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# ESOPs and the Limits of Fractionalized Ownership

Jedidiah J. Kroncke<sup>†</sup>

## I. INTRODUCTION

In early 2016, business headlines reported three different stories about companies taking non-traditional steps in compensating their employees. The owner of Chobani, the popular yogurt producer, had given away ten percent of the company's shares to its employees. These shares were worth over \$100,000 for Chobani's most recent hires and reached over \$1,000,000 in value for its more senior workers.<sup>1</sup> A few months earlier, Southwest Airlines had announced that it would be distributing close to a third of its record \$2.2 billion profit in 2015 to its employees, representing fifteen percent of their total compensation.<sup>2</sup> Near the same time, the U.S. Department of Labor had celebrated the achievements of the New Era Windows Cooperative in Chicago, worker-owned business which was growing after years of struggle emerging from the bankruptcy of its earlier employer-owner.<sup>3</sup> What all three stories shared in common was that they each garnered commentary as representing some variation of "capitalism done right." The popular resonance of this theme among these different workplace practices reflects the significant hunger for alternatives to what many consider to be the ongoing crisis of economic legitimacy in the United States and around the globe.

Across a myriad of countries and political regimes, the twentieth century has witnessed a recurrent rise and fall of economic ideologies.

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<sup>1</sup> Joseph Blasi, *What Chobani's Employee Stock Ownership Plan Means for the Middle Class?*, HUFFINGTON POST BUS. (May 2, 2016), [http://www.huffingtonpost.com/joseph-biasi/what-chobanis-employee-st\\_b\\_9815020.html](http://www.huffingtonpost.com/joseph-biasi/what-chobanis-employee-st_b_9815020.html) [<https://perma.cc/2Q96-3HA9>].

<sup>2</sup> Becky Yerak, *Southwest Profit-Sharing Checks Hit a Record \$620 Million*, CHI. TRIB. (Feb. 11, 2016), <http://www.chicagotribune.com/business/ct-southwest-profit-sharing-0212-biz-2-20160211-story.html> [<https://perma.cc/7MCR-3P6Z>].

<sup>3</sup> Brendan Martin, *The Promise of Worker-Ownership*, U.S. DEPT OF LAB. BLOG (Feb. 16, 2016), <https://blog.dol.gov/2016/02/16/the-promise-of-worker-ownership> [<https://perma.cc/7V5W-CQYP>]; see also Astra Taylor, *Hope and Ka-Ching: Workers of the World, Apply Here*, 25 BAFFLER 128, 128 (2014).

The rapidity of these cycles has only increased following deepening global interconnection and the hurtling speed of capital mobility. The organizing logic of the Cold War offered a rough binary of political affiliation that masked quite significant variations of capitalism, but the Cold War's end has yet to result in movement towards any truly global ideology.<sup>4</sup> Herein, the attractiveness of "Third Way" conceptualizations of economic development promised justice without revolution by combining the presumed benefits of free markets and various forms of social security.<sup>5</sup> The limited traction of these "Third Way" paradigms has been matched by cyclical attractions to more centralized, state-led capitalism, in what, until recently, had popularly been called the "BRICS" nations.<sup>6</sup>

What is striking is that stories like those of Chobani, Southwest, and New Era Window draw on an ideal of "employee ownership" that has co-existed during all of these pendulum-like swings in economic ideology. Though rarely at the core of any national economic project, employee ownership has always managed to find proponents across political divides, and has at worst faced indifference rather than outright political opposition. The ways in which notions of employee ownership are expressed vary greatly, emphasizing assorted aspects of these recent stories—direct ownership of corporate shares, robust profit-sharing or labor-management. Each of these emphases has historical roots as deep as industrial capitalism itself, from nineteenth century utopian collectives to today's more fashionable debates over "financial inclusion."

For all their variations, what these practices share in common is the notion that it is not income inequality per se that is most troubling, but wealth inequality. Proponents of such argue that income is only an imperfect indicator of the central dysfunction of a maldistribution of capital, or the benefits of capital. The politically unobjectionable status of employee ownership is derived in part from that fact that it represents a corrective to capitalism rather than a fundamental challenge. At the same time, the seriousness of employee ownership as a central objective of economic reform has been limited by the perception that it

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<sup>4</sup> Not surprisingly, Henry Hansmann's own work on employee ownership followed his interest in alternative forms of economic organization in the late 1980s and early 1990s. *E.g.*, Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749 (1990).

<sup>5</sup> Shaun Wilson & Ben Spies-Butcher, *After New Labour: Political and Policy Consequences of Welfare State Reforms in the United Kingdom and Australia*, 37 POLY STUD. 408 (2016).

<sup>6</sup> THE RISE OF THE BRICS IN THE GLOBAL POLITICAL ECONOMY (Vai Io Lo & Mary Hiscock eds., 2014).

is difficult, if not impossible, to replicate or scale it to a degree of systemic importance.

Perhaps no country represents the persistence of employee ownership's simultaneous popularity and minority status than the United States. Though often held out as the model free market economy with a comparatively weak welfare state, the U.S. has the highest levels of employee ownership in the world, reaching approximately fifteen percent of its total workforce.<sup>7</sup> In the broadest strokes, this level of employee ownership reflects the particular relevance and durability of what could be called "economic republicanism" in U.S. history.<sup>8</sup>

As political republicanism seeks to restrain the arbitrary exercise of power by representative government, economic republicanism sees the exertion of arbitrary power in the economic realm as a co-equal enemy of liberty.<sup>9</sup> In fact, the presumption that political and economic freedom are intertwined was the predominant assumption of most every social theorist, captured by the traditional use of the term "political economy," before the disciplinary divisions that emerged in the twentieth century, especially in economics.<sup>10</sup> Following this earlier tradition, economic republicans argued that the equality of interdependence between citizens in the workplace is as foundational to human freedom as it is in political elections, with the synchronic benefit that economic decentralization greatly facilitates political equality.<sup>11</sup> This integrated notion of public and private citizenship reflects an understanding that the process of economic production is not simply a utilitarian exercise in wealth creation, but one that necessarily implicates fundamental notions of autonomy and dignity.<sup>12</sup> Summarily, substantive civic equality is impossible under conditions of acute economic equality,<sup>13</sup> and generations of political philosophers have argued that

<sup>7</sup> THE ESOP ASSOCIATION, 2015 ESOP COMPANY SURVEY (2015).

<sup>8</sup> The concept has a far more complex historical lineage, as old as modern political economy itself. JEFF GATES, *THE OWNERSHIP SOLUTION: TOWARD A SHARED CAPITALISM FOR THE TWENTY-FIRST CENTURY* 14 (1998). ("[B]oth Adam Smith and Thomas Jefferson proposed radically decentralized systems, along with a centralized government strong enough to ensure their decentralization."). The legacy of this tradition in the U.S. manifests itself in other contexts where forms of ownership are still state-subsidized, such as the mortgage interest deduction. See William Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

<sup>9</sup> David Watkins, *Republicanism at Work: Strategies for Supporting Resistance to Domination in the Workplaces*, 4 SPECTRA 1, 1 (2015), <https://spectrajournal.org/SPECTRA/article/view/239/167> [<https://perma.cc/F34T-6ZBG>].

<sup>10</sup> MARY FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905* (1975).

<sup>11</sup> *Infra* section II.A.

<sup>12</sup> Nien-He Hsieh, *Justice at Work: Arguing for Property-Owning Democracy*, 40 J. SOC. PHIL. 397 (2009).

<sup>13</sup> "The most important point of excellence which any form of government can possess is to

political virtue are inextricably linked in the daily praxis of democratic life.<sup>14</sup>

What divides proponents of employee ownership is the degree to which they place an antisubordination rationale at the heart of their project, and how far they seek to subvert the inherent power dynamics of commodified labor exchange.<sup>15</sup> More radical forms of economic republicanism declare that wage-labor is inextricably a form of dependency at odds with true economic freedom. Underlying this position is an understanding of the essentially coercive force of human biology, where participation in a labor market can never be truly voluntary unless alternative means of self-sufficiency exist.

Such differentiation has become more acute as the modern workplace continues to blur the line between the public and private lives of workers, and technological advances offer up the prospect of almost complete workplace surveillance.<sup>16</sup> Simultaneously, the precariousness of work has only increased across sectors of the U.S. economy, destabilizing the traditionally more static boundaries of the corporation<sup>17</sup> and policy preferences for facilitating workplace turnover.<sup>18</sup>

As such, while Chobani, Southwest, and New Era Windows are grouped by some under flexible rubrics such as “financial inclusion,” in practice they disrupt the dominant paradigm of workplace governance to quite different degrees. Chobani offers workers a one-time voluntary grant of minority voting rights by a still majority owner; Southwest offers no participatory rights through profit sharing; and New Era Windows would appear to completely flatten the labor/capital hierarchy. If one takes seriously that a recurrent and longitudinal pattern of employ-

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promote the virtue and intelligence of the people themselves. The first question in respect to any political institutions is how far they tend to foster in the members of the community the various desirable qualities, moral and intellectual.” JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 39 (1869).

<sup>14</sup> John Rawls’s investigation into the nature of a true “property-owning democracy” is one modern instantiation of this tradition, now developed by a range of thinkers concerned with the continued status differentiations of citizens who own capital versus those who contribute labor to an economy. Nien-He Hsieh, *Work, Ownership and Productive Enfranchisement*, in PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND 147 (Martin O’Neill & Thad Williamson eds., 2012).

<sup>15</sup> Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (2009).

<sup>16</sup> Chris Bertram, *Let It Bleed: Libertarianism and the Workplace*, CROOKED TIMBER (July 1, 2012), <http://crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace/> [https://perma.cc/6FN6-ZNPF].

<sup>17</sup> Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 85 (Claire A. Hill & Brett H. McDonnell eds., 2012).

<sup>18</sup> Jedidiah Kroncke, *Law and the Hedonics of Development* (forthcoming 2018).

ment insecurity and workplace subordination are not a true lived condition of liberty, then these distinctions begin to challenge the utility of their common classification.

Understanding these variations is a key next step to understanding the renewed interest in the past decade for reinterpreting the American tradition of economic republicanism. Legal scholars and political theorists alike have looked back to the late nineteenth and early twentieth century to recover these ideals, notably in debates over the meaning of the Thirteenth Amendment.<sup>19</sup> Most of these efforts focus on the anti-subordination ethos of the Thirteenth Amendment and its implications for labor regulation.<sup>20</sup> Yet, whatever social legitimacy these efforts may add to the political cause of promoting workplace reform, the finer details of developing working alternative institutions has remained the trickiest obstacle to overcome.<sup>21</sup>

The aim of this paper will be to explore the tensions within the category of “employee ownership” through the legal mechanism most responsible for the modern spread of employee ownership in the United States—the mid-twentieth century creation of the Employee Stock Ownership Plan (or ESOP). The article will present the history and current state of ESOPs in the United States as evidencing two axes of what will be called the “employee ownership conundrum”: 1) the tension between gradualism and systemic reform and 2) the unsure relationship between antisubordination effects and ownership interests in the workplace. The lens of the ESOP highlights these two particular tensions as the most acute example of the limitations of an intra-systemic reform that does not challenge any existing economic interests while also completely separating capital ownership from participatory logics in the workplace.<sup>22</sup>

The consequence of this separation has led ESOP proponents into a cyclical struggle with critics who argue that existing minority em-

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<sup>19</sup> *E.g.*, Jack M. Balkin & Sanford Levinson, *The Dangerous 13th Amendment*, 112 COLUM. L. REV. 1459 (2012); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 689 (2014). This interest is not entirely new, and has been explored in prior decades to varying degrees. Lea S. VanderVelde, *The Labor Vision of the 13th Amendment*, 138 U. PA. L. REV. 437 (1989).

<sup>20</sup> Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016).

<sup>21</sup> ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS 107–09 (2010).

<sup>22</sup> This represents a private variation of what Mariana Prado would call an “institutional bypass.” Mariana Mota Prado, *Institutional Bypass: An Alternative for Developmental Reform* (April 19, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1815442](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442) [<https://perma.cc/TJE6-CPCS>].

ployee ownership (EO) levels in the United States are the natural consequence of market dynamics. This cycle exists in an unproductive clash between recurrent econometric analyses without clearly demonstrated causal mechanisms by either side of the debate. Most critically for ESOP proponents, the limits of quantitative analysis have led to significant endogeneity issues which has obscured the fact that the promotion of ESOPs are not inequality reducing, but exacerbating as they reward extant winners in the labor market or already successful companies with pre-existing commitments to progressive workplaces.<sup>23</sup> In tandem, the retreat to a language of efficiency by proponents has allowed EO critics to advance survivalist arguments which take for granted the wide-range of social and economic practices which shape and replicate existing patterns of workplace governance.

The sum force of these distortions has reduced the employee ownership debate in the United States to battles over comparative corporate efficiency, and completely severed the link between ownership and republicanism which motivates antisubordination critiques of the modern workplace. This emphasis has further led to an abstract focus on the formal structures of ownership, rather than the lived reality of workplace decision-making. While more wide-spread and less unequal ownership of land and capital may facilitate the interdependent freedom that economic republicans imagine, such interdependence is always foundationally a matter of power. Property ownership may be a powerful proxy or indicia of personal autonomy and freedom, but it can be legally configured to promote neither. As such, the ESOP exposes the limits of property-centric versions on economic republicanism through its fractionalized version of corporate share ownership.

The technical seriousness of the debate can serve as a salutary and needed antidote to the often utopian visions of worker governance advanced in debates on alternative workplace structures. Yet, to truly realize the economic liberty sought by republican ideals will require a set of fundamental analytical shifts in ESOP scholarship specifically and EO scholarship more generally.

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<sup>23</sup> As explored later, the core issue here is that productive companies with existing participatory cultures are more likely to adopt ESOPs as one of many wage substitutes and complements. Thus, marginal productivity effects, flatter wage structures, or other positive outcomes attributed to ESOPs are not reflective of the impact of ESOPs themselves but pre-existing conditions conducive to their formation.

## II. THE REGULATORY GENIUS OF THE ESOP

## A. Louis Kelso and the Desire for a New Capitalism

The popularity of anti-feudal social theories in early American history generally involved variations of what today is commonly referred to as an “ownership society.”<sup>24</sup> In the Revolutionary Era and throughout the nineteenth century, much of this idealism focused on the model of small independent agrarian farmers. This intertwined view of economic and political citizenship was seen as liberatory from the ancient regimes of England and Europe and justified the exclusionary logic of restricting political enfranchisement to land owners. As industrial capitalism overtook the logic of the late nineteenth century American economy, these ideals were challenged by the emergence of wage labor. The ideology of the early Republican Party reflected the uneasy conflict between the ideal of a morally free citizen as economically enfranchised and the subordination inherent in the commodification of labor.<sup>25</sup> The older vision of a citizen body of free farmers possessing an equality of civil and economic resources could not survive in the new industrial economic order which generated new lines of inequality among citizens in wealth, income, social standing, education, knowledge, occupational prestige, and authority.<sup>26</sup>

Yet, the life of these ideals did not survive long past the early twentieth century, submerged under the rapid rise of wage labor as the predominant condition of economic life for the majority of Americans.<sup>27</sup> However, the rise of industrial capitalism never fully deadened the life of economic republican ideals in the U.S.<sup>28</sup> As the corporate form came to organize U.S. industrial activity in the early decades of the twentieth century, the aspiration that workers could themselves be owners was

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<sup>24</sup> See Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005).

<sup>25</sup> ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

<sup>26</sup> ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* (2014).

<sup>27</sup> No idea better represented the intensity of this conceptual turn than the theories of “scientific management” espoused by Frederick Taylor, which wholly transformed the new industrial employee into another fungible input of economic production to be managed for maximized productive output. See generally FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911).

<sup>28</sup> Contemporary scholars have often mined this era to recover some of these ideals, articulating notions of “social-republican property” or “civic-republicanism.” Others have similarly tried to recapture the religious roots of alternative economic theories tying together economic and political virtue. Simon, *supra* note 8; see Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008); ADIN BALLOU, *PRACTICAL CHRISTIAN SOCIALISM: A CONVERSATIONAL EXPOSITION OF THE TRUE SYSTEM OF HUMAN SOCIETY* (1854).

recurrently popular,<sup>29</sup> and a serious subject of inquiry by the first generation of professional economists who formed the American Economic Association.<sup>30</sup> The Revenue Act of 1921 included some of the first government providing tax incentives to promote employee ownership of stocks and profit-sharing plans.<sup>31</sup> On the whole, however, the mainstream form of resistance to subordination in the workplace was through unionization and collective bargaining, reflecting in large part the acceptance that labor and capital were not just conceptual distinctions but now sociologically distinct groups who should directly bargain over economic surpluses.

In short, the National Labor Relations Act of 1935 regularized collective bargaining after decades of legal and police repression of unions, and its adversarial conception of labor/capital relations included an explicit ban on intra-corporate employee organizations, or what were known as “company unions.”<sup>32</sup> The view that company unions were attempts to undermine worker unions led to a general suspicion by union leaders of share ownership plans.<sup>33</sup> Even attempts at promoting financial literacy became sites of ideological contest over co-optation in the U.S. labor movement,<sup>34</sup> and more radical critiques from Marxist intellectuals commonly rejected employee owned firms as reactionary and anti-revolutionary.<sup>35</sup>

As entrenched as wage labor became in the U.S. economy, attempts to infuse capitalism with republican ideals persisted. Even as the Cold War deepened the association between American nationalism and free market capitalism, such hope did not fade. Louis Kelso, a corporate lawyer and World War II veteran with an overtly patriotic set of motivations, developed his own interpretation of classical political economy in the 1940s, which he dubbed “binary economics.” Central to Kelso’s theory was that human capital was far less important to modern capitalism than technological capital, and a mechanism was needed to equip all

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<sup>29</sup> See, e.g., JOHN CRAWFORD, *THE PHILOSOPHY OF WEALTH* (1886); Peter Grosscup, *How to Save the Corporation*, 24 *MCCLURE’S MAG.* 443 (1905).

<sup>30</sup> Edward Bemis, *Cooperation in the Northeast*, 1 *PUBLICATIONS AM. ECON. ASS’N* 7 (1886).

<sup>31</sup> Margaret M. Blair et al., *Employee Ownership: An Unstable Form or a Stabilizing Force*, in *THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION* 241, 249 (Margaret M. Blair & Thomas A. Kochan eds., 2000).

<sup>32</sup> Daniel Nelson, *Employee Representation in Historical Perspective*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 371 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

<sup>33</sup> *Id.*

<sup>34</sup> Nicholas Osborne, *Little Capitalists: The Social Economy of Saving in the United States, 1816–1914* (2014) (unpublished Ph.D. dissertation, Columbia University) (on file with the Columbia University Library system).

<sup>35</sup> ROSA LUXEMBURG, *REFORM OR REVOLUTION* (1970).

citizens with the ability to participate in the economy using both.<sup>36</sup> Kelso did not see himself as a critic of capitalism, but as its redeemer by integrating the majority of the population into capitalism's productive power, the basis for his self-styled "Capitalist Manifesto."<sup>37</sup> Critically, he saw access to capital credit as a basic right of citizenship, in contrast to economic rights necessitating redistributive interventions by the government.

Kelso would make his specific mark on American capitalism by designing the Employee Stock Ownership Plan (ESOP). Kelso designed the first ESOP in 1956 for a retiring newspaper owner in Palo Alto who wanted to sell his business to his employees. Under conventional finance, the employees would have had to negotiate a loan, collateralized by their personal savings and assets while drastically reducing their wages to pay off their collective debt. Kelso's innovation was to set up the ESOP as a loan trust which collateralized the company itself and whose balance would be paid down by future corporate earnings—essentially self-liquidating over time. Kelso firmly believed that capital ownership could be broadened through future growth in corporate earnings, rather than by expropriating the assets of existing owners.<sup>38</sup> The efficacy of this first ESOP was limited, as the newspaper employees still had to leverage their own assets for twenty-eight percent of the buyout loan, but the precedent was set. The ESOP held out the possibility of a private, and thus voluntary, mechanism for transitioning from concentrated to disperse capital ownership that solved the problem of a lack of initial capital buy-in by workers.<sup>39</sup>

## B. The ESOP as Regulatory Innovation

Even with his great personal evangelism for the potential of ESOPs to transform and improve capitalism, Kelso found few initial other takers for his plan. The particular authority of an ESOP to borrow money to buy stock for participants was based solely on Internal Revenue Service rulings and had no clear statutory authorization. The future success of Kelso's legal innovation was not born from the results of its early implementations, but from its political attractiveness. In 1973, Kelso persuaded Louisiana's Democratic Senator Russell Long, then chair of Senate Finance Committee, to make promotion of the ESOP a national

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<sup>36</sup> Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 443 (2008).

<sup>37</sup> See generally LOUIS O. KELSO & MORTIMER J. ADLER, *THE CAPITALIST MANIFESTO* (1958).

<sup>38</sup> JOHN LOGUE & JACQUELYN YATES, *THE REAL WORLD OF EMPLOYEE OWNERSHIP* 12 (2001).

<sup>39</sup> Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs, and "Ownership Societies"*, 92 CORNELL L. REV. 865, 895 (2007).

legislative priority.<sup>40</sup> Long was the son of famed radical Huey Long, but embraced a much more corporate-friendly form of right-wing populism than had his father. In his speeches about the ESOP, Long would extol notions of independence and self-reliance that drew on the still extant appeal of economic republicanism.<sup>41</sup>

The rhetorical advantages of Kelso's model became clear as left and right-wing politicians, ranging from Jesse Helms to Jesse Jackson, would take turns supporting a project that seemed simultaneously pro-capitalism and pro-equality.<sup>42</sup> The ESOP threatened no particular economic interest, and had the appeal of gradualist caution while sidestepping any need to address the sources of pre-existing capital inequalities in American society. This advancement neither required national ownership of enterprise nor extensive government regulation, but could still generate greater civic equality through more widespread opportunity.

At the center of its revolutionary narrative was the enlightened entrepreneur, already a success under the current system, as the virtuous redeemer of capitalism and whose private choice would not only help the U.S. better ward off the challenges of communism, but also Japanese economic power—a growing concern in the 1980s.<sup>43</sup> Long could thus champion the ESOP as a truly American innovation, which represented a form of advanced capitalism involving high levels of employee ownership and wide spread access to capital credit. Essentially, instead of trying to create a revolution exogenous to capitalism, the ESOP sought to radicalize capitalism by increasing its own social exclusivity.

Kelso convinced Long to formally include ESOP regulation as part of the passage of the Employee Retirement Income Security Act<sup>44</sup> in 1974 (ERISA). ERISA gave statutory legitimacy to ESOPs and sanctioned a robust set of tax incentives for their formation and payoff. ESOPs now qualified federally as an employee benefit plan regulated

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<sup>40</sup> RAYMOND RUSSELL, SHARING OWNERSHIP IN THE WORKPLACE 11 (1985); ALAN ZUNDEL, DECLARATIONS OF DEPENDENCY 109 (2000); see also Russell Long, *Employee Stock Ownership Plans: Spreading the Wealth to the Average American Worker*, 26 AM. U. L. REV. 515 (1977).

<sup>41</sup> Andrew W. Stumpff, *Fifty Years of Utopia: A Half-Century After Louis Kelso's The Capitalist Manifesto, A Look Back at the Weird History of the ESOP*, 62 TAX L. REV. 419, 424–25 (2008).

<sup>42</sup> JEFF GATES, THE OWNERSHIP SOLUTION 167 (1998).

<sup>43</sup> In this way the ESOP was a forerunner of the various Japanese workplace practices that would gain attention in the United States during the 1980s. The notion that Japanese corporate governance was potentially superior to U.S. models spurred the growth of more integrated theories of labor regulation and corporate governance. Donald Clarke, *Nothing but Wind? The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMP. L. 75, 83 (2011); Edward Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 367 (1996).

<sup>44</sup> 29 U.S.C. §§ 1001–1461 (2012).

by the U.S. Department of Labor and the Internal Revenue Service. Specifically, ESOPs were categorized as stock bonus plans under ERISA Code Section 401(a).<sup>45</sup> Like other stock bonus plans, the ESOP trustee was to be picked by the company's existing board of directors.

Kelso's original use of trust law was grafted onto a regulatory scheme originally intended for a quite distinct purpose: protecting retirement investments. There was nothing inherent in ESOPs that mandated or even strongly suggested their operation as a retirement vehicle; it was similar only as another form of capital accumulation. Moreover, the ESOP loan is repaid through employee payroll deductions and company earnings, but the true enabling component of ESOP regulation under ERISA is that ESOP trustees are granted an exemption from the core fiduciary duty that undergirded the whole of ERISA itself, the duty of diversification.<sup>46</sup> For public companies, ESOP employees could vote their shares as would normal stock owners, but for privately held companies, as were and are the majority of ESOPs, the trustee controlled the voting power of unallocated and allocated shares alike, except on issues of corporate sales or ownership realignments.<sup>47</sup> While Kelso saw this innovation as necessary for short-circuiting current ownership patterns, it placed ESOPs in an odd position in regards to both their regulatory logic and the ideal of worker self-government.

However, the politically unobjectionable positioning of the ESOP which Kelso and Long achieved initially found few detractors as Congress continued to pass legislation after 1973 incentivizing ESOPs. First, incentives were created for the originators of the ESOP loans. Per IRS Code 133(a), a lender could exclude half of the income from an ESOP loan if the ESOP stock represented a majority ownership stake.<sup>48</sup> There were limitations in place to prevent self-dealing, as lenders were ineligible for this deduction if they were part of the same umbrella financial organization as the company in question. IRS Section 4975(d)(3) also provided that a leveraged ESOP loan must be made for the benefit of employees, at a reasonable rate of interest, and can only use the company's stock as security interest.<sup>49</sup> Penalties were implemented so that if ownership levels fell below a certain, and in time changing, threshold of ownership. These incentives also extended to the repayment of the

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<sup>45</sup> *Id.* § 1101.

<sup>46</sup> *Id.* § 1104(a)(2).

<sup>47</sup> Michael Hart, *ESOPs in Corporate Acquisitions*, 14 BENEFITS L.J. 9, 12 (2001).

<sup>48</sup> 26 U.S.C. § 133(a) (repealed 1996).

<sup>49</sup> *Id.* § 4975.

ESOP loan itself. The dividend contributions made by the company to pay off the ESOP loan were made tax deductible.<sup>50</sup>

Cumulatively, these two incentives allowed ESOP loans to originate at comparatively low rates, and serve as an advantaged source of capital infusions for a corporation. In many ways, an ESOP is like an internal tax-exempt stock exchange. The ESOP generates a new source of low cost capital credit that can be repaid in pre-tax corporate dollars.

The most consequential incentive for the proliferation of the ESOP was that previous owners could defer capital gains taxation on the sale proceeds, subject to a few requirements for the size of the ESOP and other self-dealing restrictions. Owners could thus rollover the full value of their existing interest in their corporation into other securities without any tax consequences. This advantage is at the heart of Kelso's plan to see existing corporate owners voluntarily facilitate his capital ownership revolution.

In short order, Kelso's original trust innovation and its regulation under ERISA helped fuel a relative explosion in ESOPs through the 1980s. In the 1960s there were less than a dozen U.S. companies who operated with significant employee ownership, but by the late 1980s the number would rise to close to ten percent of the private workforce.<sup>51</sup> Today ESOPs total near a trillion dollar in assets.<sup>52</sup> Most ESOPs are in small private companies, with fewer than fifty participants, with a third having majority ESOP ownership and a quarter with one hundred percent ESOP ownership.<sup>53</sup>

The popularity of the ESOP ideal led to a boom in interest regarding employee ownership more generally. Pro-employee ownership components were present in a range of new federal legislation, and several states passed their own parallel acts establishing centers for EO promotion in general and ESOPs specifically.<sup>54</sup> Private organizations focused on ESOP lobbying and research were a significant part of this

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<sup>50</sup> Under IRS Code 415(c)(1), the limit on these contributions was higher than for other defined contribution plans, with an inflation indexed ceiling of twenty-five percent of total worker pay. For employees, one quarter of their salary could also be deducted from gross income for principal payments on the ESOP loan, and more to pay interest expenses if the company was a C corporation. Any gains made on stock owned by the ESOP were not taxed until they would be distributed, and gains qualified under IRS Code 1042(a) for further roll-over deferments. Gina Marie Agresta-Richardson, *Employee Stock Ownership Plans: Uncertainties Plaguing the Duties of the ESOP Fiduciary with Respect to Coting and Defensive ESOPs*, 14 AKRON TAX J. 91, 96–98 (1999).

<sup>51</sup> For general statistics on ESOP numbers over time, see *ESOP (Employee Stock Ownership Plan) Facts*, NAT'L CTR. EMP. OWNERSHIP, <https://www.esop.org/> [<https://perma.cc/486Y-VLH8>].

<sup>52</sup> THE ESOP ASSOCIATION, *supra* note 7.

<sup>53</sup> *A Statistical Profile of Employee Ownership*, NAT'L CTR. EMP. OWNERSHIP (Nov. 2016), <http://www.nceo.org/articles/statistical-profile-employee-ownership> [<https://perma.cc/ZLY5-B5KV>].

<sup>54</sup> Timothy G. Merker, *Working Toward Employee Ownership*, 11 J. LEGIS. 127, 138–43 (1984). The most active and longest lasting state program is the Ohio Employee Ownership Center: *Ohio*

new wave of EO enthusiasm, including the ESOP Association, the Foundation for Enterprise Development and the National Center for Employee Ownership.<sup>55</sup> Crucial to this growth were private consultants who came to specialize in ESOP valuation and formation as their main practice.<sup>56</sup>

### III. MISPLACED FOCI LEFT AND RIGHT: THE ACADEMIC DÉJÀ VU OF ESOPs

#### A. The Reputational Divide of the ESOP

Concurrent with the proliferation of ESOPs was a general increase in their academic investigation, along with employee ownership more broadly. The politically defensible position of ESOPs allowed them to be characterized as instantiations of radical but still patriotic economic republicanism<sup>57</sup> and studied by mainstream think tanks.<sup>58</sup> Scholars argued for unions to embrace ESOPs and participate in their spread, putting aside concerns they were ploys at weakening the larger labor movement.<sup>59</sup>

The initial thrust of this academic interest was not to justify the ESOPs on political or rhetorical grounds, but to take up an evaluation of their impact on economic performance. While few who studied ESOPs fully embraced the particulars of Kelso's theory of binary economics, most shared his belief that worker ownership improved the operational dynamics of corporations. The efficiency advantages of ESOP were argued to be sourced in improved worker productivity and informational dynamics within corporate governance.<sup>60</sup>

The basic mechanism seen as increasing worker productivity in ESOPs was motivational in nature, as ownership linked increased prof-

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*Employee Ownership Center*, <http://www.oeockent.org> [<https://perma.cc/LYH8-VTN>].

<sup>55</sup> Information on these groups can be found at their websites: *The ESOP Association*, <http://www.esopassociation.org> [<https://perma.cc/Z2UC-WN5Q>]; *Foundation for Enterprise Development*, <http://www.fed.org> [<https://perma.cc/SN6A-Z39H>]; *National Center for Employee Ownership*, <https://www.nceo.org> [<https://perma.cc/ZL25-DMY5>].

<sup>56</sup> The ESOP Association maintains a database of companies that provide ESOP-specific services. *ESOP Database*, <http://www.esopassociation.org/network/esop-experts> (last visited Sept. 6, 2017).

<sup>57</sup> Simon, *supra* note 8.

<sup>58</sup> See Margaret M. Blair & Douglas L. Kruse, *Worker Capitalists? Giving Employees an Ownership Stake*, 17 BROOKINGS REV. 23 (1999).

<sup>59</sup> E.g., William Foote Whyte & Joseph R. Blasi, *Employee Ownership and the Future of Unions*, 473 ANNALS AM. ACAD. POL. & SOC. SCI. 128, 137–40 (1984).

<sup>60</sup> For a general discussion of Kelso and a summary of the general arguments for ESOPs, see JOSEPH BLASI ET AL., *THE CITIZEN'S SHARE* 159–163, ch. 5 (2013).

itability to total worker compensation. Tying profitability to compensation relies on the elasticity of human effort and thus aligns corporate interest with employee interest. Early empirical results worked to dispel the idea that ESOP contributions themselves were just wage substitutes, claiming that ESOP companies paid out higher average and median wages than comparable companies.<sup>61</sup> Other studies showed that this ownership effect reduced various employee driven costs such as worker compensation claims.<sup>62</sup> From the perspective of corporate governance, employee owners were cast as internal agents able to minimize the informational and monitoring costs for both workers and managers. Improved workplace communication was cast as leading to higher retention rate at ESOP companies, which in itself lowered long run hiring and training costs.

Furthermore, the argument was advanced that when an ESOP company faces market downswings, employee owners are theoretically willing to accept a lower rate of return on capital than traditional investors. Without a demand for higher returns, the firm may be able to cut costs and remain competitive in its market for years to come.<sup>63</sup> Reinforcing studies used this dynamic to explain the relative stability of ESOP companies, which rarely default on their original loans or go into bankruptcy, and can maintain their levels of employment during recessions.<sup>64</sup> While this stability may theoretically prevent the immediate transition of capital to higher-return allocations within the market, most of these analyses relied on a stated or implicit presumption that without long-term stakeholders, capital would chase short-term gains over long-term social returns.

All of these discrete factors are cited in more general studies that have argued that ESOP companies are demonstrably more profitable than comparable companies,<sup>65</sup> and that these benefits improve over

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<sup>61</sup> See, e.g., Douglas Kruse & Joseph Blasi, *Employee Ownership, Employee Attitudes, and Firm Performance* (Nat'l Bureau of Econ. Research, Working Paper No. 5277, 1995).

<sup>62</sup> LOGUE & YATES, *supra* note 62, at 47.

<sup>63</sup> *Id.* at 130.

<sup>64</sup> A study by the Department of Labor in 1995 indicated that over a ten years period only 0.8% of ESOP plans defaulted and less than 1% of ESOPs companies went into bankruptcy. Kruse & Blasi, *supra* note 61, at 19–20. In the last recession, ESOPs were four times less likely to cut employment. Cory Rosen, *The Impact of Employee Ownership and ESOPs on Layoffs and the Costs of Unemployment to the Federal Government*, NAT'L CTR. FOR EMP. OWNERSHIP (July 16, 2015), <https://www.nceo.org/observations-employee-ownership/c/impact-employee-ownership-esops-layof-fs-costs-unemployment-federal-government> [<https://perma.cc/H8GY-V5K2>].

<sup>65</sup> SARAH MAVRINAC & NELL JONES, U.S. DEPT OF LAB., *THE FINANCIAL AND NON-FINANCIAL RETURNS TO INNOVATIVE WORKPLACE PRACTICES: A CRITICAL REVIEW* (1994); Saeyoung Chang, *Employee Stock Ownership Plans and Shareholder Wealth: An Empirical Investigation*, 19 FIN. MGMT. 48 (1990).

time.<sup>66</sup> The most active ESOP researchers have been Joseph Blasi and Douglas Kruse who regularly update their research showing two to three percent increases in ESOP profitability relative to their corporate cohort.<sup>67</sup> Many of the new ESOP organizations founded in the 1980s sponsor this research,<sup>68</sup> and it has also been promoted by the state agencies created to evaluate the impact of ESOP incentives.<sup>69</sup> A recent Ernst & Young study, for example, claims that S-ESOPs, in particular, outperformed the S&P 500 by sixty-two percent between 2002 and 2015.<sup>70</sup>

More challenging for ESOPs has been isolating which of the specific mechanisms theorized to contribute to ESOP successes are causally related to these numbers. Several dissertation-length case studies have attempted to establish this qualitatively, though the results are recurrently inconsistent.<sup>71</sup> For ESOP proponents, this lack of causal clarity ever-lurks behind their more confident econometric conclusions.

However, with equal vigor a steady and growing backlash against ESOPs emerged in parallel with studies advancing their positive attributes.<sup>72</sup> Few of these studies directly attacked ESOPs by attempting to demonstrate the poor economic performance of companies with ESOPs. Instead, the primary thrust of these critiques stemmed from the unintended uses of ESOPs and their mismatched regulation under ERISA.

Critics argued that the significant tax incentives provided ESOPs led them to be enacted not as tools of worker empowerment, but as instruments for other corporate interests. Of highest profile were the manipulation of the tax-advantaged nature of ESOPs loans as a stop-gap

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<sup>66</sup> See, e.g., Raymond Lancaster, *ESOP Accounts, Age and Seniority: Effect on Work Related Behavior at Four Small Companies* (May 2004) (unpublished Executive Doctor of Management dissertation, Case Western University) (on file with the Case Western Reserve Library system).

<sup>67</sup> *SHARED CAPITALISM AT WORK* (Douglas Kruse, Richard Freeman & Joseph Blasi eds., 2011).

<sup>68</sup> Steven F. Freeman, *Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience* (Univ. of Pa. Organizational Dynamics, Working Paper No. 07-01, 2007).

<sup>69</sup> Peter Kardas et al., *Wealth and Income Consequences of Employee Ownership: A Comparative Study from Washington State*, 10 J. EMP. OWNERSHIP L. & FIN. 3 (1998).

<sup>70</sup> ERNST & YOUNG, *CONTRIBUTIONS OF ESOPs TO PARTICIPANTS' RETIREMENT SECURITY* (2015).

<sup>71</sup> Compare Fanmin Kong, *The Effects of Profit Sharing Plans and ESOPs on Firm Employment Fluctuations* (Aug. 2001) (unpublished Ph.D. thesis, University of Minnesota) (on file with the University of Minnesota Library system) with Peter B. Thompson, *Leader Values, the Structure of Employee Stock Ownership Plans, and Organizational Outcomes*, (2003) (unpublished Ph.D. dissertation, University of Illinois) (on file with the University of Illinois Library system).

<sup>72</sup> See, e.g., 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 (1997); Myron S. Scholes & Mark A. Wolfson, *Employee Stock Ownership Plans and Corporate Restructuring: Myths and Realities*, 19 FIN. MGMT. 12 (1990).

to recapitalize and stave off bankruptcies and other shutdown scenarios.<sup>73</sup> Others argued that ESOPs were in fact giveaways to existing owners who see them simply as estate planning tools to avoid taxation,<sup>74</sup> which was an open tactic by private ESOP consultants.<sup>75</sup> Another abusive tactic highlighted by this scholarship is the use of ESOPs as anti-takeover devices, where the formation of the ESOP instantly creates both risk-adverse owners in employees and an ESOP trustee appointed by current management.<sup>76</sup> This tactic gained a great deal of attention during the attempted takeover of Polaroid in 1989.<sup>77</sup>

Yet, the most heated critique of ESOPs has been the how they affect workers' economic diversification.<sup>78</sup> These critiques argue that allowing ESOPs to be regulated as retirement vehicles while exempted from ERISA's general duty of diversification, especially without direct worker control, compromises workers' long-term interests.<sup>79</sup> Moreover, this risk is exponentially acute when corporate stock prices are falling.<sup>80</sup> The most famous instance where this risk was demonstrated was the decision in *Summers v. State Street Bank* when the employees of United Airlines sued their ESOP trustee for not selling off stock during United's turn to bankruptcy in 2002. When Judge Richard Posner finally decided the case for the Seventh Circuit in 2006, he cited generally pro-employee ownership legal scholar Brett McDonnell, as well as Kruse and Blasi, but ultimately asserted that "[t]he time may have come to rethink the concept of an ESOP, a seemingly inefficient method

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<sup>73</sup> LOGUE & YATES, *supra* note 62, at 129.

<sup>74</sup> *Employee Stock Ownership Trusts: Tax Advantages for Estate Planning in Close Corporations*, 84 YALE L.J. 1519 (1975).

<sup>75</sup> Frank P. VanderPloeg & William C. Weinsheimer, *Why Pay Estate Tax When an ESOP Will Do It for You*, 10 PROBATE NOTES 132 (1984). The NCEO also promotes the advantages of contributions to ESOPs as charitable donations. *The Virtues of Using ESOPs with Charitable Contributions*, NAT'L CTR. EMP. OWNERSHIP, <https://www.nceo.org/articles/esops-charitable-contributions> [<https://perma.cc/2NGL-QYR8>].

<sup>76</sup> Peter J. Walsh, Jr., *The ESOP as an Anti-Takeover Defense*, 8 DEL. LAW. 39 (1990); Eric A. Grannis, *Problem of Mixed Motives: Applying Unocal to Defensive ESOPs*, 92 COLUM. L. REV. 851 (1992).

<sup>77</sup> See Robert F. Bruner & E. Richard Brownlee II, *Leveraged ESOPs, Wealth Transfers, and "Shareholder Neutrality": The Case of Polaroid*, 19 FIN. MGMT. 59 (1990).

<sup>78</sup> E.g., Michael D. Savage, *The Attack on Proposed ESOP Regulations: A Battle Won at the Expense of the War?*, 63 A.B.A. J. 716 (1977); William R. Levin, *The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan*, 95 YALE L.J. 148 (1985); Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363 (1990).

<sup>79</sup> Meredith L. Gray, Comment, *A Presumption Without Prudence: Replacing Moench v. Robertson with a Prudent "When in Doubt, Don't" Standard for ESOP and 401(k) Company Stock Fund Fiduciaries*, 2010 WIS. L. REV. 907.

<sup>80</sup> Kenneth Hayes, *Moench v. Robertson: When Must an ESOP Fiduciary Abandon a Sinking Ship?*, 49 RUTGERS L. REV. 1231 (1997).

of wealth accumulation by employees because of the under-diversification to which it conduces.”<sup>81</sup>

This under-diversification argument continued to gain steam during the general turn against employer stock in 401(k)s,<sup>82</sup> which emphasized the irrationalities stemming from exaggerated optimism, worker lock-in and the same endowment effects found in home ownership. These liabilities were notably on display during the collapse of Enron in 2001.<sup>83</sup> Following the financial crisis beginning in 2007, more stories emerged of ESOP trust valuations going to zero.<sup>84</sup> Three years after being named the ESOP Association’s Public Company of the Year, Procter & Gamble witnessed a ninety-two percent decrease in the value of its employee’s retirement benefits.<sup>85</sup>

As a result of these critiques and the recurrence of financial crises, much of the ESOP enabling federal and state legislation of the 1980s has lapsed, including specific interventions to limit abusive uses to reduce tax expenditures.<sup>86</sup> The most significant change was the elimination of the roll-over provision for original corporate owners found in the 1989 Omnibus Budget Reconciliation Act, essentially eliminating the use of ESOPs as a privileged method for avoiding estate taxation.<sup>87</sup> After the removal of this provision, the number of ESOPs in the U.S. has remained relatively steady. And while ESOP trustees have avoided losing their ERISA exemption, ESOPs continue to face increased regulation as part of the general limits on retirement investments following the Pension Protection Act of 2006.

This back and forth of legislative support was repeated in microcosm when in 1998 Congress allowed S Corporations to form ESOPs, along with a tax exemption for corporate earnings proportional to the ESOPs ownership of corporate stock.<sup>88</sup> Spurred by the existing pattern

<sup>81</sup> *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1249 (2007).

<sup>82</sup> Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(K) Plans*, 14 ELDER L.J. 1, 18 (2006).

<sup>83</sup> David Millon, *Enron and the Dark Side of Worker Ownership*, 1 SEATTLE J. SOC. JUST. 113 (2002).

<sup>84</sup> Sean M. Anderson, *Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help*, 41 LOY. U. CHI. L.J. 1, 6–7 (2009).

<sup>85</sup> *P&G’s ESOP Lauded*, CIN. BUS. COURIER (May 16, 1997), <http://www.bizjournals.com/cincinnati/stories/1997/05/12/daily22.html> [<https://perma.cc/BPZ4-5HEU>].

<sup>86</sup> John Logue, *Thinking Globally, Acting Locally: Subnational Strategies to Promote Employee Ownership, Owners at Work* 4 (2001) (presented at Capital Ownership Group Conference, Washington, D.C.).

<sup>87</sup> See TODD SYNDER, CONG. RESEARCH SERV., RS21526, *EMPLOYEE STOCK OWNERSHIP PLANS (ESOPs): LEGISLATIVE HISTORY* (May 20, 2003).

<sup>88</sup> Michael S. Knoll, *Samuel Zell, the Chicago Tribune, and the Emergence of the S ESOP: Understanding the Tax Advantages and Disadvantages of S ESOPs*, 70 OHIO ST. L.J. 519, 520–21

of concentrated S corporation ownership, S-ESOPs proliferated and the trade association ESCA, Employee-Owned S Corporations of America, quickly formed and came to claim 190,000 members. In 2005, Congress modified these regulations to limit the ability of small, closely held businesses to form S-ESOPs—again bringing an end to their expansion.<sup>89</sup>

## B. The Limitations of Regulatory Re-invention

The debate over ESOPs over the last forty years has reached a steady tempo where these positive and critical positions are periodically recycled in new surveys and articles. Starting in the late 1970s, proponents have addressed critiques and re-stated the need for Congressional action to foster employee ownership.<sup>90</sup> They cite surveys that very few ESOPs were created under conditions of near-bankruptcy or duress.<sup>91</sup> They also point out that criticisms of ESOP formation as a takeover defense forget that high priced takeover offerings can be a great boon to employee owners just as they would be to any other type of owner and that workers' longer time horizons better equip them to resist short-term value grabs by self-interested managers.<sup>92</sup> Proponents have also exerted a great deal of effort to demonstrate that few ESOP participants are under-diversified in comparison to industry norms, and that most ESOP companies provide a secondary retirement plan for workers.<sup>93</sup> Some have argued that what diversification issues remains can be solved through insurance for long-term market downswings.<sup>94</sup> Most ESOP proponents lament the stultifying effect of removing the ESOP rollover benefit for owners, and often cite Logue and Yates's longitudinal study of ESOPs in Ohio to claim that most ESOPs are formed not

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(2009).

<sup>89</sup> Beckett Cantley, *Congress Giveth and Congress Taketh Away: The Slow Death of the SESOP*, 20 AKRON TAX J. 59, 72–74 (2005).

<sup>90</sup> See, e.g., Timothy Tomlinson, *Securities Regulation of Employee Stock Ownership Plans: A Comparison of SEC Policy and Congressional Intent*, 31 STAN. L. REV. 121 (1978).

<sup>91</sup> Less than two percent of ESOP were established under these conditions. THE ESOP ASSOCIATION, *supra* note 7.

<sup>92</sup> NICHOLAS V. GIANARIS, MODERN CAPITALISM: PRIVATIZATION, EMPLOYEE OWNERSHIP, AND INDUSTRIAL DEMOCRACY 127 (1996).

<sup>93</sup> THE ESOP ASSOCIATION, *supra* note 7. On average ESOP companies contribute seventy-five percent more to their workers total retirement plans than comparable companies. Loren Rogers, *ESOPs as Retirement Benefits: An Analysis of DOL Data*, THE MENKE GROUP (Fall 2010), <http://www.menke.com/blog/esops-as-retirement-benefits-an-analysis-of-dol-data/> [<https://perma.cc/458W-WKE3>]; see also *Research on Employee Ownership, Corporate Performance, and Employee Compensation*, <https://www.nceo.org/articles/research-employee-ownership-corporate-performance> [<https://perma.cc/JLX4-Y8X4>].

<sup>94</sup> Lauren E. Berson & Nicholas L. Cushing, *Safeguarding Employee Stock Ownership Plans: Insurance as Assurance*, 26 HOFSTRA LAB. & EMP. L. J. 539 (2008).

to draw in new capital or to improve departing owners' tax interests alone.<sup>95</sup>

Several times ESOP proponents have made arguments for the reform of ESOPs to address various criticisms.<sup>96</sup> California Republican House Member Dana Rohrabacher has been the most consistent proponent of ESOPs, and is considered one of the most politically conservative members of Congress. In 1999, Rohrabacher co-sponsored legislation with self-identified socialist Vermont Senator Bernie Sanders that would have established a new federal corporation type, the Employee Owned and Controlled Corporation—ninety percent employee owned and eligible for even more significant tax breaks.<sup>97</sup> Rohrabacher was also instrumental in getting ESOP-favorable proposals included in the 2004 American Job Creation Act,<sup>98</sup> and Sanders has continued to introduce legislation promoting ESOPs up through his recent run for the U.S. Presidency.<sup>99</sup>

Yet, this cycle of critique and promotion leaves sidelined the fundamental issue which challenges the role of ESOPs as an effective systemic tool for spreading employee ownership as a genuine form of economic republicanism.<sup>100</sup> The theory that ownership of company shares empowers workers requires, in an era of growing director primacy, a strong assumption of intra-corporate shareholder democracy and that such participation is a meaningful restriction on labor subordination by management or other owners.<sup>101</sup> The relative success of the ESOP as an ad hoc regulatory innovation required it to significantly compromise both of these objectives by making direct voting rights of ESOP trust shares optional and allowing existing managers to appoint ESOP trustees. Critically, the initiation of ESOPs does not itself require employee consent.<sup>102</sup>

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<sup>95</sup> Logue and Yate's study of Ohio's 270 then active ESOPs set the split at 70/30 for philosophical motivations for implementing an ESOP. LOGUE & YATES, *supra* note 62, at 129.

<sup>96</sup> Kieron Swaine, *Public Policy and Employee Ownership: Designing Economic Institutions for a Good Society*, 26 POL'Y SCI. 289, 309–310 (1993).

<sup>97</sup> LOGUE & YATES, *supra* note 62, at 171.

<sup>98</sup> *Member Proposals for Improvements to the U.S. Tax System: Hearing Before the Subcomm. on Tax Policy of the Comm. on Ways and Means*, 114th Cong. 44 (2016).

<sup>99</sup> *Senator Sanders Introduces Bill to Support Employee Ownership*, VT. EMP. OWNERSHIP CTR., <http://www.veoc.org/node/68> [<https://perma.cc/5S3JN-GS6K>].

<sup>100</sup> Brett McDonnell, *ESOPs' Failures: Fiduciary Duties When Managers of Employee-Owned Companies Vote to Entrench Themselves*, 2000 COLUM. BUS. L. REV. 199, 260 (2000).

<sup>101</sup> See Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn toward Board Primacy*, 51 WM. & MARY L. REV. 2071 (2010).

<sup>102</sup> Michael E. Murphy, *The ESOP at Thirty: A Democratic Perspective*, 41 WILLAMETTE L. REV. 655, 663–64 (2005).

In addition, there is still no formal bar to a corporation taking out a large ESOP loan, making large pre-tax repayments, and then canceling the program. While few active ESOPs take this form, ninety percent of all tax benefits for ESOPs, and thus decreases in government revenue, are attributable to ESOP plans that have paid off very little of their loan debt as well as represent low levels of overall employee ownership.<sup>103</sup> The fact that “employee” for ESOP purposes can include all levels of management leads to the same cynicism that ESOPs loans are simply management self-lending, where ESOP participation is limited to select employees who can manipulate stock prices.<sup>104</sup> And the rise and fall of the S-ESOP rested on almost completely on a formal, but empty, re-categorization of existing owners as workers.

In practice, this disconnect between ownership and actual control/participation in workplace governance strikes at the very heart of the republican linkage of private and public virtue. Even for majority owned ESOP corporations, only a small majority pass on voting rights to individual employees, and even fewer in minority-owned firms.<sup>105</sup> While ESOP voting rights are not necessarily withheld from workers, all aspects of ESOPs are still determined by managerial discretion. For example, one of the most heralded early ESOPs was that of Science Applications International Corporation (SAIC). Founder Richard Beyster funded a great deal of ESOP promotion and scholarship, but subsequent reporting revealed that Beyster used managerial power over the ESOP to enforce a highly authoritarian governance culture at SAIC.<sup>106</sup> Moreover, managers quickly took the company public after Beyster’s forced retirement.

These anti-participatory dynamics have helped reinforce existing union mistrust of ESOPs as variations of company unionism. Tellingly, only a small fraction of ESOPs exist at union-friendly workplaces.<sup>107</sup> Studies of labor disputes post-ESOP formation have shown no decline in their frequency, if a general shift to holdouts rather than strikes.<sup>108</sup>

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<sup>103</sup> LOGUE & YATES, *supra* note 62, at 170.

<sup>104</sup> GIANARIS, *supra* note 92, at xvii.

<sup>105</sup> LOGUE & YATES, *supra* note 62, at 32.

<sup>106</sup> Donald L. Barlett & James B. Steele, *Washington’s \$8 Billion Shadow*, VANITY FAIR (Mar. 2007), <http://www.vanityfair.com/news/2007/03/spyagency200703> [<https://perma.cc/T2N4-EEQ2>].

<sup>107</sup> Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”*, 67 *FORDHAM L. REV.* 957, 964–65 (1998); Dan Bell, *Worker-Owners and Unions: Why Can’t We Just Get Along?*, *DOLLARS & SENSE* (Oct. 6, 2006), <http://www.dollarsandsense.org/archives/2006/09/06bell.html> [<https://perma.cc/N9MC-Z58M>].

<sup>108</sup> Peter Cramton et al., *ESOP Fables: The Impact of Employee Stock Ownership Plans on Labor Disputes* (Federal Reserve of New York Working Paper No. 347, 2007).

And to the extent that unions can effectively bargain over ESOP contributions,<sup>109</sup> such bargaining would then truly render them simply risky wage substitutes.

Here again the costs of ESOPs regulation under ERISA rears its ugly head. While some proponents have argued for requiring majority voting for trustee appointments, or even trustee decisions,<sup>110</sup> such reform, especially as it implicates unallocated ESOP shares, would again conflict with the fiduciary model required by ERISA.<sup>111</sup> This continued disconnect between ESOP formation and worker empowerment re-frames the diversification critique not simply in terms of general fiduciary principles but also in how employees bear the brunt of the risks and costs of ESOP formation and maintenance.

The well-documented failure of Weirton Steel's ESOP—which was the then largest ESOP in the U.S. when formed in 1984—replayed all the possible downsides of ESOP's current governance structure.<sup>112</sup> The employees collectively agreed to significant wage cuts to pay McKinsey & Co. \$500,000 to study the possibility of ESOP formation, and then even more to implement it. While initially buoyed by an immediate uptick in international steel markets, Weirton faced repeated conflicts between workers and management in which the ESOP trustee steadfastly backed management decisions. Though outside expertise had been used to set up the ESOP, it was left to the workers themselves to try and discern how to navigate life as ESOP employees amid even greater managerial entrenchment post-ESOP formation.<sup>113</sup> And the experience of Weirton Steel has been replicated in other firms, often representing, like United Airlines, the largest ESOP projects.<sup>114</sup>

In fact, the prominent role of private ESOP consultants and entrepreneurs as funders of ESOP research and lobbyists for continued federal and state subsidization is necessarily predicated on their own self-interest. While some ESOP consultants may be true believers in employee ownership, their existence as repeat players in the market for

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<sup>109</sup> James D. Hutchinson, *Employee Stock Ownership Plans: A New Tool in the Collective Bargaining Inventory*, 26 AM. U. L. REV. 536 (1977).

<sup>110</sup> Olson called this a "co-operative ESOP." Deborah Groban Olson, *Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPS, Stock Purchases, and Co-operatives*, 1982 WIS. L. REV. 729, 818–22 (1982).

<sup>111</sup> Matthew M. O'Toole, *The Disproportionate Effects of an ESOP's Proportional Voting*, 85 NW. U. L. REV. 824 (1991).

<sup>112</sup> See generally CHARLES S. VARANO, FORCED CHOICES: CLASS, COMMUNITY, AND WORKER OWNERSHIP (1999); C. JOHN KRUZESKI, WESAP: WEIRTON STEEL EMPLOYEE STOCK ANNIHILATION PLAN (2005).

<sup>113</sup> McDonnell, *supra* note 100.

<sup>114</sup> John D. Russell et al., *Stained Steel: ESOPs, Meta-Power, and the Ironies of Corporate Democracy*, 27 SYMBOLIC INTERACTION 383 (2004).

ESOP valuation and formation creates conflicts of interest for a process that is still almost universally management instigated.<sup>115</sup> In 2001, John Logue approximated that private sector ESOP practitioners outnumbered public and non-profit workers by a 50:1 ratio.<sup>116</sup> The U.S. Department of Justice has been increasingly aggressive in investigating and prosecuting management manipulations in ESOP formations, following the larger trend of monitoring how workers' capital can often be used against their collective self-interests.<sup>117</sup>

On a broader scale, even with the significant tax subsidies they have enjoyed, the impact of ESOPs as a social policy has been limited. In Robert Hockett's 2007 study of stock ownership plans he noted that "how few Americans hold substantial, material-independence-confering or participation-fostering stakes in firms" which would validate the ideal of an ownership society.<sup>118</sup> The reality of ESOPs as a regulatory re-invention may have simply created a gap in the closed system of corporate finance that Kruse and Blasi's claim "recycles credit until wealth grows bigger and bigger and rewards existing owners."<sup>119</sup>

Simply put, ESOPs cannot impact patterns of capital accumulation outside of stock ownership. One has to remember that only ten percent of all economic wealth, even in a developed country such as the United States, is held in stocks.<sup>120</sup> While it has been demonstrated that ESOPs are rarely pure wage substitutes, the efficiency and income gains reported by pro-ESOP studies are still far from revolutionary, as long-time ESOP supporter Corey Rosen admits: "[i]f all ESOPs are expected to do is make employees more money, the case for them could become very hard to make."<sup>121</sup>

Beyond the general structural limits of ESOPs to achieve their loftiest ideological goals, there is also a hereto unexamined possibility that ESOPs are in fact inequality exacerbating rather than inequality reducing. The inability for the rare focused case study to establish exactly how ESOPs enhance workplace dynamics reflects the reality that the vast majority of ESOP studies likely suffer from quite significant endogeneity issues. This goes far beyond controlling for the impact of tax subsidies themselves, to the fact that most ESOP plans, especially if

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<sup>115</sup> Sean M. Anderson, *supra* note 84, at 18.

<sup>116</sup> Logue, *supra*, note 86, at 4.

<sup>117</sup> David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2152 (2014).

<sup>118</sup> Hockett, *supra* note 39.

<sup>119</sup> Hansmann, *supra* note 4, at 1779.

<sup>120</sup> COREY ROSEN, EMPLOYEE OWNERSHIP: PERFORMANCE, PROSPECTS AND PROMISE, *in* UNDERSTANDING EMPLOYEE OWNERSHIP 24 (Cory Rosen & Karen Young eds., 1991).

<sup>121</sup> *Id.* at 41.

enacted for ideological reasons, exist at companies that are already likely to have progressive workplace policies and atypical compensation patterns.<sup>122</sup>

Thus, it may be true that most ESOPs exist in companies where employees have more robust and diversified retirement options than companies of comparable market positions.<sup>123</sup> But that does not mean that these employees would lose these comparatively generous benefits without an ESOP, beyond what one would expect for their level of tax subsidization. Similarly, the low termination rate of existing ESOPs in part reflects that fact that many ESOPs are initiated not when companies are distressed but when they have already achieved a track record of success. The previously cited performance gaps between S-ESOPs and other S Corporations are so pronounced they cannot be explained simply by enhanced productivity or by their survivability during the recent recession.<sup>124</sup> ESOPs succeed not because they impel average or low-performing companies to succeed, but are at best expressions of companies that are already doing well or are already committed to participatory workplace practices.

This type of endogeneity concern exists throughout most of the pro-ESOP scholarship. One of the earliest broad surveys of ESOPs by the General Accounting Office in 1987 claimed the ESOPs were not themselves meaningful without a “supportive” corporate culture,<sup>125</sup> and the acquisition of majority ownership status could not be linked to new or increased growth as ESOPs age.<sup>126</sup> Subsequent studies have reiterated that ownership alone cannot improve worker motivation without a continued commitment to participatory programming.<sup>127</sup> In contrast, variations in worker participation, distinct from ownership, ultimately explain a great deal of whatever comparative profitability companies with ESOPs enjoy.<sup>128</sup> Thus, the presence of ESOPs at successful companies

<sup>122</sup> Joseph Blasi et al., *Do Broad-based Employee Ownership, Profit Sharing and Stock Options Help the Best Firms Do Even Better?*, 54 BRITISH J. INDUS. REL. 55 (2016).

<sup>123</sup> See Joseph Blasi et al., *Risk and Lack of Diversification under Employee Ownership* (Nat'l Bureau of Econ. Research, Working Paper No. 14229, 2008).

<sup>124</sup> See Phillip Swagel & Robert Carroll, *Resilience and Retirement Security: Performance of S-ESOP Firms in the Recession*, THE MENKE GROUP (March 10, 2010), [http://www.menke.com/archives\\_articles/resilience-retirement-security.pdf?x34404](http://www.menke.com/archives_articles/resilience-retirement-security.pdf?x34404) [<https://perma.cc/4U5M-NP9B>].

<sup>125</sup> U.S. GENERAL ACCOUNTING OFFICE, PEMD-87-8, EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP (1986).

<sup>126</sup> Andrew J. Torgove, *Employee Ownership, Competitive Share Markets, Control Premia and the Performance of the Firm* (May 1999) (unpublished Ph.D. dissertation, The New School) (on file with the New School Library system).

<sup>127</sup> See Douglas Kruse et al., *Motivating Employee-Owners in ESOP Firms*, in EMPLOYEE PARTICIPATION, FIRM PERFORMANCE AND SURVIVAL (Virginié Perotin & Andrew Robinson eds., 2004).

<sup>128</sup> LOGUE & YATES, *supra* note 62, at 101.

seems more driven by these pre-existing commitments than the existence of ESOPs themselves. What this ultimately means is that ESOP tax subsidies are only serving to further benefit those who are already at the top of the labor market, and less likely to suffer the worst effects of workplace subordination. The end result of which can only be inequality exacerbating.

What then of companies without such commitments, and without stable pre-existing market success? Perhaps the most damning demonstration of the pitfalls of the ESOP is the rare ethnographic study made by Carole Bruce.<sup>129</sup> Bruce carried out a longitudinal study of an ESOP that would at the outset have appeared to follow the Kelsonian ideal. An agricultural and horticultural company, Arboretum had an existing owner who chose to sell the company to its workers through an ESOP (to reinvest in other ventures). Arboretum's ESOP even included the less common right of workers to partial board representation. However, Bruce reveals how little impact workers had on Arboretum's governance, and how formal ownership did little to disrupt the broad range of direct and indirect status differentiations among employees and managers. Workers were most disappointed by the simple fact that they were not able to access the scheduling flexibility they had originally expected.<sup>130</sup> Though ESOP consultants had been brought in during the company's initial conversion, little to no post-transition training was provided for existing or new hires.<sup>131</sup>

While Arboretum had been successful in the past, it had run tight profit margins now undermined by new debt obligations and the need to payoff future retirements. By contrast, the former owner of Arboretum not only stayed on as the well-compensated chairman of the board, but also continued to demand obedience to his vision for the company and routinely excluded employee representatives from key strategic meetings. This example adds an even more cynical edge to the generally low level of participation in ESOP governance by rank and file employees.<sup>132</sup>

In practice, the transition to the ESOP at Arboretum generated even greater feelings of insecurity and subordination for employees.<sup>133</sup> The size of the ESOP loan hung over the workers' heads, and repayment

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<sup>129</sup> Carole F. Bruce, *Building Workplace Democracy in America: Employee-Owned Industry Models* (2003) (unpublished Ph.D. dissertation, Fielding Graduate Institute) (on file with the Fielding Graduate Institute Library system).

<sup>130</sup> *Id.* at 146–53.

<sup>131</sup> *Id.* at 171–82.

<sup>132</sup> Corey Rosen, *Employee Ownership: Performance, Prospects and Promise*, in *UNDERSTANDING EMPLOYEE OWNERSHIP* 1, 27 (Cory Rosen & Karen Young eds., 1991).

<sup>133</sup> Bruce, *supra* note 129, at 198.

obligations, however comparatively subsidized, reduced investment in the company and contributed to an ever-present sense of economic precarity.<sup>134</sup> In this case, the company had provided no previous retirement benefits, and the ESOP became the workers' only retirement vehicle. Even with some formal participatory powers, employees felt that managers came to wield even greater power over them as their sense of responsibility for corporate performance—without real participation in decision-making—was deployed vigorously as a new disciplinary tool.

While not necessarily a precarious workplace pre-ESOP, this case study constellates the endogeneity issues faced in evaluating ESOPs as worthy objects of public subsidy.<sup>135</sup> Here we see the flipside of ESOPs political attractiveness as an intrasystemic reform—its apoliticism appeals to those who are already winners within the current system and who are naturally drawn to voluntary private mechanisms that do not challenge the terms of their pre-existing success. For already successful companies, the impact of the ESOP can be benign, but even here ESOPs are counter-productive in the search for pre-tax structures that ease economic inequality,<sup>136</sup> much less realize the transformative ideals of economic republicanism.

### C. The ESOP Conundrum as the EO Conundrum

The limitations of the ESOP as an innovation to promote economic republicanism, if not simply material equality, is centrally derived from its characteristics that at first blush appear to be so alluring. It would seem to cut through otherwise entrenched political divisions while offering up the possibility of recapturing a lost human element in economic production without broad regulatory upheaval, much less social revolution. Louis Kelso's legal ingenuity in crafting the ESOP reflected his own general commitment to capitalism and voluntary reform. But this ingenuity came at a cost, as it generated a legal form that ultimately led to more problems and abuses than it transformed any particular workplace or assuaged growing inequality.

By opting for a gradualist reform strategy that completely divorced worker participation from ownership, Kelso's ESOP came to acutely evidence what will be called the "employee ownership conundrum." Proponents of employee ownership, in and outside of the specific ESOP context, have recurrently wrestled with the tensions between gradualist and systemic change as well as linking ownership to genuine workplace

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<sup>134</sup> *Id.*

<sup>135</sup> Stanley R. Pietruska III, *ESOPs: Corporate Advantages Put Taxpayers at a Disadvantage* 23 W. ST. U. L. REV. 53 (1995).

<sup>136</sup> Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. R. 69 (2015).

participation. Yet, the ideological appeal of employee ownership finds adherents on almost every continent, as there have even been attempts to spread ESOPs across the globe.<sup>137</sup> The EO conundrum thus functionally expresses itself in questions over why employee ownership has not become more prominent in modern economies, and how/if its episodic successes can be better generalized.

Moving from debates over ESOPs to employee ownership more generally is often a muddied process. EO scholarship, especially in the U.S. where ESOPs consume much of its attention, often works with a great deal of definitional slippage when discussing employee ownership. Sometimes “employee ownership” is cited as the general inquiry when it is in fact purely ESOPs that are at question. Other studies will include non-ESOP stock purchase plans, and some will include full worker cooperatives. It is a persistent enough issue that general cautions are still made within the scholarship to clearly delineate even basic issues such as minority and majority share ownership in different forms of EO.<sup>138</sup>

Some analytical overlap between ESOP and EO scholarship is natural, and it is possible to find in critiques of employee ownership the same diversification and risk-aversion arguments leveled against ESOPs.<sup>139</sup> Even without facing tax-subsidy or abusive use critiques, the general EO scholarship tends to elide direct confrontation with issues of inequality and workplace subordination. Instead it focuses on the general Pareto efficiency of employee ownership as a governance ideal, with proponents again asserting its performative benefits and critics taking its lack of existing prominence as the natural result of a market-driven revealed preferences.

Perhaps the oddest thing about the structure of the general EO debate is its persistently strong preference for solely quantitative evaluation amid intense disagreement over causal mechanisms. The result of this imbalance is a constant statistical battle that has difficulty reaching persuasive claims about the underlying workplace mechanisms of either EO success or failure. This state of affairs is driven in part by the dominance of economists in EO debates, but it is still striking as the empirical baseline of EO studies has remained clear for some time now. Companies with varying levels of EO have rarely been demonstrated to

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<sup>137</sup> Jedidiah Kroncke, *Comparative Employee Ownership: The Regulatory Ecologies of Economic Republicanism* (forthcoming 2018) (on file with author).

<sup>138</sup> See, e.g., Eric Kaarsemaker et al., *Employee Share Ownership Plans: A Review*, in OXFORD HANDBOOK OF PARTICIPATION IN ORGANIZATIONS (Paul J. Gollan et al. eds., 2010).

<sup>139</sup> See, e.g., Samuel Bowles & Herbert Gintis, *Credit Market Imperfections and the Incidence of Worker-Owned Firms*, 45 METROECONOMICA 209 (1994).

perform less well than those without it.<sup>140</sup> Some studies may find neutral or statistically insignificant differences, but it is rare to find robustly negative results. Critics never point to specific company case studies where newly high EO levels led to performative degeneration or collapse. Instead, critics simply restate that EO promotion is unnecessary, assuming whatever levels exist are a “natural” equilibrium.<sup>141</sup> This is not an impasse that quantitative studies can overcome, as proponents can only make generalized arguments of EO superiority to which critics’ survivalist position can easily accommodate simply through a call for inaction.

If we return to the endogeneity issues discussed in relationship to ESOP companies, this static state of argumentation is well-represented in the difficulty that pro-ESOP and pro-EO scholars, in the United States and abroad, have had in differentiating the effects of share ownership from the impacts of non-ownership but pro-worker participation policies.<sup>142</sup> A company can create any number of programs that empower workers’ in any range of governance issues without their basis being in an ownership right. ESOPs are particularly vulnerable to this analytic bind as actual ownership-based participation is routinely limited.

In Judge Posner’s aforementioned ruling in *State Street Bank*, he cited the research of Blasi and Kruse exactly to this effect.<sup>143</sup> He was not unconvinced of the merit of ESOPs simply by their misfit under ERISA, but by the lack of persuasive evidence that ESOP formation led to the benefits that justified its preferential tax treatment.<sup>144</sup> Blasi and Kruse responded to Posner’s citation by claiming that their empirical work had advanced since the specific study Posner cited, and that they could argue more confidently that “the interaction of employee ownership and other forms of shared capitalism with other corporate policies is associated with positive workplace performance.”<sup>145</sup> But an argument

<sup>140</sup> James C. Sesil, *Sharing Ownership via Employee Stock Ownership*, in OWNERSHIP AND GOVERNANCE OF ENTERPRISES 96 (Laixiang Sun ed., 2003).

<sup>141</sup> See, e.g., Berson & Cushing, *supra* note 94.

<sup>142</sup> OXERA CONSULTING, TAX-ADVANTAGED EMPLOYEE SHARE SCHEMES: ANALYSIS OF PRODUCTIVITY EFFECTS (2007), <https://www.oxera.com/getmedia/6cd32d14-e6d5-44cb-b84b-5522582e38c9/Tax-advantaged-employee-share-schemes%E2%80%9494overview.pdf.aspx> [<https://perma.cc/UE2Y-UB8C>]; Ernest H. O’Boyle et al., *Employee Ownership and Firm Performance: A Meta-Analysis*, 26 HUM. RESOURCE MGMT. J. 425 (2016).

<sup>143</sup> *Summers v. State Street Bank Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006).

<sup>144</sup> *Id.*

<sup>145</sup> Joseph Blasi & Douglas Kruse, *The Court’s Views on Employee Ownership Research*, OHIO EMP. OWNERSHIP CTR. [http://www.oeockent.org/download/judge\\_posner’s\\_decision\\_and\\_responses/\\_oaw-posnerresplaskruse.pdf](http://www.oeockent.org/download/judge_posner’s_decision_and_responses/_oaw-posnerresplaskruse.pdf) [<https://perma.cc/PJX7-6S43>]; see also Jeffrey N. Gordon, *The United Airline Bankruptcy and the Future of Employee Ownership*, 7 EMPLOYEE RTS. & EMPLOYMENT POL. J. 227 (2003).

for interactivity is still causally murky and only recapitulates the endogeneity problem—once again compounded by definitional slippage in distinguishing forms and levels of employee ownership.

The EO scholarship outside of ESOPs and outside of the U.S. similarly has difficulty finding a specific causal role for EO beyond the measurable impact of pro-participatory programs.<sup>146</sup> A recent survey of European companies shows that companies with EO do better by cohort comparison, but this can only be traced to the presence of an EO program and no effect could be found between levels of EO, or improving following increasing levels of EO within the same company over time.<sup>147</sup> Another recent, more global survey by Blasi and Kruse, joined by their frequent co-author Richard Freeman, again points to the presence of EO policies at worker-friendly companies, but cannot specifically isolate the independent effect of share ownership.<sup>148</sup> While such complementary effects may still be proven at a later date, the fact remains that actual corporate decision making at most EO firms is indistinguishable from non-EO companies,<sup>149</sup> and that most of the firms analyzed were not low performers to begin with. The endogeneity issue is reinforced even further by studies that show that EO programs are found in companies within highly competitive labor markets in which employees are already comparatively empowered to bargain for varied forms of compensation.<sup>150</sup>

The same pattern repeats itself when general productivity claims are specified into arenas such as corporate innovation and human capital development.<sup>151</sup> Furthermore, studies have shown countervailing results on discrete workplace practices where ESOPs exhibit patterns

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<sup>146</sup> JONATHAN MICHIE ET AL., *EMPLOYEE OWNERSHIP, MOTIVATION AND PRODUCTIVITY* (2002), <http://www.efesonline.org/LIBRARY/Employees%20Direct%20Report.qxd.pdf> [<https://perma.cc/ZB B2-65F5>].

<sup>147</sup> See Ansgar Richter & Susanne Schrader, *Levels of Employee Share Ownership and the Performance of Listed Companies in Europe*, 54 BRIT. J. INDUS. REL. 1 (2016).

<sup>148</sup> Joseph Blasi et al., *Do Broad-based Employee Ownership, Profit Sharing and Stock Options Help the Best Firms Do Even Better?*, 54 BRIT. J. INDUS. REL. 55 (2016).

<sup>149</sup> James Sesil et al., *Sharing Ownership via Employee Stock Ownership*, in OWNERSHIP AND GOVERNANCE OF ENTERPRISES 96, 115 (Laixiang Sun ed., 2003).

<sup>150</sup> E. HAN KIM & PAIGE OUMET, *EMPLOYEE CAPITALISM OR CORPORATE SOCIALISM? BROAD-BASED EMPLOYEE STOCK OWNERSHIP* (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1529631](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529631) [<https://perma.cc/5MC8-WD2W>].

<sup>151</sup> Erika E. Harden et al., *Who Has a Better Idea? Innovation, Shared Capitalism and Human Resources Policies*, in SHARED CAPITALISM AT WORK 225, 248–50 (Douglas L. Kruse et al. eds., 2010); Andrew Pendleton & Andrew Robinson, *Employee Share Ownership and Human Capital Development: Complementarity in Theory and Practice*, 32 ECON. & INDUS. DEMOCRACY 439 (2011).

of managerial entrenchment.<sup>152</sup> This type of complementary relationship also has been advanced for the presence of unions,<sup>153</sup> but again it is hard to distinguish this effect from unions' separate impact on any pro-employee policy, such as profit sharing.<sup>154</sup>

This often empirically orthogonal relationship between ownership and participation is what leaves pro-EO positions so vulnerable to survivalist arguments that recur to their own theories of the more general question of employee motivation and compensation.<sup>155</sup> Survivalist critiques do not need to directly undermine arguments about the performance of companies with EO, or develop general governance models that wholly contradict theoretical linkages between EO and discrete employee behaviors. For example, studies have shown that EO companies generally suffer from less employee theft<sup>156</sup> and reduced absenteeism.<sup>157</sup> One can admit this as true without then jumping to a wholesale endorsement of EO, especially if the size effects are small.

The classic survivalist retort to ESOPs is the "1/N" problem commonly discussed in debates over the impact of employee stock in 401(k) accounts of large companies. Here the greater the number of employees, the lower the individual incentive for an employee to engage in self-sacrificing behavior.<sup>158</sup> This general model better explains studies that show no independent productivity effects for stock option plans,<sup>159</sup> and is further buttressed by the whole of the academic literature on executive compensation—whose most consistent empirical result is that the granting of stock options to high level managers, the exact actors most directly involved in corporate decision-making and not subject to the

<sup>152</sup> John Gamble, *Management Commitment of Innovation and ESOP Stock Concentration*, 15 J. OF BUS. VENTURING 433 (2000).

<sup>153</sup> Richard C. Hoffman et al., *MBC Ventures, Inc.: An ESOP with a Union Partner*, in SHARED ENTREPRENEURSHIP: A PATH TO ENGAGED EMPLOYEE OWNERSHIP 231 (Frank Shipper ed., 2014).

<sup>154</sup> Naercio Menezes-Filho et al., *Unions and the Economic Performance of Brazilian Establishments* 31 (Inter-American Development Bank, Research Network Working Paper #R-464 2001).

<sup>155</sup> Donald A. McGrath, *Human Resources: A Comparative Look at the Legal and Tax Environment for Motivating and Compensating People in the United States and Canada*, 16 CAN.-U.S. L.J. 125 (1990).

<sup>156</sup> Linden Spencer, *A Correlation Analysis Between Employee Theft and Employee Ownership* (2009) (unpublished Ph.D. dissertation, University of Phoenix) (on file with the University of Phoenix Library system).

<sup>157</sup> Sarah Brown et al., *Absenteeism and Employee Sharing: An Empirical Analysis Based on French Panel Data, 1981–1991*, 52 INDUS. & LAB. REL. REV. 234 (1999).

<sup>158</sup> Shlomo Benartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J. L. & ECON. 53 (2007).

<sup>159</sup> See, e.g., Derek C. Jones et al., *The Productivity Effects of Stock Option Schemes: Evidence from Finnish Panel Data*, 33 J. PRODUCTIVITY ANALYSIS 67 (2010).

same 1/N limitations, has no definitive impact on executive performance or profitability.<sup>160</sup>

Similarly, EO proponents focus on intracorporate monitoring costs of both employees and managers as one vector for improved productivity in EO companies.<sup>161</sup> This leads to better disclosure for all corporate stakeholders,<sup>162</sup> as well as reduced coordination costs.<sup>163</sup> Such assumptions render plausible the argument that EO stabilizes companies and improves firm survival over time.<sup>164</sup> Packaged together, such assumptions can be generalized into a theoretical model of EO superiority.<sup>165</sup> To varying degrees, critics concede these points, but, again, can use survivalist logic to argue that the relevant size effects are small or counterbalance by other costs associated with EO arrangements.<sup>166</sup>

The best example of the survivalist position is Henry Hansmann's now-classic critique of ESOPs, which he then developed into a general critique of employee ownership.<sup>167</sup> In justifying his position, Hansmann takes all pro-EO arguments seriously and does not deny their theoretical coherence or empirical validation. But he does offer what many have found to be the compelling explanation for why EO is not more extensive, and why EO-promotion is likely to fail: heterogeneity costs. Hansmann's central argument is that most employees do not have similar

<sup>160</sup> See Robert J. Jackson, Jr. & Colleen Honigsberg, *The Hidden Nature of Executive Retirement Pay*, 100 VA. L. REV. 479 (2014). It is also relevant that most of the regulatory reaction against stock options as a form of executive compensation has similarly impacted the functioning of share plans for all employees.

<sup>161</sup> Alejandro Suarez, *Employee Stock Ownership Plans: A Solution or a Hindrance to the Search for a Representative and Productive Style of Employee Ownership*, 2 BUS. L.J. 131 (1991); see also Sangsoo Park & Moon H. Song, *Employee Stock Ownership Plans*, 24 FIN. MGMT 52 (1995); John Peter Daley, *Employee Stock Ownership Incentives and Contracting Efficiency, with Evidence from Employee Stock Ownership Plan Adopters* (1999) (unpublished Ph.D. dissertation, University of Washington) (on file with the University of Washington Library system).

<sup>162</sup> Peter M. Hall, *Meta-Power, Social Organization, and the Shaping of Social Action*, 20 SYMBOLIC INTERACTION 397 (1997); Francesco Bova et al., *Employee Ownership and Firm Disclosure*, 32 CONTEMP. ACCT. RES. 639 (2015).

<sup>163</sup> Russell Yankwitt, *Buy Me Some Peanuts and Ownership: Major League Baseball and the Need for Employee Ownership*, 5 CORNELL J. L. & PUB. POL'Y. 401 (1996).

<sup>164</sup> Margaret M. Blair et al., *Employee Ownership: An Unstable Form or a Stabilizing Force, in THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION* 241 (Margaret M. Blair & Thomas A. Kochan eds., 2000).

<sup>165</sup> Chong-en Bai & Chenggang Xu, *Does Employee Ownership Improve Incentives for Efforts* (LSE STICERD Theoretical Economics Working Paper TE/01/413, 1996).

<sup>166</sup> Hansmann's pattern of acknowledgement and rebuttal is repeated by Stephen Bainbridge, who addresses many of the monitoring and informational claims of pro-worker participation scholars but then ultimately concludes they are limited by the decision-making problems they would simultaneously produce. Stephen M. Bainbridge, *Privately Ordered Participatory Management*, 23 DEL. J. CORP. L. 979 (1998).

<sup>167</sup> Hansmann's series of articles on ESOPs and EO were recollected and extended in HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996).

interests, especially in larger enterprises. Especially as companies today are more geographically dispersed and employ workers in a variety of often distinct enterprises, solidarity of worker interest is unlikely and potential voting coordination even more so. Variations in employee skill levels make compensation one obvious area where conflicts can arise as easily among employees as between employees and managers.<sup>168</sup>

Hansmann's heterogeneity position also pushes him to look at companies generally excluded by EO researchers, which are technically employee-owned because they are naturally homogenous, such as professional firms. His example of the sale of Lehman Brothers to American Express also shows how a once homogenous entity can develop internally heterogeneous divisions, in this case a generational split between traders, and thus need to be reconstituted as a non-partnership.<sup>169</sup>

Hansmann thus does not need to be dismissive of pro-EO arguments in order to undermine their ultimate conclusions. For example, many pro-EO scholars argue that employees, especially in larger corporations, have a longer time horizon for evaluating corporate decisions, and thus are better positioned than the short-termism that dominates managerial incentives.<sup>170</sup> Hansmann could acknowledge this, but simply argues that, to the extent it can be proven, such longer time horizons actually generate more acute divisions via intra-employee heterogeneity (such as new hires and retirees). A pro-EO study can be cited that ties increasing effects of EO on retail sales firms,<sup>171</sup> to which Hansmann could retort that such effects could be replicated better with targeted commission-based pay structures without the distorting effects of coordinating the conflicting interests of sales and non-sales staff.

The power of Hansmann's heterogeneity argument is directly proportional to the intensity of the EO conundrum regarding ownership and participation. He directly cites the lack of worker participation in ESOPs as a negative example that ownership with such diversified decision-making leads to better outcomes.<sup>172</sup> Hansmann can then also

<sup>168</sup> Henry Hansmann, *The Viability of Worker Ownership*, in *THE FIRM AS A NEXUS OF TREATIES* 171 (Masahiko Aoki et al. eds., 1990).

<sup>169</sup> Hansmann, *supra* note 4, at 1808.

<sup>170</sup> Emeka Duruigbo, *Tackling Shareholder Short-Termism and Managerial Myopia*, 100 *KY. L. J.* 531 (2011).

<sup>171</sup> See Brent Kramer, *Employee Ownership and Participation Effects on Firms Outcomes in Firms Majority Employee-Owned Through Employee Stock Ownership Plans in the US*, 31 *ECON. & INDUS. DEMOCRACY* 449 (2010).

<sup>172</sup> Hansmann also claims that there is "considerable circumstantial evidence" that such participation is costly. However, this is the weakest empirical assertion in his argument and is directly rebutted by the baseline performance neutrality established by the vast majority of empirical EO studies. Hansmann, *supra* note 4, at 1802.

point to the limited actual participation by workers in ESOPs as a feature, rather than a flaw, in what success they have achieved.<sup>173</sup>

The force of the heterogeneity theory thus persists even with new rounds of positive empirical work by EO scholars. The minority status of EO companies in the current corporate ecology coupled with the weak theoretical link between actual ownership and EO company outcomes give little reason to convert for those not already committed to EO for ideological reasons. As the bulk of the quantitative EO research is caught up battling over results with relatively small size effects—significance issues aside—it is easier to take the opposition’s points as true but minor, and the revealed preference of the market as *de facto* evidence that even multiple vectors of EO benefits are holistically underwhelming. In sum, underlying the endogeneity problem is the simple fact that if EO is so conclusively positive, then why don’t more companies adopt, even with zero or slight tax advantages?

#### D. Republicanism and the Conundrum’s Ecological Impasse

The elision of EO scholarship regarding the ownership/participation axis of the conundrum itself reflects the particular terrain on which Kelso set the stage of its American instantiation. The use of quantitative methods to show that EO is better for profitability is understandable as a defensive move against critiques, but over time this reliance has severely narrowed the radicalism of employee ownership’s republican roots. Why is profitability the end point of the argument? Economic republicans didn’t argue for the centrality of ownership concepts because they thought it would lead to greater growth (though some did). Their primary motivation was a particular concept of economic citizenship grounded on notions of personal independence and social power, or simply antisubordination.<sup>174</sup> Liberty and efficiency were rarely enemies in early American political economy, but there were certainly not bedfellows.

Kelso’s intrasystemic focus already conceded the first axis of the EO conundrum that actual economic republicanism struggled with at the turn of the twentieth century: can change occur from within the logic of the existing wage-based system? Resistance of early republicans to wage labor or stock ownership plans reflected the republican integration of political and economic life, not a dogged determination to show

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<sup>173</sup> *Id.* at 1799.

<sup>174</sup> See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

that it was equally efficient to the authoritarian workplace they saw persistently rife with feudal social assumptions.

This is not to say that EO scholarship has not been useful. It has shown that the predictions of systemic dysfunction predicted by managerial triumphalists are greatly overstated. But it has reached the point where it can only invoke republican norms at the highest level of generality. And it prematurely concedes ground when high-EO concentrations might in fact inhibit aggregate growth, but are still consonant with republican ideals.

Take, for example, capital mobility. The increasingly rapid and transnational free flow of non-human capital allows it to seek out the highest ROI settings with global range and proactively engage in regulatory arbitrage. By contrast, an EO company is not going to reallocate its capital to another country simply to marginally increase ROI. The recent controversy over the relocation of the U.S. manufacturing operations of Carrier Corporation to Mexico rearticulated exactly these concerns.<sup>175</sup> The company had enjoyed recurrent and ongoing profitability, but still sought further returns through its relocation plan. Fighting this battle on an econometric terrain is always going to fail. What is needed is an explicitly political, value based-grounding that is far more secure in its concept of economic citizenship. Sociological work can specify how the severe velocity mismatch of economic and social capital disrupts communities and forces costs on workers that atomistic, income-based analysis cannot capture.<sup>176</sup> However, the weighing of such costs is always going to reflect a set of political choices.

Such clarity would require a much closer fit between arguments for policies based on ownership ideals and the actual underlying antistatist values of republicanism. This is no small challenge, as while recourse to highly abstract notions of citizenship are persuasive to some, operationalizing them is far more difficult—as the ESOP example again so clearly shows. Moving to develop a tighter framing first requires that economic republicans can in some basic way evaluate and identify what they want in practice.

This difficulty is parallel to the search in development theory writ large for new conceptual framings, trying to turn away from GDP growth to concepts such as “human flourishing” or “capabilities.”<sup>177</sup> No shortage of labor scholars has searched for substitute evaluative rubrics

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<sup>175</sup> IBJ Staff, *Carrier Plans to Lay Off 1,400 Indy Workers in Mexico Move*, IND. BUS. J. (Feb. 10, 2016), <http://www.ibj.com/articles/57162-carrier-plans-to-lay-off-1400-indy-workers-in-mexico-move> [https://perma.cc/QC6Z-93GV].

<sup>176</sup> ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015).

<sup>177</sup> See Martha Nussbaum & Amartya Sen, *THE QUALITY OF LIFE* 1–6 (1993); Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999).

to justify their reform agendas, such as dignity.<sup>178</sup> Progressive corporate law scholars also wrestle with establishing the existence and degree of social externalities in corporate governance, and even creatively redeploy intangible property frameworks.<sup>179</sup> Ownership concepts have even been worked into human rights and other development discourse, but still a high level of generality.<sup>180</sup>

Moving the EO debate to grapple with similar issues would require a fundamental change in EO framing that perhaps all of its current adherents would not share. It would involve risking exactly the type of easy, but shallow, bi-partisanship that ESOPs evidence so well. Much of Kelso's success was finding a place for EO in the Cold War era where any sustained critique of American economic practices was met with almost instant red-baiting. But the virtuous philosopher-entrepreneurs who Kelso imagined would take up his ESOP to transform American capitalism never emerged, and those that did quite often draped themselves with EO to signal virtue rather than to make any personal sacrifice to realize a new form of economic citizenship.

Re-grounding the republican values as the motivator of EO work would allow proponents to take seriously the traditional labor movement's skepticism about financial inclusion, not for its economic effects, but for its political consequences.<sup>181</sup> And in doing so, EO work would prevent itself from falling so far down the productivity rabbit hole to where it loses all of its connection to the lived experiences of workers. The private, gradual and non-conflictual transformation that Kelso imagined that the ESOP would unleash has never come to fruition exactly because no genius of pure legal innovation can escape politics.

This type of reconstructive project requires more than just a reaffirmation of republican values. It would require two distinct and qualitative developments within the field: 1) clarity about the specific workplace dynamics and structures that reflect republican values distinct from ownership itself, and 2) developing an ecological regulatory sensibility for developing specific legal and institutional reforms to allow

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<sup>178</sup> RANDY HODSON, DIGNITY AT WORK 3 (2001).

<sup>179</sup> Margaret M. Blair, *Closing the Theory Gap: How the Economic Theory of Property Rights Can Help Bring "Stakeholders" Back into Theories of the Firm*, 9 J. MGMT. & GOVERNANCE 33 (2005).

<sup>180</sup> Steve Clem, *Transnational Corporations, International Agencies/Organizations and Employee Ownership Policy* (July 16, 2009), [http://www.oeclock.org/download/general\\_articles\\_on\\_employee\\_ownership/transnational.pdf.pdf](http://www.oeclock.org/download/general_articles_on_employee_ownership/transnational.pdf.pdf) [<https://perma.cc/MRF5-FWF3>].

<sup>181</sup> Compare MICHAEL BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1979) with Randy Hodson et al., *Is Worker Solidarity Undermined by Autonomy and Participation? Patterns from the Ethnographic Literature*, 58 AM. SOC. REV. 398 (1993).

meaningful EO to spread while addressing survivalist arguments. Furthermore, the development of an economy truly grounded in republican norms of freedom will require a far more systemic intervention in corporate formation, and one that may never emerge without a sustained social movement that makes reshaping workplace power a priority.

#### IV. CONCLUSION: THE SHALLOW GENIUS OF THE ESOP

Likely one of the largest gaps between those approving of and those critical of modern labor relations is their consideration of the pivotal assumption of economic republicanism: that economic and political citizenship are inextricably linked. One would not expect, for example, for an authoritarian political regime to have any desire to promote economic republican norms. Authoritarian regimes are, in fact, deeply wary of labor movements exactly because they fear the slippage from economic to political solidarity.<sup>182</sup> Recognizing, or not recognizing, this linkage is most consequential as democratic theories of political citizenship are uncontroversially concerned with issues of power between various social actors. And the relationship of citizens to the state is just one of these critical dyads, and one which is often more remote in daily life than that among employees and employers.<sup>183</sup> Concepts of the workplace that necessarily elide issues of power are thus required to see employees only as fungible inputs whose complete value is best set by the pricing mechanism of a labor market.<sup>184</sup> Commodities do not need economic citizenship.

The lesson of the ESOP is then one of good intentions gone awry, but exactly because it sought to solve by technical sleight a problem concerned with the social distribution of power. It also represents a particular challenge to the property-centric concept of economic republicanism. Ownership itself is a means to the end goal of economic liberty, not a good onto itself. Even if the relationship of a worker to their workplace is completely reconceived in terms of property rather than exchange, this achieves nothing if this shift does not lead to a redistribution of power within the firm.<sup>185</sup> This reality is one reason why there is little evidence that fractionalized ownership in the workplace leads to

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<sup>182</sup> Jedidiah J. Kroneke, *Property Rights, Labor Rights, and, Democratization: Lessons from China and Experimental Authoritarians*, 46 NYU J. INT'L L. & POL. 115 (2013).

<sup>183</sup> ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES* (2017).

<sup>184</sup> Representatively, Hansmann approvingly cites how corporations are structured with "the functional purpose of avoiding some of the pitfalls of the democratic process." Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 589, 603 (1993).

<sup>185</sup> Robert N. Stern & Tove Helland Hammer, *Employee Ownership: Implications for the Organizational Distribution of Power*, 23 ACAD. MGMT. J. 78 (1980).

greater political participation,<sup>186</sup> or the development of more transformative economic ideals by workers.<sup>187</sup>

The inability of employee ownership scholarship to speak convincingly to the contemporary anxiety over economic inequality and legitimacy reflects how thoroughly undermined the field has been by its historical bargain in the United States for the appearance of apoliticism. Perhaps no better indicator is the extent to which human resource management studies have taken over the field in recent decades.<sup>188</sup> HRM studies explicitly articulate that the power of ESOP and other share schemes is to make workers feel empowered enough to improve their motivation,<sup>189</sup> but are content with a near-Orwellian aspiration to achieve such motivation without actually allowing workers to interfere with managerial discretion.<sup>190</sup> Even pro-ESOP scholars like Blasi and Kruse recognize that their efficiency-based arguments about worker motivation are inherently predicated only on psychological perception, not direct worker power.<sup>191</sup>

If this article is seen as unkind to ESOP proponents, it is important to note that much of the technocratic seriousness with which they approach the subject of economic liberty is matched by the often-non-technical seriousness with which more radical workplace visions are advanced. There are strong unresolved tensions among labor law critics about the relative importance of autonomy versus voice in the work-

<sup>186</sup> ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY 97 (1985).

<sup>187</sup> See EDWARD GREENBERG, WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION (1986); JEFFREY BERRY et al., THE REBIRTH OF URBAN DEMOCRACY 259 (1993); see also CHRISTOPHER EATON GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES 170 (1984).

<sup>188</sup> See, e.g., Michael Aiken et al., *Organizational Structure, Work Process, and Proposal Making in Administrative Bureaucracies*, 23 ACAD. OF MGMT. J. 631 (1980); Eric C.A. Kaarsemaker & Erik Poutsma, *The Fit of Employee Ownership with Other Human Resource Management Practices: Theoretical and Empirical Suggestions Regarding the Existence of an Ownership High-Performance Work System*, 27 ECON. & INDUS. DEMOCRACY 669 (2006).

<sup>189</sup> Katharine Klein & Rosalie Hall, *Correlates of Employee Satisfaction with Stock Ownership: Who Likes an ESOP Most?*, 73 J. APPLIED PSYCHOL. 630 (1988); Katherine Klein, *Employee Stock Ownership and Employee Attitudes: A Test of Three Models*, 72 J. APPLIED PSYCHOL. 319 (1987); see also Richard J. Long, *Employee Profit Sharing: Consequences and Moderators*, 55 INDUS. REL. 477 (2000).

<sup>190</sup> Jon Pierce et al., *Employee Ownership: A Conceptual Model of Process and Effects*, 16 ACAD. MGMT. REV. 121 (1991); Jon Pierce et al., *Toward a Theory of Psychological Ownership in Organizations*, 26 ACAD. MGMT. REV. 298, 308 (2001); Jon Pierce & Donald Gardner, *Self-Esteem Within the Work and Organizational Context: A Review of the Organization-Based Self-Esteem Literature*, 30 J. MGMT. 591 (2004); Derek Jones et al., *How Does Employee Involvement Stack Up? The Effects of Human Resource Management Policies on Performance in a Retail Firm*, 49 INDUS. REL. 1 (2010).

<sup>191</sup> See, e.g., Kruse & Blasi, *supra* note 61, at 11 ("Employee ownership may have positive effects if employees value ownership in itself or perceive that it brings greater income, job security, or control over jobs and the workplace. On the other hand, it may have negligible or even negative effects if employees perceive no different in their work lives.").

place, as well as the role of specific expertise in workplace management.<sup>192</sup> Much of the activist-driven labor cooperative movement expresses near utopian visions of human nature, and argues that simple transparency is all that is required for any worker to fully and equally participate in corporate decision-making.<sup>193</sup> This ideology of non-hierarchy runs deep, and sits uneasily with any form of differential expertise or representative decision-making.<sup>194</sup> As such, EO scholarship rarely acknowledges any concern for forms of horizontal subordination in cooperative workplaces,<sup>195</sup> or consideration that full participation in all levels of governance may not be the aspiration of every worker.<sup>196</sup>

This concern with technical seriousness is also key to understanding the failure of the ESOP as not simply some sort of secretive anti-worker ploy. It is a clarion example of how no ideal model of worker empowerment can be evaluated simply by its own internal logic, but requires understanding its interaction with the larger regulatory ecology in which it exists. The almost complete standstill in ESOP growth after the owner tax roll-over benefit was removed is telling of the capacity for purely voluntary capital expansion. Nevertheless, a great deal of the intra-ESOP literature correctly identifies many of the core issues in systemic replication that face any alternative workplace institution that operates outside of the current corporate norm.<sup>197</sup>

This is the heart of Jeffrey Hirsch's critique of Hansmann's survivalist thesis, where Hirsch notes that revealed preference arguments presume that current corporate structures are not dependent on a whole host of other regulatory design choices.<sup>198</sup> In practical terms, the

<sup>192</sup> Orly Lobel & Anne Marie Lofaso, *Systems of Employee Representation: The US Report*, in *SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY* (Roger Blanpain et al. eds., 2012); see also JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE* (2004).

<sup>193</sup> Joyce Rothschild, *The Logic of a Co-Operative Economy and Democracy 2.0: Recovering the Possibilities for Autonomy, Creativity, Solidarity, and Common Purpose*, 57 *SOC. Q.* 7, 10 (2016) ("In response to Schumpeterian fears that the people do not know enough to govern, participants in the new social movements and co-operative economy answer with their insistence that all relevant information and relationships be shared with the group at hand, and an Internet age makes this far more plausible than it once was.")

<sup>194</sup> Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 *CLINICAL L. REV.* 255 (2010).

<sup>195</sup> Richard B. Freeman, *Worker Responses to Shirking Under Shared Capitalism*, in *SHARED CAPITALISM AT WORK* 77 (Douglas L. Kruse et al. eds., 2010).

<sup>196</sup> Robert Bussel, "Business Without a Boss": *The Columbia Conserve Company and Workers' Control, 1917-1943*, 71 *BUS. HIST. REV.* 417 (1997).

<sup>197</sup> DAVID I. LEVINE, *REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN* (1995); see Peter Molk, *The Puzzling Lack of Cooperatives*, 88 *TUL. L. REV.* 899 (2014).

<sup>198</sup> Specifically, for Hirsch's arguments about ESOPs, the choice under the NRLA regime to ban company unions is one such pre-existing regulatory choice that could easily be reversed. See

creation of the ESOP as an intrasystemic innovation did solve key questions that plague cooperative workplaces, such as access to credit (both at the initial buy-in stage and later based on outside evaluators' abilities to understand their business models) and their interaction with dispute resolution forums like the judiciary (which have developed doctrines over time based on economic forms with different agency structures).

In this vein, if one is to move beyond simply imagining workplace institutions that validate norms of economic republicanism and toward an agenda for systemic change, then much of the existing ESOP literature is instructive to the extent that it emphasizes the need for alternative workplaces to form, fail and reconstitute as easily as extant corporate forms. If every alternative workplace requires huge start-up costs alongside significant employee self-sacrifice then their ability to replicate will be severely deadened.

One of the lessons of the ESOP literature is that worker and manager human capital formation is often a pre-social reality as it concerns the new ESOP. If those with specific managerial expertise are trained to run different sorts of companies, it is difficult to undo these years of training.<sup>199</sup> Similarly, if workers are trained in a system/society that presumes a need for civic education for political participation, but no specific education for economic participation, then many of the issues with worker governance become self-fulfilling.<sup>200</sup>

For example, when Posner wrote about ESOPs after his decision in *Summers*, he rearticulated Hansmann's presumption that workers would always exhibit harmful short-termism by opting for opportunistic over-compensation rather than long-term investments in their companies.<sup>201</sup> It is not so much that this claim is definitively empirically untrue, as much of the ESOP literature struggles with means to shift workers into an "owner mentality" that prioritizes longer-term decision-

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Jeffrey Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"*, 67 FORDHAM L. REV. 957 (1998); see also Michelle Welsh et al., *The End of the 'End of History for Corporate Law?'*, 29 AUSTRAL. J. CORP. L. 147 (2014).

<sup>199</sup> Peter M. Hall, *Meta-Power, Social Organization, and the Shaping of Social Action*, 20 SYMBOLIC INTERACTION 397 (1997).

<sup>200</sup> Robert S. Tart, *The Fabled ESOP*, WM. & MARY ANN. TAX CONF. 83, 99 (1975).

<sup>201</sup> Richard Posner, *The Economics of ESOPs—Posner's Comment*, BECKER-POSNER BLOG (Apr. 8, 2007), <http://www.becker-posner-blog.com/2007/04/the-economics-of-esops—posners-comment.html> [<https://perma.cc/R7GZ-KAHW>] ("A worker will trade off any long-term benefits to the corporation from a corporate action that would increase the value of his shares against whatever short-term benefits, in the form of a higher salary or greater fringe benefits or a lighter workload, an alternative course of action would confer on him; and usually the tradeoff will favor increased compensation for work over increased stock value."); Henry Hansmann, *supra* note 4, at 1772.

making.<sup>202</sup> The real question is whether this must be true, or simply reflects the consequences of the dominant paradigm of worker subordination. One valuable remainder from the ESOP movement was efforts, primarily at the public level, to create sectoral or multi-company training initiatives to reduce the cost of training nonmanagerial employees in basic corporate practices.<sup>203</sup> While public expenditures on such efforts were and are miniscule in comparison to the tax expenditures directed toward ESOP formation, they provide some precedent for looking outside the corporation for complementary reforms.

This more ecological view of reform may seem more ambitious than is achievable in the current historical moment. It still squarely presents the issue of where EO scholars truly committed to economic republicanism should focus their efforts. It is hard to walk back decade-long strategies after seeing the bipartisan potential of ESOPs, but their variation of ownership without voice or power is now a trap that has been tainted by far too many abuses. The appeal of gradualist approaches seems ever more reasonable than more radical changes, but the continued marginal utility of making intracorporate arguments about efficiency seem to have turned negative. No matter how appealing or historically resonant the rhetoric of ownership may be, it is rendered tangential to workplace antistatization when actuated through fractional forms. And to the extent that the ESOP phenomenon continues to only heap greater rewards on existing economic success, it risks alienating employee ownership promotion from the type of labor movement that would be required for more systematic change. There is still great potential in the resonance of economic republicanism in the otherwise reform-adverse arenas of American politics, but a higher standard is required to judge what type of reforms will render this resonance truly productive for economic liberty.

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<sup>202</sup> See generally, CHRISTOPHER EATON GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES 35 (1984); Valerie Hensen, Understanding Employee Ownership: A Sense-Making Approach (2004) (unpublished Ph.D. dissertation, University of New Mexico) (on file with the University of New Mexico Library system).

<sup>203</sup> LOGUE & YATES, *supra* note 38, at 167.