Reviving the Forgotten American Dream

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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 to some misgivings about how our present capitalist system is functioning, as will many others given the events of this past September. Many scholars and theorists have come to suspect that there is a more just and efficient path to wealth accumulation and distribution than what we have seen so far, or at least something we may have missed along the way.[2] This issue presents an economic question but 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.[3] The focus of this paper is property ownership in terms of capital assets and how the drive to own productive resources was once an integral part of our national culture but has fallen to the wayside recently.[4] This drive is no longer mentioned as any part, much less a central part, of the American Dream.

There is no doubt that both the American left and right (for the most part) share a vision of a wealthier America. However, 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

1. *See, e.g.*, 30 COUNCIL RECORDS 149 (Apr. 26, 1787) (Council advises and consents to the nominations of James Bowdoin, Jr., et al.); *see also* Robert Frank, *The Rich Man's Michael Moore*, WALL ST. J., Feb. 23, 2008, at W1, *available at* http://online.wsj.com/public/article/SB120371859381786725-uxj2Kp_72MTkNVzHt8X jC2ZaPcw_20080323.html?mod=tff_main_tff_top#printMode (discussing the public's negative reaction to Jamie Johnson, heir to Johnson & Johnson, who makes documentaries about wealth inequality).

2. These scholars include among them Louis Kelso, Robert Ashford, Norm Kurland, Mortimer Adler, and several others. Many of their works will be cited throughout this article.

3. *See, e.g.*, BRIAN GRIFFITHS, THE CREATION OF WEALTH 25-27 (InterVarsity Press) (1984) (discussing the creation of wealth in market versus non-market economies); Magnus Henrekson, *Entrepreneurship and Institutions*, 28 COMP. LAB. L. & POL'Y J. 717, 730 (2007) (discussing the importance of the protection of private property for economic growth); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001) (discussing the causal relationship between "secure property" and "contract rights and growth").

4. Capital, as I use the term in this paper, refers to the real productive resources used to produce goods, such as land, buildings, and machinery. This type of capital is distinguished from financial capital, which typically means funds obtained to finance operations, and human capital, which is often used to describe the investment businesses make into their human workforce in terms of education, training, and so on.

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.[5] 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.[6] For the left, redistribution is seen as a necessary evil, as regulation and welfare are required to provide for those individuals that the market has failed, Neither side seems willing to recognize the strengths in the other's arguments, or the failings in its own. There is good reason to question, for example, whether the American economy is operating at full capacity and whether it is necessary to take from others in order to create more wealth-enhancing opportunities for the less economically advantaged.[7]

To be certain, the most significant problem confronting anyone who favors the broader ownership of capital assets is the issue of redistribution. Those persons behind most of the efforts to raise the standard of living for low-income earners in America have assumed that we must necessarily take from one and give to the other in order to achieve a more economically egalitarian society.[8] While redistribution in some form of taxation that provides public benefits is not without its place in government, redistribution is widely perceived as having long-term negative effects on growth.[9] 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 distribute wealth amongst a widespread segment of the American people. Broad ownership of productive property, what we now call capital, was a widely lauded, key aspect of democracy according to the founders of America.[10] The argument is still

5. *See* BARRY M. GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 42-43, 101(Hillman Books) 1960; *see generally* JONATHAN M. SCHOENWALD, A TIME FOR CHOOSING: THE RISE OF MODERN AMERICAN CONSERVATISM (Oxford University Press 2001) (discussing, among others, William F. Buckley Jr.'s work to establish American conservatism).

6. Michael Lind, *The Smallholder Society*, 1 HARV. L. & POL'Y REV. 143, 144 (2007); *see* ROBERT A. LEONE, WINNERS, LOSERS, AND GOVERNMENT REGULATION 11-12 (Basic Books 1986).

7. For a neoclassical analysis and argument against the "full capacity" proposition, *see* James Crotty, *Why There is Chronic Excess Capacity*, 45 CHALLENGE 21, 21-44 (2002).

8. *See, e.g.*, TSUNEO ISHIKAWA, INCOME AND WEALTH 36-37 (Oxford University Press 2001).

9. *See id.* at 37. This concept is intensely more complex than is illustrated by this one sentence, but an in depth discussion of it is beyond the scope of this article.

10. This premise will discussed at length in Section I, *infra*.

true today. Widespread capital ownership is necessary for sustainable growth and 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 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 contrasts capital ownership with home ownership, which is still an integral part of the American dream, but which has not been the springboard to wealth that was advertised. Part IV discusses several efforts and theories as to how capital can be effectively spread among the masses.

I. OWNERSHIP AND LIBERTY

A. A Brief History of American "Ownership"

"Ownership" is set off with quotations above because the word has such myriad connotations today that it is difficult to determine which definition is being used in much of the academic discourse. 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.[11] Then, I 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.[12] Although private property and individual property rights have been utilized in various forms for millennia, the way we think of ownership today has been modified over time to adopt to the new forms of

11. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) (the "bundle of sticks" concept of property rights is a "familiar metaphor").

12. 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. *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, 289-92 (1995).

ownership made possible through technology.[13] Roman property law included rights such 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 forth.[14] In general, much of what we think of as contemporary property law has existed for many years in some form.[15] The United States was built on the idea of actual, individual ownership of real property *as a means of production*.[16] In the earliest days of colonization, men were frequently paid with land instead of currency.[17] Willi Paul Adams observed that the "acquisition and cultivation of land was the very raison d'etre for the colonies."[18]

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.[19] The concept of broad ownership as a fundamental aspect of democracy and political freedom has deep roots. Aristotle suggested that democracies would be far more likely to succeed in societies that contained a large middle class.[20] The Virginia Declaration of Rights listed as an inherent right of every American, along with life, liberty, and the pursuit of happiness, the "means of acquiring

13. *Id.* The focus of the argument over 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 its Limits in American History*, 120 HARV. L. REV. 385, 392-94 (2006).

14. 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) (David A. Thomas ed., The Michie Company 1994).

15. *See generally* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993) (discussing land ownership, theory, and evolution); Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247 (2007) (discussing the "bundle of rights," and the sources of property law).

16. *See, e.g.*, Eric T. Freyfogle, *Property Rights, the Market and Environmental Change in 20th Century America*, 32 ENVTL. L. REP. 10254 (2002) (discussing the United States' use of land to create products).

17. 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 (The University of North Carolina Press 1960) (citing ALEXANDER BROWN, THE GENESIS OF THE UNITED STATES, 774-80 (1890)).

18. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY 191 (The University of North Carolina Press 1980), *cited in* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 10 (Oxford University Press, 3d ed. 2008).

19. *See* DONALD WORSTER, THE WEALTH OF NATURE 95-111 (Oxford University Press 1993) (discussing early Americans' conceptions of property).

20. *See* ARISTOTLE, POLITICS 4.11, at 119-21 (Peter L. Phillips Simpson trans., 1998) (discussing despotic rule and cities).

and possessing property."[21] Virginia adopted this declaration on June 12, 1776, immediately prior to the signing of the Declaration of Independence.[22] 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.[23] As President, Jefferson implemented policies that heavily favored the broad distribution of real property, particularly through the decision to make public lands in the territories available only to settlers who would work the land.[24]

Jefferson was not alone in his beliefs. Many of the framers, including Alexander Hamilton, James Madison, and Benjamin Franklin, despite the federalist and anti-federalist differences among them, expounded on the interdependent, and often reinforcing, relationships among property ownership, economic autonomy, and political freedom.[25] In the months preceding America's declaration of independence, John Adams was concerned with the role that property ownership would have in the new nation, writing that "power always follows property."[26] Based on this understanding, Adams advocated making "the acquisition of land easy to every member of society" or, alternatively, "to make a division of the land into small quantities, so that the multitude may be possessed of landed estates."[27]

21. VA. CONST. art. 1. John Locke also commonly used the word "property" as an all-inclusive term 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).

22. Larry P. Arnn, *Saving the Ownership Society*, USA TODAY, July 1, 2006, (Newspaper).

23. *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 62, 137 n.1 (1942) (discussing Jefferson's use of the Virginia Constitution while drafting the Declaration of Independence and discussing Locke as an influence). The Virginia Declaration of Rights is reprinted in Am. Jur. 2d Desk Book, Item No. 185 (2d ed. 1979).

24. *See* Merrill Goozner, *Forty Acres and a Sheepskin*, THE AMERICAN PROSPECT 90 (Mar./Apr. 1999).

25. *See, e.g.*, Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J.L. & PUB. POL'Y 355, 363-64 (2006); *see also* GREGORY ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 82 (1997); MICHAEL NOVAK, THE FIRE OF INVENTION: CIVIL SOCIETY AND THE FUTURE OF THE CORPORATION 38-39 (1997); RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 200, 220 (1996).

26. Letter from John Adams to James Sullivan (May 26, 1776), *in* 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS 376 (Charles Francis Adams ed., 1971) (1854); *see also* Michael Lind, *supra* note 6, at 144.

27. Letter from John Adams, *supra* note 26, at 377.

The New Hampshire Constitution of 1784 stated that "[a]ll 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."[28] The Massachusetts Constitution includes among its enumerated inalienable rights "that of acquiring, possessing and protecting property."[29] The distinction between the "right to property" and the "right to acquire property" intuitively appears 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.[30]

For many, the ownership of property is in itself perhaps the greatest expression of, and requisite for, freedom.[31] The general idea at the time of America's founding was that, with legal protection, an owner of property would be secure enough to challenge those in power and less fearful of government reprisal.[32] The existence of many land owners, therefore, could check an ambitious government in a way that a non-propertied citizenry could not.[33] Under this view, political freedom is only realized through property ownership.[34] This idea correlates 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.[35] Ownership leads to freedom, which in turn leads to development, both economic and political.[36] Additionally, the ownership of property was clearly associated with the idea of social

28. N.H. CONST. art. I § 2.

29. MASS. CONST. art. CVI. The right to acquire property is also specifically mentioned in the constitutions of Pennsylvania and Virginia, the Federalist and Anti-Federalist papers, and numerous opinions of the United States Supreme Court. *See* Robert H.A. Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 RUTGERS L.J. 3, 97 n.370, 104 n.392 (1990) [hereinafter Ashford, *Louis Kelso*].

30. *See* ROBERT ASHFORD & RODNEY SHAKESPEARE, BINARY ECONOMICS: THE NEW PARADIGM 341-42 (1999).

31. John Adams is reported to have said that "property must be secured or liberty cannot exist." 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1850).

32. *See* TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 9-12 (1998); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1538 (2007); Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907 (1993).

33. *See* BETHELL, *supra* note 32, at 3.

34. Korngold, *supra* note 32.

35. JOHN STUART MILL, *Principles of Political Economy, in* MASTERWORK OF ECONOMICS 164, vol. 1, (Leonard Abbott ed., 1973).

36. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 14 (1999).

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."[37] 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. Galatin stated that "[t]he 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."[38]

The attitudes of Jefferson and Madison obviously did not reflect the whole of society at the time, but political momentum clearly favored not only the rights and legal protections of property possession, but also acquisition of real property. Even though some favored more widespread ownership prior to the American Revolution, it was by far the exception rather than the rule for the lower economic classes to hold property.[39] Not until the mid-18th century, when the ideals of the Enlightenment became more expansively adopted within American society, did ownership start to become a reality among the non-elites.[40]

Yet, the right to own property 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 rights acquired through their husbands.[41] 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.[42] However, civil rights law and human rights theory did catch up with property law, and eventually made it possible for men and women of all ethnicities to hold property. 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 a negative net worth, and that the ability to acquire capital as

37. Letter of Thomas Jefferson to John Adams (Oct. 28, 1813), *in* THE ADAMS-JEFFERSON LETTERS 387, 388 (Lester J. Cappon ed., 1959); *see also* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 220 (2003).

38. Ward Morehouse, Stuart Speiser, & Ken Taylor, *The Universal Capitalism Movement in the United States*, 58 REV. SOC. ECON. 63, 67 (2000).

39. *See* Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 728 (1985).

40. *See id.* at 734.

41. *See* HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.2 (2d ed. 1987).

42. *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).

a practical matter is highly concentrated is not widely perceived as a serious impediment to a functioning democracy. Yet, this perspective directly conflicts with the views of our nation's founders.

As American society moved forward into the 19th century, both leading up to and through the beginning of the industrial revolution, property ownership became the anchor with 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.[43]

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."[44] However, it was also during this period that capital assets were becoming increasingly more concentrated, resulting in a widening wealth gap. This period is perhaps best characterized as a time of enormous "socio-economic transformation of the way in which people participated in production."[45] American society saw the movement of "millions of proprietary 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."[46] 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 productive efficiency of which corporations were capable.[47]

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.[48] During this period, substantial economic growth spurred a rise in living standards, caused significantly by the cheaper goods produced through

43. "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).

44. Peter S. Grosscup, *How to Save the Corporation*, 24 MCCLURE'S MAGAZINE 443 (1905); *see also* Robert Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility*: *Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society*, 76 TUL. L. REV. 1531, 1550 (2002) [hereinafter Ashford, *Corporate Wealth Maximization*].

45. Ashford, *Corporate Wealth Maximization*, *supra* note 44, at 1550.

46. *Id.* at 1551-52.

47. *See id.* at 1552.

48. *See* Grosscup, *supra* note 44, at 445.

industrialized manufacturing and agriculture.[49] This development disguised the long-term effect of corporatization, which was the "proletarianization of American society."[50] Judge Peter Grosscup characterized the inherent problem with this emerging system in the following way:

> [T]he 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.[51]

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 alone is not the thing that is necessary for full liberty, as Jefferson intimated through his yeoman republic.[52] The productive ownership of capital, not just capital alone, is the key, and it is the capacity to produce valuable goods through their labor and their capital 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.[53] 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.[54]

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

49. *See* Lind, *supra* note 6, at 149.
50. *See id*.
51. Grosscup, *supra* note 44, at 444.
52. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 127, 189 (1980).
53. *See* Paul B. Thompson, *Globalization, Losers, and Property Rights,* 9 MINN. J. GLOBAL TRADE 602, 608 (2000).
54. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 1781-1785, *reprinted in* THE COMPLETE JEFFERSON 678 (Saul K. Padover ed., 1969).

on no one but themselves for their livelihood."[55] The idea of land ownership has been subsumed as an end in itself, but Worster reminds us that land ownership is necessary only insofar as 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 that 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."[56] I would venture to say that Jefferson would agree with this definition of freedom, and would also say that productive ownership is 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 the 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.[57]

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

B. The Modern American Dream

The original concept of the "American Dream" was first imagined by James 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."[58] The easiest way to characterize this original sentiment is as a system in which a person is

55. Lisi Krall, *Thomas Jefferson's Agrarian Vision and the Changing Nature of Property*, 36 J. ECON. ISSUES 131 (2002) (quoting DONALD WORSTER, THE WEALTH OF NATURE 100 (1993)).

56. SEN, *supra* note 36, at 14-15.

57. 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 & PATRICIA HETTER, TWO-FACTOR THEORY: THE ECONOMICS OF REALITY (1967); ASHFORD & SHAKESPEARE, *supra* note 30.

58. JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 404 (1931).

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 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.[59]

The modern American Dream is far more focused on the availability of education, healthcare, job opportunity, retirement security, 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.[60]

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 home ownership has not 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.[61] From 1979 until 2003, the three lowest quintiles of American family income earners (the bottom 3/5) saw their real income (adjusted for inflation) increase by only 5.5 percent, as compared to the top two quintiles (the top 2/5) who saw their real income grow by about 35 percent in the same period.[62]

The dream of home ownership has almost ubiquitously been transformed into another mode of indebtedness from which the typical "owner" faces 30 years of debt payment to own his home outright, or the potential of foreclosure and a reversion to rental living, or possibly homelessness.[63] 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 have not altered this fact.

59. *See* Sunstein, *supra* note 32.

60. *See* HEATHER BETH JOHNSON, THE AMERICAN DREAM AND THE POWER OF WEALTH: CHOOSING SCHOOLS AND INHERITING INEQUALITY IN THE LAND OF OPPORTUNITY 150 (2006).

61. U.S. Census Bureau, *Housing Vacancies and Homeownership*, Annual Statistics 2007, Tables 14 & 14a, *available at* http://www.census.gov/hhes/www/housing/hvs/annual07/ann07ind.html (last visited Feb. 23, 2008).

62. Economic Policy Institute, *The State of Working America 2006-07*, Figure 10, *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 49% increase over the same period, with the top 1% experiencing a 111% increase.

63. *See* Roger S. Cox, *Bankruptcy and Creditor's Rights*, 58 SMU L. REV. 563, 573 (2005) (citing *In re Lee*, 309 B.R. 468, 481 (Bankr. W.D. Tex. 2004)).

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

II. CAPITAL OWNERSHIP AND WEALTH

What separates the rich in America from the poor? Answers to that question invariably include things such as education, race, parentage, job security, societal influence, legal systems, and generally available economic opportunities within communities.[64] Very few scholars and economists touch on capital ownership, or a lack thereof, as the central, defining characteristic of poverty and social insecurity.[65] The reality that greater capital ownership leads to greater wealth can hardly be contested. To understand the connection, all one needs to do is look at the wealthiest people in the world and see that they are all highly capitalized.[66] 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 rarely been an argument made by politicians in this country, or been at any time a real political consideration. Returning to 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?[67]

64. *See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 308 (2006); DENNIS LIVINGSTON, SOCIAL STRATIFICATION IN THE UNITED STATES: THE NEW AMERICAN PROFILE POSTER 3 (Stephen J. Rose ed., The New Press 2000) (1992); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1195-96 (1977); Rick Santorum, *Wealth Creation in the New Millenium: Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 383 (2002). Benkler's work in particular addresses the issues listed but also looks to property rights and property accessibility as a central component of wealth and wealth disparity.

65. Many legal and economic writers readily acknowledge that capital ownership is the most powerful wealth creating mechanism that we know of but have not, or will not, recognize the reverse as also true—that a lack of capital ownership is a prime cause of poverty. *Cf., e.g.*, CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM 21 (2002); Morehouse, Speiser, & Taylor, *supra* note 38, at 63. 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).

66. Luisa Kroll, *The World's Billionaires*, FORBES.COM, Mar. 5, 2008, *available at* http://www.forbes.com/2008/03/05/richest-people-billionaires-billionaires08-cx_lk_0305billie_land.html (last visited May 8, 2008).

67. VA. CONST. art. 1.

A. Neoclassical Economic Philosophy and Ownership

According to neoclassical economics, social utility and welfare are best maximized by voluntary participation in markets.[68] Mainstream economics today is largely neoclassical.[69] Neoclassical theory emphasizes utility maximization (essentially satisfaction gained through the efficient allocation of resources and ultimately consumption), and attempts to provide a general theory for the supply and demand of goods and the factors of production.[70]

Many proponents of neoclassical economics (both economists and non-economists) not only accept neoclassical economics as the best or most propitious foundation for economic policy but also as a general endorsement of private ownership over public ownership. However, neoclassical theory takes the existing distribution of assets as a given, and considers it to be exogenous.[71] Thus, whether capital ownership is broadly owned or highly concentrated is not fundamentally important to the neoclassical analysis of utility maximization. Moreover, neoclassical theory places no particular emphasis on private versus public ownership, or the corporation versus the individual, in terms of the most efficient allocation of resources.[72] Neoclassicals simply argue that the most efficient use of property is the use to which it should be put and, in fact, *is* put in market economies.[73]

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.[74] For neoclassical thinkers, whether the property owner is a person or an entity is irrelevant, and the locus of ownership should not,

68. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 160 (3d ed. 2000).

69. E. Roy Weintraub, *Neoclassical Economics*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, *available at* http://www.econlib.org/library/Enc/NeoclassicalEconomics.html (last visited Mar. 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." *Id.*

70. Weintraub, *supra* note 69.

71. *See, e.g.*, JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 231 (2d ed. 2004). Certain fields, socio-economics in particular, argue that there are both exogenous and endogenous components of distribution. *See* Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 WIS. L. REV. 611, 622 (1997).

72. Francisco E. Guerra-Pujol, *Cornel West, Meet Richard Posner: Towards a Critical Neoclassical Synthesis*, 17 BERKELEY LA RAZA L.J. 39, 46 (2006).

73. *Id.*

74. Weintraub, *supra* note 69.

in theory, affect growth or utility.[75] Thus, according to neoclassical thinkers, ownership by a corporation should generate as much growth as ownership by an individual.[76]

According to neoclassical theory, the evidence that the corporation is the most efficient owner of capital in a highly industrialized and capital-rich society is seen in the fact that most investible business assets are owned by corporations.[77] To many people, however, it may come as a surprise that neoclassical theory is a theory of efficiency but not a theory of growth.[78] Thus, the frequently cited virtues of maximizing efficiency via neoclassical analysis as being synonymous with maximizing wealth are overstated and misleading.

Although Adam Smith in his classical economics, as set forth in the Wealth of Nations, was concerned with wealth maximization (in the sense of total macro-economic growth of a society), such wealth maximization is not the primary concern of neoclassical theory. As Professor Robert Ashford has observed, "people could all be starving on a doomed planet orbiting a dying sun and yet every transaction could be perfectly efficient."[79] Neoclassical analysis not only neglects entirely the connection between ownership and freedom, which so many of the framers found essential to the conception of America, it also excludes from its analysis the growth implications of broad versus concentrated ownership.[80]

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. As corporations possess more property, theorists such as Jefferson and Madison might have argued that this would make individuals less free because, more and more, those individuals are dependent on corporations for their livelihoods and are thus likely to constrain their actions to only those activities that accord with corporate objectives.[81]

The corporate-individual dichotomy is, however, a false one. The conflict is not between corporations and individuals, but is between

75. *See See* Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box*, 76 FORDHAM L. REV. 1015, 1026 (2007).

76. Robert Ashford, *The Socio-economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187, 1188 (2002) [hereinafter Ashford, *The Socio-economic Foundation*].

77. *Id.*

78. *Id.* at 2000.

79. Ashford, *The Socio-economic Foundation*, *supra* note 76.

80. 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* LYNNE L. DALLAS, LAW AND ECONOMIC POLICY: A SOCIOECONOMIC APPROACH (2005).

81. *See* ADAMS, *supra* note 26.

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. Corporations are not the problem in and of themselves. The problem with corporate ownership is that the corporate strategy and system of corporate finance has caused the unnecessary narrowing of ownership generally.[82] And yet, neoclassicals have no problem with concentrated ownership of assets.

B. *Historical Perspectives on Neoclassical Economics*

Neoclassical economics as a strain of economic thought originated in the late 19th century, largely due to the works of, among others, William Stanley Jevons and Carl Menger.[83] At that time, the validity of economics as a specific academic discipline was viewed with 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,[84] but prior to the 1870's a majority of institutions did not offer courses in economics.[85] In the 1870's and 1880's, American students frequently traveled to Germany to obtain more extensive coursework in economics.[86] The first American professorship in economics was established in 1871 at Harvard, which also awarded the first Ph.D. in economics in 1875.[87] The growth in economics as a discipline coincided 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, neoclassical theory grew and gained a significant foothold in the majority of the world's market economies moving into the 20th century. Neoclassical

82. *See* Grosscup, *supra* note 44, at 445; *see also* Robert Ashford, *Memo on Binary Economics to Attorneys for Women and People of Color re: What Else Can Public Corporations Do for Your Clients?*, 79 ST. JOHN'S L. REV. 1221 (2005) [hereinafter Ashford, *Memo on Binary Economics*].

83. WILLIAM STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY (H. Stanley Jevons ed., 5th ed. 1957) (1871); CARL MENGER, PRINCIPLES OF ECONOMICS (James Dingwall & Bert F. Hoselitz eds., 1950) (1871); *see also* Kristoffel Grechenig & 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).

84. 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).

85. John B. Parrish, *Rise of Economics as an Academic Discipline*: *The Formative Years to 1900*, 34 S. ECON. J. 1, 2 (1967).

86. *Id.* at 3.

87. The occupant of the first professorship in economics was Charles Dunbar, of Harvard. *Id.* at 6. Only three Ph.D.'s in economics were awarded in the 1870's—one at Harvard, one at Yale, and one at Johns Hopkins. *Id.* at 7.

economics rose as emphasis on individual ownership declined. Yet, just eight years prior to the publication of Jevons's and Menger's books, Congress enacted The Homestead Act of 1862 which granted property rights of up to 160 acres in midwestern and western lands to heads of households or 21-year old males who agreed to live on and farm the granted land for five years.[88] The Homestead Act amounted to a land credit in exchange for the promise to cultivate the land. 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 Act.[89] The Act was premised partly on the belief that broad ownership should be the national preference.

Abraham Lincoln was a strong proponent of broad ownership, not only as an engine for growth, but also as a central support for any sustainable democratic society. Lincoln spoke in New Haven, Connecticut in 1860, and 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.[90]

Following the enactment of the Homestead Act, the nation saw a broadening ownership base along with substantial economic growth and little inflation.[91] The distribution of productive assets contributed directly to this growth, and yet neoclassical economic theory does not consider the difference between individual, corporate, and public ownership in terms of growth. After neoclassical economics took root, legislative endeavors such as the Homestead Act were finished. Into the

88. The Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed by* Pub. L. No. 94-579, tit. VII, § 702, 90 Stat. 2787 (1976); *see also* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 395 (1968).

89. Trina Williams, *The Homestead Act: A Major Asset-building Policy in American History* 6 (St. Louis Washington University/Center for Social Development, Working Paper No. 00-9, 2000), *available at* http://gwbweb.wustl.edu/csd/Publications/2000/wp00-9.pdf.

90. President Abraham Lincoln, Address at New Haven, Conn. (Mar. 6, 1860), *in* 14 THE COLLECTED WORKS OF ABRAHAM LINCOLN 13, 24-25 (1953).

91. ASHFORD & SHAKESPEARE, *supra* note 30, at 219.

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 a desire for home ownership only, and not for the ownership of productive capital.[92] In the modern era, capital ownership is represented primarily by equity in publicly traded corporations[93] rather than through land ownership, as it was prior to the 20th century. 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 growth of socialism and communism in Europe and Russia, in the United States the fear of redistributionist policies regarding economic growth played a significant role in the adoption of Keynesian economics as a model for American economic stability.[94] Keynesian economic theory is an outgrowth of neoclassical philosophy.[95] 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.[96] According to Keynes, the government needed a spending policy that could "bridge the gap" between inadequate supply and demand in order to stave off future economic turmoil.[97] Thus, greater government spending was hailed as the solution, as opposed to creating a system that generated greater consumer spending. Why the government, and not individuals, should be given the means to spend more is a question that has not been easily answered by Keynesian economics.

A confluence of mutually reinforcing events led to the adoption of Keynesian economics and away from broader ownership of capital. After World War II and the Great Depression, Americans faced the global rise of state socialism and the Soviet Union. Due to widespread fear endemic to the early cold-war era, anyone who advocated heterodox economic theories faced staunch criticism coinciding with the rise of Marxism-Leninism, with many academics being labeled as radicals or

92. *Cf.* Economic Policy Institute, *supra* note 62; U.S. Census Bureau, *supra* note 61. As noted earlier, home ownership has not translated into greater overall wealth, or greater income, for the middle class.

93. *See* Gregory S. Alexander, *Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 111, 123-24 (1993).

94. Morehouse, Speiser, & Taylor, *supra* note 38, at 67.

95. *Id*.

96. *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 104, 258 (1936); Morehouse, Speiser, & Taylor, *supra* note 38, at 67.

97. Morehouse, Speiser, & Taylor, *supra* note 38, at 67.

communists themselves.[98] People viewed Keynes's theory as one that provided politicians with an economic model not prone to attack by the anti-socialist fervor, despite the fact that so many of the founders heavily favored broad capital ownership.[99] As a result, increasing the size and spending capacity of the government became the answer, and arguments in support of economic democracy were silenced.[100]

Keynesians were preceded by neoclassicals with respect to capital distribution, however, and the ascendance of neoclassical philosophy tracked closely with de-emphasis on individual capital ownership.[101] Neoclassicalism ultimately led American society to forget that capital ownership was one of the building blocks upon which the American dream was premised.

III. BROADENING HOME OWNERSHIP

As already stated, the rate of home ownership has increased by seven percent over the past 20 years.[102] This growth in ownership can be attributed in part to the number of programs, both local and national, that created tax breaks and other economic incentives for home ownership by low- and middle-income earners.[103] While home ownership in itself is not the catalyst for social mobility that it once was, it still provides people of moderate means with a valuable asset that typically appreciates over time, and a source of collateral by which they can become creditworthy in the eyes of lenders.[104] Evidence also shows that the move from renting to home ownership helps create healthier and higher-

98. *See generally* Frederic S. Lee, *To Be a Heterodox Economist*: *The Contested Landscape of American Economics, 1960's and 1970's*, 38 J. ECON. ISSUES 747 (2004).

99. *See supra* Section I.A.

100. Morehouse, Speiser, & Taylor, *supra* note 38, at 67.

101. *See supra* Section II.A.

102. *See supra* Section I.B.

103. *See, e.g.*, Kevin M. Cremin, *The Transition to Section 8 Housing: Will the Elderly be Left Behind*, 18 YALE L. & POL'Y REV. 405 (2000); 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, 19-20 (2005) (racially based policies of FHA, while encouraging suburban home ownership among whites, effectively segregated urban minority neighborhoods); Thomas A. Loftus, *Reforming Welfare: Are Effective Property Rights a Key?*, 7 MD. J. CONTEMP. LEGAL ISSUES 387, 409-12 (1996) (arguing for a "new homesteading approach" to alleviate poverty by allocating rural land for subsistence agriculture).

104. Havard, *supra* note 103, at 3. Using home equity as a source of collateral has been a double-edged sword for many Americans with equity serving as the only substantial store of value that many American families possess. After 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, Mar. 31, 2008, (Opinion), *available at* http://www.latimes.com/news/opinion/sunday/commentary/la-oe-schiff31mar31,0,1983693.story.

achieving families.[105] The role of home ownership is certainly important to the American Dream. It is perhaps the largest remnant of the framers' concept of ownership that is still alive today, and is a springboard from which to launch the ownership discussion.

The concept of ownership has been modified, however, to fit within the framework of modern society's consumer debt addiction.[106] Starting after World War I, and taking hold after World War II, the consumer credit revolution changed what Americans thought it meant to "own" something.[107] 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, but often with a heavy debt load accompanying these things. In actuality, American families are renting the useful lives of these items from lenders or retailers.[108] It is rare that an American family owns their home or car free from any debt obligation. The government advocates high amounts of consumption as a means to sustain growth. Status and class in American society is determined according to income and consumption instead of capital ownership. There is no doubt that we are awash in consumer credit, and yet individual capital credit is nowhere to be found. "The American ideal of the largely self-sufficient citizen-producer has been replaced by the citizen-consumer."[109]

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

The National Housing Act of 1934 was likely the single largest spur to home ownership after the Homestead Act.[110] The National Housing Act's lasting significance came through the creation of the Federal Housing Administration ("FHA"), which insures lenders against the risk

105. *See* Winton Pitcoff, *Has Homeownership Been Oversold?*, SHELTERFORCE ONLINE, Jan./Feb. 2003, www.nhi.org/online/issues/127/homeownership.html (last visited Mar. 11, 2008).

106. As of January 2008, outstanding consumer credit obligations were in excess of 2.5 trillion dollars. This number includes only personal debt, and does not account for mortgage obligations. Federal Reserve Statistical Release G.19 Consumer Credit (released Mar. 7, 2008), *available at* http://www.federalreserve.gov/releases/g19/20080307/ (last visited Sept. 11, 2008).

107. Lind, *supra* note 6, at 149.

108. *Id*.

109. *Id*.

110. *See* 12 U.S.C.A. §§ 1701-1750 (2008) (this reference also includes the housing act amendments of 1938 and 1942).

of default on single-family homes.[111] The FHA gives middle income families the ability to purchase housing at affordable rates of interest by providing them access to credit that was not available to middle-income earners to such an extent prior to its creation.[112] Before the FHA, buying a home created a substantial risk due to the then-practice of providing a mortgage loan for up to only half of the value of the home being purchased.[113] This practice often meant that when the mortgage was paid off, the "buyer" still did not own the house outright unless a substantial amount of the purchase price was paid up-front.[114] 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.[115] Paying off the house at the end 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; thus, the remaining option was to leave the house.[116]

The FHA solved this problem by allowing buyers to obtain larger loans to pay most or all of the cost of their home at prevailing interest rates, and enabling them to acquire a home earlier in life because they did not have to wait until they could afford to pay half the price of a home.[117] The National Housing Act came at a time when the government was affirmatively broadening home ownership during the New Deal Era in response to the massive lending crisis of the Great Depression.[118] The National Housing Act resulted in some of the highest rates of home ownership growth in America's history. From 1920 to 1960, home ownership rates grew by 16%, creating what has been referred to as a new ownership class or "asset class," the scope of which has not been recreated since then.[119]

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111. Fred Wright, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231, 251 (2005).

112. *See id.* at 60, 252. Prior to the creation of the FHA, home mortgage loans were partially amortized, leaving a buyer with less than 100% equity in their home once the loan was completely repaid. This required buyers either to pay off the remaining price of the home up front, or to find a second mortgage at the expiration of the first. *See* DOROTHY ROSENMAN, A MILLION HOMES A YEAR 21-22 (1945).

113. Wright, *supra* note 111, at 233.

114. *Id*.

115. Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 191 (2005).

116. *Id.*

117. *Id.* at 193.

118. *Id.*

119. 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 646 (1975) (corrected reprint 1989)

As initially established, the FHA worked by taking .5% off of standard interest rates paid to lenders (the cost of which was passed on to borrowers), which lenders paid into a reserve fund.[120] This fund was held by the FHA, and used to indemnify lenders in case of default on mortgage loans.[121] The federal government also guaranteed the FHA's reserve fund in case of a shortage.[122] The FHA thus ensured that lenders would face no risk in loans that qualified for insurance through the FHA.[123] The FHA, however, maintained broad discretion in setting the qualifying standards for loan insurance, which at the time included severe racial bias in the FHA's insurance practices with the institution of "redlining." Redlining was an FHA practice that favored whites to the exclusion of blacks and other non-white minorities, based on the agency's conclusion that blacks uniformly depressed the value of homes in communities.[124] By redlining neighborhoods, blacks and other non-white minorities were barred from long-term amortized mortgages made possible through FHA insurance.[125] As a result, insurance for white buyers made up 90% of the insurance provided by the FHA, and large numbers of white American families fled to the suburbs, leaving blacks to live in the often decaying inner cities.[126]

Congress responded by enacting the Home Mortgage Disclosure Act of 1975 and the Community Reinvestment Act of 1977 ("CRA"), in efforts to make mortgage lending transparent and less prone to racial bias.[127] These laws provided data-collecting mechanisms that curtailed the practice of redlining, but enforcement remains difficult due to the task of analyzing all the lending data after it is collected, and the lack of administrative resources to handle that task.[128] In 1995, changes were made to the CRA to integrate objective measures intended to strengthen the government's ability to evaluate lenders' history and procedures for small-businesses, small-farms, and community-development

[hereinafter BUREAU OF THE CENSUS, HISTORICAL STATISTICS]; *see also* Gordon, *supra* note 115, at 188-90.

120. Gordon, *supra* note 115, at 193.

121. *Id*.

122. *Id*.

123. *Id.* at 192.

124. John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399, 404-07 (2007).

125. Lynne Dearborn, *Homeownership: The Problematics of Ideals of Reality*, 16 J. AFFORDABLE HOUSING & CMTY DEV. L. 40, 41 (2006).

126. Kimble, *supra* note 124, at 406.

127. 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").

128. Dearborn, *supra* note 125, at 42.

organizations.[129] Large banks are now evaluated based upon a three-part test of their lending, investments, and services, while small banks are subject to less extensive assessment.[130]

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.[131] Despite its negative history, the FHA still enables more families and individuals to own homes than were able to at any time prior to the FHA's creation.

B. Arguments Against Home Ownership as a Systemic Economic Solution—Problems and Limitations

With all the benefits that home ownership bestows upon both owners and their communities—psychological and investment benefits to owners, better community citizenship for neighborhoods and cities—the current housing crisis is forcing many Americans to question the real values, social and economic, of owning their own home.[132] Over the past generation, Americans went from being savers to being wholly dedicated consumers, spending nearly everything, and saving very little.[133] America's housing growth, in both quantity and value, served for years as the main store of equity for many Americans.[134] Too many home owners were strapped for cash, burdened by consumer debt, and crippled by inadequate earning power.[135] As a result, they were unable to resist the pressures and temptations to use their rising home values as a substitute for the truly productive, sustainable source of earnings that is more consistently provided by a diversified, productive, and creditworthy capital estate. Thus, as that equity disappears because of the bursting

129. Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 525 (2005).

130. 12 C.F.R. §§ 25.21-25.26, 228.21-228.26 (2004).

131. Federal Housing Administration (FHA), The History of the FHA, *available at* http://www.hud.gov/offices/hsg/fhahistory.cfm (last visited Mar. 10, 2008).

132. *See* Lynn Asinof, *Buying Isn't Always the Smartest Option*, BOSTON GLOBE, Nov. 25, 2007, at 1E (addressing how purchasing a home may no longer be the best financial investment); 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), Mar. 16, 2008, at 1A (addressing American homeowners increasing decision to foreclose on their homes).

133. Clive Crook, *Housebound: Why Ownership May be Bad for America*, THEATLANTIC.COM, Dec. 2007, http://www.theatlantic.com/doc/200712/real-estate/2 (last visited Mar. 11, 2008).

134. *Id.*

135. Floyd D. Norris, *Signs of Lean Times for Home Equity, The American Piggy Bank*, N.Y. TIMES, Bus. Sec., Dec. 9, 2006; Michelle Roberts, *Banks Put Stopper in Home Equity Spigot*, THE OREGONIAN, Aug. 23, 2008.

bubble of the housing market, the income streams of many American families are disappearing with it.[136] Unstable equity and appreciation in the housing market has shown that faith in home ownership as a sole store of value has been misplaced.[137] The housing crisis has come at a time when Americans are generally concerned about their economic futures. A recent survey shows that a third of Americans age 50 or older lack confidence in their ability to retire, with more than two-thirds of them expecting to work well into old age.[138]

The housing situation is made exponentially more complicated with the recent conservatorship takeover of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, better known as Fannie Mae and Freddie Mac.[139] With these two government sponsored enterprises facing severe liquidity shortages, heavy losses, and an inability to raise capital, failing to place them into conservatorship and continue their operation would have utterly crippled the home mortgage credit lines in the U.S.[140] Even with their rescue, the future for mortgage credit remains far from certain as the remainder of the financial industry in the U.S. suffers through the recent financial crisis. All forms of credit will certainly be less easy to come by.

Homes, also, are like anchors. Increasingly in today's economy the workforce needs to be mobile. As people buy homes and stay in one place, labor's ability to disperse across the landscape of growing industries suffers. "When opportunities are elsewhere, deracination is liberation."[141] The mortgage interest deduction for homeowners factors heavily into this argument.[142] "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

136. Norris, *supra* note 135; Roberts, *supra* note 135.

137. *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) (addressing the effect of the housing market on the value of home ownership).

138. Pedro Nicolaci da Costa, *Aging Americans Unsure They Can Afford to Retire*, REUTERS, Mar. 12, 2008, *available at* http://www.reuters.com/article/bondsNews/idUSN1162119020080312?sp=true (last visited Mar. 13, 2008).

139. Zachary Goldfarb, David Cho, & Binyamin Appelbaum, *Treasury to Rescue Fannie and Freddie: Regulators Seek to Keep Firms' Troubles From Setting Off Wave of Bank Failures*, WASHINGTON POST, Sept. 7, 2008, at A1.

140. *See* Stephen Labontan & Edmund L. Andrews, *In Rescue to Stabilize Lending, U.S. Takes Over Mortgage Finance Titans*, N.Y. TIMES, Bus. Sec., Sept. 7, 2008.

141. *See* Free Exchange, *Subsidizing Rootedness*, ECONOMIST.COM, Dec. 3, 2007, http://www.economist.com/blogs/freeexchange/2007/12/subsidising_rootedness.cfm (last visited Mar. 11, 2008) (addressing the problems of homeownership and mobility in the face of unemployment).

142. *Id.*

seeing nothing and going nowhere."[143] The mortgage interest deduction for taxpayers, originating in §§ 163(h)(3), 164(a)(1), and 121 of the Internal Revenue Code, has been denounced as a tax subsidy for the well-off, shifting ultimate tax liability away from the wealthy onto the poor and middle class.[144] As a result, home ownership drains the government of tax revenue and 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, generally they enjoy greater self-esteem, personal satisfaction, and improved health.[145] Additionally, homes are thought to provide a better overall environment for child-rearing, greater neighborhood and community stability, and more political involvement and participation in local voluntary organizations by owners.[146]

Perhaps the greatest problem with homes is that they do not produce income. Owners fall behind on their mortgage payments when their income fails to keep up with their obligation to pay off the interest and principal on their home loan. People use their homes 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 is dependent upon how quickly the capital will pay for its own cost of acquisition.[147] The importance of property is its ability to produce income, to increase purchasing power, and to make individuals self-reliant. Home ownership does not accomplish these objectives.

As this article is published, what started as a housing bubble has spilled over into an international credit crisis causing the failure of major financial institutions, massive market intervention, and financial rescue efforts by governments throughout the world, with no clear end in sight. As Professor Robert Ashford noted:

> Credit for residential home owners is in essence a form of consumer credit; and credit for home and condominium "flippers" unsoundly depends for its vitality on ever appreciating home values. Both involve credit systemically based on enabling people to purchase

143. *Id.*

144. Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 169-70 (2005).

145. *See* Robert D. Dietz & Donald R. Haurin, *The Social and Private Micro-Level Consequences of Homeownership*, 54 J. URB. ECON. 401 (2003).

146. These are commonly recognized benefits, but there is little supporting empirical evidence regarding some of home ownership's stated advantages. *See* Dietz & Haurin, *supra* note 145.

147. This issue will be discussed in greater detail in Section IV.B, *infra*.

> what they cannot afford rather than enabling people to acquire the capital that will enable them to afford that which is increasingly produced by capital. Unlike capital credit, which is widely enjoyed by existing owners to acquire capital with the earnings of capital, home ownership credit is not in itself sustainably productive.[148]

IV. CAPITAL OWNERSHIP CONTRASTED

There has been no great effort to disperse capital, as opposed to homes, among a larger segment of the population; thus, capital ownership remains in the hands and pockets of a small minority of people.[149] After early growth in the land tenure systems, the time of the framers, and up through the days of the Homestead Act, the realization came that land was limited and not the only resource needed for prosperity and growth.[150] Credit was also necessary to build the infrastructure and firms under which the industrial American economy ultimately thrived.[151] Along with credit and the capital ownership milieu that took root in the early 20th century came more sophisticated methods of purchasing and selling capital in the marketplace. But, the newly created capital (largely in the form of stock) was only bought by a narrow segment of the population.[152] This segment consisted of those who had the education to recognize the opportunity and either the income to pay the price of it or the creditworthiness to get the loan for it.[153] High income earners of the world earn capital income, and realize gains by disposing of capital assets, without ever engaging in what lay people consider to be "labor." The middle- and lower-income classes earn almost exclusively from their labor. This is true for high-school graduates as well as professionals.

148. Commentary of Robert Ashford, Oct. 7, 2008 (on file with author).

149. Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? ESOP's, Other SOP's, and "Ownership Societies,"* 92 CORNELL L. REV. 869-72 (2007).

150. Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 80-81 (2005).

151. *Id.*

152. *See, e.g.*, Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treaties,* 94 HARV. L. REV. 561, 562-65 (1981); Michael V. Seitzinger, Book Review, *Icarus in the Boardroom: The Fundamental Flaws in Corporate American and Where They Came From by David Skeel*, 52 FED. LAW. 54, 55 (2005).

153. *See* RONALD M. GLASSMAN, WILLIAM H. SWATOS, JR., & PETER KIVISTO, FOR DEMOCRACY: THE NOBLE CHARACTER AND TRAGIC FLAWS OF THE MIDDLE CLASS 121 (1993).

A. *Along Came the ESOP*[154]

The only sustained attempt to deliver to the masses an opportunity to own capital and realize capital income was through Louis Kelso's creation of the Employee Stock Ownership Plan, or the "ESOP."[155] Kelso observed that over time human labor in production diminished, technology advanced, and that as society became more mechanistic and automated in its use of capital to produce goods the returns to capital increased and returns to labor stagnated.[156] Kelso saw that wealth was concentrated in the hands of those who were able to earn from capital.[157] In response, Kelso devised the ESOP to make shareholders out of the employees.[158] Employee ownership, as Kelso argued, empowers employees by increasing participation in their place of work, decreasing their likelihood of shirking, and increasing employee-shareholders' personal wealth.[159]

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.[160] A leveraged ESOP works through an employer's adoption of the ESOP as a sponsored ERISA (Employee Retirement Income Security Act) plan and sets up a trust that

154. The origins and history of ESOP's have been discussed extensively elsewhere. This section is 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 (1997).

155. *See, e.g.*, WILLIAM GREIDER, THE SOUL OF CAPITALISM 23-48 (2003) (addressing historical and logical elements of capitalism); EQUITABLE CAPITALISM: PROMOTING ECONOMIC OPPORTUNITY THROUGH BROADER CAPITAL OWNERSHIP 127-40 (Stuart M. Speiser ed., 1991) (addressing comparative ESOPs); MAINSTREET CAPITALISM: ESSAYS ON BROADENING SHARE OWNERSHIP IN AMERICA AND BRITAIN (Stuart M. Speiser ed., 1988); Ashford, *Louis Kelso*, *supra* note 29, at 115 (discussing Kelso's ESOP theory).

156. *See* LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO 36 (1958). Kelso has frequently been denounced by many mainstream economists for his several positions on economic theory, some of which are discussed *infra.* Much of the criticism against Kelso has been in the form of attacks against his lack of a formal education in economics, as opposed to the substance of his arguments.

157. JEFF GATES, THE OWNERSHIP SOLUTION: TOWARD A SHARED CAPITALISM FOR THE 21ST CENTURY 19-20 (1999).

158. KELSO & ADLER, *supra* note 156, at 52.

159. *Id*.

160. *See* Michael E. Murphy, *The ESOP at Thirty: A Democratic Perspective*, 41 WILLAMETTE L. REV. 655, 657-58 (2005) (noting in the ensuing decade, Senator Long helped secure the passage of approximately 25 bills that further elaborated on the original ESOP legislation).

is meant to hold stock purchased from the company.[161] The trust borrows money from a lender and uses the ESOP's funds to purchase the stock.[162] The trust is typically administered by a committee formed by the sponsoring corporation's board of directors, and owing a fiduciary duty to the equitable owners of the stock—the employees.[163] 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.[164] The sponsoring firm also makes cash contributions to the ESOP as it would with any other contribution plan.[165] As the loan is paid off, the stock held in trust is proportionally released from its security obligation and held for the benefit of the employee shareholders.[166] 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 ESOPs.[167] Generally, the stock held in trust can only be sold or otherwise redeemed if the employee retires or leaves the corporation.[168]

After its institution in 1974, nearly 5,000 companies had adopted ESOPs by 1986.[169] By 1990, 10,000 companies were participating in ESOPs with more than 12 million workers receiving the benefits of them.[170] By the late 1990s, new ESOPs were adopted at an average rate of 450 per year.[171]

Yet, ESOPs have significant drawbacks. The primary issue that many commentators have with ESOPs is that the plans do little to minimize risk because the employees' investment in company stock is not a sufficiently diversified investment.[172] Thus, critics claim that while they provide an additional source of income for employees, that income flows from the same source as does the income made from labor—the employing company.[173] Thus, should the company become insolvent, employees lose not only their income from labor, but also their income

161. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 121-22 (3d ed. 1987); Mitchell Langbert, *ERISA: Law, Interests, and Consequences*, 28 J. ECON. ISSUES 1 (1994).

162. EMPLOYEE BENEFIT RESEARCH INSTITUTE, *supra* note 161, at 122.

163. *Id.*

164. *See* William R. Levin, *The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan*, 95 YALE L.J. 148, 152-53 (1985).

165. *Id.*

166. *Id.*

167. Jeffrey R. Gates, *A Brief History of U.S. ESOP Legislation*, 3 J. EMPLOYEE OWNERSHIP L. & FIN. 34, 49-54 (1991).

168. *Id.*

169. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 105 (1996).

170. National Center for Employee Ownership, Statistical Profile of Employee Ownership (1997).

171. *Id.*

172. *See* Hockett, *supra* note 140, at 897-98.

173. *Id*.

from capital, and are left without the safety net that provides much of the impetus to own capital in the first place.[174]

It must be noted, however, that Louis Kelso never intended ESOPs to be the total solution to the capital distribution problem or the need for capital ownership diversification [175] To facilitate broadening ownership and economic growth, he proposed the adoption of other stock ownership plans including consumer stock ownership plans (CSOPs), individual capital ownership plans (ICOPS), public capital ownership plans (PubCops), commercial capital ownership plans (ComCops), and general stock ownership plans (GSOPs).[176] In addition to ESOPs, Kelso proposed that some of these ownership plans ("SOPs") be allowed to further diversify the holdings of participants voluntarily through "mutual stock ownership plans" (or MUSOPs).[177]

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.[178] A common question among binary economists is, "Why are there so few capitalists in our capitalist society?"[179] This was a question commonly also posed by Kelso.[180] Professor Ashford has identified the three distinguishing features of binary economics as follows: (1) Labor and capital are "independent" or "binary" factors of production; or in other words, they are "independently productive"; (2) Technology makes capital much more productive than labor; and (3) Capital has a strong, positive distributive relationship to growth such that the more broadly capital is acquired, the more it can be profitably employed to increase output, and the more an economy (and major corporations within the economy) will profitably grow.[181]

174. *Id*.

175. Robert Ashford, *Binary Economics: The Economic Theory That Gave Rise to ESOPs*, 19 OWNERS AT WORK 12 (2007).

176. LOUIS O. KELSO & PATRICIA HETTER KELSO, DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION 67-73 (1986).

177. *Id.*

178. *See generally* Robert H.A. Ashford, *The Binary Economics of Louis Kelso: A Democratic Private Property System for Growth and Justice*, *available at* http://www.cesj.org/binaryeconomics/binary-cwp1ed.pdf (last visited Mar. 19, 2008).

179. Ashford, *Louis Kelso*, *supra* note 29, at 32 n.121.

180. *See* LOUIS KELSO & PATRICIA HETTER, TWO FACTOR THEORY (1967) (noting that less than 1% of American households in our capitalist society are functionally capitalist).

181. Ashford, *Memo on Binary Economics*, *supra* note 82, at 1227. The third distinguishing feature is known as the principle of binary growth.

Orthodox economists have been slow to accept binary economics, largely due to its theoretical premise that labor and capital are independently productive.[182] Orthodox economists do not view capital as having independent productive value apart from labor. According to neoclassicals, capital's only purpose is to make more efficient the work done by labor.[183] 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.[184]

One notable characteristic of the writing of later proponents of binary economics is their increased emphasis on the economic growth ("binary growth") that they maintain will result from the implementation of a binary economy without redistribution.[185] Although certainly present in Kelso's writings, this emphasis on economic growth underscores an additional reason in support of the importance of broader ownership to a democratic society.[186]

Distinguishing capital as having an independent productive capacity as opposed to being dependent upon labor to improve efficiency may appear somewhat arbitrary, but if it is true it creates an entirely new value for productive capital and throws a harsh light on the current pricing scheme in which labor earns approximately 70% of wages and capital "earns" 30%.[187]

The "independent productiveness" of labor and capital can be illustrated using the following example of hole-digging, with a person digging by hand or instead using a shovel. "A person can dig a hole in four hours by hand and one hour with a shovel (capital). According to conventional economic analysis, with a shovel, labor productivity increases by a factor of four. But from a binary perspective, per hole, with the shovel, labor is contributing only twenty-five percent of it's former productiveness, and the shovel is contributing seventy-five percent."[188]

In this example, the traditional economist would argue that the person is really doing the work, and the shovel is making the work more

182. *Id.* at 9-10.

183. DICTIONARY OF BUSINESS AND ECONOMICS 369 (C. Ammer & D. Ammer eds., 1984).

184. *Id.*

185. *See e.g.*, ASHFORD & SHAKESPEARE, *supra* note 30; Ashford, *Corporate Wealth Maximization*, *supra* note 44; Ashford, *Louis Kelso*, *supra* note 29; Ashford, *Memo on Binary Economics*, *supra* note 82.

186. L. KELSO & M. ADLER, THE NEW CAPITALISTS 101-05 (1961).

187. 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. *See* 118 CONG. REC. 20,207 (1972) (statement of Paul Samuelson, read into the record by Sen. Harris); Ashford, *Louis Kelso*, *supra* note 29, at 77.

188. Ashford, *Memo on Binary Economics*, *supra* note 82, at 1228.

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.[189] By way of one final example, this relationship can also be demonstrated through the work of hauling sacks. "A person can haul one sack one mile in one hour and is exhausted. In the same time, (1) with a horse, ten sacks can be hauled four times as far (yielding a forty-fold increase in output) and (2) with a truck, five hundred sacks can be hauled forty times as far (yielding a twenty thousand-fold increase in output)."[190] In this example, it should be clear that the horse and the truck (the capital inputs), not the human labor, are doing all of the extra work.[191]

Another argument against the independent productive nature of capital is that it took human capital (i.e., investment, time, effort) to create the shovel, or the truck, and thus the production that results when the shovel or truck is being used is dependent upon the investment in creating them in the first place. This argument considers all capital necessarily dependent upon the human labor that it took to produce the capital. However, the argument fails because there is a variety of "capital" that is not the result of human investment, yet that capital produces independently. Plants, trees, and land are capital assets to the farmer, and yet the farmer plays a relatively small role in their ability to produce crops. In the shovel example above, suppose the shovel was a found object instead of an invented one, but is still useful for digging. It still has its own independent productiveness. The fact that investment through labor is necessary to transform something into a capital asset does not deprive that object/asset of its independently productive character.

Building on the concept of independent productiveness of capital, binary economics has established its "general theory" for capital acquisition.[192] The binary general theory approach enables "prime-credit-worthy" companies to meet their capital requirements, while enabling their employees and others to acquire shares in participating corporations with non-recourse credit, and pay for those shares with the earnings of acquired capital.[193] The shares distribute their full return, first, to pay the cost of capital acquisition and, second, to provide a capital source of income to supplement wages and welfare benefits.[194] The full return is the net of reserves for depreciation, research, and

189. *Id*.
190. *Id.* at 1228-29.
191. *Id.*
192. ASHFORD & SHAKESPEARE, *supra* note 30, at 237.
193. Ashford, *Memo on Binary Economics*, *supra* note 82, at 1224.
194. *Id.*

development that is needed to maintain the competitive productive capacity of the capital.

This plan thus allows corporate employees to acquire capital through "constituency trusts," which hold capital for constituents in a manner similar to ESOP's.[195] These constituency trusts would be funded through loans from commercial lenders, which funds in turn would be used to acquire stock from the participating corporation.[196] Lenders would take the note they received from the trust and discount it to the central bank.[197] To guard against any risk in making the loan, lenders would be insured by commercial capital credit insurers.[198] The commercial capital credit insurers would obtain reinsurance from capital credit reinsurers, which would serve as security on the initial loan and allow the loan to be made without a down payment.[199] Repayment on the loans would be made with income earned through the stock ownership trust.[200]

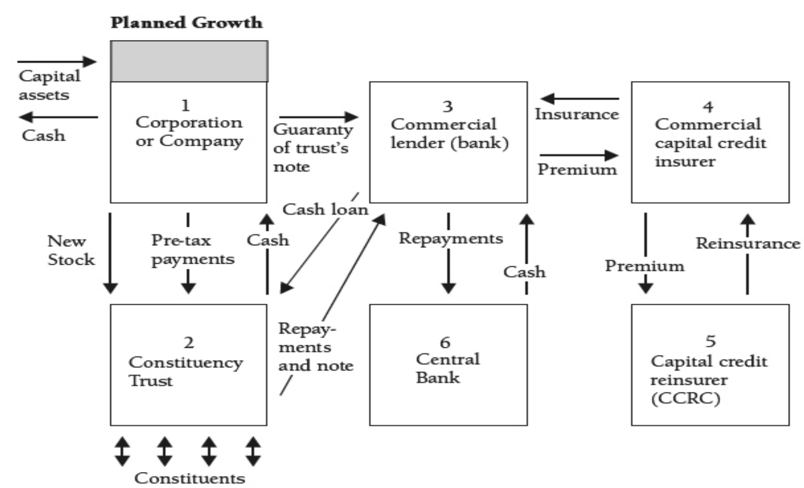
This "general theory" is predicated on the same model that corporations use to finance capital acquisitions. A fundamental principle of corporate finance is to invest only in capital that pays for its own acquisition cost in a competitively short period of time.[201] In most projects, this period of time is typically three to seven years.[202] As a result, new capital pays for its own cost and generates self-financing return. The goal of the general theory is to open up this self-financing mechanism of corporate finance to anyone who wants to earn capital income.[203]

The ultimate goal of binary economics is a system in which this model is implemented on a scale large enough 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.[204] This cycle supplements the growth of these firms and creates additional

195. *Id*.
196. ASHFORD & SHAKESPEARE, *supra* note 30. The stock acquired through this plan would be called "binary stock," a new variety of stock that would require enabling legislation. *Id.* at 239. This stock would entitle the owner to full payout rights, requiring corporations to pay to the equitable owner of the stock the amount of the corporation's profits proportional to their equity stake. *Id.* at 237.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 256. This principle is known as the "feasibility question."
202. *Id*.
203. *Id.* at 239.
204. *Id.* at 286.

capital income for members of other constituency trusts.[205] Ultimately, the broader ownership of these capital assets leads to greater growth. Trust constituents are able to meet a larger variety of consumption needs, and, in so doing, tangentially supplement their own income through the collective action of the various constituents, all with a capital income that did not previously exist.[206] Capital income is broadly distributed to purchase the products of the corporations which have established these constituency trusts.[207]

Figure 1
General Theory Diagram



Source: From Ashford and Shakespeare (1999, p. 237).

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 proven successful over time.[208] The concept of capital credit insurance exists now only for homebuyers in the form of credit insurance provided through the FHA, so that collateral is not required up front in order to secure a home loan.[209] A central bank exists

205. *Id*.
206. *Id.* at 320-25.
207. Binary economics has a close theoretical corollary with the writings of John Locke. Binary economics finds its 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. Additionally, De Tocqueville believed that there was a direct correlation between widely distributed property ownership and political stability. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Vol. 2, 268 (1835).
208. ASHFORD & SHAKESPEARE, *supra* note 30, at 238-39.
209. *See supra* Section VII.A.

for the discounting of debt, and there are multitudes of employees and potential stakeholders that would benefit from institution of the general theory.

The only altogether new organization needed is a Capital Credit Reinsurance Corporation ("CCRC").[210] The FHA was established to provide primary insurance and reinsurance to potential home-buyers, enabling them to purchase homes.[211] The CCRC would similarly provide insurance for non-residential capital credit.[212] Just as the FHA has proven itself to be a *profit-making* governmental entity, requiring no taxpayer-provided subsidy, the CCRC would operate with the expectation that it would turn a profit and discontinue if it failed to so do.[213] The purpose of modern corporate finance is to enable firms to obtain capital assets before they earn the cash to pay for them.[214] 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 heavily capitalized corporations.

Binary economics is ambitious in its scope. While it has several critics who claim that there are theoretical problems and inconsistencies with the theory, none of its critics have substantially disproven the theory, or even soundly attacked it.[215] Most binary economists readily admit that there are valid concerns about the ultimate effects of a "binary economy," but 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, and whether the voluntary ownership broadening solutions based on binary theory might better serve the societal needs for

210. ASHFORD & SHAKESPEARE, *supra* note 30, at 227.
211. Wright, *supra* note 111, at 251.
212. ASHFORD & SHAKESPEARE, *supra* note 30, at 227.
213. Federal Housing Administration, About the Federal Housing Administration, http://portal.hud.gov/portal/page?_pageid=73,1828027&_dad=portal&_schema=PORTAL (last visited May 10, 2008).
214. EILIS MA FERRAN, COMPANY LAW AND CORPORATE FINANCE 50 (1999) (describing the various debt-creating methods to acquire funds and assets and operate a company).
215. Timothy Terrell is one of the most vocal academics that is critical of binary economics. *See* Timothy D. Terrell, *Binary Economics: Paradigm Shift or Cluster of Errors?*, 8 Q. J. AUSTRIAN ECON. 31 (2005). A full response to Terrell's critique is beyond the scope of this article, but his critique has less to do with the conceptual basis for binary economics than it does with aspects of how the theory is presented. Terrell misunderstands the premise and underlying principles of binary economics. Additionally, Terrell analyzes the implications of binary economics 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, without support, that the fundamental role of capital is to make labor more productive, which is a neoclassical stance.

widespread affluence and democracy than other approaches based on other theories.

C. Capital Homesteading

Capital Homesteading is an approach that accepts the validity of binary economics and builds on it to advance a comprehensive system to replace and to enhance the present approach to social security. Capital Homesteading has a much more expansive view of changes that would be required to accomplish broader ownership of capital, including tax policy changes, elimination of certain subsidies, changes in monetary policy, and creation of additional trust entities, to name a few.[216] The Center for Economic and Social Justice developed the concept of Capital Homesteading, largely under the direction of Norman Kurland who, like Robert Ashford, was a former colleague of Louis Kelso.[217] This section touches 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 to create non-inflationary growth.[218] As in binary economics, The Federal Reserve would have a role in Capital Homesteading and only be allowed to discount eligible "industrial, agricultural and commercial paper" subject to a 100% cash-reserve requirement.[219] The overall goal would be the synchronization of cash creation and growth to stabilize the rate of inflation.[220]

Significantly, Capital Homesteading would also eliminate the system of fractional reserve banking in the U.S. system.[221] This differs from the traditional binary approach and the work of Louis Kelso, whose writings are conspicuously bereft of the notion. Additionally, Capital Homesteading claims to eliminate the need for social security.[222] Binary economics, in contrast, is a theory and a practice, but not a replacement

216. *See* Capital Homestead Act 6-7, http://www.cesj.org/homestead/strategies/national/cha-full.pdf (last visited Apr. 2, 2008).

217. *See* Center for Economic and Social Justice, Board of Directors, http://www.cesj.org/about/cesjnetwork/directors.htm (last visited April 2, 2008).

218. Capital Homestead Act, *supra* note 216, at 4.

219. *Id*.

220. *Id*.

221. Fractional reserve banking is the system by which banks are authorized to lend more money than they have in reserve, but expect only a minor percentage of their customers to cash out their accounts at any particular time. To accommodate that fraction, the bank keeps a reserve of funds available, but not nearly a sufficient amount to cover all of its deposits. For a general overview of fractional reserve banking, see THOMAS MAYER, JAMES S. DUSENBERRY & ROBERT Z. ALIBER, MONEY, BANKING AND THE ECONOMY 178-90 (1984).

222. Capital Homestead Act, *supra* note 216.

for current governmental programs or institutions. Despite their differences, the two schools of thought share much in common and are both considered to be continuations of Kelso's work.

Capital Homesteading adopts many of the additional "SOPs" that Kelso proposed.[223] Capital Homesteading would continue to use ESOPs, but advocates the adoption of Community Investment Corporations ("CICs") to be held by community residents, Consumer Stock Ownership Plans ("CSOPs") to be held largely by public utility customers, and the ultimate SOP, the ISOP, for every U.S. citizen.[224] The strategy is to create a "Capital Homestead Exemption" that allows every citizen to accumulate a tax-exempt estate as the modern equivalent of the 160 acres made available under the Homestead Act.

1. The Consumer Stock Ownership Plan

The purpose of the CSOP is to allow customers of capital-intensive firms with high fixed costs that typically exist as natural monopolies to own a share of the utility and be entitled to future profits from that utility.[225] Using low-cost capital credit, customers would be able to purchase shares in these companies, 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 ESOPs, and after paying for the cost of acquisition, dividends from the stock would either be taken as income by the shareholders or applied against their utility bills.[226]

2. Community Investment Corporation

The CIC is 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.[227] However, the GSOC was perceived as being unduly cumbersome, so no state adopted it.[228] Capital Homesteaders argue that the failure of the GSOC was its scope, and that CICs are feasible if applied at the community level.[229] CICs can be given effect by using the already existent real estate planning and development corporation as its entity form.[230] The CIC places in its shareholder-residents a valuable asset premised largely on

223. *See* discussion *supra* Section IV.A.
224. Capital Homestead Act, *supra* note 216, at 4-5.
225. *Id.* at 13; *see also* KELSO & KELSO, *supra* note 176, at 67-72.
226. Capital Homestead Act, *supra* note 216, at 13.
227. *Id*.
228. *Id.*; *see also* JEFF GATES, THE OWNERSHIP SOLUTION: TOWARD A SHARED CAPITALISM FOR THE TWENTY-FIRST CENTURY 75-76 (1998).
229. Capital Homestead Act, *supra* note 216, at 13.
230. *Id.*

"stakeholder" theory.[231] According to that theory, stakeholders are defined by their interest in any decision or change in circumstances that will affect them in any appreciable way.[232] Under this theory, shareholders in a CIC would be entitled to receive profits earned by community development projects, profits that normally flow to either a public entity or private developer.[233]

3. Individual Stock Ownership Plan

The ISOP is intended to broaden the application of the existing model for Investment Retirement Accounts ("IRA's").[234] Like ESOP shareholders, potential shareholders in an ISOP may acquire a diverse portfolio of qualified securities, but, unlike ESOPs, employment by a private entity would not be a pre-condition to this acquisition. ISOPs would be sponsored by corporations but would 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 shareholders.[235]

4. Capital Homesteading and Redistribution

It is significant to note that, as proposed, the Capital Homesteading Act includes a simplification and modification of the tax that is centered around taxing all income from all sources at a single rate. Although the approach may be seen as continued reliance on redistribution, its goal, like that of binary economics, is to minimize and eventually eliminate the need for redistribution and a correlative broadening of capital ownership.[236]

D. Universal 401(k)

Presently, 401(k)'s are not as much an ownership-broadening device as they are, by definition, a retirement savings account. 401(k)'s are intended to secure a cash payout for individuals upon retirement. However, they currently fail to accomplish their stated task. Relatively few workers have access to them, and many of those that do fail to enroll

231. THOMAS E. BACKER ET AL., WHO COMES TO THE TABLE? STAKEHOLDER INTERACTIONS IN PHILANTHROPY 10-11 (2004).
232. *Id.*
233. Capital Homestead Act, *supra* note 216, at 13.
234. *Id*.
235. *Id*.
236. *Compare* Capital Homestead Act, *supra* note 216, *with* Robert Ashford, *Socio-economics and Professional Responsibility in Teaching Law Related Economic Issues*, 41 SAN DIEGO L. REV. 133, 168 (2004).

in them, or sufficiently pay into them.[237] Many employees also fail to roll their accounts into other tax-favored retirement accounts when they change employers.[238]

In 2003, 85% of workers in the lowest wage quintile (the lowest 1/5) and 73% of small-business employees had no employer provided retirement program or pension.[239] The same was true for 75% of Hispanic and 60% of African-American employees.[240] Overall, less than 50% of American workers have an employer-sponsored retirement plan in any given year.[241] 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.[242]

One method to address the failings of the current 401(k) system is a universal 401(k) available to all workers, regardless of whether they work for a company that has adopted a 401(k) or another retirement plan. The universal plan 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 account holders.[243] Employers would be encouraged to match employee contributions to these plans, and the government would provide special tax breaks to employers that offered a certain favorable level of matching funds to lower-wage workers.[244] One 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.[245]

There would, however, be some differences between the universal 401(k) and the current IRA system. Risk-diversifying measures would

237. *See* ALICIA H. MUNNELL & ANNIKA SUNDÉN, 401(K) PLANS ARE STILL COMING UP SHORT (2006), http://ccr.bc.edu/briefs/index.php (follow "Topics: Private Pensions" hyperlink; then follow "PDF" hyperlink); *see also* Jacob S. Hacker, *The New Economic Insecurity—And What Can Be Done About It*, 1 HARV. L. & POL'Y REV. 111, 120 (2007).

238. MUNNELL & SUNDÉN, *supra* note 238.

239. EPI ISSUE GUIDE, RETIREMENT SECURITY, ECON. POL'Y INST. (2006), http://www.epi.org/content.cfm (follow "Issue Guides: Retirement Security" hyperlink, then "Download the Entire Guide in PDF Format" hyperlink); *see also* GENE SPERLING, A PROGRESSIVE FRAMEWORK FOR SOCIAL SECURITY REFORM, CTR. FOR AM. PROGRESS (2005), http://www.americanprogress.org/experts/SperlingGene.html (follow "A Progressive Framework for Social Security Reform" hyperlink).

240. SPERLING, *supra* note 239, at 3.

241. *Id.*

242. PETER DIAMOND & PETER ORSZAG, SAVING SOCIAL SECURITY: A BALANCED APPROACH 139 tbl.8.2 (2004).

243. *See* Tyler Cowen, *Universal 401(k) Accounts Would Bring the Poor into the Ownership Society*, N.Y. TIMES, Dec. 28, 2006, *available at* http://www.nytimes.com/2006/12/28/business/28scene.html.

244. SPERLING, *supra* note 239, at 3.

245. *Id*. at 2.

protect universal IRA's against placing too much of the funds' assets in any one stock or investment. Additionally, proponents of the universal 401(k) 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 would be adjusted over time to limit risk as the fund holder approached retirement age.[246] 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 avoiding the problem of having lump-sum payments spent instead of saved when employees lose or change jobs.[247]

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, Universal 401(k)'s 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.[248] This surcharge would amount to 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, universal 401(k)'s would be a welcome addition to the retirement savings plans 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. From the binary economics point of view, the universal 401(k) allows people to acquire capital with the earnings of labor, but it does not do enough to allow people to acquire capital with the earnings of capital. The only capital acquired with the earnings of capital comes from capital that was previously acquired with the earnings of labor. In short, it is not the right solution for a capitalist society.

E. Micro-Credit

Possibly the most intriguing of all these proposals is micro-credit, largely due to its proven 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.[249] Generally, the commercial banks do not serve the poor because of the high cost of small transactions, lack of collateral, geographic

246. Hacker, *supra* note 237, at 120.
247. *Id*.
248. SPERLING, *supra* note 239, at 3. Income could be capital gains, dividends, or ordinary income. According to this plan, the surcharge would apply regardless of the income's character.
249. *See generally* BENTON E. GUP, THE FUTURE OF BANKING 317 (2003).

isolation, and social prejudice.[250] Originating in 1977 from the Grameen Bank in Bangladesh, microcredit consists 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.[251] The cumulative investment from the Grameen Bank alone is now in excess of six billion dollars, with a repayment rate of approximately 98%.[252]

The Grameen Bank is the product of Nobel Laureate Dr. Muhammad Yunus.[253] In 1977, upon returning to Bangladesh after receiving his Ph.D. in economics, Yunus began an experimental lending operation. "[He] lent a total of $27 to 42 women so 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."[254] In 1983, after this simple but inspiring success, the Grameen Bank was officially formed.[255] There are similar examples of successful microcredit lending outside of Bangladesh, notably in Latin America and Africa.[256]

Microcredit loans are characterized by small loans and short repayment periods. Funds are used largely in agriculture, trading, small craft production, and processing industries.[257] All credit provided through micro-lending is designated for acquiring capital for the purpose of income generation—there is no consumption credit.[258] Without capital, many poor people simply cannot efficiently produce enough goods or crops to compete with larger industrial farming or manufacturing operations and, as a result, they remain impoverished.[259] "Making inexpensive credit available to the rural poor is understood to be the key to breaking a vicious circle of low capital low productivity,

250. *Id*.
251. AMINUR RAHMAN, WOMEN AND MICROCREDIT IN RURAL BANGLADESH: ANTHROPOLOGICAL STUDY OF THE RHETORIC AND REALITIES OF GRAMEEN BANK LENDING 1 (2001). Ninety-five percent of the recipients of loans from the Grameen Bank are women. *Id.*
252. *Id.*; GRAMEEN BANK STATISTICS (2008), http://www.grammeen-info.org (follow Data & Reports: Monthly Statement in USD" hyperlink).
253. GUP, *supra* note 249, at 319.
254. *Id.* at 318.
255. *Id.*
256. *Id.*
257. *Id*.
258. Mokbul Morshed Ahmad, *Distant Voices: The Views of Field Workers of NGO's in Bangladesh on Microcredit*, 169 GEOGRAPHIC J. 65 (2003).
259. *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).

low savings, and consequent low capital."[260] There is little empirical data showing the extent to which micro-lending 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%, with $678 million in total assets.[261]

However, Grameen is the exception rather than the rule regarding profitability. Most micro-credit institutions are unsuccessful at covering their costs. One reason is that many of the institutions focus on poverty alleviation to the exclusion of profitability, and offer below-market interest rates.[262] 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 frequent travel to remote locations in order to meet clients.[263] 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. What the foregoing 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.

V. CONCLUSION

In researching the various strains of economic philosophy for this article, the dichotomous moral philosophies of Marxism and binary economics in particular were striking. It seems that Marxist philosophy took hold after a number of people looked at the 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 the most egalitarian of all economic philosophies. The binary economist reasons as Kant did in his categorical imperative, that if some members of society are able to

260. Jameel Jaffer, *Microfinance and the Mechanics of Solidarity Lending: Improving Access to Credit Through Innovations in Contract Structure*, 9 J. TRANSNAT'L L. & POL'Y 183, 195 (1999).

261. 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 Apr. 5, 2008).

262. Yoko Miyashita, *Microfinance and Poverty Alleviation: Lessons from Indonesia's Village Banking System*, 10 PAC. RIM. L. & POL'Y 147, 159 (2000).

263. TOR JANSSON ET AL., PRINCIPLES AND PRATICES FOR REGULATING AND SUPERVISIG MICROFINANCE 23 (2004), http://microfinancegateway.org/files/21298_20.pdf.

acquire capital with the earnings of capital, and this is something to be desired, then so should everyone else be similarly enabled.[264]

Additionally, I am aware how critical I have been in this article of neoclassical economics. This criticism is not meant to be that of an angry outsider. I say with sincerity that neoclassical economics has played a fundamental role in the study and furtherance of economic thought. My criticism is meant to be taken as constructive, and meant to further the understanding of economics by asserting arguments that have not received much "play" in contemporary economic circles. The Chicago School, the Yale School, the Austrian School, and all the schools in between, have not been talking about capital distribution as much as I and many others feel they ought to be.[265] Capital ownership, and the lack thereof among a broad segment of the population, needs more attention.

The fact that so many of the founders believed that capital ownership was essential for a functional democracy is a potent element of this article, especially today when many readily acknowledge that America has very, very concentrated ownership of capital. The question should not be 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 to continue on with a system in which individual citizens are denied the ability to fully participate in the bounty of their country? Not much would be risked by making the acquisition of capital less of a barrier for those who need it most, and a great deal stands to be gained. The focus should be on broadening capital ownership without conjuring up the specter of redistribution.

It seems reasonably clear that the widespread failure to stress the importance of capital ownership has at its foundation a theoretical basis in conventional economic theory that assumes that broadening ownership necessarily, or most likely, requires redistribution and that gives some credence to the distribution or redistribution of income as perhaps an important factor in growth; but that gives little or no credence to the possibility that the broader distribution of capital acquisition with the earnings of capital will enhance both broader distribution and greater growth. The reluctance to acknowledge the relevance of binary economics in the discussion of broadening capital ownership is plainly seen in the otherwise very impressive and scholarly work of Robert Hockett, who advances all of Louis Kelso's ownership-broadening

264. *See generally* H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY (University of Chicago Press 1948).

265. In all fairness, the Yale School of Economic theory has indeed dealt with the problems inherent in our current scheme of capital distribution, but has done so only within a neoclassical framework.

proposals, but none of Kelso's binary economic arguments in support of them.[266]

Binary economics seems to be the only theory that approaches capital concentration as the problem, and proffers a reasonable, voluntary, market-based solution. ESOPs certainly are not the solution, and Louis Kelso never intended them to be.[267] He intended them only as a first step. Unfortunately, Kelso did not live long enough to see the second step, which is what this article is about—how to move towards broader capital ownership.

The advantage of the binary approach is that it identifies the right to acquire capital with the earnings of capital as the essential right that must be extended to all people by opening the system of corporate finance through the general theory approach described above. Capital Homesteading is an approach worth serious consideration because it is founded on the same principles. The goal of expanded home ownership is a worthy goal. However, recent experience with "Fannie Mae" and "Freddie Mac" reveals that expanding home ownership is not a complete or sustainable solution and does nothing to enhance the inadequate earning capacity of the poor and working.

Universal 401(k)s, while seemingly the most "in sync" with this country's current redistributionist policies for poverty alleviation, do nothing to address the root cause of the wealth gap. They provide tax incentives for greater retirement savings but do not enable people who are not well-capitalized to acquire capital with the earnings of capital as the well-capitalized do. Therefore, they do nothing to increase the purchasing power of individuals throughout their lifetimes.[268]

Micro-credit is also a beneficial program, but, like home ownership and 401(k) plans, micro-credit gains are inherently limited because they do not provide sufficiently competitive access to the growing capacity to do work and distribute income. Although there are benefits to encouraging home ownership (e.g., 401(k) savings, micro-credits) the gains are small and their potential is limited compared to the far more potent access to capital acquisition by America's 3000 or so largest credit-worthy corporations.

Binary economics may not be the only answer available, but it is 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

266. *See* Hockett, *supra* notes 149, 150; *see also* Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society"*, 79 S. CAL. L. REV. 45, 133 (2005).

267. *See supra* Section IV.A.

268. *See supra* Section IV.D.

can be effectuated within the construct of a capitalist society. Binary economics provides the only solution that invokes capitalism to help 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."[269]

269. Thomas Franck, *One Man One Vote or One Man One Goat: Reflections on Democracy in the Global Arena*, 13 WIDENER L. REV. 371, 374 (2007).