Reviving the Forgotten American Dream

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Table of Contents

INTRODUCTION...................................................... 1

I. OWNERSHIP AND LIBERTY
   A. A Brief History of American “Ownership”............. 3
   B. The Modern American Dream.......................... 12

II. CAPITAL OWNERSHIP AND WEALTH
   A. Neoclassical Economic Philosophy and Ownership… 14
   B. Historical Perspectives on Neoclassical Economics… 17

III. BROADENING HOME OWNERSHIP
   A. The National Housing Act of 1934 and the Federal Housing Administration…………………. 22
   B. Arguments Against Home Ownership……………….. 25

IV. CAPITAL OWNERSHIP CONTRASTED
   A. Along Came the ESOP…………………………………. 28
   B. Binary Economics……………………………………….. 31
   C. Capital Homesteading………………………………… 37
   D. Universal 401(k)……………………………………….. 40
   E. Micro-Credit…………………………………………. 42

V. CONCLUSION...................................................... 44
INTRODUCTION

It is difficult to talk about wealth inequality in public forums without at some point being labeled a socialist or some form of extreme leftist.\(^1\) The discussion, however, continues to be had by capitalists and socialists alike. My ideology is the former, but I will admit some misgivings about how our present capitalist system is functioning. Many scholars and theorists have come to suspect that there is a more just and efficient path to wealth accumulation and distribution, or at least something we might have missed along the way. This is an economic question, but it is also a legal one, as so much of wealth creation springs from property ownership, with private property being held out as, and acknowledged to be, the bedrock of sustainable growth.\(^2\) The focus of this paper is property ownership in terms of capital, and how the drive to own productive resources was once an integral part of our national culture, but has fallen to the wayside recently. This drive is no longer mentioned as any part, much less a central part, of the American Dream.

There is no doubt that the American left and right (for the most part) both share a vision of a wealthier America, but they have become trapped within their own economic paradigms when it comes to explaining a way to move forward, to provide for a greater number of citizens, to spur economic growth, and to broaden wealth and opportunity for all Americans. The right believes that only through the primal and uncontrolled machinations of the free-market can wealth be properly allocated, and that regulation and governmental welfare almost always do more harm than good. They advocate what is very much a sink-or-swim philosophy. The left, on the other hand, generally believes that the unregulated free market only leads to the proletarianization of working Americans, and that regulation and welfare are required to provide for those that the market has failed, which necessarily means redistribution. Neither side seems willing to recognize


the strengths in the other’s arguments, or the failings in its own. However there is good reason to question whether, for example, the American economy is operating at full capacity and whether to create more wealth-enhancing opportunities for the less economically advantaged, it is necessary to take from others.  

To be certain, the most significant problems confronting anyone who argues in favor of broader ownership are the various arguments against redistribution. Much of the literature on broadening ownership assumes that we must necessarily take from one and give to the other in order to achieve the broader ownership. While redistribution in terms of some form of taxation which provides public benefits isn’t without its place, redistribution simply is not a good general model for long-term growth. It may be true that not everyone can become rich, but it is not true that our present economic system is the best and only way to create and spread wealth among a widespread segment of the American people. Broad property ownership, in terms of what we now commonly call capital, was a widely lauded, key aspect of democracy according to the founders of America. The argument is still true today. Capital ownership is necessary for sustainable growth, and capital ownership is necessary for a functional democracy.

Consequently, this paper is divided into five parts. Part I addresses the history and theoretical underpinnings of private property ownership in America. America has always valued ownership, but we see that the kind of ownership, and the parties who had ownership were considered far more important in America’s past than they are in America’s present. Part II covers capital ownership specifically, and how capital has been proven over time to be the primary driver of personal wealth and national economic growth. The political powers that presently exist do not acknowledge this fact, and do not draw from it the conclusion that capital is what the poor need to escape subsistence. Part III

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3 For a neoclassical analysis and argument against the “full capacity” proposition, see James Crotty, *Why There is Chronic Excess Capacity*, CHALLENGE, Vol. 45 (2002).
contrasts capital ownership with home ownership, which still is an integral part of the America dream, but which has not been the springboard to wealth that it has been advertised as. Part IV discusses several efforts and theories as to how capital can be effectively spread among the masses. Some of them call for redistribution, and some them do not. Those that do not find it better to work within the mechanisms already in existence the marketplace. Part V concludes the paper.

VI. **OWNERSHIP AND LIBERTY**

A. A Brief History of American “Ownership”

I use quotations to set off ownership because it has such myriad connotations now that it is hard to know precisely what people are talking about when they talk about ownership. For the sake of brevity I will refer to ownership somewhat broadly, using the term to encompass ownership of both real property and capital, with ownership necessarily encompassing all the “bundled sticks” of rights, and then distinguish real property and capital as we move on for further analysis. What follows is a brief recitation of how ownership has been conceived throughout American history, and how certain forms of ownership have been critical to the attainment and maintenance of liberty.

Private property is not a new development in human history. Certainly, the way we think of “ownership” now has been modified over time to adopt the new forms of ownership that have been made possible through technology, but private property and individual property rights have been utilized in various forms

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5 Property records as well as property sales and alienation rights existed for over a millennium in Mesopotamia before Western law began to recognize such rights as Rome came to power. See, e.g., Johannes M. Renger, *Institutional, Communal, and Individual Ownership or Possession of Arable Land in Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C.*, 71 CHI-KENT L. REV. 269, 290-92 (1995).
for millennia.\(^6\) Roman property law included such rights as the ability to possess and enjoy land, to give rights to heirs at death, to pass on rights while alive, to encumber land through servitudes, to secure debt, and so on.\(^7\) In general, much of what we think of as contemporary property law has existed in some form for many years.\(^8\) The United States was built, very much from its inception, on the idea of actual, individual ownership of real property as a means of production.\(^9\)

Men were frequently paid with land instead of currency in the earliest days of colonization.\(^10\) Willi Paul Adams observed that the “acquisition and cultivation of land was the very raison d’etre for the colonies.”\(^11\)

The idea of owning property began to be seen, not only as a luxury of being in the new world, but as a right to which persons in the nascent United States were entitled.\(^12\) The concept of broad ownership as being a fundamental aspect of democracy and political freedom has deep roots. Aristotle contended that democracies would be far more likely to succeed in societies which contained a large middle class.\(^13\) The Virginia Declaration of Rights listed as the inherent right of every American, along with life, liberty, and the pursuit of happiness, the

\(^6\) The focus of the argument as to when the western ideal of private property rights came into being revolves largely around free alienability of property. See Claire Priest, Creating an American Property Law: Alienability and it’s Limits in American History, 120 HARV. L. REV. 385, 392-94 (2006).

\(^7\) David A. Thomas, Why the Public Plundering of Private Property Rights is still a Very Bad Idea, 41 REAL PROP. PROB. & TR. J. 25, 35-36 (2006). For an extensive account of Roman property law influence on western legal tradition, see David A. Thomas, Landholding in Ancient Britain, in THOMPSON ON REAL PROPERTY §2.04(c) (Thomas Ed. 1994).


\(^9\) e.g. Eric T. Freyfogle, Property Rights, the Market and Environmental Change in 20th Century America, 32 ENVTL. L. REP. 10254 (2002); Sarah Molseed, An Ownership Society for All: Community Development Financial Institutions as the Bridge between Wealth Inequality and Asset Building Policies, 13 GEO. J. ON POVERTY L. & POLY 489 (2006).

\(^10\) Early settlers were paid to settle in America with the land on which they would eventually live and work. At Jamestown, men were offered 50 acres to settle, and another 50 if they would pay the cost of surveying their new land. This 100 acre incentive was often not enough. Richard L. Morton, Colonial Virginia, 46 (1960) (citing Alexander Brown, The Genesis of the United States, 774-80 (1890)).


“means of acquiring and possessing property.” This declaration was adopted by Virginia on June 12, 1776, immediately prior to the signing of the Declaration of Independence. Thomas Jefferson relied heavily on the Virginia Declaration while writing the Declaration of Independence, and was heavily influenced, as were many of the framers, by the writings of John Locke. As President, Jefferson put into effect policies which heavily favored broadly distributed real property, particularly through the decision to make public lands in the territories available only to settlers who would work the land.

Jefferson was not alone in his beliefs. Many of the framers, including Alexander Hamilton, James Madison, and Benjamin Franklin expounded on the reinforcing relationships between property ownership, economic autonomy, and political freedom, despite many of the federalist, anti-federalist differences between them. John Adams wrote at the outset of the declaration of independence that “power always follows property.” Based on this understanding, Adams advocated making “the acquisition of land easy to every member of society,” or alternatively “to make a division of land into small

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14 Virginia Bill of Rights of 1776, Art. I. John Locke also commonly used the word “property” as an all-inclusive to term to which included the concept of liberty: “Lives, Liberties and Estates, which I call by the general name, Property.” JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §123 (Thomas P. Peardon Ed. 1952) (1690). This expansive view of property was also present in much of the thinking of the framers, particularly James Madison. See James Madison, Property, National Gazette, Mar. 29, 1792, reprinted in 14 The Papers of James Madison 266 (R. Rutland, et al eds. 1983).
15 Larry P. Arnn, Saving the Ownership Society, USA Today (Society for the Advancement of Education), July 1, 2006 (2006 WLNR 15393122).
17 Merrill Goodzier, Forty Acres and a Sheepskin, The AMERICAN PROSPECT 90 (March 1999).
quantities, so that the multitude may be possessed of landed estates.” The New Hampshire Constitution of 1784 stated that “all men have certain natural, essential, and inherent rights; among which are—the enjoying and defending [of] life and liberty—acquiring, possessing, and protecting property—and in a word, of seeking and protecting happiness.” The Massachusetts Constitution includes among its enumerated inalienable rights “that of acquiring, possessing and protecting property.” The distinction between the “right to property,” and the “right to acquire property,” appears intuitively to be of little difference—they both seem to mean the same thing. Yet without a viable right to acquire property, the protection of the right to own property might in practical terms be limited to those who have already acquired it, or who may acquire it in ways that are not open to others. Indeed, years of participation in the American experiment have taught us that acquisition of property has been far more of a hurdle than the right to maintain and protect it once acquired for many classes of people than this subtle distinction would lead the passive reader to imagine.

For many, the ownership of property is in itself perhaps the greatest expression of, and requisite for, freedom. The general idea at the time of America’s founding was that an owner of property with legal protection would be secure enough to challenge those in power, and be less fearful of government reprisal. The existence of many land owners could check an ambitious government in a way that a non-propertied citizenry could not. Under this view,

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20 Letter from John Adams, supra note 19 at 377.
21 Constitution of New Hampshire of 1784, Bill of Rights, Art. I, Sec. II.
22 Constitution of Massachusetts, Art. CVI.
23 Justice Marshall was reported to have said that “property must be secured or liberty cannot exist.” 6 The Works of John Adams 280 (Charles Francis Adams ed. 1850).
25 Bethell, supra note 23, at 3.
political freedom is only realized through property ownership.\textsuperscript{26} This easily couples with John Stuart Mill’s argument that economic progress can only be accomplished through the security of citizens against violence and the arbitrary power of government.\textsuperscript{27} Ownership leads to freedom, which in turn leads to development, both economically and politically.\textsuperscript{28} Additionally, the ownership of property was clearly associated with the idea of social mobility, and thus the creation of a society in which there was less reliance on multigenerational wealth as a provider of economic order. Jefferson himself commented that he wanted a system in which there was a “natural aristocracy” existing only as a result of “virtue and talents.”\textsuperscript{29} Albert Gallatin, Secretary of the Treasury under both Jefferson and Madison, established an early profit-sharing plan at his glassworks facility in New Geneva, Pennsylvania. He is quoted saying that “The democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well.”\textsuperscript{30}

The attitudes of Jefferson and Madison obviously did not reflect the whole of society at the time, but the political momentum was clearly favoring not only the rights and legal protections of possession, but also acquisition. Even though there was sentiment in favor of more widespread ownership prior to the American Revolution, it was by far the exception rather than the rule for the underclasses to hold property.\textsuperscript{31} Not until the mid-18th century, when the ideals of the

\begin{thebibliography}{9}
\bibitem{28} See \textit{Amartya Sen, Development as Freedom} 14 (1999).
\bibitem{30} Ward Morehouse, Stuart Speiser, & Ken Taylor, \textit{The Universal Capitalism Movement in the United States}, 58 REV. SOC. ECON. 63, 67 (2000). Gallatin was an active participant in several policy aspects in the earliest days of the United States. He was also a founder of New York University.
\end{thebibliography}
Enlightenment became more expansively adopted by American society, did ownership begin to become a reality among the non-elites.\(^{32}\)

And yet the right to own was at bitter odds with the social climate and natural rights theory of the time, when humans could still be held as property themselves and women generally only had the rights acquired through their husbands.\(^{33}\) The ideal of ownership rights existed long before the reality of equalized civil rights made it possible for minority ethnic groups and women to effectuate those rights, but civil rights law and human rights theory did catch up.\(^{34}\) The political right to vote has been progressively expanded to the point that few would question whether universal suffrage for a nation’s citizens is an essential characteristic of a democracy, the fact that most voters own very little property, that many voters have negative a net worth, and the ability to acquire capital as a practical matter is highly concentrated, is not widely perceived as a serious impediment to a functioning democracy. This perspective is in direct conflict with the views of our nation’s founders.

As American society moved forward into the 19\(^{th}\) century, both leading up to and through the beginning of the industrial revolution, property ownership became the anchor upon which American growth was grounded. Alexis de Tocqueville found the right to own private property to be America’s saving grace in a time when Europe was bogged down in revolution and war.\(^{35}\)

\(^{32}\) Id.

\(^{33}\) HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.2 (2d ed., 1987)

\(^{34}\) See John P. Diggins, Slavery, Race, and Equality: Jefferson and the Pathos of Enlightenment, 28 AM. Q. 206, 222 (1976) (stating that abolitionists found the natural rights theory problematic because it did not distinguish human rights and property rights).

\(^{35}\) “There is no country in the world where the sentiment for property shows itself more active and more restive than in the United States, and where the majority evinces less inclination to doctrines that threaten to alter the constitution of goods in any manner whatsoever.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 610-11 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1840).
It was during the period from the middle of the 19th century up through the beginning of the 20th century when the American people, by “way of increased material output, and power of productivity . . . [became] richer than in any previous period.” However, it was also during this period that the problem of accessible property ownership, especially in terms of productive property and capital, began to become uncompetitive, and the wealth gap in this country was flung wider. This period is perhaps best characterized as a time of enormous socio-economic transformation of the way in which people participated in production. American society saw the movement of “millions of farmers, artisans, and producers…owning their own means of production in diffuse communities throughout the country to millions of urban laborers, owning little or nothing, but employed by large corporations.” This sea change was caused almost entirely by economies of scale—mass production and specialization allowed corporations to more cheaply produce goods, and smaller businesses could not match the level of production efficiency that corporations were capable of. It was during this time that productive private property was transformed from being owned by many producers spread out among the larger American population, to being owned largely by corporations. During this period, substantial economic growth spurred a rise in living standards, caused significantly by the cheaper goods produced through industrialized manufacturing and agriculture. This development disguised the long-term effect of corporatization, which was the “proletarianization of American society.” Judge Peter Grosscup characterized the inherent problem with this emerging system in the following way:

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36 Peter S. Grosscup, How to Save the Corporation, 24 McClure's Mag. 443 (1905).
38 Id. at 1551
39 Id.
40 Grosscup, supra note 35 at 444.
41 Lind, supra note 19, at 149.
42 Id.
The fundamental basis of the corporation is the institution of private property and the guarantees our government gives to private property. Now, it so happens that the fundamental basis of . . . measurable individual independence, and the opportunity to measurably exercise individual dominion, is also this institution of private property.  

It is this narrowing of ownership that works against the idea of ownership as a vehicle of liberty that was set forth by Jefferson, Madison, and their ideological peers. But land ownership by itself alone is not the “thing” that is necessary for full liberty, as Jefferson intimated through his “yeoman republic.” Productive ownership of capital, not just capital, is the key, and it is the capacity to produce valuable goods that enables individuals to become autonomous citizens in a functional democracy. In past times, land and the means of production were one and the same in a society that was largely agrarian, but times have changed. In his Notes on Virginia, Jefferson illustrated his affection for the agrarian lifestyle in the following passage:

Those who labor in the earth are the chosen people of God, if ever He had a chosen people…Corruption of morals in the mass of cultivators is a phenomenon of which no age nor nation has furnished an example. It is the mark set on those, who, not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistence, depend for it on casualties and caprice of customers. Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.

This is a famous quote of Jefferson’s, and in analyzing it Donald Worster believed that “Jefferson is saying that it is impossible to corrupt an entire nation so long as the majority of its citizens are small landowners, dispersed across the landscape, dependent on no one but themselves for their livelihood.” The idea

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43 Grosscup, supra note 36, at 444.
of land ownership has gotten subsumed as an end in itself, but Worster reminds us that land ownership is necessary only insofar that it is a means of accomplishing the ultimate end of economic independence, and from economic independence comes real liberty. Nobel Laureate Amartya Sen envisioned the notion of true liberty as being one in which we are “expanding the freedoms we have reason to value,” making us “fuller social persons, exercising our own volitions and interacting with—and influencing—the world in which we live.” I would venture to say that Jefferson would agree with this definition of freedom, and would also say that productive ownership was necessary for its attainment, without which freedom cannot be realized.

Until the industrial revolution in America was well under way, perhaps by the mid nineteenth century, land was the primary form of productive capital, and certainly that form that made the greatest difference between being wealthy and fully “free” and being subservient to others. But with the advance of the industrial revolution human-made capital has been increasingly important because it has become increasingly productive. Thus in the modern economy, productive property is capital—it includes not only land, but also technology, machinery and tools that are responsible for the majority of America’s, and the world’s, output.

In the modern era, land and productive property, or capital, are widely viewed as two different things serving two different purposes. Capital is thought of in commercial terms, while land is largely thought of in residential terms by most Americans.

49 The idea of capital being independently productive is not novel, but is either unrecognized or under-emphasized in conventional economics. It is however a foundational concept within the writings of Louis Kelso and in the field of binary economics, discussed infra. See generally Louis Kelso, Two-Factor Theory: The Economics of Reality (1967); Robert Ashford and Rodney Shakespeare, Binary Economics: The New Paradigm (1999).
B. The Modern American Dream

The original concept of the “American Dream” was first imagined by John Truslow Adams as “that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement.” The easiest way to characterize this original sentiment is as a system in which a person was free and able to achieve prosperity through one’s abilities and hard work, and not due to a class hierarchy or similar structure. If one were to ask people today what they envision the American dream to be, very few of them are likely to respond by saying that they want to own their own means of production, however this was very much a part of the original “right to property” memorialized in the Declaration of Independence.

The modern American Dream is far more focused on the availability of education, healthcare, job opportunity, and a general sense of social mobility, rather than on the concrete goal of ownership of productive resources. Certainly, home ownership is an important aspect of any American’s individual dream of autonomy, as are all the previously listed items, but nowhere has there been a focus on what is really necessary to realize the “classlessness” so often imagined for American society—capital.

Certainly, home ownership is a way to place in people’s hands a generally appreciable asset which will provide shelter and a form of wealth accumulation over time, but in no way has home ownership shown itself to be a real means of elevating people beyond subsistence. The rate of homeownership has increased by about seven percent over the past 20 years. By way of comparison, from 1973 until 2005, the three lowest quintiles of American family income earners...
(bottom 3/5) saw their real income (inflation adjusted) increase by only 14.3 percent, as compared to the top two quintiles (top 2/5) who saw their real income grow by about 55 percent in the same period.54

In fact, the dream of home ownership has almost ubiquitously been transformed into another mode of indebtedness from which the typical “owner” faces either 30-years to get out of debt and own his home outright, or the other presently problematic outcome of foreclosure and a reversion to rental living or potentially homelessness.55 Regardless of what moral judgment can and perhaps should be made about this trend, one thing is clear: poor and working people are falling further behind relative to their wealthier neighbors, and increasing rates of home ownership has not altered this fact.

So if ownership is vital to the realization of the American dream, and home ownership has increased over the years, what’s missing? The answer, as will be discussed, is capital ownership, and capital-based income.

VII. CAPITAL OWNERSHIP AND WEALTH

What separates the very rich in America (and the world) from the very poor? Answers to that question have invariably included things such as education, race, parentage, job security, societal influence, legal systems, and general available opportunity within communities.56 Very few scholars and economists

54 Economic Policy Institute, The State of Working America 2006-07, Figure 1K, available at http://www.stateofworkingamerica.org/tabfig_01.html (last visited Feb. 23, 2008). The top 1/5 of families in terms of income experienced about a 65% increase over the same period.
touch on capital ownership, or lack thereof, as the central defining characteristic of poverty and social insecurity. The reality that greater capital ownership leads to greater wealth can hardly be argued. All one needs to do is look at the wealthiest people in the world and see that they are all highly capitalized in order to understand the connection. But however simple and direct this connection might seem, the idea of providing capital to the poor in order to lessen or alleviate poverty has never created a political argument in this country, or even been at any time a political consideration. Returning the Virginia Constitution’s statement that “acquiring and possessing property” should be a fundamental right, what use are the legal protections of property for those who have been unable to obtain any?59

A. Neoclassical Economic Philosophy and Ownership

Neoclassical economics is a field of economic thought which states that social utility and welfare are best maximized by voluntary participation in markets. Mainstream economics today is largely neoclassical economics. However, neoclassical theory places no particular emphasis on private versus

57 Many legal and economic writers will readily acknowledge that capital ownership is the most powerful wealth creating mechanism that we know of, but have not or will not, for whatever reason, recognize the reverse as also true—that a lack of capital ownership is a prime cause of poverty. Compare e.g. CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM 21 (2002); Ward Morehouse, Stuart Speiser, & Ken Taylor, The Universal Capitalism Movement in the United States, 58 REV. SOC. ECON. 63 (2000). In prescient support of capital ownership, Senator Thomas Hart Benton of Missouri stated in 1826: “The freeholder ... is the natural supporter of a free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants. We are a republic, and we wish to continue so: then multiply the class of freeholders ....” 2 Reg. Deb. 727 (1826).


59 Virginia Bill of Rights, supra note 14.

60 ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 160 (3d ed. 2000).

61 E. Roy Weintraub, Neoclassical Economics, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at http://www.econlib.org/library/Enc/NeoclassicalEconomics.html (last visited March 10, 2008). Weintraub comments that “President Richard Nixon, defending deficit spending against the conservative charge that it was ‘Keynesian,’ is reported to have replied, ‘We're all Keynesians now.’ In fact, what he should have said is ‘We're all neoclassicals now, even the Keynesians,’ because what is taught to students, what is mainstream economics today, is neoclassical economics.
public ownership, or the corporation versus the individual in terms of the most efficient allocation of resources. The neoclassicals argue simply that the most efficient use of property is the use to which it should be put, and in fact, is the use to which property is put in market economies. It takes the present distribution of assets as a given, and considers the distribution to be exogenous.

Neoclassical theory emphasizes utility maximization (essentially satisfaction gained through consumption), and attempts to provide a general theory for the supply and demand of goods and the factors of production. For the neoclassical thinker, the person or entity which owns the property is irrelevant, and the locus of ownership should not, in theory, affect growth or utility. Thus, according to neoclassical thinkers, ownership by a corporation should generate as much growth as ownership by an individual, to say nothing of substantial freedoms.

According to neoclassical theory, the corporation is the most efficient ownership form in a highly industrialized and capital intensive society. Growth and wealth maximization is more of an afterthought for most neoclassicals, if they

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63 Id.
65 Weintraub, *supra* note 61.
66 Robert Ashford, *Memo on Binary Economics to Attorneys for Women and People of Color re: What Can Public Corporations Do for Your Clients?*, 79 ST. JOHN'S L. REV. 1221, 1232 (2005). Some contemporary neoclassical economists, even very well-respected ones, have mistakenly argued that neoclassical theory does indeed advocate individual ownership. See Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the “Fee Simple” Box*, 76 FORDHAM L. REV. 1015, 1026 (2007). Neoclassical theory only favors private ownership over public on the assumption that it is the most efficient allocation, but it does not in any sense stress individual ownership over collective (private) ownership.
68 Id.
consider these issues at all. In fact, neoclassical economics is not in itself a theory of growth. Efficiency is the primary concern with little or no attention given to welfare maximization. This postulate neglects entirely the connection between ownership and freedom which so many of the framers found essential to the conception of America. While freedom, a non-economic consideration, holds no intrinsic value at first blush, utility is arguably less easily recognized in an un-free society.

Even assuming that corporate ownership of capital can create as much economic growth as individual ownership, greater individual freedom does not follow from this assumption. In fact, as more property is possessed by corporations, theorists such as Jefferson and Madison might argue that this will necessarily make individuals less free, as they are dependent more and more on corporations for their livelihoods and thus will constrain their actions to only those things which will accord with corporate objectives. The corporate-individual dichotomy is however, a false one. The conflict is not between corporations and individuals, but rather broad ownership and narrow ownership. The entity on this level of macro-analysis is of only tangential concern. Broader ownership of capital is the goal. The problem with corporate ownership is that it has caused the narrowing of ownership generally. Corporations are not the problem in and of themselves. And yet, neoclassicals have no quarrel with the narrow holding of assets.

70 The relatively new (and very broad) field of socio-economics is highly involved in questions relating to distribution and individual ownership in both its normative as well as positive analyses of growth. See generally LYNN L. DALLAS, LAW AND ECONOMIC POLICY: A SOCIOECONOMIC APPROACH (2005).
71 See e.g. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN STUART MILL, ON LIBERTY (1859); A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH 133-38 (1905).
72 See Adams, supra note 19.
73 See Grosscup, supra note 36, at 444.
B. Historical Perspectives on Neoclassical Economics

Neoclassical economics as a strain of economic thought is cited as originating in the late 19th century largely due to the works of William Stanley Jevons and Carl Menger (among others).\footnote{William Stanley Jevons, Theory of Political Economy (1871); Carl Menger, Principles of Economics (1871). See also Kristoffel Grechenig and Martin Gelter, The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism, 31 HASTINGS INT'L & COMP. L. REV. 295, 319-21, 336 (2008).} Even at this time, the validity of economics as a specific academic discipline continued to be viewed with some skepticism. Course offerings in political economy appeared in the catalogues of schools such as Columbia, Harvard, Washington and Lee, the University of Pennsylvania, and the University of Virginia in the 1820’s,\footnote{E.R.A. Seligman, The Early Teaching of Economics in the United States, in ECONOMIC ESSAYS CONTRIBUTED IN HONOR OF JOHN BATES CLARK (Jacob A. Hollander ed. 1927).} but prior to the 1870’s, a majority of institutions did not offer courses in economics.\footnote{John B. Parrish, Rise of Economics as an Academic Discipline: The Formative Years to 1900, 34 SO. ECON. J. 1, 2 (1967).} In the 1870 and 80’s, American students frequently traveled to Germany to obtain more extensive coursework in economics.\footnote{Id. at 3.} The first American professorship in economics was established in 1871 at Harvard, which also awarded the first Ph.D in economics in 1875.\footnote{Id. at 7.} This growth in economics as a discipline coincides directly with the rise of neoclassical economics.

While there was a significant amount of refinement in the general theories that took place after the time of Jevons and Menger, the neoclassical theory grew and gained a significant foothold in the majority of the world’s market economies moving into the 20th century. The rise of neoclassical economics coincides with a decline in emphasis on individual ownership. And yet, just eight years prior to the publication of Jevons’ and Menger’s books, The Homestead Act of 1862 was enacted, directly granting property rights of up to 160 acres in midwest and western lands to heads of households or 21-year old males who would simply
agree to live on and farm the land for five years. The act amounted to a land credit in exchange for the promise to cultivate it. To understand the scope of this endeavor, it should be noted that nearly 287.5 million acres were either granted or sold to homesteaders under the Homestead Act. This act was premised partly on the belief that broad ownership should be the national preference.

In fact, Abraham Lincoln was another strong proponent of the idea of broad ownership generally, not only as an engine for growth, but as a central support for any sustainable democratic society. Speaking in New Haven, Connecticut, in 1860, Lincoln distinguished the free labor society of the North with the slave labor society of the South, stating:

What is the true condition of the laborer? I take it that it is best for all to leave each man free to acquire property as fast as he can. Some will get wealthy. I don't believe in a law to prevent a man from getting rich; it would do more harm than good. So while we do not propose any war upon capital, we do wish to allow the humblest man an equal chance to get rich with everybody else...I want every man to have the chance—and I believe a black man is entitled to it—in which he can better his condition—when he may look forward and hope to be a hired laborer this year and the next, [to] work for himself afterward, and finally to hire men to work for him! That is the true system.

Following the enactment of the Homestead Act, the economy saw a broadening ownership base along with substantial growth and little inflation. The distribution of productive assets contributed directly to this growth, and yet neoclassical economics does not contemplate the difference between individual, corporate, and public ownership in terms of growth. After neoclassical

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81 President Abraham Lincoln, Address at New Haven, Connecticut (Mar. 6, 1860), in 14 THE COLLECTED WORKS OF ABRAHAM, LINCOLN 13, 24-25 (1953).
economics took root, legislative endeavors such as Homestead Act were finished, and not only that, but into the 20th century and leading up to the onset of the great depression and World War II, the ideal of broad ownership among the populace as a central facet of the American Dream dissolved into becoming a desire only for home ownership, and not for the productive ownership of capital.\textsuperscript{83} In the modern era, capital ownership is represented primarily by equity in publicly traded corporations, not through land ownership as it was prior to the 20th century.\textsuperscript{84} The nature of capital has changed, but the political and economic value inherent in its ownership has not.

After the great depression and during the major growth periods of socialism and communism in Europe and Russia, fear in the United States of redistributionist policies regarding economic growth played a significant role in the adoption of Keynesian economics, an outgrowth of neoclassical philosophy, as a model for American economic stability.\textsuperscript{85} According to John Maynard Keynes, the cause of the great depression and the problem in capitalist countries generally was “insufficient aggregate demand” caused by consumers who did not grow their purchasing power at the same rate as the supply of America’s mass production industries, and that what was needed was a government spending policy which could “bridge the gap” between inadequate demand and supply in order to stave off future economic turmoil.\textsuperscript{86} Thus, greater government spending was held out as the solution even when Keynes himself would agree that the problem was too little consumer spending. Why the government, and not individuals, should not be given the means to “spend more” is a question that has not been easily answered by Keynesian economics.

\textsuperscript{83} Compare U.S. Census Bureau, \textit{supra} note 52, and Economic Policy Institute, \textit{supra} note 53.
\textsuperscript{85} Morehouse, Speiser, Taylor, \textit{supra} note 30 at 1.
\textsuperscript{86} See \textsc{John Maynard Keynes, The General Theory of Employment, Interest, and Money} (1936); Morehouse et al, \textit{supra} note 30 at 64.
It was a confluence of mutually reinforcing events that led towards the adoption of Keynesian economics and away from the movement for the broader ownership of capital. After World War II and the Great Depression, Americans were looking at the global rise of state socialism and the Soviet Union. Due to the widespread fear which was endemic of the early cold-war era, anyone who advocated greater economic opportunity through systemic reforms was labeled a communist. Keynes became looked to as an economist who provided a theory which would allow politicians an economic model which was not so easily prone to attack by the anti-socialist fervor, despite the fact that so many of the founders heavily favored broader capital ownership. Increasing the size and spending capacity of the government became the answer, and arguments in support of economic democracy were silenced.

Keynesians were preceded by neo-classicalists regarding capital distribution however, and the ascendance of neo-classical philosophy tracks closely with the de-emphasis on individual capital ownership. Neo-classicalism ultimately led this society to forget that capital ownership was one of the building blocks upon which the American dream was premised.

VIII. BROADENING HOME OWNERSHIP

As already stated, the rate of home ownership has increased by 7 percent over the past 20 years. This growth in the ownership rate can be partly attributed to the number of programs, both local and national, which have created tax breaks and other economic incentives for low- and middle-income earners to own a home. While home ownership in itself is not the same catalyst for social

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87 Morehouse, Speiser, Taylor, supra note 30 at 3.
88 See section I(a), supra.
89 Morehouse, Speiser, Taylor, supra note 30 at 3.
90 See section II(A), supra.
91 See e.g. Cassandra Jones Havard, To Lend or Not to Lend: What the CRA Ought to Say about Sub-prime and Predatory Lending, 7 FLA. COASTAL L. REV. 1, 18 (2005); Kevin M. Cremin, The Transition to Section 8 Housing: Will the Elderly be Left Behind, 18 YALE L. & POL’Y REV. 405
mobility that it once was, it does provide people of moderate means with a valuable asset that will typically appreciate over time as well as a source of collateral with which they can become credit worthy potential investments in the eyes of lenders. There is also evidence which shows that the move from renting to home ownership works to create healthier and higher achieving families. The role of home ownership is certainly important to the American Dream. It is perhaps the biggest remnant of the framers original concept of ownership that is still alive today, and for this reason it serves as a good springboard from which to launch into the ownership discussion.

However, the concept of “ownership” in the general sense has been modified to fit within the framework of present day society’s consumer debt addiction. Starting after World War I, and really taking hold after World War II, the consumer credit revolution changed how Americans considered what it meant to “own” something. Formerly, financial responsibility meant purchasing only what one could afford, which entailed money management and financial savings. Now, families and individuals ostensibly “own” their homes or cars or even personal home appliances, while all they are actually doing is renting the useful life of these items of property from lenders or retailers. The U.S. government has advocated high amounts of consumption as the means to sustain growth. Status and class in American society is determined according to income

92 Id. at 3. Using home equity as a source of collateral has been a double edged sword for many Americans however, with equity serving as the only substantial store of value that many American families possess. By relying on home equity as an asset to borrow against, many homeowners saw their purchasing power decrease or disappear as a result of the housing crisis of 2007 and 2008. See Peter Schiff, Let the Housing Chips Fall, L.A. TIMES (Opinion), March 31, 2008, available at http://www.latimes.com/news/opinion/sunday/commentary/la-oe-schiff31mar31,0,1983693.story (last visited March 31, 2008).
94 As of January of 2008, outstanding consumer credit obligations were in excess of 2.5 trillion dollars. This number only includes personal debt, and does not account for mortgage obligations. Federal Reserve Statistical Release G.19 Consumer Credit (released March 7, 2008), available at http://www.federalreserve.gov/releases/g19/current/ (last visited March 28, 2008).
95 Lind, supra note 19, at 149.
96 Id.
and consumption instead of capital ownership. There is no doubt that we are awash in consumer credit, and yet capital credit is nowhere to be found. “The American ideal of the largely self-sufficient citizen-producer has been replaced by the citizen-consumer.”

A. The National Housing Act of 1934 and the Federal Housing Administration

The National Housing Act of 1934, was most likely the single largest spur to home ownership after the Homestead Act. The National Housing Act’s primary lasting significance came through the creation of the Federal Housing Administration (“FHA”), which works to insure lenders against the risk of default on single-family homes. The FHA thus gave middle income families the ability to purchase housing at affordable rates of interest by providing them access to credit that wasn’t available to the same extent prior to the creation of the FHA. Before the FHA, buying a home created a substantial risk due to the then current practice of only providing a mortgage loan for up to half of the value of the home being purchased. This often meant that at when the mortgage was paid off, the “buyer” still didn’t own the house outright unless he or she paid a substantial amount of the purchase price up-front. As a result, home buyers had essentially three choices at the end of their mortgage term: get a second mortgage, pay off the house, or find a new place to live. Obviously, paying off the house at the end

97 Id.
100 Id. Prior to the creation of the FHA, home mortgage loans were typically only partially amortized, leaving a buyer with less than 100% equity in the home once the loan was paid off. This required buyers to either pay off the remaining price of the home up front, or to find a second mortgage at the expiration of the first. See DOROTHY ROSEMAN, A MILLION HOMES A YEAR 21-22 (1945).
101 Wright, supra note 99, at 23.
102 Id.
of the mortgage term was not realistic for the vast majority of buyers, and there was no guarantee that acquiring a second mortgage would be possible.\textsuperscript{104} Thus, the remaining option was to leave the house.

The FHA solved this problem for many buyers by allowing them to attain larger loans to pay most of or the entire cost of a home, at prevailing interest rates, and also enabled them to acquire a home earlier in life as they didn’t have to pay (and thus save) half the price of a home.\textsuperscript{105} The National Housing Act came during a period when the government was making an effort to affirmatively broaden home ownership on a large scale during the New Deal Era as a response to the massive lending crisis of the Great Depression.\textsuperscript{106} The period during which this statute was enacted saw some of the highest rates of homeownership growth in America’s history. From 1920 to 1960, home ownership rates grew by 16 percent, creating what has been referred to as a new “ownership class” or “asset class,” the scope of which has not since been recreated.\textsuperscript{107}

As initially established, the FHA worked by taking a half-percent off the standard interest rates paid to the lender (the cost of which was passed on to the borrower) which was paid into a reserve fund by the lender.\textsuperscript{108} This fund was held by the FHA, and was used to indemnify lenders in case of default on the mortgage loan.\textsuperscript{109} The federal government also guaranteed the FHA’s reserve fund in case of a shortage.\textsuperscript{110} The FHA thus ensured that lenders would face no risk in loans that qualified for insurance through the FHA.\textsuperscript{111} However, the FHA maintained broad discretion in setting the qualifying standards for loan insurance,
discretion which led to severe racial bias in its insurance practices and the institution of the practice of “redlining.” Redlining was an FHA practice that in favor of whites to the exclusion of blacks and other non-white minorities, and came about from the agency’s conclusion that blacks uniformly depressed the value of homes in a community.\footnote{112} By redlining neighborhoods, blacks and other non-white groups were barred from the long-term amortized mortgages made possible through FHA insurance.\footnote{113} As a result, insurance for white buyers made up 90 percent of the insurance provided by the FHA, and resulted largely in the collective flight of large numbers of white American families to the suburbs, leaving blacks to live in the often decaying inner cities.\footnote{114} To address this practice, Congress enacted the Home Mortgage Disclosure Act of 1975 and the Community Reinvestment Act of 1977 (“CRA”) in an effort to make mortgage lending transparent and less prone to racial bias.\footnote{115} These laws have provided data-collecting mechanisms which have strongly curtailed the practice of redlining, but enforcement remains difficult due to the giant task of analyzing all the lending data after it is collected, and the lack of administrative resources to do so.\footnote{116} In 1995, changes were made to the CRA to integrate objective measures into the CRA regulations, intended to strengthen the government’s ability to evaluate a lenders history and evaluative procedures for small-businesses, small-farms, and community-development organizations.\footnote{117} Large banks are now evaluated on a three-part test of their lending, investments, and services, with small banks being subject to less extensive assessment.\footnote{118}

\footnote{114} Kimble, supra note 61 at 406.
\footnote{115} 123 Cong. Rec. 17, 604 (1977) (Sen. Proxmire, the Congressional sponsor of the CRA, stated that the CRA “is intended to eliminate the practice of redlining by lending institutions.”).
\footnote{116} Dearborn, supra note 62, at 42.
Presently, the FHA is part of the Department of Housing and Urban Development (“HUD”), created in 1965, and provides insurance on 4.8 million single family mortgages and 13,000 multifamily projects.\footnote{Federal Housing Administration (FHA), The History of the FHA, available at http://www.hud.gov/offices/hsg/fhahistory.cfm (last visited March 10, 2008).} Despite all its negative history, the FHA still has enabled more families and individuals to own homes than at any time prior to its creation.

B. Arguments Against Home Ownership

With all the benefits that home ownership has been shown to bestow on both the owners and their communities—psychological and investment benefits to owners, better community citizenship for neighborhoods and cities—the current housing crisis has forced many Americans to question the real values, social and economic, of owning their own homes.\footnote{See Kara McGuire, Houses are Left Behind to Pay Car, Credit Bills: Cash Strapped Consumers with Costly Loans are Changing Priorities as Home Values Fall, STAR TRIBUNE (Minneapolis), 1A, March 16, 2008; Lynn Asinof, Buying isn’t Always the Smartest Option, BOSTON GLOBE, Business Section 1E, Nov. 25, 2007.} Over the past generation, Americans have gone from being savers to being wholly dedicated consumers, spending everything, and saving very little.\footnote{Clive Crook, Comment, Housebound: Why Ownership May be Bad for America, THEATLANTIC.COM, Dec. 2007, available at http://www.theatlantic.com/doc/200712/real-estate/2 (last visited March 11, 2008).} America’s housing growth, in both quantity and value, has served for many years as the main store of equity for many Americans.\footnote{Id.} As that equity disappears over the bursting bubble of the American housing market, the savings of many American families goes with it. Unstable equity and appreciation in the housing market has shown that faith in home ownership as a store of value has been misplaced.\footnote{See Frank A. Hirsch, The Evolution of a Suitability Standard in the Mortgage Lending Industry: The Subprime Meltdown Fuels the Fires of Change, 12 N.C. BANKING INST. 21, 44 (2008).} Money lost in that disappearing equity could have been invested elsewhere. The housing crisis comes at a time when American’s are generally wary of their economic futures. A recent survey shows that a third of American 50 years old and older lack
confidence in their ability to retire, with more than two-thirds expecting that they will continue to work well into old age.124

Additionally, homes, as the argument goes, are like anchors. More and more the economy needs a readily mobile workforce. As people buy homes and make the decision to stay in one place, the ability of labor to disperse across the landscape of growing industries suffers. “When opportunities are elsewhere, deracination is liberation.”125 The mortgage interest deduction for homeowners factors heavily into this argument.126 “Subsidising [sic] homeownership through huge tax breaks not only reinforces a cultural ethos in which home ownership is considered central to the American Dream, but also reinforces pernicious communitarian myths of the profound romance in seeing nothing and going nowhere.”127 The mortgage interest deduction for taxpayers, originating in sections §§ 163(h)(3), 164(a)(1), and 121 of the Internal Revenue Code, has been denounced as merely a tax subsidy for the well-off, shifting ultimate tax liability away from the wealthy to onto the poor and middle class.128 As a result, home ownership not only drains the government of tax revenue, but it stifles growth by limiting the movement of labor.

However, many of these arguments do not account for the often cited sociological benefits of home ownership. While home owners may be less mobile, they are generally believed to benefit from greater self-esteem, personal satisfaction, and improved health. Additionally, homes are thought to provide a better overall environment for child-rearing as well as greater neighborhood and

126 Id.
127 Id.
community stability, and more political involvement and participation in local voluntary organizations by owners.\textsuperscript{129}

Perhaps the greatest concrete problem with home ownership is that homes do not produce income. Owners fall behind on their mortgage payments when their income from labor fails to keep up with their obligation to pay off the interest and principal on their home loan. People use their home values to supplement their purchasing power by borrowing against the equity in their homes and ultimately depleting their wealth. In contrast, capital, unlike a house, produces income, and the decision whether to acquire the capital initially is dependent on how quickly the capital will pay for its own cost of acquisition.\textsuperscript{130}

The importance of property is its ability to produce income, to increase purchasing power, and to make an individual self-reliant. Home ownership does not accomplish this.

IX. \textbf{CAPITAL OWNERSHIP CONTRASTED}

Capital, as opposed to housing, has seen no great movement to disperse it among a larger segment of the population, and capital ownership remains constrained by the hands and pockets of a small minority of the population.\textsuperscript{131}

After the early growth in land tenure systems, and after the time of the framers and up through the days of the Homestead Act, the realization came that land was limited and that it was not the only resource necessary for prosperity and growth.\textsuperscript{132} Credit was necessary to build the infrastructure and firms that the industrial American economy thrived under.\textsuperscript{133} With credit and the new capital ownership milieu that took root in the early 20\textsuperscript{th} century came more sophisticated

\textsuperscript{129}These are commonly argued benefits, but there is little supporting empirical evidence regarding some of home ownership’s stated advantages. \textit{See} Robert D. Dietz & Donald R. Haurin, \textit{The Social and Private Micro-Level Consequences of Homeownership}, 54 J. URB. ECON. 401 (2003).

\textsuperscript{130}This issue will be discussed in greater detail in section IV(B), \textit{infra}.

\textsuperscript{131}Robert Hockett, \textit{What Kinds of Stock Ownership Plans Should There Be? ESOP’s, Other SOP’s, and “Ownership Societies”}, 92 CORNELL L. REV. 865 (2007).


\textsuperscript{133}\textit{Id.}
methods of purchasing and selling capital in the marketplace, but the ownership of the new capital that was created (largely in the form of stock) was only bought by the narrow segment of the population. This segment consisted of either those who had both the education to recognize the opportunity and either the income to pay the price of it or the credit-worthiness to get the loan for it. The billionaires of the world earn a capital income, and are able to realize gains by disposing capital assets without any of what the lay person would consider to be “labor.” The middle and lower classes earn chiefly and often exclusively from their labor. This is true for high-school graduates as well as professionals.

A. Along Came the ESOP

The only sustained attempt at delivering to the masses the opportunity to own capital and realize a capital income was through the efforts of Louis Kelso in the creation of the Employee Stock Ownership Plan, or the “ESOP.” Kelso observed that over time the human role (i.e. labor) in production had become greatly diminished, and that as technology advanced and society became more mechanistic and automated in its use of capital to produce goods, that returns to capital increased and returns to labor stagnated. Kelso, along with several

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136 The origins and history of the ESOP have been discussed extensively elsewhere. This section is only meant as general background to illustrate the lack of emphasis on capital ownership in public discourse. See, e.g., D. Bret Carlson, ESOP and Universal Capitalism, 31 TAX L. REV. 289, 289-93 (1976); Ezra S. Field, Money for Nothing and Leverage for Free: The Politics and History of the Leveraged ESOP Tax Subsidy, 97 COLUM. L. REV. 740, 748-50.
138 See LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO 36 (1958). Kelso has been frequently denounced by many mainstream economists for his several positions on economic theory, some of which will be discussed infra. Much of the criticism against Kelso has
others, saw that wealth remained concentrated in the hands of those who were able to earn from capital. In response to this dilemma, Kelso devised the ESOP to make shareholders out of the employees of the company that employed them. Employee ownership, as Kelso argued, would empower employees by increasing participation in one’s place of work, decrease the likelihood of shirking, and increase the personal wealth of the employee-shareholders.

In 1973 Kelso found a patron for the ESOP in Senator Russell Long, and in 1974, legislation was passed which authorized ESOP’s, and subsequent legislation in the following years defined their use, tax status, shareholder voting rights, and so forth. The essence of the leveraged ESOP is that the employer adopts the ESOP as a sponsored ERISA plan and sets up a trust which is meant to hold stock purchased from the company. The trust borrows money from a lender and uses these funds to purchase the stock. The trust is administered typically by a committee formed by the sponsoring corporation’s board of directors, owing fiduciary obligations to the equitable owners of the stock—the employees. The stock is used as collateral to secure the loan, and dividends (if any) from the stock are used to pay back the principal and interest on the loan. The sponsoring firm will also make cash contributions over time to the ESOP just as it would with any contribution plan. As the loan is paid off, the stock held in trust is proportionally released from its security obligation, and is held for the

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140 Kelso & Adler, supra note 79, at 52.
141 Id.
144 Id.
145 Id.
147 Id.
benefit of the employee shareholders. There are additional tax incentives for both the company instituting the ESOP plan and the lender providing the loan, which are meant to incentivize adoption of ESOP’s. Generally, the stock held in trust can only be sold or otherwise redeemed if the employee retires or leaves the corporation.

After the institution of the ESOP in 1974, nearly 5,000 companies had adopted plans by 1986. By 1990, 10,000 companies were participating in ESOP’s with more than 12 million workers receiving the benefit of them. By the late 1990’s, new ESOP plans were being adopted at an average rate of 450 per year. Yet ESOP’s have significant drawbacks. The primary issue that many commentators have had with ESOP’s is that they do little to minimize risk. While they provide for another source of income for employees, that income is taken from the same source as does the income made from labor—the employing company. Thus, should the company become insolvent, the employee loses not only their income from labor, but also their income from capital, and is left without the safety net that is central reason to own capital in the first place.

Many economic and legal ideas have come about (and often conflicted) in the attempt to pick up where the benefits of the ESOP end, with the ultimate goal being capital ownership for a broader segment of society.

It must be noted however, that Louis Kelso never intended ESOP’s to be the solution to the problem poor capital distribution. In addition to ESOPs, Kelso wanted a number of additional “SOP’s” (stock ownership plans) to further diversify not only capital ownership, but also the social ownership that is inherent

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148 Id.
150 Id.
152 National Center for Employee Ownership, Statistical Profile of Employee Ownership (1997).
154 Id.
155 See id.
in community stakeholders. He favored the adoption of “COP’s” (cooperative ownership plans), which included GSOP’s (government employee stock ownership plans), and also the most broad plans of all, ISOP’s (individual stock ownership plans) and USOP’s (universal stock ownership plans), which would not be dependent upon any single corporation for their solvency.

B. Binary Economics

Binary Economics relies on much of the same philosophical groundwork that was laid by Kelso, and is often viewed as one of several continuing branches of Kelsonian thought. A common question among Binary Economists is why it is that there are so few capitalists in our capitalist society? This was a common question of Kelso’s. Binary Economics has been slow to find acceptance among orthodox economists largely due to its theoretical premise that labor and capital are independently productive. In all fields of orthodox economics, capital is not viewed as having an independent productive value apart from labor. Capital’s only purpose is thus to make more efficient the work done by labor, according to neoclassicals. Output is thus a function of productivity, or output per unit of input, and capital output is viewed as a return on investment, while labor is the only independently productive input in the system.

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160 See LOUIS KELSO AND PATRICIA HETTER, TWO FACTOR THEORY (1967).
161 Id. at 99-100.
163 Id.
Contrast binary economics, which gives an independently productive input value to both capital and labor. Capital does work, labor does work, and together their ability to produce an output is labeled as “productiveness,” not productivity.\textsuperscript{164} While the distinction may appear arbitrary, if it is true, it creates an entirely new value for productive capital and throws a harsh light on the current pricing scheme to which labor earns approximately 70 percent of wages and capital “earns” 30 percent.\textsuperscript{165}

One can conceptualize the meaning of the independent productiveness of labor and capital in production by comparing a simple shovel with an automatic elevator or a vending machine. In binary economics, a shovel, though physically dependent on human labor to realize its productive input, is as independent a wealth producer as the person who digs a hole, with or without the shovel.\textsuperscript{166}

In the above example, the traditional economist would argue that the person is really doing the work, and the shovel is just making him more efficient. A binary economist would say that both the shovel and the person are doing work independently, and thus making the entire output of the operation more efficient.\textsuperscript{167} Another argument against the independent productive nature of capital is that it took human capital i.e. investment, time, effort to create the shovel, and thus the production that results in time 2 (when the shovel is being used) is dependent upon the investment in creating the shovel in time 1, and thus grants all capital a necessarily dependent relationship with the human labor that it took to produce the capital. This argument also fails, as there is a variety of “capital” that is not the result of human investment, and yet still produces independently. Agricultural producers, in terms of plants, trees, and land, are capital assets to the farmer, and yet he plays a relatively small role in their ability


\textsuperscript{165} It is universally acknowledged, by binary and conventional economists alike, that labor “earns” between 70-75% of the total income in the economy, and this has been true for some time. \textit{See} 118 Cong. Rec. 20,207 (1972) (statement of Paul Samuelson, read into the record by Sen. Harris); Ashford, \textit{supra} note 143, at 77.

\textsuperscript{166} Ashford & Shakespeare, \textit{supra} note 81 at 25.

\textsuperscript{167} Ashford & Shakespeare, \textit{supra} note 81 at 26.
to produce crops. In the shovel example above, suppose the shovel was just a wedge shaped stick, useful in digging, and was found by the laborer. The stick required no investment, and yet it has its own independent productiveness. The fact that investment through labor is necessary to transform something into a capital asset does not deprive of its independently productive character.

Binary economics has established what has been labeled as its “general theory” for capital acquisition. This plan is intended to allow employees of a corporation to acquire capital through “constituency trusts,” which would hold capital for constituents in a similar manner as an employee stock ownership plan. These trusts would be funded through loans from commercial lenders, which funds would in turn be used to acquire stock from the participating corporation. Lenders would additionally take the note they receive from the trust and discount it to the central bank. To guard against any risk in making the loan, the lenders would be insured by a commercial capital credit insurer. The capital credit insurer would then obtain reinsurance from a public commercial credit reinsurer corporation to serve as security on the initial loan, allowing the loan to be made without a down payment. Repayments on the loans are to be made with the income earned through the stock ownership trust. This “general theory” is predicated on the same model that corporations use to finance capital acquisitions. A fundamental principle of corporate finance is to invest only in capital that pays for its own acquisition cost in a competitively short period of time, which in most projects is typically less than five years. As a result, new capital pays for its own cost and generates a self-financing return. The goal of

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168 Ashford & Shakespeare, supra note 81, at 237.
169 Id.
170 Id. The stock acquired through this plan would be of a new variety called “binary stock” which would require enabling legislation. This stock is conceived of entitling the owner to full payout rights, requiring that the corporation pay to the equitable owner of the stock the amount of the corporation’s profits represented by the share.
171 Id.
172 Id.
173 Id.
174 Id.
175 Id. at 238. This is known as the “feasibility principle.”
binary economics’ general theory is to open up this self-financing mechanism of corporate finance to anyone who wants to earn a capital income.\footnote{176}{Id. at 239.}

The ultimate goal of binary economics then is to have a system in which this model is implemented on a large enough scale to enable production and demand to become linked by enabling consumers to purchase, partly with their newly acquired capital income, goods produced by corporations that have also adopted the general theory model, thus supplementing the growth of these firms, and creating additional capital income for members of other constituency trusts.\footnote{177}{Ashford & Shakespeare, supra note 81, at 286.} Ultimately, the broader ownership of these capital assets will lead to greater growth by allowing the trust constituents to meet a larger variety of consumption needs, and in so doing, tangentially supplementing their own income through the collective action of the various constituents, all with a capital income that did not previously exist.\footnote{178}{Id. at 320-25.} Thus, capital income is broadly distributed to purchase what is produced by the corporations that have established these constituency trusts.\footnote{179}{Binary economics has a close theoretical corollary with the writings of John Locke. Binary economics finds is basis in: (1) Universal participation, (2) distribution according to production and voluntary exchange, and (3) limitations which are necessary to protect the rights of others.}
A central theme in binary economics is the use of market institutions along with the general model of corporate finance that already exists and has been proven successful over time. Capital credit insurance exists and has been shown to be an effective means of substituting insurance for collateral, so have the constituency trusts already been utilized in corporations that have adopted ESOP’s. A central bank exists for the discounting of debt, and there is obviously a multitude of employees and potential stakeholders that would benefit from the institution of the general theory. The only new organization needed is a Capital Credit Reinsurance Corporation (“CCRC”). The FHA was established to provide primary insurance and reinsurance to potential home-buyers enabling

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180 Ashford & Shakespeare, supra note 81, at 291.

181 Ashford & Shakespeare, supra note 81 at 228.

182 Id. at 227.
them to purchase homes. The CCRC would similarly provide insurance for non-residential capital credit. Just as the FHA has proven itself to be a profit-making governmental entity (thus requiring no-taxpayer provided subsidy), the CCRC would operate in the same fashion, with the expectation that it will turn a profit, and discontinuation if it failed to do so. The purpose of modern corporate finance is to enable firms to obtain capital assets before they have earned the cash to pay for them. Binary financing is meant to work in the same way, and would allow people who own little or no capital to earn a capital income in a manner similar to the way that heavily capitalized corporations do.

Binary economics is ambitious in its scope. While it has several critics who make certain claims about theoretical problems and inconsistencies with the theory, none of these critics have substantially disproven the theory, or even soundly attacked it. Most binary economists will readily admit that there are valid concerns about the ultimate effects of a “binary economy,” but would point out that no system of economics is perfect. The question should instead be whether binary economics is a better way of explaining many of the shortcomings that conventional economics does not address?

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183 Wright, supra note 95, at 251.
184 Id. at 227.
186 Id.
187 One of the most vocally critical academics of binary economics has been Timothy Terrell. See Timothy D. Terrell, Binary Economics: Paradigm Shift or Cluster of Errors?, 8 Q. J. AUS. ECON. 31 (2005). A full response to Terrell’s critique is beyond the scope of this article, but his arguments have less to do with the conceptual basis for binary economics than they do with certain aspects of how the theory is presented. Terrell’s critique misconceives the premises and underlying principles of binary economics. Additionally, Terrell insists on analyzing the implications advanced by binary economists from a perspective that assumes that the economy is already at full capacity (a neoclassical argument), and that the distribution of ownership will not affect pricing. Terrell also assumes and argues, without support, the neoclassical stance that the fundamental role of capital is to make labor more productive.
C. Capital Homesteading

“Capital Homesteading” is not an entirely different creature than binary economics. Both theories share some of the same proponents and ideological history, but Capital Homesteading has a much more expansive view of the changes that would be required to accomplish the broader ownership of capital, including tax policy changes, elimination of certain subsidies, changes in monetary policy, creation of additional trust entities and so on. The concept of Capital Homesteading was developed by the Center for Economic and Social Justice, largely under the direction of Norman Kurland, who was, like Robert Ashford, a former colleague of Louis Kelso. I will touch only on some of the major topics in the theory.

One of the focal arguments for capital homesteading is the need for a reduction in prime interest rates, to not more than three percent, for private-sector investment, with the goal of creating non-inflationary growth. As in binary economics, The Federal Reserve would have a role in Capital Homesteading, as the Fed would only be allowed to discount eligible “industrial, agricultural, and commercial paper” subject to a 100 percent cash-reserve requirement, with the overall goal being the synchronization of cash creation and growth to stabilize the rate of inflation.

Capital Homesteading also adopts many of the additional “SOP’s” that Kelso proposed, as discussed supra, section IV(A). Capital Homesteading would continue to use the ESOP, but also advocates for the adoption of Community Investment Corporations (“CIC’s”) to be held by community residents, Consumer Stock Ownership Plans (“CSOP’s”) to be held largely by public utility customers,

190 Capital Homestead Act, supra note 133 at 4.
191 Id.
and also the penultimate SOP, the ISOP, for every U.S. Citizen.\textsuperscript{192} The strategy is to create a “Capital Homestead Exemption” allowing every citizen to accumulate a tax-exempt estate as the modern equivalent of the 160 acres made available under the Homestead Act.

1. \textit{The Consumer Stock Ownership Plan}

The purpose of the CSOP is to allow customers of capital-intensive firms with high fixed costs which typically exist as natural monopolies to own a share of the utility and thus be entitled to future profits from the utility.\textsuperscript{193} Using low-cost capital credit, customers would be enabled to purchase shares in these companies, thus providing a new source of financing for the utility. Profits attributable to the shares would be used to pay off the enabling loan, as with an ESOP, and after paying for the cost of acquisition, dividends from the stock could either be taken as income by the shareholders or applied against their utility bills.\textsuperscript{194}

2. \textit{Community Investment Corporation}

The CIC is somewhat of a remnant of the General Stock Ownership Corporation (“GSOC”), also a product of Kelso’s, which was added to the Internal Revenue Code through the Revenue Act of 1978, however the GSOC was perceived as being unduly cumbersome, and no state adopted it.\textsuperscript{195} Capital Homesteaders argue that the failure of the GSOC was its attempted scope, and that CIC’s are feasible if applied to the community level, and can be given effect by using the already existent real estate planning and development corporation as its entity form.\textsuperscript{196} The CIC places in its shareholder-residents a valuable asset premised largely on “stakeholder” theory whereby stakeholders are defined by their interest in any decision or change in circumstances which will affecting them

\textsuperscript{192} Id. at 5.
\textsuperscript{193} Id. at 13. \textit{See also} Kelso & Kelso, supra note 115, at 67-72.
\textsuperscript{194} Capital Homestead Act, \textit{supra} note 133, at 13.
\textsuperscript{196} Capital Homestead Act, \textit{supra} note 133, at 13.
in any appreciable way. Using this theory, shareholders in a CIC would be entitled to receive profits earned by community development projects, profits which now normally flow to either a public entity or private developer.

3. Individual Stock Ownership Plan

The idea behind the ISOP is to broaden the application of the existing model for Investment Retirement Accounts (“IRA’s”). Like the ESOP, potential shareholder’s in an ISOP could acquire a diverse portfolio of qualified securities, but employment by a private entity would not be a pre-condition to this acquisition. ISOP’s would still be sponsored by corporations, they would simply allow anyone, not just employees, to opt into them. The credit used to purchase the securities would be secured and repayable with corporate earnings, and remaining dividends would be payable to the shareholder.

4. Arguments Against Capital Homesteading

A primary argument against Capital Homesteading, as proposed, is that much of its tax-adjustments entail a not insignificant amount of wealth redistribution by necessity. This isn’t to say that many subsidies and tax penalties and benefits need to be re-assessed, but the Capital Homesteading idea veers away from a central tenet of binary economics in that it advocates affirmative redistribution of wealth.

Significantly, Capital Homesteading also argues for eliminating the system of fractional reserve banking in the U.S. system. This differs from the

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197 Thomas E. Backer et al., Who Comes to the Table? Stakeholder Interactions In Philanthropy, 9-10 (2004)
198 Capital Homestead Act, supra note 133, at 13.
199 Id.
200 Id.
202 Fractional reserve banking is the system in which banks are authorized to lend more money then they have in reserve, but expect only a minor percentage of their customers to seek to cash from their accounts at any particular time. To accommodate that fraction, the bank keeps a reserve
traditional binary approach and the work of Louis Kelso, whose writings are conspicuously absent of the notion. Additionally, Capital Homesteading is put forward as a means of eliminating the need for social security, which has caused negative reactions from the left. Binary economics, in contrast, is posited as both a theory and a practice, but not as a replacement for any current governmental programs or institutions. Given their several differences, the two fields of thought share much in common, and are both conceived to be continuations of Kelso’s work.

D. Universal 401(k)

As presently implemented, 401(k)’s are not so much an ownership broadening device as they are, by definition, a retirement savings account. However, 401(k)’s, even if judged according to what they are intended to do, which is to secure for individuals a cash payout at retirement, are failing to accomplish their stated task. Relatively few workers have access to them, and many of those that do fail to enroll in them, or sufficiently pay into them. Many employees also fail to roll their accounts into other tax-favored retirement accounts when they change employers. In 2003, 85 percent of workers in the lowest wage quintile (lowest 1/5) and 73 percent of small-business employees had no employer provided retirement program or pension. The same was true for 75 percent of Hispanic and 60 percent of African-American employees. Overall, less than 50 percent of American workers have an employer-sponsored

of funds available, but not nearly a sufficient amount to cover all its deposits. For a general overview of fractional reserve banking, see T. MAYER, J. DUSENBERRY & R. ALIBER, MONEY, BANKING AND THE ECONOMY 178-90 (1984).


204 Munnell & Sunden, supra note 203.


206 Id.
retirement plan in any given year.\textsuperscript{207} General retirement security is poor: Among households of persons 55 to 59 years old, the median amount held in IRA’s and 401(k)’s is only $10,400.\textsuperscript{208}

One proposed method to alleviate some of these inefficiencies in the current 401(k) system is the creation of a Universal 401(k) that is available to all workers, regardless of whether they work for a company that has adopted a 401(k) or some other retirement plan. The general concept would require the federal government to create tax-free retirement accounts which would supplement private accounts if they already exist, into which the government would match personal contributions made by the account holder.\textsuperscript{209} Employers would be encouraged to match employee contributions to these plans, and the government could provide special tax breaks to employers that offered better matches to lower-wage workers.\textsuperscript{210} Gene Sperling’s Universal 401(k) proposal would establish 2-to-1 matching funds for low income families, and 1-to-1 matching payments for middle-income families.\textsuperscript{211}

There would, however, be some differences from the current IRA system. Risk-diversifying measures would protect the Universal IRA’s against placing too much of the fund’s assets in any one stock or investment. Additionally, proponents argue that the default investment option under Universal 401(k)’s should be a low-cost index fund containing an array of stocks and bonds that also would be adjusted over time, to limit risk as the fund holder approached

\textsuperscript{207} Id.
\textsuperscript{211} Sperling, supra note 149, at 3.
Since all employed persons would have access to universal 401(k)'s, all benefits would remain in the same account throughout a worker's life, thus avoiding the problem of having lump-sum payments spent instead of saved for if a person loses or changes jobs.

The obvious downside of the Universal 401(k) is that it would not exist as an independently functioning program without redistribution. Unlike the binary economics proposal, The Universal 401(k) would require extensive redistribution, in the form of a three percent surcharge on all incomes over $200,000, regardless of the source of the income, according to Sperling. This proposal amounts to what would be a three percent wealth tax, and a direct redistribution from the wealthiest Americans to lower and middle income earners. The proposal builds its own dead-end. To be sure, a Universal 401(k) would be a welcome supplement to the retirement savings needs of American workers if it could be accomplished without additional taxation, but in its present form it cannot. The political power of the highest income earners will not allow such a wealth expropriation. In short, it is not the solution for a capitalist society.

E. Micro-Credit

Possibly the most intriguing of all these proposals is micro-credit, largely due to its proven record of success. Microcredit largely serves the poorest members within developing countries, where capital markets are similarly undeveloped, and commercial banks are hesitant to lend to the poor. Originating in 1977 from the Grameen Bank in Bangladesh, microcredit consists

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212 Hacker, supra note 147, at 120.
213 Id.
214 Sperling, supra note 149, at 4. Income could be capital gains, dividends, or ordinary income. According to this plan, the surcharge would apply regardless of the income’s character.
216 Id. at 317.
of small, collateral-free institutional loans to members of the lower class, mostly impoverished women, to be invested in small amounts of capital for generating personal income.\textsuperscript{217} The cumulative investment from the Grameen Bank alone is now in excess of six billion dollars, with a repayment rate of approximately 98 percent.\textsuperscript{218}

The Grameen Bank is the product of Nobel Laureate Dr. Muhammad Yunus.\textsuperscript{219} Upon returning to Bangladesh after receiving his Ph.D. in economics, Yunus began an experimental lending operation in 1977. “Dr. Yunus lent a total of $27 to 42 women so that they could purchase bamboo to make and sell stools. In a short time, the women were able to repay the loans while continuing to support themselves and their families.”\textsuperscript{220} After this simple but inspiring success, the Grameen Bank was officially formed in 1983.\textsuperscript{221} There are also similar examples of successful microcredit lending outside of Bangladesh however, notably in Latin America and Africa.\textsuperscript{222} Microcredit loans are characterized by relatively small amounts, with a short repayment period. Funds are used largely in agriculture, trading, small craft production, and processing industries.\textsuperscript{223} All credit that is provided through micro-lending is designated for acquiring capital for the purpose of income generation—there is no consumption credit.\textsuperscript{224} Without capital, many poor simply cannot efficiently produce enough goods or crops to compete in any real sense, with larger industrial farming or manufacturing operations and as a result they remain impoverished.\textsuperscript{225} “Making inexpensive credit available to the rural poor has been understood to be the key to breaking a

\textsuperscript{217} Aminur Rahman, Women and Microcredit in Rural Bangladesh: Anthropological Study of the Rhetoric and Realities of Grameen Bank Lending 1 (1999). 95 percent of the recipients of loans from the Grameen Bank are women.


\textsuperscript{219} Id.

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Gup, supra note 181, at 318.

\textsuperscript{223} Id.

\textsuperscript{224} Mokbul Morshed Ahmad, Distant Voices: The Views of Field Workers of NGO's in Bangladesh on Microcredit, 169 Geo. J. 2003.

\textsuperscript{225} See Dustin Miller, Climbing the Mountain: Providing a Vehicle for Banking Services to Kenya’s Rural Farmers, 19 Geo. Int'l Envtl. L. Rev. 783, 787 (2007).
vicious circle of low capital low productivity, low savings, and consequent low
capital.”

There is however little empirical data showing the extent to which micro-
lending has lessened poverty in the countries where it has been implemented, but
the returns for the Grameen Bank are sufficient to show that the bank is indeed a
business and not a charity. In 2005, the Grameen’s return on equity was over 21
percent, with $678 million in total assets. However, Grameen is the exception
rather than the rule regarding profitability. Most micro-credit institutions are
unsuccessful at covering their costs, one reason for this being that many of them
focus on poverty alleviation to the exclusion of profitability, and offer below
market interest rates. Profitability is a doubly high hurdle for micro-credit
lenders because of the high administrative costs of processing so many small
transactions, dealing with a high turnover rate, and required frequent travel to
remote locations in order to meet clients. Essentially, Micro-lenders must act
like banks and not like charities if they are to be sustainable. Despite the
difficulties that micro-finance enterprises face, they can be successful at
accomplishing the task of extending capital credit, and what the forgoing statistics
show is that everyone, the poor and the rich alike, can benefit from access to
capital credit, which is precisely what the Grameen and similar enterprises
provide.

226 Jameel Jaffer, Microfinance and the Mechanics of Solidarity Lending: Improving Access to
227 Grameen Bank, Performance Indicators and Ratio Analysis, available at http://www.grameen-
info.org/bank/performaceindicators.html?id=19&cat_id=289&title=Grameen+II+Briefing+Notes
(last visited April 5, 2008).
228 Yoko Miyashita, Microfinance and Poverty Alleviation: Lessons from Indonesia's Village
229 Tor Jansson et al., Principles and Practices for Regulating and Supervising Microfinance 23
2008).
X. **CONCLUSION**

In researching this paper and becoming more comfortable with the several strains of economic philosophy, I was struck by the dichotomous philosophies, not economic but moral philosophies, of Marxism and binary economics in particular. It seems that Marxist philosophy took hold after a number of people looked around at the various owners of capital and said “if I can’t own it, then nobody should.” The binary economist might be more inclined to look around and say “even if I don’t own it, I should, and so should everybody else.” The latter statement not only seems more adult, but also more egalitarian than Marxism, which somewhat ironically holds itself out as being the most egalitarian of all economic philosophies. The binary economist reasons as Kant did in his categorical imperative, arguing that if some members of society are able to acquire capital with the earnings of capital, and this is something to be desired, then so should everybody else be similarly enabled.230

The fact that so many of the founders believed that capital ownership was essential for a functional democracy is a potent element of this paper, especially today when all parties will readily acknowledge the fact that America has very, very concentrated ownership of capital. The question should be now, not why should we act to broaden ownership, but why should we not? What really are the reasons for *not* broadening the capital ownership base other than for the purpose of continuing on with a system in which individual citizens are denied the ability to fully participate in the bounty of their country? We would not risk much by making the acquisition of capital less of a barrier for those who need it most, and we stand to gain a great deal. I do not assume to be able to provide the solution through any one particular theory. The focus should be broadening capital ownership without conjuring up the specter of redistribution.

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In this regard and many others, binary economics is correct, and it seems the only way of thinking which sees capital concentration as the problem, and proffers a reasonable, if not perfect, solution. The ESOP is certainly not the solution, and Louis Kelso never intended it to be. He intended it only as a first step. Unfortunately, Kelso was not able to live long enough to see the second step, which is what the whole of this paper is about—how to take that next step towards wider capital ownership. Capital Homesteading, while being theoretically very similar to binary economics, unfortunately falls into the trap of leaning again on the wealthy to subsidize capital acquisition for the poor, instead of utilizing the existing capitalist mechanisms available to broaden ownership without laying the bill at the feet of the already well-to-do members of society. The Universal 401(k), while being seemingly the most “in sync” with this country’s current redistributionist policies for poverty alleviation, does nothing to address the root cause of the wealth gap. It provides greater retirement savings, but does nothing to increase the purchasing power of an individual throughout his or her lifetime. Binary economics may not be the only answer available to us, but it is the only one that posits a solution that is both coherent in its analysis of the need for greater capital ownership among a broader segment of society, and which can be effectuated within the construct of a capitalist society. It provides the only solution which invokes capitalism to help us realize the dream of Democracy.

“It seems to me that we've tried capital concentration in this country. Indeed, we are still trying it. It has failed to perform as an efficient engine for the kind of economic development that narrows inequalities and facilitates democratic governance.”

231 See section IV(A), supra.
232 See section IV(C), supra.
233 See section IV(D), supra.