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David ELLERMAN*

ARE CORPORATIONS THE PROBLEM?**

Abstract. *Are corporations the problem? Can reforms in the area of corporate responsibility (e.g., more stakeholder governance) lead to any real changes? The goal of the article is to analyse debates concerning the Citizens United case, corporate personhood, the stakeholder theory, the affected interests principle and, finally, deeper fallacies with respect to the rights of capital embedded in Marxism and conventional economic theories of capital and corporate finance. The last analysis considers another institution at the root of the problems of the current economic system: the renting of human beings in the employment relationship – which has also corrupted the original idea of a corporation that dates back to medieval times.*

Keywords: *corporate personhood, employment or human rental relationship, fundamental myth about "ownership of the means of production", Marxism.*

INTRODUCTION

Corporations are today the centre of much critical analysis of the economic system that creates and perpetuates obscene inequalities in income and wealth. In the Antebellum American South, a similar inequality existed in wealth and real income between masters and slaves. Was the root of this problem the legal form of the slave plantations or the master–slave relationship itself? Would a different legal form for plantations, leaving the master–slave relationship intact, have solved the problem? We face a similar quandary today. A large part of the social criticism focuses on the corporation's legal form rather than the master–servant or employer–employee relationship. The analysis presented in this article questions the idea that the legal form of the corporation is really the root of the problem, and instead claims the core problem is the employment relationship. To address these questions, our entry point is the whole debate about corporate governance to argue that the problem is not the corporation *per se*.[1]

* David Ellerman, PhD, Associate Researcher, Faculty of Social Sciences, University of Ljubljana, Slovenia, e-mail: david@ellerman.org.

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[1] For the current state of the debate on corporation governance, see Clarke and Branson (2012) or Gordon and Ringe (2018).

CITIZENS UNITED AND CORPORATE PERSONHOOD

In the American context, a good place to start is the debate on whether the Citizens United Supreme Court decision, supposedly based on the idea that a corporation is a legal person and thus should hold free speech rights just like natural persons.

The first point to make is that corporate personhood was not the basis for the decision. In fact, the decision relied on the idea that members (shareholders) of the corporation are (in)directly natural persons such that corporate political speech may then be construed as the associational speech of those natural persons, similar to the political speech of trade unions or NGOs is the associational speech of their members. Even though in the case of large publicly traded corporations, this reasoning might be factually absurd, it was nevertheless the reasoning used, not the rights that corporations hold as 'persons'. Indeed, Justice Stevens' dissent referred to the fancifulness of seeing corporations' political actions as the voice of the natural person shareholders.

> *It is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will conflict with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.* (Stevens 2010)

One can these days even find calls to abolish corporate personhood (Edwards and Morgan 2004; Ripken 2012 and 2019; Tombs and Whyte 2015). Yet, for several reasons, that would be a cure worse than the disease itself. Other forms of business ownership could just as well lead to political influence being purchased as long as money is allowed to play its current role in the political process regardless of where it comes from.[2] Moreover, whole use of the word "person" is not necessary to describe the characteristic features of a corporation; namely, it is a *legal party* that is separate from the shareholders. A corporation's assets and liabilities are not the personal assets or liabilities of the shareholders. While it is said

[2] See the work of Lawrence Lessig (2011; 2019) for alternatives.

that shareholders have "limited liability" for corporate debts, this is misleading. Shareholders have *no* personal liability for such debts (albeit their shares may lose value) and the corporation is fully liable for its debts.

According to the original conception of a corporation, which goes back to Roman and medieval law, such a legal form permits a group of people to undertake the risks of a joint enterprise while keeping those corporate risks from reaching their personal assets. If the corporate form were to be abolished, then only wealthy people would be able to undertake the risks of sizable business enterprises, in turn condemning the rest of the population to merely being hired hands (for more, see below).

Similarly, it is hard to imagine any change more politically favourable to the rich 1% than restricting the exercise of political voice to natural persons. Such a change would rule out associational speech by trade unions, NGOs, and other civic associations, none of which are natural persons. John Q. Public and Charles Koch in that scenario would each have the right to as much of a political voice as they could individually afford.

STAKEHOLDERS' RIGHTFUL CLAIMS

An old maxim in Roman law states: "What touches all is to be approved by all" (Tierney 1982, 21). Today, this idea is often formulated as the "Principle of Affected Interests… Everyone who is affected by the decisions of a government should have the right to participate in that government" (Dahl 1970, 64). This principle is often used to support a stakeholder theory of corporate governance according to which stakeholders are the customers, workers, suppliers as well as any affected local residents (Robé 2011; Harrison et al. 2019). A valid component of this principle is that people should have the right and the means to protect their legitimate interests. Nevertheless, typical use of the principle suffers from the sin of omission: the failure to differentiate two very distinct ways to protect one's affected interests.

(1) The *negative* or *decision-constraining control right* is the right to restrain the decision of another party that will affect one's interests. In a market economy, this usually takes the form of the decision not to buy a product or not to supply a service. Conventional economics criticises a monopoly seller or a monopsony buyer as leading to inefficiency, yet another problem is that it effectively neutralises the buyer's or seller's negative control rights. Further, negative externalities (e.g., pollution) also adversely affect one's interests beyond a market relationship and thus there must be a more effective means to protect these interests apart from individuals trying to bargain with corporations.

(2) The *positive* or *decision-making control right* is the right to participate in the decision of another party to protect one's interests. This is the form of the Affected Interests Principle usually evoked to argue for all stakeholders (i.e., all whose interests are affected) to somehow participate in a corporation's decision-making. Application of the principle is plagued by both practical and theoretical difficulties.

The problem in practice is the lack of any plausible form of representing all whose interests are affected. For instance, when a mobile phone manufacturer makes design or pricing changes this affects all users around the world who use these phones, yet there hardly seems to be any way for consumers to elect representatives to 'protect their interests'. Their best protection is afforded by competition in the marketplace, i.e., by their negative control rights. The representational notion of stakeholder control is hence often set aside in favour of a fiduciary notion. Still, this notion suffers from a similar problem of the accountability of the fiduciaries to their beneficiaries and the legitimacy of those beneficiaries holding positive decision-making rights in the first place.

Despite the affected interests principle being validly applied to the exercise of stakeholders' negative or decision-constraining control rights, in itself this entails no claim that stakeholders should somehow 'participate' in the other party's exercise of their positive or decision-making rights. The typical problem is that stakeholders may have little power or opportunity to exercise non-trivial negative control rights vis-à-vis large corporations due to corporations' capture of the state and the state's power to regulate. The conclusion is that such state capture should be abolished; it is not that private corporate overlords (managers and their corporate boards) should be empowered to serve some undefined 'social' interests without any means of true accountability or grounds for legitimacy.

The fundamental flaw in stakeholder theory or the affected interests principle is that it considers certain hypothetical positive control rights as the solution to the very real problem of negative control rights that are *ineffective* due to monopoly/monopsony power, negative externalities, a lack of information about corporate plans, and government regulations that are inadequate or poorly enforced because of state capture. Rather than reformers receiving a warm buzz by asserting ineffective claims to assert positive stakeholder governance rights, energy should be redirected to stronger anti-trust, environmental, and corporate transparency regulations.

WHAT ABOUT SHAREHOLDERS' DEMOCRACY?

Are shareholders like citizens in a democracy? The legal theory underlying the conventional corporation of today is that members[3] of the corporation are the common shareholders – and those membership rights are ordinary property rights (more on this below) and thus the shareholders are also called "owners" of the corporation.[4] Some legal commentators have argued that shareholders are not the 'owners' of a corporation *because* they do not own the assets of

[3] "In general, the shareholders are the members of the company and the terms 'shareholders' and 'members' may be used interchangeably" (Hannigan 2012, 304).

[4] See Chassagnon and Hollandts (2014) for a review of the literature on who 'owns the corporation', although the debate is somewhat linguistically ill-posed since it is the membership rights that are owned as property rights by the shareholders. Whether or not one interprets that as ownership of 'the corporation' is largely a linguistic and ideological interest.

the corporation as their personal assets (Robé 2011; Stout 2012). However, this seems a perfect *non sequitur* as it seems no one has claimed that shareholders are owners *because* they somehow personally own the corporate assets. Moreover, shareholders, again in theory, elect the corporate board and corporations are routinely bought and sold with the agreement of the shareholders, e.g., in daily transactions of private equity. Therefore, the argument that shareholders are not, in theory, owners of the corporation at best seems to be a suggestion to use some other linguistic euphemism for the legal role of shareholders.

For most of the 20th century, notably after Adolf Berle and Gardiner Means' classic book *The Modern Corporation and Private Property* (1932), it was well known that the actual control of a publicly traded corporation (by managers and the board) is separate from the corporation's ownership (by far-flung shareholders). Yet, since in theory member-shareholders elect the board, the board members and thus the managers were seen as agents of the shareholders as the principals in an agent–principal relationship. Nonetheless, given that it is so factually farcical to picture the far-flung shareholders as 'principals' supervising their 'agents', a few modern legal theorists, e.g., in the standard corporate law 'hornbook' by Harvard's Robert C. Clark (1986), have suggested that the theoretical agency relationship should be watered down to a fiduciary one. While that may sound a little more realistic, it is quite an odd 'fiduciary' relationship in which the 'beneficiaries' legally elect the 'fiduciaries' and can legally sell the entire organisation.

Even more far-fetched are the calls to undo the 'separation of ownership and control' by establishing shareholder democracy. In publicly traded companies, there is a huge collective action problem for any shareholders to privately shoulder the costs to obtain enough other shareholders to vote to defeat the management-supported slate of board candidates. Hence, in Albert Hirschman's terms, the realistic response of dissatisfied shareholders is to exercise their negative control rights to exit – even called the "Wall Street Rule" (Sell your shares) – rather than try to exercise their voice (their positive control rights as members of the corporation).

Still, these pragmatic problems pale next to the deeper problem with the whole concept of shareholders' democracy. In the course of a corporation's business activities, the management does not exercise managerial authority over the shareholders (qua shareholders), only over the (indirect) property of the shareholders, and democracy is a system for governing people, not governing property. The only people over whom management exercises authority (within the scope of business activities) are the corporation's employees.

> *The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution. … Shareholder democracy, so-called, is misconceived*

> *because the shareholders are not the governed of the corporation whose consent must be sought.* (Chayes 1966, 39–40)

The "shareholder democracy" concept is analogous to the people of Russia going through the motions of running 'democratic' elections for the government of Ukraine.

Some legal theorists still object to restricting the 'democratic' franchise to "the governed":

> *Yet in fact there is democracy in the typical investor-owned firm; it is just that the investors of capital do the voting rather than the workers. Converting to worker ownership means not only enfranchising the workers but also disenfranchising the firm's investors while continuing to deny the franchise to the firm's consumers.* (Hansmann 1996, 43)

In a similar vein, one might say that the American Revolution enfranchised the Americans (or at least white male property owners) but also disenfranchised the English while continuing to deny the franchise to the French to elect a government of the Americans.

We have seen that the stakeholder notion of affected interests as well as the call for 'shareholder democracy' fail to address the theoretical and practical questions of:

1. who should legitimately control corporate management; and
2. who can do so effectively?

The democratic answer to the first question is: "the people who are managed by the corporate management", and the answer to the second question is: "The only cohesive, workable, and effective constituency within view is the corporation's work force" (Flynn 1973, 106). In spite of Robert Dahl's mention of the affected interests principle (1970), when it came to later specifying 'the alternative' he made no use of that principle or the stakeholders theory. Instead, he advocated "a system of economic enterprises collectively owned and democratically governed by all the people who work in them"[5] (Dahl 1985, 91).

Yet, these answers seem beyond the reach of almost all 'responsible' legal, economic, and political thinkers, and thus the kabuki theatre of the 'corporate governance debate' will continue.

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[5] The footnote reads: "In clarifying my ideas on this question I have profited greatly from a number of unpublished papers by David Ellerman, cited in the bibliography, as well as numerous discussions with and papers by students in my graduate seminar on The Government of Economic Enterprises and my undergraduate seminar on Democracy at Work".

WHAT ABOUT COOPERATIVE CORPORATIONS?

The original concept of a corporation (in its Roman and medieval roots) was a group of natural persons engaged in certain joint activities "that possessed a juridical personality distinct from that of its particular members" (Tierney 1982, 19). However, the original idea of these joint corporate activities *carried out by the members* was completely corrupted by having these activities actually carried out by employees of the corporation – a change that fully developed when wage labour became the dominant form of work in the Industrial Revolution.

Many see the *cooperative* corporation as a revitalisation of the idea of people joining together to perform certain cooperative activities and to democratically govern those joint activities.

> *A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.*
> (International Cooperative Alliance 2015, ii)

This noble idea was nevertheless soon also undercut by the similar use of employees to perform actual cooperative activities – except for worker cooperatives where the work is carried out by the members.

Consider a consumer cooperative. What is the cooperative activity performed by its members? It is not consumption; that would be a commune or a kibbutz. The activity engaged in by the consumer-members is shopping done on an individual or family basis in the cooperative, which is a distribution business for food and other consumer goods. Still, those business activities are carried by employees of the consumer cooperative – aside from the vestigial 'work requirement' for members such as handing out cheese samples to customers for a few hours each month.[6] For instance, in an upscale consumer cooperative many members were scandalised when it was discovered that some members were having their work requirement performed by their nannies or servants – seemingly without any recognition that all members have the same relationship to the cooperative's employees.

Corruption of the cooperative ideal is even more pronounced in agricultural marketing and processing cooperatives (e.g., Land O'Lakes or Ocean Spray), sometimes known as "producer cooperatives", where members are supposed to be the farmers selling their raw products through the cooperative. The problem is not simply that the 'farmers' may be agribusinesses running on hired labour but that the 'cooperative' activities in the cooperative corporations' huge processing facilities are all performed by employees.

6 Most consumer co-ops do not have a work requirement and are thus perfectly mirrored by non-cooperative supermarkets which give 'members' a discount secured by showing a bar-coded 'rewards card' at checkout.

It is only in worker cooperatives that the actual activities of the corporation are performed by the members and the people being governed by the management are the same members of the company.

PERSONAL RIGHTS AND PROPERTY RIGHTS

To understand the difference between membership in a cooperative and ownership in a conventional corporation, one must appreciate the difference between personal rights and property rights. People generally hold both types of rights. For instance, a citizen's voting rights in a municipality are based on having the functional role of residing in the city, but those rights may not be bought or sold and are hence personal rights, not property rights. In a cooperative corporation, membership rights are based on the functional role of 'patronage' in the cooperative (e.g., working in a worker cooperative or shopping in a consumer cooperative). When membership rights are intended to be based on holding a certain functional or patronage role, it makes no sense to treat them as alienable property rights. A 'buyer' may not have a functional role, and if that person has a functional role there would be no need to 'buy' the rights.

It is easy to distinguish personal rights from property rights in terms of inheritability (or 'bequeathability'). When a person dies, personal rights like one's vote in municipal elections are extinguished whereas property rights like the votes attached to one's corporate shares are passed on to one's estate and heirs. If membership rights, like in a conventional corporation, may be inherited or generally may be bought and sold they are property rights and the members are then usually referred to as "owners".

WHAT ARE THE RIGHTS OF CAPITAL?

The Fundamental Myth

Misconceptions when it comes to corporations are typically accompanied by a far more basic falsehood that is a fundamental misunderstanding of the rights held by capital in the current economic system.

The *fundamental myth* is that the discretionary decision-making control rights over the productive process and the rights to the product of that process are legally part and parcel of the ownership of the capital assets employed in the process, i.e., the "ownership of the means of production".[7] The point is not that capital should not have those rights but that capital in fact does not possess such legal rights in the present legal system.

During the last century, a 'Great Debate' raged between (so-called) Capitalism and Socialism/Communism concerning:

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[7] I am using "capital" in the older sense of capital assets used in production, i.e., the 'means of production', not in the sense of wealth in general like in the works of Thomas Piketty (2014 and 2020).

> *the classical distinction between firms with privately-owned production means and firms with publicly-owned production means. In this case one will have capitalism on the one hand and two or more forms of socialism on the other....* (Jossa and Cuomo 1997, 113)

In any case, the whole debate was ill-posed from the outset since (like the very name "capitalism") it was based on a misconception about the rights of capital. It is often said that Marx did not provide details of his vision of socialism or communism. Yet, if one spends one's adult life condemning Y (e.g., *private* ownership of the means of production), it is clear that one's image of a better society will not include Y. The alternative of socialism or communism in the Marxist tradition accordingly *had* to have social, public or state ownership of the means of production along with the public employment relation – as indeed was the case in every Marxist country (with the possible exception of Yugoslavia).

Marx also popularised the capital-based phraseology of "capitalist" and "capitalism". To understand Marx's (mis-)conception of the 'rights of capital' embodied in the 'ownership of the means of production', one must go back to the medieval notion of dominion based on the ownership of land. What today we might call the "landlord" was then the Lord of the land exercising both political/juridical control over the people living on the land and rights to the fruits of their labour. As the legal historian Frederic Maitland (1850–1906) put it: "ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*..." (Maitland 1960, 174). Or as the German legal scholar, Otto von Gierke (1841–1921) simply stated: "Rulership and Ownership were blent" (Gierke 1958, 88).

It is this medieval notion of dominion associated with land ownership or 'landism' that Marx carried over to the ownership of capital in his conception of 'capitalism'.

> *It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital, just as in feudal times the functions of general and judge were attributes of landed property.* (Marx 1977, 450–51)

Marx's blunder has been a staple of socialist thought ever since, as noted by Bo Rothstein.

> *It is astonishing that a hundred years of socialist thought have not confronted the basic capitalist idea – that owners of capital have the right of command in the relations of production. The idea behind nationalization, wage earner funds, and the like is in fact fundamentally the same idea as that on which capitalism is based, namely, that ownership of capital should give owners the right to command in the production process (be they democratically elected*

> *politicians, state bureaucrats/ planners, workers' representatives, or union officials). Indeed, this is a nice example of what Antonio Gramsci called bourgeois ideological hegemony.* (Rothstein 1992, 118)

The defenders of 'capitalism' are more than happy to accept this view that the management rights ('leadership of industry') and the rights to the product are all 'an attribute of capital', of 'ownership of the means of production'. Any change in the employer's role can then be pitched as a violation of 'property rights'.

What is Wrong with the 'Fundamental Myth'?

The myth is *simply* incorrect; capital has no such rights in the 'capitalist system'. Notwithstanding Marx's imprimatur and the constant ideological assertion of the 'rights of capital', it only takes an understanding of the *renting out of capital* to see the fallacy.

Suppose capital assets are *rented out* to another legal party who buys, hires or already owns the other inputs and undertakes a productive process. Then, that legal party, by virtue of being the hiring party (not the owner of the capital assets), exercises the discretionary management rights within the limits of the input contracts (i.e., management rights) over that process and has ownership of whatever product emerges.

Capital is in fact routinely rented out. In addition to banks and other financial firms in the business of lending financial capital, real estate companies, equipment rental companies, and computer hardware companies are also in the business of hiring, renting or leasing physical capital assets out.

Let us consider some simple examples. When an individual owns, say, a widget-making machine, it is easy to understand that the machine could be rented out. However, if the individual forms a corporation and puts in the machine and other capital as initial capital, many people then think that the individual's ownership of the corporation somehow makes a fundamental difference in the logic of rentability as if the machine can no longer be rented out. Yet, of course, the machine can still be rented out, in which case the owner of the corporation does not have management or product rights in the going-concern operation using that machine. The process of incorporation does not miraculously transubstantiate the ownership of a capital asset into the ownership of the net results produced using the capital asset in a going concern.

The identity of the legal party holding those management and product rights in a going concern is legally determined by the pattern of market contracts, i.e., by who hires or rents what or whom, not by the prior ownership of capital.

> *This* contract theory of the power over the corporation *fundamentally changes the parameters for establishing economic democracy. Not realizing the*

> *importance of this logic has probably been the second most important mistake by the socialist and Marxist left over the last hundred years.*
> (Rothstein 2020, 10)[8]

This is a conceptual point about the structure of property rights in the current system and is not about the bargaining power (typically in the hands of capital owners) or transaction costs involved in renting capital out of a corporation or renting people into a corporation.[9]

The ownership of capital gives the owner negative control rights over the use of the capital, as in: "No, you may not use this machine, building, or land". This right is sufficient to turn those who nevertheless use the machine, building or land into trespassers – but it does not automatically turn them into employees.

> *Central to ownership is the right to exclude others from contact with an item. Ownership thus gives the owner of an item the right to control the uses to which others put it in the sense that he may veto any use of it proposed by someone else. But it does not give him any right to tell anyone to put that property to the use that he wants. It is not a right to command labor.*
> (McMahon 1994, 16)

The positive discretionary control or management rights over employees legally arise from the employer–employee contract, not ownership of the capital that the employees are using.

The Briggs Manufacturing Example

It is the pattern of contracts (who hires what or whom) that determines who owns the product made using some of the corporation's assets (which could be leased out). On top of the fundamental myth being involved in the common misunderstanding of the 'ownership of a corporation', it is expressed in the usual notion of 'owning a factory'. Still, the simple logic of the rentability of capital does not stop at the ownership of a whole factory.

In the early 1950s, automobile manufacturer Studebaker-Packard Corporation had the Packard bodies produced in the Detroit Conner Avenue plant of the Briggs Manufacturing Company. After the Briggs founder died, all 12 of the US Briggs plants were sold to the Chrysler Corporation in 1953. "The Conner Ave.

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8 Rothstein considers the foremost mistake to be "that the industrial working class would be the engine behind a new (socialist) mode of production" (ibid., 10).

9 The author has been making this distinction between the corporation and the contractually-defined firm-as-a-going-concern for almost half a century (Ellerman 1975). A French legal scholar, Jean-Philippe Robé, has independently made essentially the same distinction between the corporation and "the firm – the organization built via contracts transferring control over resources to the corporations used to legally structure the firm" (Robé 2011, 4). For instance, paying attention to this corporation/firm distinction in the previous quote from Rothstein, it would read the *"contract theory of the power over the [firm]"* (Rothstein 2020, 10).

plant that had been building all of Packard's bodies was leased to Packard to avoid any conflict of interest" (Theobald 2004).

This example illustrates the vacuity of the common idea that 'being the firm' is determined by 'ownership of the corporation'. Where was the 'ownership of the corporation' that included who owned the car bodies coming off the assembly line or the management rights over that production process? Of course, the shareholders of Studebaker-Packard owned that company and similarly for the shareholders of Chrysler, yet that did not answer the question of 'who is the firm' in that going-concern operation in the Conner Avenue plant. That was determined by the pattern of new market contracts – by who hires, rents, or leases what or whom. Studebaker-Packard leased the factory from Chrysler. The Studebaker-Packard Corporation would then hold the management rights over the hired workers and product rights for the operations of the factory owned by the Chrysler Corporation.

In spite of the logical argument and real-life examples, most economists and legal theorists (not to mention the Marxist faithful) seem unwilling to draw out the implications of capital being rentable. Of course, conventional economists and legal thinkers *can* understand that capital is able to be rented out, but they find no convenience in teasing out the consequences. Out of learned ignorance or intellectual lassitude, they assume the fundamental myth that serves as *pons asinorum* in understanding of the 'rights of capital'. For them, it is a bridge too far.

Sorry Karl, Even the Name "Capitalism" is a Misnomer!

In the Middle Ages, there was little or no developed market for renting out land. This led those governance and product rights to be rolled into the medieval notion of land ownership as dominion. Still, capital assets, including land, are *routinely* rented out in the 'capitalist' system. Given the central role of the Marxist notion of 'ownership of the means of production', it may be understandable why Marxists cling on to the fundamental myth and the 'capitalist' phraseology as a matter of quasi-religious dogma.[10] Many defenders of the 'capitalist' system seem equally dogmatic in failing to think through the consequences of capital being rentable in a private property market economy.

There was, however, one economist who stood out as the most philosophically and economically sophisticated defender of the 'capitalist' system, which he did not refer to by that name. This was Frank Knight (1885–1972), one of the founders of the Chicago School of Economics. Knight was perfectly clear that

[10] The point here is that Marx was wrong to adopt the fundamental myth that the product and management rights are part of the ownership of the means of production – "the second most important mistake by the socialist and Marxist left over the last hundred years" (Rothstein 2020, 10). Instead of understanding the point, many will just think of other reasons to use the name "capitalism", e.g., to refer to the high-school level banality that organised capital has overwhelming bargaining power over unorganised workers.

"capitalism" is a misnomer and concerning Marx's role in propagating that myth about capital ownership.

> *Karl Marx, who in so many respects is more classical than the classicals themselves, had abundant historical justification for calling, i.e., miscalling – the modern economic order "capitalism." Ricardo and his followers certainly thought of the system as centering around the employment and control of labor by the capitalist. In theory, this is of course diametrically wrong. The entrepreneur employs and directs both labor and capital (the latter including land), and laborer and capitalist play the same passive role, over against the active one of the entrepreneur. It is true that entrepreneurship is not completely separable from the function of the capitalist, but neither is it completely separable from that of labor. The superficial observer is typically confused by the ambiguity of the concept of ownership.*
> (Knight 1956, 68, fn. 40)

The system today is not characterised by capital being unrentable, but by *both* persons and capital goods being legally rentable.

> *Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must* rent *himself at a wage.* (Samuelson 1976, 52 [italics in the original])

Similar remarks are made by other economists.

> *The commodity that is traded in the labor market is labor services, or hours of labor. The corresponding price is the wage per hour. We can think of the wage per hour as the price at which the firm rents the services of a worker, or the rental rate for labor. We do not have asset prices in the labor market because workers cannot be bought or sold in modern societies; they can only be rented. (In a society with slavery, the asset price would be the price of a slave.)*
> (Fischer et al. 1988, 323)

A better name for the current system is a *human rental system* (Ellerman 1992, 2015, 2021) that differs importantly from the previous system in which workers were owned rather than rented. Moreover, the human rental relationship is voluntary in the usual juridical (and un-'theorised') sense of the word.[11]

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[11] We are not indulging in the usual left-wing parlour game of escalating one's theorised notion of 'voluntariness' so as to exclude the employment contract – and thus stay within the conventional classical liberal criterion of voluntariness as being a necessary and sufficient condition for accepting a legal contract – instead of developing the notion on inalienable rights that descends from the Reformation idea of the 'inalienability of conscience' in the Abolitionist and Democratic movements.

It is a shame that so many economists and conventional classical liberals think that since they and Marxists all agree on the 'rights of capital' that it must be a valid characterisation of the misnamed 'capitalist' system. Frank Knight possessed the intellectual clarity to draw out the consequences of capital being rentable for the "superficial observer" who cannot move beyond easily refuted banalities to do with the 'rights of capital'. Capital is rentable in any private property market economy and "in a free society the larger part of the productive capacity employed (as matters stand today in a typical Western nation) consists of the services of human beings themselves, who are not bought and sold but only, as it were, leased" (Knight 1936, 438). And it is that hiring, renting or leasing of persons that is the characteristic feature of the present system.

CONCLUSIONS

The aim of this article was to analyse a miscellany of misconceptions about corporations and the rights of capital. Yet, the corporate form itself, at least in its original conception, is not the problem. Blaming 'corporations' for the ills of the current system of renting human beings is like blaming glass bottles for alcoholism.

An important idea to preserve is the original and ancient idea of a corporation as a group of natural persons engaged in certain joint activities "that possessed a juridical personality distinct from that of its particular members" (Tierney 1982, 19). This original conception of the corporation is well described in Davis (1961), Raymond (1966), and in Abram Chayes' *Introduction* in the book by Davis.

> *We can here perhaps note a final irony, at least. The concept of the corporation began for us with groups of men related to each other by the place they lived in and the things they did. The monastery, the town, the gild, the university, all described by Davis, were only peripherally concerned with what its members owned in common as members. The subsequent history of the corporate concept can be seen as a process by which it became progressively more formal and abstract. In particular the associative elements were refined out of it. In law it became a rubric for expressing a complicated network of relations of people to things rather than among persons. The aggregated material resources rather than the grouping of persons became the feature of the corporation.* (Chayes 1961, xix)

The point that is hardly, if at all, mentioned in the corporate law literature is that the original associative activity of the members was squeezed out since it was replaced by the joint activity of the employees (including the managers) of the corporation. Conceptually speaking, the modern *absentee-owned* corporation is a 'wholly-owned subsidiary' of the human rental relationship: the employment contract.

The key problem lies *not* in the original idea of a corporation but in the legal institution that has completely corrupted and undermined this conception – namely, the employment relationship, the renting of human beings.

Thus, the original notion of the corporate embodiment for people engaged in a joint human activity was turned into a piece of property like a piece of real estate or "a large, composite machine" to be bought and sold in the marketplace. When an occupant of the White House in America suggested purchasing Greenland, leading thinkers in political science, economics and law along with various pundits and thought-leaders ridiculed the suggestion and did not accept the justification that "it's just a real estate deal". Yet, the same thinkers find no problem in the daily purchase and sale of corporations (whose workforce is many times the population of Greenland); after all, it is supposedly just the purchase and sale of 'aggregated material resources' – since "the associative elements were refined out of [the modern corporations]."

An interesting aspect of the whole corporate governance debate is how so many legal, political and economic thinkers have completely lost sight of the concept of democracy in the organisations where people spend most of their waking hours. The human rental relationship and subsequent debasing of membership into ownership seems to have eclipsed the democratic ideal among so many learned thinkers today who would otherwise pledge their undying allegiance to democratic self-governance in the public sphere. The feminist movement has learned well that "It's private" is no justification for denying women basic human rights 'within the household'. Still, many people (including many feminists) seem to take "It's private" as a sufficient reason to deny the basic human rights of self-governance within the firm. It is only as a result of this professionally prudent forgetting of democratic ideals in the workplace that the whole question of corporate governance and purpose is 'up for grabs' in the first place. There is no analogous debate concerning who should govern a municipality.

Today, more worker ownership would certainly help improve the distribution of income (Rieger 2016). However, the root problem is systemic. We now have the institution for the voluntary renting of other human beings – and that in turn has allowed the complete corruption and debasement of the original idea of the corporate embodiment for people performing certain joint activities. The human rental relationship allows absentee owners of corporations to legally appropriate all of the assets and liabilities created as the fruits of the labour of the people who work in the corporation – with those people's labour being merely treated as an expense item. This is the hub of the problem, and that statement should be as obvious as saying that at its core the problem of inequality in the Antebellum American South was the master–slave relationship.

The idea of a corporation is not the root of the present inequality problem – anymore than the legal form of cotton farms (as slave plantations) was in Antebellum times. The essential problem today is the employer–employee (or master–servant) institution for the employing, hiring, leasing or renting of human

beings. Hence the rise of neo-abolitionist calls (Ellerman 2021) to do away with that human rental institution in favour of all corporations being democratic associations of the people who carry out the corporations' activities.

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SO PROBLEM RES KORPORACIJE?

Povzetek. *So korporacije res problem? Ali lahko reforme na področju korporativne odgovornosti (npr. več ukvarjanja z deležniki) pripeljejo do resničnih sprememb? Cilj tega prispevka je analizirati razprave v zvezi s primerom Citizens United, obravnavo korporacij kot pravnih oseb, teorijo deleženikov, načelo prizadetih interesov in nazadnje globlje zmote v zvezi s pravicami kapitala, zakoreninjene v marksizmu in konvencionalnih ekonomskih teorijah kapitala in korporativnega financiranja. Zadnja analiza obravnava še eno institucijo, ki leži v temelju težav trenutnega gospodarskega sistema, in sicer najemanje ljudi v okviru delovnega razmerja – kar je prav tako pokvarilo prvotno idejo korporacije, ki sega v čas srednjega veka.*

Ključne besede: *obravnava korporacij kot pravnih oseb, zaposlovanje oz. najemanje ljudi v okviru delovnega razmerja, temeljni mit o "lastništvu proizvodnih sredstev", marksizem.*