraining from taking, but perhaps more affirmatively by assisting in the prevention of chance – of randomly distributed loan defaults – from so taking?

Second, insofar as (tax-cut-enhanced) individual firm credit-worthiness in the eye of the private lender is an essential predicate to leveraged SOP share-spreading, which II.B and II.C showed us it is, then share-spreading is also inherently limited by individual firm credit-worthiness. The amount that the SOP trust can borrow to finance its share-
purchases is determined by the credit-worthiness of its guarantor, the SOP-sponsoring firm. But this means that the lender in any leveraged SOP transaction sees the risk of default concentrated upon a single firm – the SOP trust sponsor. And that in turn means, for reasons familiar from the economics of insurance, that less credit than might have been forthcoming will ultimately be forthcoming.214

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

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

If our experience with home-spreading and education-spreading is any guide, then the answer to our last two questions is “yes.” For public credit-enhancement and securitization are precisely the strategies that we have employed in constructing the two legs upon which our incomplete “ownership society” currently stands. Here I recount matters briefly, as the fuller treatment can be found in the second of this Article’s companion pieces.215

214 See Hockett, Whose Ownership?, supra note 2 at 87-98, and Hockett, Global Macro-Hedging, supra note 17 at 183-203 for more on the relevant financial and insurance economics principles. See also infra, V.B.

215 Hockett, Hamiltonian Means, supra note 5 at 104-20, 146-53.
1. Home-Finance

First, homes: Early in the 20th Century as now, most who purchased non-agricultural, purely residential real estate did so partly on credit. What was different was that fewer, for that reason, purchased housing at all. Housing credit markets were more fragmented, mortgages in consequence less liquid investments than they are today. Home loans in consequence were extended for much briefer terms – generally two to three years – at the end of which they “ballooned” to coming due in full. Loan-to-value ratios, in turn, were very low by modern standards. As little as fifty percent was considered high, and was rare. Financing on such terms fell far short of most would-be buyers’ capacities; and so second mortgages, junior liens, and rollover refinancings were the norm.

When real estate prices leveled off, then fell in 1928, short-term mortgages no longer could be refinanced in full. Resultant forced sales and foreclosures, which reached the rate of over 1,000 per day once some 50% of all home mortgages in the country had gone into default, brought prices even lower, pulling the real estate market into a classic “downward spiral.”

The programs instituted to address this crisis, begun in the last year of the Hoover administration, broadened through the Roosevelt years and continuing in but minimally altered form today, cannot fail to impress in their innovativeness and comprehensiveness. The process began with the Federal Home Loan Bank Act (FHLBA) of 1932, which

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217 12 USCS § 601 et seq.
authorized establishment of a system of Regional Federal Home Loan Banks roughly parallel to that of the Federal Reserve’s system of Regional Federal Reserve Banks. The Regional Banks provided standards and supervision to member institutions – the private mutual savings banks (MSBs) then responsible for most mortgage lending – and in return supplied added lines of credit on the security of the mortgage loans that they held (thus “monetizing” those mortgages).

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

The FHA insurance scheme fundamentally altered the régime of home-financing in the US. It effectively replaced traditional collateralization requirements with national default-risk-pooling. The uniform requirements upon which FHA conditioned its

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218 12 USCS § 1464 et seq.
insurance fostered development of a standardized home mortgage instrument marketable throughout the country; that opened the door to securitization hence fuller risk-pooling, more on which presently. The housing quality requirements upon which FHA conditioned its insurance also ensured the financial rationality of federally facilitated home-finance investments. And FHA’s requirements of (a) actuarial soundness, and (b) risk classifying and separate pooling ensured that the system retained the traditional efficiencies of a private insurance market.

Congress effectively completed its ad hoc discovery of “the Method” of financially engineered ownership-spreading in 1938, by chartering the first modern “government sponsored enterprise” (or “GSE”): The Federal National Mortgage Association – FNMA, or “Fannie Mae” – was charged with making a national market in FHA-insured mortgage instruments themselves, i.e., with “securitizing” those mortgages. In effect, Fannie Mae along with later progeny (Ginnie Mae and Freddie Mac) closed the proverbial circle, separately completing the markets for housing credit and credit-risk-bearing, thereby maximizing the availability of such credit to home-buyers in the manner described earlier. Fannie Mae proved sufficiently successful, even on market terms, to privatize in 1968. It now offers a multitude of home finance services.220

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

Figure 8: Home-Financing Structure Since Federal Home-Ownership Legislation of the 1930s

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

2. Education-Finance

Now “human capital”: Federal involvement in higher education finance, in this case since the later 1950s and, especially, the middle 1960s, has substantially replicated that in home-finance. Once again, a perceived crisis – this time a 1957 Soviet satellite launch – acted as impetus. Public perceptions of national security and confidence that “we [were] number one” were badly shaken by the launch of Sputnik. Public discourse accordingly turned quickly to the question of who, or what, was to blame.221

One principal culprit, as determined by Congress and President Eisenhower, turned out to be substandard science and technical education. Congress reacted swiftly by passing the National Defense Education Act (NDEA) of 1958.222 At the heart of NDEA was the National Defense Student Loan (NDSL) program, which for the first time (apart from the GI Bill223) offered long-term, low-interest loans broadly to Americans seeking post-secondary education. The NDSL program, renamed the “National Direct Student Loan” program in 1972, then the “Perkins Loan” program in 1987, continues today, though subsequently established programs now account for more students and dollars:


222 20 USCS § 401 et seq.

223 The 1944 “GI Bill” had to a degree anticipated the NDEA, offering (rather more modest) financial assistance to veterans seeking higher education immediately following the Second World War. That too was consistent with “the Method” – in particular with its “conditioning” strategy.
As the 1950s gave way to the early 1960s, federal involvement with higher education spreading came to be described not simply in national defense, but in “great society” terms. The first critical step came with the Economic Opportunity Act (EOA) of 1964, whereby Congress among other things established the Federal Work-Study Program (FWSP), which like the NDSL program continues to the present day. FWSP’s linking of education aid to work is significant in light of the constraints upon effective asset-spreading catalogued above.

The EOA was but a beginning, however. The real milestone of the 1960s, which stands to contemporary higher education finance much as the 1934 NHA stands to contemporary home finance, came one year later with the Higher Education Act (HEA) of 1965. The HEA forms the basis of current federal financial assistance programs for seekers of higher education. It not only brought then existent programs under one umbrella, but established critical new programs. Most important for our present purposes was the federal Guaranteed Student Loan (GSL) Program, now known as the Stafford Loan Program.

As originally designed, the GSL Program offered one particularly salient benefit: a federal guaranty of the debts incurred by those financing their post-secondary educations through borrowing. The guaranty, of course, operated much as did federal mortgage insurance after the passage of the NHA in 1934. It removed lender risk, rendering loanable funds more readily available on cheaper terms.

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224 42 USCS § 2929 et seq.
225 20 USCS § 1001 et seq.
A particularly important augmentation of the GSL program’s credit-enhancing effect came with Congress’s 1972 Amendments to the HEA:226 Those amendments brought the Student Loan Marketing (SLM) Corporation, better known as “Sallie Mae,” a GSE bearing distinct family resemblances to Fannie Mae. As its full name suggests, Sallie Mae was chartered as a market-maker for shares in pooled student loan obligations. Like Fannie Mae, that is, it was, and is, a securitizer. Also like Fannie Mae, Sallie Mae only began as a GSE. Once the federal government had established the existence and shown the long-term viability of the requisite secondary market, it gradually withdrew: Sallie Mae began to privatize in 1997, then completed the process at the end of last year. And like Fannie Mae, it now does much more than securitizing.227

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


227 See, e.g., http://www2.salliemae.com/about.
Figure 9: Higher Education Financing Structure Since Federal Higher Education Finance Legislation of the 1960s, ’70s & ’90s
* Again bold-faced terms denote government or originally-government entities. Sallie Mae, originally a GSE, privatized in December 2004. “Loan Consolidators” can be primary lenders or other education finance companies like Sallie Mae itself. They can even be state guaranty agencies, which bear mixed public-private status.
and vary from state to state. There is, then, considerable functional and, indeed, public/private status overlap among asterisked entities.

C. Stock-Finance: Adapting the Strategy to Share-Spreading

Call the publicly augmented private credit strategy shared by our home- and education-finance programs “the Method of financial engineering.”\footnote{So I call it in Hockett, Whose Ownership?, supra note 2 at 95-102, and Hockett, Hamiltonian Means, supra note 5 at 87-153.} The Method has worked rather well in spreading the owning of homes and human capital over much, though not yet all, of the citizenry of our “ownership society”-in-the-making.\footnote{In connection with the “not yet all” caveat, note that higher education-finance and home-finance often will be of little use, to some of our citizens, absent access to nonhuman capital. For among other things, we have seen at V.B that the Method itself works in essential conjunction with the beneficiary’s earning \emph{income} that enables her to \emph{amortize} her publicly facilitated mortgage debt or student debt. Yet ours, as we saw at III, is a world in which stochastic short-to-medium term “mismatch” between productive investment and consumer demand, similar mismatch between technology-driven productivity improvements and consumer demand, and global “outsourcing” all periodically slacken domestic demand even for highly skilled labor – most Americans’ primary source of income, as we saw in effect at Part I. So there must be, ultimately, a \emph{symbiosis} among our three basic ownable capital types – homes, educations and firm-shares – in an \emph{optimally functioning} “ownership society” wrought by “the Method.” And that is once again to say, in yet another way, that our \emph{completed} “ownership society” will have to constitute a “three-legged stool.” We will do better even with homes and higher educations once we do better with firm-shares.} Might we adapt it to spread shares in firms, our hypothesized analogue to the Homesteading era’s productive land? Well, in Part IV we generalized from the ESOP to other SOP-types, essentially by replicating the ESOP’s financial-relational structure while changing some \emph{terms} in the relation. Let’s try that strategy here.

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

Also as with homes and higher educations, citizens’ direct purchases of firm-shares would be effected in part by their own borrowing. But again as in the case of home and education finance, then, we would publicly facilitate the borrowing. We would do so first by establishing, or fostering the private establishment of, a “capital mortgage” insurer analogous to FHA in the home finance case. As in that case, of course, mortgage insurance would lessen lender risk, thereby augmenting the pool of available credit. The insurer also would operate along similar lines to those operated along by FHA and the Federal Stafford Loan program: Quality conditions would be imposed upon qualifying securities (and hence issuers themselves, of course) just as they are upon qualifying homes and institutions of higher learning. Likewise, credit-worthiness conditions would have to be met by the borrowing citizens. As with home mortgages and guaranteed student loans, these imposed conditionalities would, presumably, come ultimately to be effectively “codified,” and thus standardized, in the form of a

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230 Or we might guarantee the loans, up to some amount, as in the higher education case.

231 I’ll address “market distortion” objections that this might occasion infra, Part VI. (The same objections might have been raised in connection with the quality conditions that we impose in the cases of home- and higher education-finance, after all.)

232 Another reason to require financial counseling, then, again as indeed we do in the case of guaranteed student loans. See note 221, supra.
standardized “capital mortgage” instrument. That in turn would pave the way for our employing the second mode of public credit-augmentation:

We would publicly facilitate borrowing second by establishing, or fostering the private establishment of, a secondary “capital mortgage” market-maker analogous to Fannie Mae in the home finance case and Sallie Mae in the education finance case. Let us (for now, and with some aesthetic regret) call it the “Capital Mortgage Marketing Association,” or “Cappie Mae.” Cappie Mae would purchase “capital mortgage” debt from primary lenders. Like Fannie Mae and Sallie Mae, it would pool and classify the rights to repayment that are those debts in a special purpose vehicle, then issue shares in the pool(s) – “capital mortgage-backed securities,” as it were. Also as in the case of Fannie Mae and Sallie Mae, of course (for this is the very point), the making of a secondary market in “capital mortgages” would facilitate the yet more efficient flow of default risk to that risk’s most efficient bearers, ultimately thereby enhancing available “capital mortgage” credit. (This, recall from V.B, is part of how “the Method” works.)

A possible alternative or supplement to “capital mortgage securitization” might be “capital mortgage monetization.” The Fed might, for example, credit Member Bank reserve accounts in some (discounted) amount in return for what “capital mortgage” debt they hold, perhaps up to some limit – again as with the FHFB and home mortgage debt.233 In effect, the Fed would be “credit-allocating” just as it and the FHFB do now with home mortgage debt. It would be “incentivizing” the extension of “capital mortgage” credit by Member Banks by purchasing – thus taking the risk attendant upon – “capital mortgage” debt. This extension would not be as radical as might be supposed: It

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233 See supra, V.B.1 and Figure 8, by way of reminder in the home mortgage case.
appears that the Fed’s discount window was originally fashioned with a cognate purpose in view; and the window has occasionally been opened for precisely such a purpose in cases of financially distressed firms and municipalities thought “too big to fail.” But I shall assume for present purposes – realistically, I think – that the monetization option is closed, and rest hope on “Cappie Mae.”

These credit-enhancement methods, familiar from the home- and education-finance cases briefly rehearsed through V.B, could be readily combined with the tax-break strategies rehearsed through Parts II and IV in connection with ESOPs and other SOPs. Tax incentives also facilitate the home- and education-finance programs themselves, after all. These methods also could be supplemented, as suggested at IV.C, with more direct benefit-conferrals in the case of constituencies whom we find worthy of special solicitude, either because they are faultlessly under-endowed or

234 See Federal Reserve Act of 1913, ch. 6, § 13, 38 Stat. 251, 263–64 (codified as amended in scattered sections of 12 USCS). Section 13 of the Federal Reserve Act provides for the “discount window” through which the Federal Reserve may “monetize” payables (primarily commercial paper, referred to as “eligible” paper in the Act) of participating depository institutions (technically, the latter serve as collateral for Federal Reserve lending to participating institutions), in effect trading liquidity for assets in a manner analogous to secondary markets’ “securitizing” payment obligations. Although the section 13 discount window was originally envisaged for that purpose—in effect, to facilitate and incentivize small business lending by local banks by offering the latter quick means of monetizing the resultant debts owed them—it has seldom been so used. Instead, it is primarily government (generally U.S. government, though in some cases other government) debt that is monetized by discounting. The principal nongovernmental debt-monetizing uses have been pursuant to large “bailout” packages assembled or proposed for institutions—generally banking institutions, but occasionally nonbank institutions—thought to be “too big to [allow] to fail.” See, e.g., Frederick S. Carns, A Two-window System for Banking Reform, FDIC BANKING REV., June 1995, at n.37, http://www.fdic.gov/bank/analytical/banking/1995spring/rbr1a1ft.html#2; David Fettig, Lender of More than Last Resort, REGION, Dec. 2002, http://www.mpls.frb.fed.us/pubs/region/02-12/lender.cfm; A&M-Commerce Department of Economics and Finance, Course 572 Dale Funderburk, http://www.tamucommerce.edu/eco/fin/courses/funderburk/572/yesf.txt (last visited Dec. 26, 2005). The explanation seems to be that the First World War and consequent rapid national debt growth and national industrialization quickly preempted what was originally envisaged as the window’s more localized business debt-monetizing purpose. See, e.g., STAFF OF H. SUBCOMM. ON DOMESTIC FINANCE OF THE COMM. ON BANKING AND CURRENCY, 88TH CONG., A PRIMER ON MONEY 42–43, 69–71 (Subcomm. Print 1964); G. EDWARD GRIFFIN, THE CREATURE FROM JEKYLL ISLAND: A SECOND LOOK AT THE FEDERAL RESERVE (3d ed. 1998); Norman G. Kurland, The Federal Reserve Discount Window, Center for Economic and Social Justice, http://www.cesj.org/homestead/reforms/moneycredit/discountwindow.html (last visited Nov. 21, 2005).

235 See supra, note 234, for why.

236 See Hockett, Hamiltonian Means, supra note 5 at 93, 115-16, 149.
because they have “gone above and beyond” by performing some manner of national service. Here too there is precedent in the home- and education-finance cases, wherein we do more than just enhance credit-availability for some constituencies: In those latter cases, we actually subsidize interest payments on the debts; and sometimes we even relieve them.  

Again, as with the new SOP forms proposed at Part IV, it is not to our purpose to blueprint in every detail a single preferred program or cluster of programs. The point here is simply to schematize, suggestively in broad outline. It is to show just how readily we might extend the basic strategies that we already employ, from the cases in which we do employ them to the one case in which we as yet do not. Accordingly, then, we might summarize our results here in just one more diagram:

\[\text{Id.}\]
Once more bold-faced terms denote government or possibly government entities. The “Capital Mortgage Insurer” might begin as a government entity and might
even initially be associated with the Fed, but also might ultimately be privatized. Likewise “Cappie Mae.”

Of course there are potential challenges that might stand in the way of implementing any publicly augmented private “capital mortgage” credit enhancement program. Some such challenges might be more poignant than their analogues in the home- and education-finance cases, though there also appear to be mitigating factors that operate more effectively in the firm-share-finance than in the home- and education-finance cases as well. We will do best to consider these together in a separate Part, to which I now turn.

VI. ANTICIPATED DIFFICULTIES & OBJECTIONS

Adapting the full credit-enhancement strategy, originally developed in the home- and higher education-finance contexts, to spread non-human capital would be publicly to facilitate the private extension of credit for citizen purchases of firm-shares. In effect, collectively supported private credit-risk-pooling hence credit (and thus, expected future capital) would stand in for already accumulated capital (collateral), again as in the cases of contemporary home- and higher education-finance. That in turn would enable more people to become owners in this realm just as more have become owners of homes and human capital. Citizens faultlessly lacking in non-human capital would be enabled, by exercising reasonable diligence, to acquire it, just as they now are with homes and educations. And they would be so enabled at minimal-to-no perceived cost to those already owning these assets. So public action here, as in the home and higher education cases and as in the ESOP case, would seem to conform to the values and endowment dispositions rehearsed at II.C.
Yet none of this is to say that matters here are easy. There are challenges and potential objections that we can anticipate and ought to address. In some cases these are more poignant here than they were in the home, education and ESOP realms. In other cases they are less so. Let’s take them in ascending order of difficulty:

A “Market Distortion”

One challenge is that, in order to ensure the actuarial soundness of any “capital mortgage finance” (“CMF”) program, we shall have to impose quality conditions upon the underlying assets (hence by extension the suppliers thereof) whose acquisition we are facilitating. That, as seen at V.B, is a key feature of “the Method” as applied to home- and higher education-finance. And it appears to be a critical factor in those programs’ actuarial hence political successes. But imposing such standards in the case of CMF might look like public favoring of some firms, or kinds of firms, or kinds of investments, over others. And that perceived “favoritism,” “distortion,” or “inappropriate intermingling of politics and investment” is of a kind we traditionally have disavowed, at least rhetorically.238

This challenge is easily met so long as it is first acknowledged. Note first that all public interventions in the economy, whether packaged as facilitative or as regulatory, inevitably affect some firms or industries differently than others. The home finance programs afforded stimulus to the housing industry and thereby “distorted” the

macroeconomy. (They did not, for example, stimulate the rental market. Quite the contrary.\textsuperscript{239}) The education finance programs did the same in respect of higher education and the macroeconomy. (They did not, for example, stimulate the market for apprenticeships.)

More generally, contract law “distorts” persons’ capacities to breach agreements, tort law their capacities to work what we consider unjust injury to others, property law their capacities to engage in what we consider illegitimate taking from others. Laws against murder “distort” the contract killing market. And so on. The question, then, is not whether the public should “distort” what “would” have been the workings of “natural” markets “absent government intervention.”\textsuperscript{240} The question, rather, is how, in what forms and to what degrees it should or should not permit its actions to affect them.

Note second, by way of answering what one suspects would be most peoples’ answer to that last question, that we would not have to evaluate individual businesses or business plans in any micro-managerial sense by requiring that ownership shares acquired by citizens through CMF meet minimum quality standards. Rather, the requirement can be simply that the shares be “investment grade,” per existing bank

\textsuperscript{239} The choice to favor home-ownership as primary American domiciliary mode was forthrightly a choice not to favor rental or leasing. \textit{See}, e.g., J. Paul Mitchell, \textit{Historical Overview of Federal Policy: Encouraging Homeownership}, in \textit{Federal Housing Policy and Programs: Past and Present}, \textit{supra} note 216, at 331.

\textsuperscript{240} Indeed it is absurd to suggest that “markets” as we define and celebrate them could so much as \textit{exist} absent public facilitation via bodies of law such as those just mentioned. This has been a truism at least since the time of David Hume and Adam Smith. \textit{See}, e.g., \textit{David Hume, 2 A Treatise on Human Nature} 293 (T.H. Greene & T.H. Grose eds., 1890) (three “fundamental laws” requisite not only to the preservation of markets, but of society itself—“that of stability of possession, of its transference by consent and of the performance of promises”); \textit{Adam Smith, 2 An Inquiry into the Nature and Causes of the Wealth of Nations} 213-338 (Edwin Cannan ed., 1976) (On necessity of public maintenance of institutions providing for the common defense, dispensation of justice (law), commercial marketplaces and general education if society is to attain to opulence, or indeed even to endure at all as a society).
capital adequacy regulation and as determined by reputational intermediaries such as Moody’s or Standard & Poor’s.

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

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

This is hardly a problem. Note first that we want to be conservative about the reliability of the assets that our “ownership society” spreads, including shares in firms.

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241 See 12 CFR Pt. 3, App.A.

242 It is of course well established that as few as nine or ten separate securities can diversify away upward of 90% of idiosyncratic risk. See, classically, Harry Markowitz, Portfolio Selection, 7 J. Fin. 77 (1952). See generally Harry Markowitz, Portfolio Selection: Efficient Diversification of Investments 52 (1959). See also James Tobin, Liquidity Preference as Behavior Toward Risk, 25 Rev. Econ. Stud. 25 (1958).

243 Id. See also Burton Malkiel, A Random Walk Down Wall Street 255 (3rd ed., 2004). On the other hand, of course, the index fund strategy might cut against the participation values held by Civic Republican advocates of an “ownership society,” as discussed supra Part I.B. We might mitigate that problem, if we perceived it thus, by requiring the facilitated investments to be made in funds organized as corporations, in which shareholders held governance rights, rather than as trusts in which they were protected only by fiduciary rights.
We want those stakes, ideally, to be as enduring and reliable as are homes and good educations themselves. Note, second, that there is no reason to think that assuring that reliability will dry up the financing of smaller, high end, more risky and innovative ventures. Those ventures generally seek, and receive, their financing from institutions and markets quite apart from depository institutions – indeed even apart from the larger established stock exchanges – in any event. And their financiers are, of course, typically more risk-preferring than the typical stock market participant.

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

B. “Subsidized Speculation”

A second general challenge that a CMF program might face is the avoidance of publicly facilitating “mere speculation.” The line between that and bona fide “investment” is of course notoriously difficult to draw at the margin. And even “pure speculation,” it is widely observed, is generally beneficial; it diminishes price-spreads and with them inefficiencies wrought by mere ignorance. But we would nevertheless presumably not wish to subsidize or otherwise facilitate unambiguously “casino-like” behavior among newly “capitally-empowered” novice investors – herdlike behavior of

the sort widely believed to have been a precipitating cause of the 1929 stock market crash and ensuing depression. And isn’t that, some might protest, what facilitating the leveraged purchase of firm-shares by the erstwhile capitally disenfranchised would be? Relatedly, mightn’t publicly augmented leveraged stock-acquisition result in inflation of stock-prices, even a “bubble?”

Like the “distortion” charge, this is not an especially difficult challenge to meet. Here, though, our answer is more practical than theoretical: First, the imposition of quality standards per the preceding paragraphs will itself significantly dampen any lottery-ticket-like nature of qualifying credit-facilitated investment. Second, even were that, improbably, not to suffice, it would seem easy enough simply to place direct limitations, pursuant to the conditions that we attach to the benefit of public credit facilitation, upon the velocity at which purchased shares can be *turned over*. This would of course be analogous to the tax penalties incurred by early withdrawal of funds from an IRA. We might, for example, facilitate the extension of less credit at some time $t_n$ to any beneficiary who buys and sells at too rapid a rate at time $t_{n-1}$. Or we might impose transaction excises – “Tobin taxes” – upon such behavior, all proceeds to return to the public fisc.245

Third, in respect of the “bubble” objection, note that the same objection could have been leveled in connection with home-mortgage debt-augmentation, and with higher education credit-enhancement. Yet inflation in these realms has not proved intractable. Moreover, note that in the case of firm-shares the purchases, at least if quality-

conditioned as suggested at VI.A and modulated in the ways suggested in the previous paragraph, will tend to finance *productivity-growth* on the part of firms. That means that public action here can be expected to be counterinflationary in the goods markets in a way that it is not even in the home and higher education markets. Again, then, there are multiple reasons to expect, and options by which to ensure, the investment-like as distinguished from the “merely speculative” nature of the widening business-share-ownership that we facilitate.

**C. “Cost Recovery”**

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

The answer, at least over the long run, appears to be “yes.” For one thing, the American (and indeed much of the global) equities market as a whole has tended toward an 8-11% rate of return since records have been kept; lending rates have been

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246 Kelso and his followers, recall, used to say that “capital pays for itself.” See supra notes 118, 121, 122. But that claim, recall again, either is grossly misleading or is tautologous. See supra note 124 and accompanying paragraph; and supra Part II.B. Absent de facto credit-allocative public intervention, the spread between lending charges and equity returns will be closed by arbitrage, and capital will “pay for itself” in no more than the trivial sense that rational investment dollars will not exceed discounted expected returns. Kelso and his followers don’t intend to be trivial; they are simply misleading, conveniently neglecting as they do to mention the credit-allocative role of the public when speaking of capital’s “paying for itself.” *Id.* More on this matter *infra,* this Subpart.

247 See supra Part V.B.
substantially lower than that over the same period.\textsuperscript{248} For another thing, even were that not the case, we could simply consider, as a corollary to our quality standards, stipulating that only substantial dividend-yielding stock would qualify for CH facilitation. We could even consider going yet further: We might prohibit, say, the financing of new projects by publicly listed firms with retained earnings.\textsuperscript{249} That would, first, free-up funds for dividends – potentially enhancing real incomes and discouraging excessive speculation in shares.\textsuperscript{250} And it would, second, render management more reliant upon hence accountable to outside finance – thus upon and to a broader swathe of our citizenry once financing began to originate from the newly CMF-capitally-enfranchised – than in recent decades has been the case.

Requiring dividend-payments as a matter of federal law would of course constitute a marked change in our present-day corporate governance regime, a realm


\textsuperscript{250} For a principal source of income deriving from ownership shares then would be profit shares – dividends – rather than exclusively capital gains realized only through share-sale.
commonly observed to be left, primarily and quite properly, to the states. But we need not advocate anything so radical at present. It suffices simply to remind ourselves that it might be considered should we decide to get serious about share-spreading. Regular dividend payments and reliance upon outside financing used to be much more common, after all. And in all events most such firms as might be affected by any such change – the well established firms, per our quality concerns discussed at VI.A – already are federally regulated as to many formerly state-regulated governance matters: That is of course by dint of the federal securities laws, under whose jurisdiction most of these firms fall in virtue of being publicly listed and held.

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

This objection is fair enough as a matter of theory, but readily dispatched as a matter of practice. Even ignoring the portfolio-shaping and capital adequacy rules, noted above, to which we subject our financial institutions, it is easy enough to ensure that only presently capitally disenfranchised citizens enjoy the benefit of a CMF program:

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251 See, e.g., the excellent survey of these matters in Roberta Romano, The Genius of American Corporate Law 1-31 (1993).

252 See supra note 248 and sources cited therein.

253 Id.

254 See supra notes 192, 241 and accompanying text.
Simply limit the publicly facilitated CMF insurance and securitization to “capital mortgages” entered into by individual citizens, and only up to a stipulated borrowing amount. Home mortgage insurance and securitization under our home finance programs are limited thus, after all; they’re available only for the purchase of first homes. Neither financial institutions nor plutocrats buy homes under the program.

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

D. “Subsidized Indolence”

The fourth and perhaps most important general challenge faced by a prospective CMF program comes through our observation at Part II.C, concerning perceived “earning” or “deservingness.” In the case of our higher education-finance programs, we saw at V.B.2, beneficiaries of “the Method” must diligently labor to enjoy the benefit: They must study, learn, and earn their degrees, then work to pay off their student debt. In the case of our home-finance programs, we saw at V.B.1, beneficiaries of “the Method” must generally labor to make timely mortgage payments from their wages or salaries. And things are likewise, we saw at II.A, in the case of ESOPs. Is there a counterpart in the case of firm-shares spread via CMF?

The answer, again, is “yes,” but we must make it a careful “yes.” To begin with, “capital mortgages” can be expected in most instances to be like home mortgages:

Beneficiaries of federally facilitated “capital mortgage” insurance and securitization will
in most cases, presumably, work to pay their “capital mortgage” debt as surely as they do to pay their home mortgage debt.\textsuperscript{255} It might happen that their doing so gradually reduces the hours that they have to work, as dividends and/or capital gains accruing to their stockholdings gradually supplement, then perhaps partly supplant, labor income. And indeed this is even to be hoped, since the reduction of dependency and the spread of material freedom is part of the very point of seeking an “ownership society.”\textsuperscript{256} But there is no reason to anticipate that people will simply cease working or otherwise diligently acting altogether. And that is particularly so over the time that is pertinent to the constraints imposed by our endowment sensibilities rehearsed at II.C – viz., the time during which beneficiaries must pay down their “capital mortgages.” There are several reasons:

For one thing, consumer demand of course tends to grow with income and wealth, even if at a diminishing rate;\textsuperscript{257} and thus does the perceived need to work continue, particularly in a world that does not yet allow for shortened working hours.\textsuperscript{258} For another thing, even were consumer demand not to rise in response to rises in income and wealth wrought by a successful CMF program, those latter rises, in so far as they are, after all, partly offset by interest payments that must be made pursuant to the “capital mortgages,” are unlikely to render employment unnecessary during one’s youth and early

\textsuperscript{255} In so far, that is, as the unemployment rate remains relatively low, the long-term rate from individual to individual remains yet lower, and earnings do not stagnate or drop more precipitously than they have been doing for the past three decades. See Paul Krugman, The Dropout Puzzle, NEW YORK TIMES, July 18, 2005, at A-28.

\textsuperscript{256} See supra, Introduction. Also Hockett, Whose Ownership?, supra note 2 at 5-24, 29-31; Hockett, Hamiltonian Means, supra note 5 at 49-57, 163-64.

\textsuperscript{257} See, of course, JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 89-131 (1936) (on the marginal propensity to consume).

Finally, even to the degree that rising wealth would allow for less need of employment, it could be expected to encourage more people simply to start their own businesses, or to engage in productive behavior chosen on grounds other than desperate need, rather than simply to cease being productive. That appears to be the trend, in any event, among such few “early retirees” as we find already today. So it seems highly doubtful that an actuarially successful CMF program would have to offend our endowment dispositions by appearing to be unearned or rewarding of indolence.

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

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259 Kelso once reported that the newspaper employee-beneficiaries on whose behalf he “invented” the first ESOP, for example, retired early; but not before reaching their 50s, and certainly not before the credit extended their ESOP trust had been paid. And this indeed might have been a particularly rosy early retirement scenario in any event. See Kelso & Kelso, supra note 121 at 124.

260 We might expect a more modest version of the culturally enriched, less wanting society prophesied with some whimsy (and some trepidation) by Keynes in J. M. Keynes, Economic Possibilities for Our Grandchildren, in John Maynard Keynes, Essays in Persuasion 358-73, 372 (“The course of affairs will simply be that there will be ever larger and larger classes and groups of people from whom problems of economic necessity have been practically removed.”).


262 See sources cited supra, Part II.C.

263 See Hockett, Hamiltonian Means, supra note 5, at 97.
Note, finally, that there is nothing to prevent our substituting *other* opportunities to work diligently *in place* of missing employment – as a *condition* attaching to the CMF subsidy. In effect we have suggested this already at IV.C, above, in connection with CitSOPs. We can, then, simply require that beneficiaries donate hours to Vista or Americorps. Or if need be we can establish additional public service corps for which otherwise unemployed beneficiaries of “capital mortgage” assistance will be required to work to the best of their apparent abilities in exchange for the benefit. Such corps would serve as useful domestic analogues to military service, which as we have noted *already* constitutes a primary mode of public service qualifying otherwise unemployed citizens to receive much in the way of home-finance, education-finance and health care assistance.\(^{264}\) Again, there are multiple possibilities here, and we can do little more in the present Article than speak broadly. But the time, nevertheless, is more than ripe for beginning to sketch seriously, in broad outline, our preliminary designs.

**CONCLUSION: HOPES & NEXT STEPS**

We have come a long way since the Introduction. But of course more remains to be done. For this Article, in a sense, has amounted to little more than a sustained thought-experiment: We have sought to think-through just what analogical extensions, from already-familiar and well-running programs, are possible – and might draw us closer to completing that “ownership society” we wish to become. But what to do next, once we’ve experimented in thought?

Our next step, I think, is to experiment *beyond* armchair thought: It is, first, to *model* the programs proposed in this Article, formally and econometrically. We should

work to draw a better bead upon likely consequences, and to *quantify* those to the degree we are able. I have pointed to what it seems reasonable to *expect* should we institute SOP-types and credit-augmenting programs of the kinds I have sketched. And those expectations *do* appear reasonable, in light of the ready analogies drawn between what I’ve proposed, and the successful programs they replicate and adapt. But we can proceed with more confidence – and draw wider support – if we first “crunch the numbers” and confirm expectations.

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

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

We afford tax incentives to firm-ownership-spreading. We pool and guaranty against risks for the eventuation of which no one is individually responsible. And we jump-start markets that individuals alone, owing to rational calculation and reasonable risk-aversion, dare not or cannot create single-handedly. Such measures, we saw at Parts II and V.B, are precisely what we have employed to spread ESOPs, and to establish both the mortgage insurance markets and the mortgage and student-debt secondary markets. Those latter, again, began as public institutions – and now have proved viable, after the “jump starting” and consequent proof of viability, as private ones.

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

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