ENTERPRISE LAW AND THE ECLIPSE OF CORPORATE LAW

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Abstract

The corporation is among the most important institutions of our age, and yet it is eclipsed by the enterprise. Corporate law theories have asserted that a corporation is a 'person', a 'nexus of contracts', that it has 'proprietary foundations', or is a 'concession of the state'. These theories wander across every Roman law category – persons, obligations, property, and public body. None work, because corporations combine elements of each category, but are more. A better tradition sees the corporation as a 'social institution', and as one legal form of 'enterprise'. Corporate law, traditionally confined, is not enough to understand corporations. We must integrate labour, competition, tax, tort, human rights, and public law, because this full body of enterprise law decisively changes corporate finance and governance. It also changes the rights that corporations distribute to investors, workers or service-users. In law, the concept of the 'enterprise' (or 'undertaking' or 'group') has become a dominant legal tool, because it adopts a functional understanding of firms that matches economic reality, eclipsing legal form. In that reality, most major listed corporations are under sector-specific regulation, including in banking, telecoms, big tech, or energy, as are corporations without shareholders such as hospitals or universities. Broadening our horizon enables us to teach how businesses, regulated industries, and public services – all major corporations – actually work. It lays the foundation for accurate empirical research. By shifting our vision to enterprise law, we may contemplate our entire economic constitution as it truly is.

JEL Codes: K00, K2, K21, K22, K23, K31, K32, K34, L12, L13, L2, L21, L22, L32, L33, L53, L6, L7, L8, L9, Q1, Q2

Keywords: enterprise, corporation, regulation, sector-specific, public services, labour, shareholders, investors, social institution

1. Introduction

‘The company’, argued *Gower and Davies: Principles of Modern Company Law* in 2003, ‘is a dominant institution in our society, and all the more so with the retreat in recent decades of the government-owned or public sector of the economy’.[1] To the extent that this was true, ‘the company’ has been a spectacular failure. Environmentally, since 1979, the year the UK government sold most of BP, carbon dioxide in our air rose from 336 parts per million (up from 285 ppm, pre-1780) to 424 ppm in 2024, heating the planet over 1.5°C.[2] Just 90 corporate entities are responsible for 63% of historic emissions,[3] and globally BP alone accounts for around six times the UK’s annual emissions.[4] Economically, since 2010, as the state favoured private capital over labour more than ever, British workers stopped getting any gains from growth or productivity. UK real wages halted or fell,[5] as US wages did since 1980. Income and wealth inequality soared. Life expectancy stagnated.[6] Politically, as billions of people became dependent on big tech media, with endless ads, new forms of addiction, and misinformation, fanatics with corporate funding attacked free elections, denied results and rioted. If the un-public company did become ‘a dominant institution’, the very real consequence is that it has made us dirtier, poorer, and less safe.

Yet the company was always an institution itself embedded in society, and public law did not ‘retreat’. For example, banks, railways, water, internet providers, and indeed hospitals were formed under the Companies Acts or statute, yet were also specifically regulated in ways that changed their finance and governance,[7] whether their shares became privately owned or not. Companies like the London School of Economics or Oxford University, formed under the UK Companies Acts, at common law or in statute, were still public universities, even with fees, indeed with staff *and* students electing a majority or part of their boards of directors.[8] Companies were routinely theorised as a ‘person’, as a ‘nexus of contracts’, as having ‘proprietary foundations’, or as a ‘concession of the state’. Yet these theories, and literature separating private companies from ‘the public sector’, made no sense because the division does not exist, and does not explain the real world. The real world is better explained by the concept of enterprise law, integrating private and public, and seeing the bigger social picture.

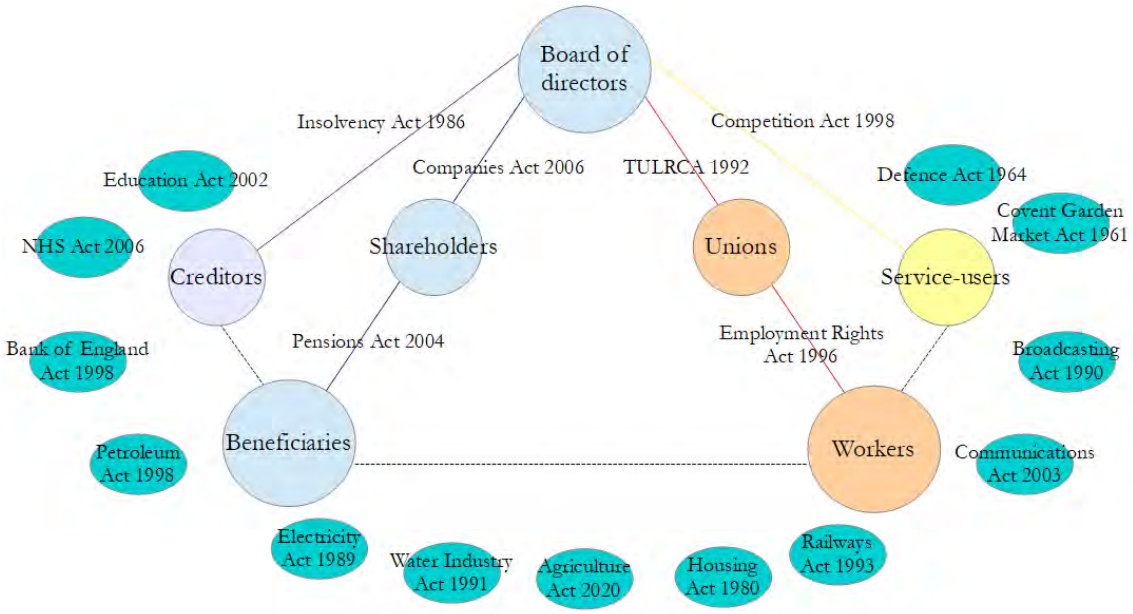
Part 2 shows how, when we look, enterprise law quietly eclipsed corporate law in the 20th century. 'Enterprise law' has come to mean the regulation of finance, governance and rights in economic life, and 'enterprise' focuses on these human functions of firms, not legal form. The founder of modern corporate law, A.A. Berle, rejected the corporation's primacy, since it was one form of 'social institution', and should not be director or shareholder dominated.[9] Corporations take their 'being from the reality of the underlying enterprise', where most big business is done by 'a constellation of corporations controlled by a central holding', not single legal units.[10] In the US Fair Labor Standards Act, amendments in 1961 defined an 'enterprise' functionally (to protect rights to minimum wages and fair time) as carrying on activities for a 'common business purpose... whether performed in one or more establishments or by one or more corporate or other organizational units'.[11] Competition, tax, accounting, and tort law followed worldwide, adopting functional concepts such as 'undertakings', 'groups', and 'enterprise liability', to guarantee corporate owners fulfilled social duties. The UK's numerous 'Enterprise Acts' never defined 'enterprise', but covered company, competition, labour, insolvency, public law, and more.[12] In the EU General Data Protection Regulation 2016 an 'enterprise' is 'a natural or legal person engaged in an economic activity, irrespective of its legal form'.[13] The enterprise concept cuts through legal form, makes rights more effective, and lets us think clearly about our true economic constitution.

Part 3 contends it is time to stop excluding the richness of enterprise law from our teaching and research, and include how energy, big tech, banking, water, health, education, or transport corporations work. Focusing on equity and debt neglects forms of finance that are often dominant, such as state aid, regulatory subsidies from externalities, or abnormal profits from holding a natural monopoly. Focusing on boards and shareholders neglects decisive governance rules, such as licensing by a regulator that requires action, structural separation, or directors elected by workers, service-users or public officials. Focusing on shareholder rights neglects the influential rights of the real investors, of workers, and of service-users to fair prices, free services or goods, equal treatment, fair standards, or special enforcement procedures. Together, a richer, accurate picture emerges of an enterprise law that not only integrates business and human rights, corporations and social responsibility, but has a systematic, functional taxonomy for our economic constitution.

Far from being a 'dominant institution', the company is one thread in a web of regulation, and its law can be viewed like one edge of a pyramid surrounded by oases. In 1943, Friedrich Kessler wrote that the 'unity of the law of contracts', based on *laissez faire* ideology, could not 'be maintained', that it was part of a socialising law of transactions, and general rules were modified for specific contracts.[14] Today, we can see that corporate law is part of a general law of enterprise, and that in specific sectors those rules are modified where the general law, particularly of private

ownership and competition, is not enough to protect the public interest.[15] In this sense, John Maynard Keynes was not accurate about a 'tendency of big enterprise to socialise itself',[16] but regulation has socialised enterprise, where it responded to economic reality, and the dangers of anti-social power. Figure 1 depicts four stakeholder inputs in the pyramid: investment of equity (in blue), investment of labour (in red), service-users' custom (in yellow), and investment in debt (in purple). The laws of these four stakeholders provide the basis for much enterprise. Yet in specific sectors, such as banks, electricity, water or rail (in green) those rules change. Specific enterprise laws, like in specific contracts, modify the general rules of finance, governance and rights to protect the public interest where general laws, especially private ownership and competition, fail.

Figure 1. The pyramid of general enterprise law, and specific enterprise law in the UK



What ensures that the law of specific enterprises, or 'Networks, Platforms & Utilities' as the revived study is now called in the US,[17] is not merely a random 'law of the horse'?[18] The answer is that a functional taxonomy of enterprise law – on finance, governance and rights – can be applied across every enterprise sector. How is the enterprise financed? How is it governed? What rights do people get from it? This is the law's economic grammar.

Part 4 explores how, with this functional taxonomy of enterprise law, a new chapter of empirical research opens. By identifying types of financial, governance and right-conferring rules, mapping their changes over time, and changes in multiple jurisdictions, the effect on social and economic variables can be understood. Does public or private finance lead to cleaner energy generation? Does publicly or privately governed health care produce better outcomes, and are insurance or single-

payer systems superior? Does service-user voice produce better standards in banking, energy, or transport regulation? Does judicial, administrative or bureaucratic enforcement of rights achieve better standards of service in universities, health, water, or the media? Ironically the 'methodology of positive economics', famously expounded by Milton Friedman – to formulate testable hypotheses, make predictions, and draw normative implications from the results – is foreclosed by the Chicago school approach to economic regulation that he helped pioneer. Focusing corporate law solely on shareholder value, bankruptcy law on creditor wealth maximisation, antitrust on consumer welfare, employment law on the individual worker, and excluding anything but hostile analysis of public regulation, makes us blind to the real empirical picture of our law. This is the Chicago school's 'unintended consequence'.

2. From corporate law theories to enterprise law reality

Before we turn to the functions and empirical opportunities of enterprise law, we must understand how corporate law theories lost touch with reality. First, there were theories of what a corporation 'is'. Second, there were theories of what a corporation 'should be'. Third, because these theories bear little relation to the real world, enterprise law quietly eclipsed corporate law.

2.1 Corporate theory and the private, public divide

(a) Persons?

The first, and possibly oldest, type of theory is that a corporation is a 'person'.[19] By analogy to real people, a corporation is 'the subject of rights and duties' in law., and has 'capacity for legal relations'.[20] The separateness of legal personhood traces back to Roman law, for instance, in Ulpianus' opinion that if 'anything is owing to a corporation, it is not due to the individual members of the same, nor do the latter owe what the entire association does.'[21] In this way, corporations were used in firms for butchers, winemaking, lawyering or managing the River Nile.[22]

The analogy of 'personhood' raises as many questions as it answered. Who should *really* get the rights and bear the duties that a corporation holds? Who *really* gets money and power in it? As Sir Edward Coke pointed out, these so called persons 'have no souls, neither can they appear in person',[23] because a corporation is not a person, but an association of real people, with its own group psychology.[24] How its rights and duties are shared would depend on the corporation's constitution, its rulebook, since the corporation 'resteth onely in intendment and consideration of the Law'.[25] As Lord Hoffmann put it in a securities regulation case, there is 'no *Ding an sich*, only the applicable rules'.[26] Far from depending purely on internal affairs, how judges apply those rules is shaped also by social policy and its aims.

(b) Nexus of contracts?

In reaction to the language of 'personhood', a second body of theory said a corporation was like a 'bundle' or 'nexus of contracts'. Referring to corporations as a 'legal fiction', scholars such as Michael Jensen, Frank Easterbrook or Oliver Williamson in the 1970s and 1980s, said investors, workers or service-users might contribute different things to a corporation, but each was 'contracting nonetheless'.[27] There was, and should be, 'a common theory of contract' that 'applies to transactions of all types'.[28] The corporation was simply the 'nexus of contracting relationships'.[29] At root was a belief that 'contracts' embody a higher ethical principle,[30] that all deals should bind no matter what, because 'contract is contract',[31] or as Thomas Hobbes wrote the 'value of all things contracted for is measured by the appetite of the contractors'.[32] Contract law's main function, like corporate law's, was simply to reduce transaction costs to do whatever individuals want, not what a democratic society might choose. Problems of delegated agency, collective action,[33] irrationality and lack of foresight,[34] or unequal bargaining power (from unequal wealth),[35] were minimal in the face of this ethical principle.

The difficulty, of course, is that a contract was just as much a 'legal fiction' as a corporation. A contract exists in law when people consent to a deal, or as Adam Smith put it, create 'reasonable expectations' that society thinks are just to enforce.[36] So, saying that a corporation is a 'legal fiction' and better described as a 'nexus of contracts' drives the analysis into a dead end. One might as well say a corporation is a 'nexus of fictions'.[37] Moreover, contracts are not all the same, and there cannot be a 'common theory', because banks and consumers, employers and workers, or directors and pensioners differ in wealth and property. Empirical evidence consistently shows that unequal bargaining power is an obstacle to fair distribution, production and innovation.[38] These inefficiencies and injustices are problems that in reality (if not corporate theory) the law routinely tackles.

(c) Proprietary foundations?

A third type of theory, partly reacting to the 'nexus of contracts', is that corporations have 'proprietary foundations'. As John Armour and Michael Whincop elaborated in 2007, on this view the key is that property rights are meant to have 'a certain priority ranking' over obligations (such as contract or tort claims) in insolvency. Corporate law does 'asset partitioning',[39] which confines creditors' claims to the company rather than investors or directors, and vice versa. Property rights over a company's assets, particularly for secured creditors, will 'protect their holders' claims better than do contractual ones',[40] because 'property' (ostensibly) binds third parties, and contracts or other obligations (ostensibly) do not.

The trouble is, property is another form of right between people like contract, not a relationship to a thing, and not automatically binding on third parties. Corporate and insolvency law itself alters the priority of property over contract. For instance, in the UK, employees' contract claims have preferential status over floating charges,[41] a floating charge has no priority over certain unsecured creditors,[42] any proprietary charge that is unregistered loses priority,[43] and employment contracts bind the purchaser of a business' assets,[44] much like home-dweller rights override the purchasers of a freehold.[45] The priority of employees especially underlines that an 'investment of labour', in a company, as Roy Goode has put it,[46] is equally or more valuable than investment of capital. Property is not simply 'better', because property rights, as Parliament saw, often result from contracts warped by unequal power, and should not always rank above social rights. More fundamentally, we cannot try to have a functional theory of one legal form (the corporate 'person') by appeal to another legal form (corporations are founded on 'property', or 'contract').[47] This is another dead end. When Berle and Means wrote in 1932 that the modern corporation 'has destroyed the unity that we commonly call property', they were right.[48]

(d) Concession of the state?

A fourth approach has long been to say that corporations are in essence public bodies, or a 'concession of the state'.[49] On this view, we do not need to figure out if a corporation is a 'person', a 'nexus of contracts' or has 'proprietary foundations', because a corporation's place in private law should be rejected. For example, Marc Moore extended this argument in 2013 to say that all private law and corporate law is 'ultimately the product of public-regulatory intervention' and we must not forget that 'the state creates the structural preconditions for private ordering'.[50] We see more mandatory rules in corporations than ones that incorporators choose, and an accountable governance structure is a 'contractually unattainable public good'.[51]

If we had to choose, this argument is preferable to those centring the corporation in the law of obligations or property. Yet the difficulty with the corporation being seen as 'public', and not 'private', is the same as the difficulty of the private/public divide itself. All law concerns human associations, from contracts, to families, to enterprises to polities. All law is social, and a corporation, like a contract, is one type of social institution among many. A social institution is something positively created by the contributions of people.[52] Corporations are not reducible to concessions of the state because very often they persist longer than the states which in law 'concede' them. This is true of the Corporation of London which preceded the Norman Conquest,[53] or the Universities of Oxford and Cambridge which also lasted through the English, British and UK state's various phases of collapse, civil wars, and restorations. Sometimes companies become the state, as did the East India Company with its own military and collection of taxes. One might say corporations are private-public hybrids, like 'franchise governments',[54] and better yet they can conduct 'politics as a vocation'.[55]

This then is the modern corporation's social significance. They are associations. They wield power. They shape privilege. They are often political. This is why so many thinkers in modern corporate law, including its founders, Berle and Means, came to see it as a 'social institution'.[56] As Melvin Eisenberg wrote, the 'corporation is not a nexus of contracts, but an enterprise organized by rules',[57] nor is it simply a 'person', nor 'property', nor merely a concession of the state. Corporation combine elements of all these fields of law, but also fulfil multiple social functions that transcend the private realm or the state, particularly being the vector for human rights. The old Roman law categories divided reality along unnatural lines to entrench the power of its military rulers, the privilege of its landed aristocrats, and political voicelessness so vicious that it de-personified its own people.[58] None of those categories are that useful to understand the corporation in our social market economy, in a democracy committed to human rights. The enterprise, as a social institution, is.

2.2 Normative corporate law theory

'Positive' corporate theories were framed to answer what a corporation 'is', but also framed the discussion of what a corporation should be. Most nakedly, the normative implication from the 'nexus of contracts' theory was that (once the veil of contractual equality was drawn) shareholders should enjoy special power, privilege and even political voice. The reasoning of Easterbrook and Fischel, Williamson, or Jensen and Meckling, was that the shareholders alone bear residual risk of corporate insolvency,[59] the 'capital is always at hazard',[60] the shareholders alone make 'asset-specific investments' which may not be protected except through boardroom control,[61] and it was only legal 'fiat' distorting what would happen in the 'nexus of contracting relationships' that enabled workers to sit in boardrooms.[62] Shareholders,

supposedly, had fairly acquired a legitimate monopoly on corporate governance. This was (supposedly) why corporations pursue shareholder value, and should.

These arguments for shareholder primacy rested on at least two false premises. First, shareholders increasingly invested 'other people's money', not their own, and so took no risk. Over the mid-20th century shareholders were increasingly asset managers and banks, today including BlackRock, Vanguard, Legal & General or Deutsche Bank. Though registered as shareholders, they bear no residual risk upon insolvency. It is not their capital at hazard. They do not make firm-specific investments. They control the votes and rights, yet all the money, all the voting privileges, derive from other people, usually from workers saving for retirement, who invariably bear more risk and contribute much more to corporations. Second, other stakeholders such as workers sat in boardrooms initially because of collective agreements, not legal 'fiat'.[63] Collective bargaining, not 'fiat', also produced the right of pension beneficiaries to vote for representatives in pension funds. Collective agreements came first. Laws codified the pattern second.[64] This happened even in the face of legal suppression, of people not being able to contract for what they wanted.[65] So empty, so ideological, so a-historical, so broken, are these shareholder primacy theories that they failed to grasp who the very shareholders were that they sought to lionise. Or possibly those theorists just thought, as Easterbrook and Fischel wrote, 'Who cares?'[66]

The theory that a corporation has 'proprietary foundations' also implied a normative conclusion. It gave pride of place to secured creditors over others when a firm is insolvent. So, anything that compromised secured credit (and the proprietary foundations theory), particularly preferential status or the ring-fenced fund, should be abolished. The argument to abolish a fair priority system can, of course, be made without saying a company is defined by its proprietary foundations, asserting that fair priority is 'redistribution',[67] rather than the anti-social rules of property law being the relevant, and quite unjust, 'redistribution' at hand. The difficulty with this argument – as with arbitrary limits to preferential status in insolvency – is that it is simply unconvincing to workers, pensioners, and small businesses who would lose. They are likely to see that, as Elizabeth Warren has put it, this would be a 'damn good deal for secured creditors',[68] mostly banks, and nobody else.

What is the normative implication of saying a corporation is 'public'? It suggests we should do more to control 'private' power, though it is not clear what. Maintaining that a corporation is a 'person' could go various ways. Most insidiously, if we equate all persons to human beings, we might start giving corporations constitutional, political or religious rights.[69] By this point positive theories may just as well be abandoned because what really matters is the exercise of raw social control. For example, in the eyes of a majority of the US Supreme Court, a law requiring that

employers guarantee their workers contraceptive health care may violate a corporation's religious freedom.[70] Perhaps this tells us that it matters less in theory what a corporation 'is', lest we 'cover social facts and factors of social existence with abstractions' that conceal 'the exercise of social power behind a veil of law'.[71] We should focus on what corporations really do.

2.3 Enterprise reality and law

In response to the shortcomings of corporate law, a new enterprise law quietly emerged, based in reality. In 1947, the great New Deal architect, A.A. Berle wrote in 'The Theory of Enterprise Entity' that more 'often than not, a single large-scale business is conducted, not by a single corporation, but by a constellation of corporations controlled by a central holding'.[72] Legal forms, like the corporation, take their 'being from the reality of the underlying enterprise', and so it made more sense to align law with reality. The first use as a legal concept was in the US Fair Labor Standards Act of 1938, after amendments in 1961, which protected rights such as a minimum wage, and time-and-a-half overtime pay if people work over 40 hours.[73] To ensure effective coverage, an 'enterprise' was said to mean any activity for a 'common business purpose... whether performed in one or more establishments or by one or more corporate or other organizational units'.[74] Employers had to pay the minimum wage to all those within the scope of the enterprise. The Civil Rights Act of 1964 also used the term 'enterprise' again for the scope of discrimination protection, and bona fide exceptions.[75]

The essential idea, proposed by Berle and found in law, was to see past the corporate form, to make rights effective. In antitrust and competition law, the equivalent shift occurred using the 'single economic unit' and 'undertaking' concepts.[76] It was the market power of this (not merely a corporate entity) that had to not be abused. In UK legislation an 'undertaking' included 'any body of persons (whether corporate or unincorporate)',[77] and the same logic was then applied across EU labour law.[78] An 'undertaking', said the European Court of Justice, 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'[79] For example, in *Viho Europe BV v Commission*, the Court of Justice held that Parker Pen making an agreement with its wholly owned subsidiary could not be found to have violated article 101 (which bans cartels and collusion), because the corporate group acted as a 'single economic unit within which the subsidiaries do not enjoy real autonomy'.[80] The same idea, to cut through or merge corporate entities, and focus on economic reality, was adopted in the laws on taxation and accounting.[81]

The functional concept of enterprise was vital to German law's post-war tradition, with tight controls on big business power, and freedom for labour and small enterprise.[82] The fascist regime, wedded to both a 'bundle of contracts' and

‘leadership’ theory of corporations, proclaimed that ‘Democracy of capital will vanish, just as it did in politics’,[83] and drove re-privatisation of industry.[84] After the war, democracy was restored in politics, and extended further into the economy, to undo the structural causes of fascism. The fascist regime, focused on primacy of capital, abolished trade unions and codetermination. After the war workers’ rights to unionise, and then to vote in their companies, were restored through collective bargaining. Then those ‘codetermination bargains’ were codified into law.[85] The fascist regime codified cartels of big business,[86] and enabled banks to usurp corporate voting rights.[87] After the war the cartels were mostly broken up (though banks kept control of shareholder votes, and still do today).[88] All these moves required a new approach to legal and economic theory.

In post-war years of reform, concepts of enterprise law were systematically developed,[89] and writing in 1988 Thomas Raiser summarised the ‘theory of enterprise law’ in Germany: the words ‘undertaking’ and ‘enterprise’ meant the same.[90] Pre-war corporate law theory had tended to exclude the public and employee interests so, wrote Raiser, the ‘social purpose of [constitutional] rights and the principle of the social state are of utmost importance in enterprise law.’ Enterprise law reflected a ‘new macro-economic and legal environment’ including ‘anti-trust law’, ‘certain elements of central planning’ or ‘state-owned production and service enterprises (including banks)’. Enterprise law is ‘aware of the fact that the governance of an enterprise includes the exercise of power, and therefore requires legal mechanisms for its control.’[91] In a similar tradition in the UK, Simon Deakin contended in 2012 that to understand ‘business enterprise or firm’ behaviour, company law explains just a ‘fraction’ of reality. We must ‘bring in insolvency law, employment law, tort law and, arguably competition and tax law, to get the full picture.’[92]

So, when the EU General Data Protection Regulation 2016 cast its scope in terms of any ‘enterprise’, this spoke to an established tradition.[93] In the world of data protection and the right to privacy, with data transferable between servers at the speed of light, through corporate groups or groups of groups, it made no sense to attach responsibility to ancient legal units, existing in Companies House registers, but little else.[94] So, an enterprise was defined to mean ‘a natural or legal person engaged in an economic activity, irrespective of its legal form’. Further, the Regulation extended to the ‘group of enterprises’, whoever does data processing.[95] The UK used the word ‘enterprise’ in an array of Acts,[96] covering competition, public services, insolvency, consumers, labour rights, education, company law, banking, and equality. In tort case law ‘enterprise risk’ developed as the main framework for attributing liability, and it expressly goes outside corporate, contract or proprietary forms.[97] The boundaries of an enterprise depend on economic reality, risk, dominant influence and bargaining power – all readily convertible into working tests that have long been used across the legal spectrum.[98]

Figure 2: Top 20 in the FTSE 100 by market capitalisation and sector-specific enterprise regulation (June 2023)

	Company	**Sector**	**Specific enterprise laws (examples)**	**Market cap (£m)**
1	AstraZeneca	Health	NHS Act 2006, Human Medicines Regs 2012	182,791
2	Shell	Oil, gas	Petroleum Act 1998, Climate Change Act 2008	155,115
3	HSBC	Finance	Banking Act 2009, FSMA 2000, etc	120,660
4	Unilever	Consumer goods		102,448
5	BP	Oil, gas	Petroleum Act 1998, Climate Change Act 2008	82,891
6	Diageo	Food distribution		74,896
7	Rio Tinto	Coal, mining	Coal Industry Act 1994, and foreign equivalents	63,236
8	Brit. Am. Tobacco	Agriculture	Agriculture Act 2020, and foreign equivalents	57,485
9	GSK	Health	NHS Act 2006, Human Medicines Regs 2012	56,592
10	Glencore	Coal, mining	Coal Industry Act 1994, and equivalents	53,635
11	RELX	Publishing		48,984
12	Reckitt Benckiser	Consumer goods		45,186
13	LSE Group	Finance	Finance Services and Markets Act 2000, etc	43,378
14	National Grid	Energy	Electricity Act 1989, etc	39,063
15	Compass	Food distribution		38,269
16	Anglo American	Coal, mining	Coal Industry Act 1994, and equivalents	32,295
17	Prudential	Finance	Financial Services and Markets Act 2000, etc	31,304
18	Haleon	Consumer goods		30,492
19	Lloyds	Finance	Banking Act 2009, FSMA 2000, etc	29,307
20	BAE Systems	Military	British Aerospace Act 1980	28,531

To understand corporations, Figure 2 illustrates how the largest firms on the FTSE 100 fall under sector-specific enterprise laws. The same goes for the S&P 500, Euronext, the FT Global 500, and the majority of large multi-national corporations. They rely upon public finance. They get regulatory subsidies. They are publicly licensed. They must answer to a regulator. Their board of directors is altered by law. They fall under special administration rules if insolvent. They are responsible for fulfilling universal social and economic rights. To understand corporations, their governance, their finance, their behaviour, corporate law is not enough.

Where Figure 2 does not highlight a sector, that company primarily functions under the general laws – particularly on competition, general consumer rights, health and safety, or environmental laws, that apply to all corporations generally. Where Figure 2 highlights a sector in blue, a major scheme of sector-specific enterprise laws alter the finance of, governance of, or distribution of rights made by, the company.

For example, AstraZeneca and GSK must secure approval to distribute regulated medicines under the Human Medicines Regulations 2012, and in the UK their dominant source of finance is the National Health Service, established under the 2006 Act. Shell and BP are fossil fuel polluters licensed by the North Sea Transition Authority under the Petroleum Act 1998, but whose regulatory subsidies of not paying for pollution are being tightened by the Climate Change Act 2008. Banks such as HSBC and Lloyds are financed, licensed and supervised by the Bank of England, the Prudential Regulation Authority, and the Financial Conduct Authority in all business. BAE Systems is subject to special control through a golden share, and like banks has statutory solvency guarantees from government. These sector-specific enterprise laws do not merely add a generic layer of regulation, and leave internal organisation alone. They add crucial rules of finance, governance, and distribution of rights. By abstracting corporate law from enterprise law, we leave major gaps in our understanding.

The shift to the broader horizon of enterprise law in the UK, the US, Germany, and EU law is found in every developed legal system, and in international law. As the International Court of Justice put it in *Barcelona Traction, Light and Power Co Ltd*,

> In considering the needs and the good of the international community in our changing world, one must realize that there are more important aspects than those concerned with economic interests and profit making; other legitimate interests of a political and moral nature are at stake and should be considered in judging the behavior and operation of the complex international scope of modern commercial enterprises.[99]

None of this means that we abandon corporate law as a tool in legal analysis, because it remains a useful building block wherever it matches the enterprise in organising finance, governance and rights. It is an important component of enterprise. Yet where the corporation does not match the ‘underlying reality’ of the enterprise, as is very often, then the full scope of enterprise law must be taken into consideration to understand corporations.

3. Functions of enterprise law

If enterprise law has eclipsed the corporate law, what are its functions? A functional theory, according to Felix Cohen, entails an 'insistence on certain questions' directed at 'the human meaning of the law'.[100] This is not just about how law develops, its nature, structure, purpose, or its narrow financial impacts, but how these affect us as human beings in the round. Across time and space, enterprise laws fulfil three main functions. They:

(1) facilitate the accumulation of resources, particularly capital used for production: a **finance** function;

(2) coordinate production, especially by sharing voting and decision power: a **governance** function;

(3) distribute resources, such as goods, services, income or wealth: a **rights** function.

These three functions – finance, governance, rights – give us a taxonomy and a way to explain what enterprises do. As one type of enterprise, corporations also perform these three functions.[101] They are a conceptual grammar and can apply equally to enterprises in health, banking, energy, transport, big tech or furniture shops. They build on Albert Hirschman's *Exit, Voice and Loyalty*, by extending 'exit' based upon market exchange to all forms of financial input, extending 'voice' to all kinds of governance and decision-power, and by extending the more confined notion of 'loyalty' to enforceable rights.[102] It provides an heuristic structure. How is the enterprise financed? How is it governed? Which are the rights it distributes? These can be elaborated as follows.

3.1 Finance, beyond equity and debt

The 'finance' function starts with the meaning of 'capital' used by Adam Smith, as property that is used for production, not consumption.[103] This includes equity and debt. In addition, enterprises may be financed by taking advantage of public investment and ownership, state aid, including guarantees against insolvency, holding a natural monopoly that can be exploited under the law, systematic unequal bargaining power in relation to workers, service-users or others that is not rectified by labour, consumer or other rights, and externalities. These are shown in Figure 3, and the division between finance commonly found in general enterprise law is in blue, and finance in specific enterprise law is in green.

Figure 3: General and specific functions of finance

	1. Finance
(1)	Equity from investors
(2)	Debt raised from creditors
(3)	Unequal bargaining power (not rectified by law)
(4)	Externalities (not internalised by law)
(5)	Public investment and ownership
(6)	State aid, including guarantees against insolvency
(7)	Natural monopoly (left exploitable by law)

In short, to understand the true finance of enterprise, all laws relating to the accumulation of resources, whether in the Companies Acts, contract law, state aid or the shortcomings of labour, consumer and environmental law, are essential.

'Regulatory subsidies' are the most significant type finance in practice. This overlaps with market failure literature.[104] For example, if an enterprise externalises the costs of production without paying, this may underwrite its entire business. This is true for all oil and gas firms, solvent purely because they do not pay for climate damage. If a water or train company takes advantage of its natural monopoly, and raises prices far in excess its costs of production plus a reasonable return, this is more significant in practice than equity or debt. If a bank takes advantage of state guarantees for deposits, or bailouts on insolvency, this can be more significant than its own debt or equity finance. These problems can also be seen from the viewpoint of 'market conditions'. If the legal and factual conditions for workable, competitive markets and private enterprise do not exist, the enterprise is likely able to take advantage of others, and enjoy an unjustified regulatory subsidy.[105]

3.2 Governance, beyond shareholders

Second, the 'governance' function of enterprise concerns all the rules (and not just those in corporate law) that may coordinate what it does, and usually how it produces its goods, services or performs other activities. General governance rules include directors who are appointed under a typical corporate constitution by a committee of directors themselves, or shareholders, and most developed countries that have directors elected by workers. Sector-specific governance laws often include directors appointed by service-users or public officials, licensing by a regulator that requires

compliance with a host of standards, and rules structurally separating the enterprise.

Figure 4: General and specific functions of governance

	2. Governance
(1)	Directors appointed by directors/shareholders
(2)	Directors from workers
(3)	Directors from service-users, or public officials
(4)	Licensing by statute or regulator (requiring compliance with multiple standards)
(5)	Structural separation rules

These governance functions are conceptually separate from finance functions: whoever finances the enterprise, whatever sticks in the bundle of 'property' they may have, governance rights can be allocated to the same or different groups. For example, even if a billionaire buys a media organisation, its staff may still retain certain rights of editorial autonomy.[106] 'Ownership' of shares, or investment, need not translate into control, and often it should not. Corporations in universities, the health sector, or central banks, including those incorporated under standard companies legislation, typically have different governance norms to a private or listed company.

3.3 Rights, for all stakeholders

Third, there is the 'rights' function. Finance and governance entail a matrix of rights and duties, but this category adds how, once accumulated and produced, resources are distributed, and claims are enforced. General enterprise law assumes there will be a contract for a price for service-users. This will be rounded out by the right of consumers to no unfair terms. Labour law secures rights for workers. Pension, insurance, or mutual fund regulation secures rights for investors. Sector-specific enterprise laws add a host of rules especially for service-users such as the right to receive a good or service, fair prices or the service or good free, special standards of equal treatment, standards of fair service defined by its nature, and special enforcement procedures.

Figure 5: General and specific functions of rights

	3. Rights of service-users, enforceable in court
(1)	Contract for a price
(2)	Fair terms and standards of service for consumers, workers and investors
(3)	Right to services or goods
(4)	Fair price for a service, or free at point of use
(5)	Equal treatment
(6)	Fair standards of service
(7)	Special enforcement procedures

Human rights instruments mostly contain rights from enterprises, without explaining how the details should work. For example, the right to progressively free school and university education does not say more about standards of teaching or class sizes.[107] The right to health and 'medical care' does not spell out the operations that are available. The right to 'the benefits of scientific progress' does not explain how business or the government must decarbonise the electricity grid and replace fossil fuels with clean technology.[108] Human rights are a destination, and enterprise law is the map. Thus, enterprise law is not only essential to understand how corporate law really works, it enables us to understand how human rights are realised in practice.

3.4 A functional taxonomy by example

The finance, governance and rights functions enable us to analyse all sectors of enterprise. Figure 6 summarises UK law in six examples of sector – health, banking, energy generation, water, rail, and internet – where the general law of enterprise (including corporate law) is significantly altered by specific enterprise laws, and where private and public entities and regulation are inseparable. The norms that are coloured blue derive from the 'general' law of enterprise, such as corporate law, while the norms that are coloured green derive from the 'specific' laws of enterprise, which alter the general law for that specific context. This underlines that corporate law is literally and metaphorically eclipsed by enterprise law, and that we simply cannot understand corporations in specific fields like these – that is most of our economy – through corporate law alone.

Figure 6. A summary of sector specific enterprise laws: health, energy generation, rail transport, communication infrastructure

	(1) Finance	(2) Governance	(3) Rights
1. Health care	• Department of Health transfers public funds to NHS England, which in turn distributes to Integrated Care Boards, NHS trusts, and so on: Finance Acts, NHS Act 2006 s 1H. • Building may be privately finance if Secretary of State certifies: NHS (Private Finance) Act 1997 s 1. • Up to 49% work by NHS trusts may be privatised (up from 2%): Health and Social Care Act 2012 s 164-5, and NHSA 2006 s 43(2A).	• Secretary of State (SS) appoints NHS England directors: NHS Act 2006 Sch A1. • Integrated Care Boards distribute finance to NHS trusts to run hospitals. Each are a 'body corporate': NHS Act 2006 Schs 1B and 7. • ICBs appointed by SS, three nominated by NHS trusts, staff 'who provide medical services' and local councils: NHS Act Sch 1B. • NHS foundation trusts directors one-third to half elected by staff, local councils and universities: NHS Act 2006 Sch 7, paras 3 and 9.	• Patient right to treatment, within capacity as determined by health authority's broad discretion: eg *R(B) v Cambridge HA* [1995] EWCA Civ 43. • Equality in treatment: NHS Act 2006 s 1C, Equality Act 2010 s 29, Sch 3, paras 13-15. • Careful performance, eg *Thake v Maurice* [1986] QC 644. • No conflicts of interest in medical referral decisions: General Medical Council, *Good Medical Practice* (2019) paras. 78–9.
2. Banking	• UK Treasury account kept at Bank of England (BoE): Exchequer and Audit Departments Act 1866. • BoE finance of private banks through base interest rate, reserve, deposit and loan policies: Bank of England Act 1946 s 4(3). • Private banks raising of equity and debt capital on markets: eg Companies (Model Articles) Regs 2008, Sch 3, paras 3 and 43. • Customer deposits are unsecured contract claims, not property, and guaranteed by Financial Conduct Authority to £85,000: *Foley v Hill* (1848) 2 HLC 28, Financial Services and Markets Act 2000 ss 212-215. • State guarantee against insolvency: Banking Act 2009 ss 1, 7-13.	• Bank of England Court of Directors appointed by Prime Minister, but removal only for limited reasons: Bank of England Act 1998 s 1, Sch 1. • Private banks must be licensed by the Prudential Regulation Authority: FSMA 2000 ss 19-20 and 55A. • Private banks directors typically appoint their own successors, subject to member majority removal power: UK Corporate Governance Code, CMAR 2008 Sch 3, para 20, CA 2006 s 168. • Note also in EU law: remuneration committee must include employee director if 'provided for by national law' in management bodies: Credit Institutions Directive 2013/36/EU art 95.	• Customer right to deposit protection up to £85,000: FSMA 2000 ss 212-215. • Right against unfair or surprising terms: eg Consumer Rights Act 2015 ss 52-5, *OFT v Abbey National plc* [2009] UKSC 6. • Right against extortionate interest rates and unfair credit relationships: Consumer Credit Act 1974 ss 140A-B.
3. Energy generation	• Private generators raise equity and debt finance: eg Companies Model Articles Regulations 2008 Sch 3. • Subsidy to fossil fuel generators in not (yet) paying for pollution, health and climate damage: eg Petroleum Act 1998 s 9A, Climate Change Act 2008 s 1, *Smith v Fonterra Ltd* [2021] NZCA 552. • Subsidy to renewable generators through Contracts for Difference scheme: Energy Act 2013 s 7.	• Private generator company directors appoint own successors, subject to member removal power: CMAR 2008 Sch 3, para 20, CA 2006 s 168. • Gas and Electricity Markets Authority appointed by SS, which licences generators: Utilities Act 2000 s 1, Sch 1. • Generators are legally separated from grid transmission and distribution: Electricity Act 1989 ss 10A-E.	• Bill payer right to switch after contract end: Standard Conditions of Electricity Supply Licence (2020) condition 24.8. • Right to capped prices, but raised routinely with tacit government approval: Domestic Gas and Electricity (Tariff Cap) Act 2018 s 1. • Right against arbitrary disconnection, and no disconnection in winter for

	• Feed-in tariff, but since 2019 at market rates, Electricity Act 1989 s 6 and SI 2012/2782.	• 50MW+ generation needs planning permission: eg EA 1989 s 36, *Trump v Scottish Ministers* [2015] UKSC 74.	pensioners: SCESL (2020) condition 27.9.
4. Water	• Finance for Scottish Water from customer bills for operation costs: Water Industry (Scotland) Act 2002 and SI 2015/79. • Subsidy to English private water companies through privatisation gift of eliminating of over £12 billion debt: G Plimmer (6 June 2017) Financial Times. • Private water co's raising equity and debt: eg CMAR 2008 Sch 3. • Subsidy for English private water companies holding a natural monopoly on reservoirs and pipes, to set prices up to Ofwat cap: Water Industry Act 1991 s 11. • Regulatory subsidy in not paying for sewage and pollution costs: eg *Manchester Ship Ltd v United Utilities Water plc* [2014] UKSC 40.	• Scottish Water directors appointed by Scottish ministers: Water Industry (Scotland) Act 2002 s 20 and Sch 3. • Ofwat members appointed by the Secretary of State: Water Industry Act 1991 s 1A and Sch 1A. • English private water company directors appoint own successors, subject to member removal power: CMAR 2008 Sch 3, para 20, CA 2006 s 168. • Power of Ofwat to direct private water companies: Water Industry Act 1991 s 12. • Consumer Council for Water with tepid information and investigation powers: Water Industry Act 1991 ss 27A-K, Sch 3.	• Water bill payers in Scotland have right to reasonable cost of water: SI 2015/79. • Water bill payers in England pay no more than the Ofwat cap, but Ofwat has duty to ensure 'reasonable returns' for *companies*: WIA 1991 ss 2, 11. • Drinking water must 'pure and wholesome' and clean: SI 1989/1147. • Bathing waters should be classified as 'sufficient' in terms of cleanliness: Bathing Water Regulations 2013 reg 5. • Right to not be disconnected: WIA 1991 s 61(1A).

5. Rail transport	• Direct government subsidies, eg £7.1 bn, ORR, Rail Finance: 2018-19 Annual Statistical Release (2019). • Subsidy for English private train operating companies from natural monopoly in charging passengers up to cap set by ORR: Railways Act 1993 s 28(1). • Subsidy through elimination of fair competition by banning UK or English government ownership (not Scottish or foreign governments): Railways Act 1993 s 25. • Private rail co's raising equity and debt: eg CMAR 2008 Sch 3.	• Office of Rail and Road members chosen by SS, with oversight powers: Railways and Transport Safety Act 2003 Sch 1, Railways Act 1993 s 4. • Network Rail Ltd, directors appointed by the Secretary of State as its sole member. • Train operating company directors appoint own successors, subject to member removal power: CMAR 2008 Sch 3, para 20, CA 2006 s 168. • ScotRail directors appointed by Scottish government. • Weak Passenger Council: Railways Act 2005 ss 19-21 and Schs 5-6	• Free passenger travel on London tube and rail (but not other rail) for Londoners over 60 and children aged up to 10: eg Greater London Authority Act 1999 ss 240-3. • Right to pay no more than ORR capped train prices: Railways Act 1993 s 28. • Right to compensation for delays: Passenger Rights Regulation 1371/2007 art 17.
6. Internet connection	• Direct government subsidies to upgrade to fibre-optic broadband, eg £5 bn in *Budget 2020*, para 1.134. • Subsidy from cheap radio spectrum licences: eg *EE Ltd v Ofcom* [2017] EWCA Civ 1873. • Subsidy from network monopoly of cables, and absence of competition since Post Office stopped at cost provision in 2014. • Private internet co's raising equity and debt: eg CMAR 2008 Sch 3.	• Office of Communications directors appointed by Secretary of State, Scottish and Welsh minister, and 'from amongst their employees': Office of Communications Act 2002 s 1. • Radio spectrum licence needed from Ofcom: Wireless Telegraphy Act 2006 s 8. • Internet company directors appoint own successors, subject to member removal power: CMAR 2008 Sch 3, para 20, CA 2006 s 168.	• Service-user right to privacy by servers not being under duty to check for illegal content and data processing by consent or law: eg Electronic Commerce Directive 2000/31/EC arts 1-15, GDPR 2016 arts 12-17. • Right to price limits only if provider has significant market power: Communications Act 2003 s 91. • Right to 'universal service' at a minimum speed of 10Mbps: CA 2003 s 65. • Right to keep phone number when switching: CA 2003 s 58.

This is merely a snapshot, designed to highlight some of the salient rules that would form core reading in an enterprise law course.[109] A functional understanding enables us to focus on key issues, and cut out the noise of extra statute and case law. It also opens the possibility of a new cross-jurisdictional empirical research agenda.

4. Empirical research, and the Chicago School's unintended consequence

Once we have identified and organised the key functions performed by enterprise law, we are able to map the law across jurisdictions, disregarding the forms of legal sources. It ceases to matter whether a norm derives from statute, case law, or softer norms, if the functional effect is the same. It also ceases to matter whether a norm derives from corporate, labour, competition, insolvency, public, or human rights law, if the functional effect is the same. A transparent qualitative assessment may be made about the degree to which the function is achieved, whether that is financing more or less, enabling voice in governance for various stakeholders to a greater or lesser degree, or by more or less protecting certain rights. Changes in legal rules may then be correlated with socio-economic outcomes over time.

This 'leximetric' research has already been conducted for large parts of labour law in 117 countries, and selected parts of corporate law and insolvency law in a smaller number of countries.[110] These measure the protectiveness of the law for workers, shareholders and creditors, on a scale of 1 (for most) to 0 (for least). For enterprise law, the measure of protectiveness would be for the public interest. An example typology of rules for each enterprise sector, to map against socio-economic data, could be built as follows:

Figure 7. Example leximetric table for enterprise finance, governance and rights, on a scale protecting the public interest

1. Finance		
(1)	Public finance, or equivalent state aid, used to ensure universal service?	Yes = 1. No = 0.
(2)	Public ownership, or equivalent method, used to retain surplus or profits for investment?	Yes = 1. No = 0.
(3)	No monopoly or special right exists to create an anti-competitive subsidy?	Yes = 1. No = 0.
(4)	No externalities or pollution from the enterprise, which is not fully compensated?	Yes = 1. No = 0.
(5)	Is there a funding method to prevent severe interruption of service from insolvency?	Yes = 1. No = 0.
2. Governance		
(1)	Statute or a regulator authorises the enterprise based on compliance with legal rules?	Yes = 1. No = 0.
(2)	Structural, vertical separation of non-competing enterprise parts, including accounts?	Yes = 1. No = 0.
(3)	Elected representatives of enterprise staff on the board of directors?	Yes = 1. No = 0.
(4)	Elected representatives of service-users on the board of directors?	Yes = 1. No = 0.
(5)	Elected representatives of the real investors on the board of directors?	Yes = 1. No = 0.

3. Rights for service-users		
(1)	Right to receive enterprise service, without discrimination based on irrelevant status?	Yes = 1. No = 0.
(2)	Right to receive enterprise service free at the point of use? (Or price cap, or subsidy?)	Yes = 1. No = 0.
(3)	Right to receive a fair standard of service or goods from the enterprise?	Yes = 1. No = 0.
(4)	Duties of enterprise or regulator owed to service-users, not capital investors?	Yes = 1. No = 0.
(5)	Right to an effective remedy to enforce rights?	Yes = 1. No = 0.

A functional approach to enterprise law enables an accurate positive understanding, from which we may build predictions, and draw normative implications. This is essentially the same as the 'Methodology of Positive Economics' advocated by Milton Friedman in his earlier work.[111] However, Friedman and his colleagues insisted that each area of general enterprise law should only serve a single goal, completely abstracted the public interest. Friedman argued that corporations and corporate law was for shareholder profit alone, and never broader notions of social responsibility.[112] Friedman also argued that labour law (if it existed at all) should only be directed towards the good of the individual employee, without any possibility for collective interests.[113] Robert Bork contended that antitrust and competition law (to the extent that it existed) should solely pursue consumer welfare, and ignore what was good for labour or the wider community.[114] Douglas Baird and Thomas Jackson argued that insolvency or bankruptcy law was for creditor wealth maximisation, and should equally not incorporate labour or community interests.[115]

Then, to complete the picture, the Chicago School argued against any conception of specific enterprise laws. George Stigler argued that all public regulators were liable to capture by industry.[116] Friedrich von Hayek, like his colleagues, insisted that any public ownership of enterprise should be entirely out of the question,[117] and that social justice was nothing more than a 'mirage'.[118] Frank Easterbrook argued that studying specific sectors, such as the 'law of the horse' (i.e. transport) or 'cyberspace' (i.e. internet regulation), was tantamount to building 'courses suited to dilettantes'. Our law 'courses should be limited to subjects that illuminate the entire law', with 'general rules' alone, such as 'property, torts, commercial transactions'.[119] Furthermore, we should keep corporate law away from 'some form of public control'.[120] Each field of economic regulation served single functions, and the public interest was gone. No integration of stakeholder interests, no public interest, just an atomised shareholder, worker, consumer, or creditor without any possibility of recognising cooperative and social good.

An unintended consequence of this Chicago School approach was to destroy any accurate positive understanding of our economy, because the real world did not isolate corporate from labour, competition, human rights, or public law. In order to understand the economy in an empirically grounded manner, we cannot impose the theory on reality. Rather we must adopt a legal theory that matches economic reality.

The enterprise law tradition differs fundamentally from the Chicago School, seeing that corporate law, as Berle and Means wrote, integrates the interests of investors, workers, consumers, and creditors because the goal is to 'serve... all society', not a narrow group of shareholders or directors.[121] Labour law incorporates collective interests precisely to protect individual liberty and freedom, or as Sidney and Beatrice Webb wrote, to 'result in the utmost possible development of faculty in the individual human being'.[122] Competition law aims to protect the entire competitive structure for the 'public interest, individual undertakings and consumers', as the Court of Justice of EU has continually held.[123] Insolvency and bankruptcy law are made, in the words of Elizabeth Warren, not just maximise creditor wealth, but to protect 'the older employee, the regular customer, the dependent supplier, and the local community' as well.[124] Enterprise law as a whole enables us to understand how our most crucial social institutions really work. It enables us to perceive the immense splendour, and the pressing problems, of our entire economic constitution and its capacity to realise universal human rights.

5. Conclusion

Enterprise law has quietly eclipsed corporate law, and it is time our teaching, research and practice changes to match. Corporate law explains elements of modern enterprise. But by itself that just a fraction of how most major corporations behave. Corporate law does not explain the vast ecosystem of business, regulated industry and public services. It is a few bare bones, without the heart and soul of our economic constitution that enterprise law creates. University educators have a fundamental duty to understand our world and its functioning, and in social sciences we must understand problems and their causes, so that we can think about the options for change. Enterprise law matches how stock classifications work, how law firm practice divisions work, how modern government works, and how economic life really is. Our next step, and an agenda for future research, is to categorise enterprise laws across the world, see how they have changed, and assess their impact upon social and economic indicators, such as productivity, equality, and clean energy.

And at its most reductive corporate law's limited horizon risks trapping us into a narrative that government must stay out of business, business is all for profit, profit must be maximised, and so greed is good. The principles of political economy, from Adam Smith onwards, teach us otherwise: that however selfishly people may act,

there is good in everyone, we live through helping others, and the task of society is to bring that good out.[125] Our laws must be the 'omnipresent teacher',[126] and we cannot encourage the pernicious doctrine that shareholder value trumps social value. Enterprise law accounts for the incredible growth, splendour, and riches of our world, and so we must embrace the colour and creativity of a living law that the leading figures of corporate law know best. This is our new enterprise.

Notes

1 PL Davies, *Gower and Davies: Principles of Modern Company Law* (7th edn 2003) 1, and see substantially similar up to (11th edn 2021)

2 M Poynting, 'World's first year-long breach of key 1.5C warming limit' (8 February 2024) BBC.

3 R Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122 Climatic Change 229, 237.

4 ACCR, Part 1: BP GHG emissions (March 2022) 3, estimating 2,249 MtCO2e in 2019. UK 2023 emissions: 384.2 MtCO2e.

5 e.g. G Tilly, '17-year wage squeeze the worst in two hundred years' (11 May 2018) TUC.

6 OECD.Stat, Life Expectancy. UK life expectancy was 80.6 in 2010 and 80.4 in 2020, before the Covid-19 drop. A major cause of stagnation is the Health and Social Care Act 2012, letting NHS trusts do 49% private work, up from a 2% limit, diverting resources.

7 See Figure 2, in part 3 below.

8 Memorandum and Articles of Association of the London School of Economics and Political Science, art 10.5. Oxford University Act 1854 s 6. Higher Education and Research Act 2017 ss 91-4 on public funding.

9 AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) 3, 46 and 308.

10 AA Berle, 'The Theory of Enterprise Entity' (1947) 47(3) Columbia Law Review 343, 344.

11 Fair Labor Standards Act of 1938, 29 USC §203(r)(1), for the purpose of responsibility for the minimum wage and overtime pay. This came from the Fair Labor Standards Amendments Act of 1961.

12 e.g. Enterprise Act 2002, Companies (Audit, Investigations and Community Enterprise) Act 2004, Enterprise and Regulatory Reform Act 2013, Small Business, Enterprise and Employment Act 2015, Enterprise Act 2016.

13 General Data Protection Regulation (EU) 2016/679 art 4(18), for the purpose of personal data protection rights.

14 F Kessler, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' (1943) 43(5) Columbia Law Review 629, 636, and see H Beale et al, Chitty on Contracts, with the distinction between volume I (General Principles) and volume 2 (Specific Contracts).

15 cf Aristotle, Politics (ca 350 BC) Book 3, ch IX, 'the state exists for the sake of a good life'.

16 JM Keynes, 'The end of laissez faire' (1924)

17 M Ricks, G Sitaraman, S Welton and L Menand, *Networks, Platforms & Utilities: Law and Policy* (2022) ch 1

18 FH Easterbrook, 'Cyberspace and the Law of the Horse' [1996] *University of Chicago Legal Forum* 207

19 e.g. Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22, 51, per Lord Macnaghten, 'The company is at law a different person altogether from the subscribers to the memorandum...'

20 B Smith, 'Legal Personality' (1928) 37(3) Yale Law Journal 283

21 SP Scott, *The Civil Law* (1932) vol 3, Digest, Book III, Title IV, comment 7(1), Ulpianus, On the Edict, Book X

22 SP Scott, *The Civil Law* (1932) vol 15, Codex, Book XI, Titles XVI XVII and XXVIII.

23 *Case of Sutton's Hospital* (1612) 77 Eng Rep 960

24 V Kurki, A theory of legal personhood (2019) on 'we-mode'.

25 *Case of Sutton's Hospital* (1612) 77 Eng Rep 960

26 *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] UKPC 5, [10] per Lord Hoffmann

27 FH Easterbrook and DR Fischel, ‘The Corporate Contract’ (1989) 89 *Columbia Law Review* 1416, 1429-1430

28 OE Williamson, *The Economic Institutions of Capitalism* (1985) 241, ‘... labor market transactions included. The organization of labor organization is nevertheless a very complicated matter.’

29 M Jensen and T Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305, 311. cf D Gindis, ‘On the Origins, Meaning and Influence of Jensen and Meckling’s Definition of the Firm’ (2020) *Oxford Economic Papers*, 966, on the ideas spreading to law schools.

30 JCD Zahn, Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht (1934) or *Economic Leadership and Contractual Ethics in the New Corporate Law* (1934) reviewed in F Kessler, ‘Book Review: Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht’ (1935) 83 University of Pennsylvania LR 393, 394. Later on see, for example, HN Butler, ‘The Contractual Theory of the Corporation’ (1989) 11 *George Mason University* LR 99, apparently placing significant faith in markets to solve most problems.

31 cf *Bank guarantees case* (Bürgschaft) (19 October 1993) BVerfGE 89, 214, section C2(b).

32 T Hobbes, *Leviathan* (1651) I, § 15

33 Mill (1848) Book V, ch XI, §§11-12

34 D Kahneman, *Thinking, Fast and Slow* (2011) and Mill (1848) Book V, ch XI, §§8-10

35 A Smith, *The Wealth of Nations* (1776) Book I, ch 8, §12 on ability to ‘hold out’.

36 A Smith, *Lectures on Justice, Police, Revenue and Arms* (1763) Part I, Introduction and §9. See also JS Mill, *Principles of Political Economy* (1848) Book V, ch XI, §§1-2

37 E McGaughey, ‘Ideals of the corporation and the nexus of contracts’ (2015) 78(6) Modern LR 1057. E McGaughey, ‘The codetermination bargains: the history of German corporate and labor law’ (2016) 23(1) Columbia J of European Law 135, 138-48.

38 e.g. A Cohn, ‘Social Comparison and Effort Provision: Evidence from a Field Experiment’ (2014) 12(4) Journal of the European Economic Association 877. VV Acharya, ‘Labor laws and innovation’ (2013) 56(4) Journal of Law and Economics 997

39 H Hansmann and R Kraakman, ‘The Essential Role of Organizational Law’ (2000) 110 *YLJ* 387

40 J Armour and MJ Whincop, ‘The Proprietary Foundations of Corporate Law’ (2007) 27(3) *Oxford Journal of Legal Studies* 429, 454. At 449-453 the authors also point to agency law, trust law, and the old law on ultra vires transactions to invalidate unauthorised deals towards third parties.

41 Insolvency Act 1986 ss 175, 176, 386 and Sch 6. Also s 176ZA on insolvency practitioners’ contractual claims. cf Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, art 4.

42 Insolvency Act 1986 s 176A

43 Companies Act 2006 s 859H

44 Transfer of Undertakings (Protection of Employment) Regulations 2006, implementing Directive 2001/23/EC.

45 eg Protection from Eviction Act 1977. Land Registration Act 2002 Sch 3, para 2. BGB 1900 §566. Bruton v London and Quadrant Housing Trust [1999] UKHL 26, per Lord Hoffmann.

46 R Goode, *Principles of Corporate Insolvency* (3rd edn 2005) 44

47 cf Armour and Whincop (2007) 27(3) OJLS 429, 430-1, ‘For scholars seeking to understand the functions performed by corporate law, the contractarian theory has proved a useful workhorse’.

48 AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) 7, referring to motivations to work hard from property becoming fictitious when investors owned shares, but directors were in control of the board.

49 *Trustees of Dartmouth College* v *Woodward*, 17 US 518, 636-638 (1819). Also *Hale* v *Henkel* 201 US 43, 74 (1906) 'the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public.'

50 M Moore, Corporate Governance in the Shadow of the State (2013) 178 and 236

51 Moore (2013) 270 and 277

52 F Neumann, *Behemoth* (1942) Part 3, II.8, 366-8, summarising G Renard, *L'institution: fondement d'une renovation de l'ordre social* (1931) and see further E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2016) 23(1) Columbia Journal of European Law 135, 143-6 on 'Corporations as Institutions'

53 Magna Carta 1215 and 1297 cl IX, the 'City of London shall have all the old Liberties and Customs'.

54 D Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107(1) *American Political Science Review* 139. ST Omarova, 'The "franchise" view of the corporation: purpose, personality, public policy', in E Pollman and RB Thompson, *Research Handbook on Corporate Purpose* (2021) ch 11

55 cf M Weber, 'Politics as a vocation' (1919)

56 Berle and Means (1932) 3, 46 and 308; L Strine, 'Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance' (2007) 33 *Journal of Corporate Law* 1, 4; S Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2011) 37 *Queen's LJ* 339.

57 MA Eisenberg, 'The Structure of Corporation Law' (1989) 89 *Columbia LR* 1461, 1487 and 1524. Also *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] UKPC 5, per Lord Hoffmann, 'There is in fact no such thing as the company as such, no Ding an sich, only the applicable rules'.

58 W Magnuson, *For Profit: A History of Corporations* (2022) ch 1.

59 F Easterbrook and D Fischel, 'Voting in Corporate Law' (1983) *26 Journal of Law and Economics* 395, 403

60 OE Williamson, *The Economic Institutions of Capitalism* (1985) 241

61 Williamson (1985) 304-6

62 MC Jensen and WH Meckling, 'Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination' (1979) 52 *Journal of Business* 469, 473

63 McGaughey (2016) 23(1) Columbia J of European Law 135

64 E McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2018) 47(1) Industrial LJ 76

65 E McGaughey, 'Democracy in America at Work: The History of Labor's Vote in Corporate Governance' (2019) 42(2) Seattle University LR 697

66 F Easterbrook and D Fischel, 'The Corporate Contract' (1989) 89(7) *Columbia Law Review* 1416, 1446

67 J Armour, 'Should we redistribute in insolvency?' in J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (2006) ch 9

68 E Warren, 'Bankruptcy Policy' (1987) 54 *University of Chicago LR* 775, 803

69 eg City of London (Various Powers) Act 1957 s 6 and *Chan Yu Nam* v *Secretary for Justice* [2010] 1 HKC 493

70 *Hobby Lobby* v *Burwell, Inc*, 573 US 682 (2014) and E McGaughey, 'Fascism-lite in America (or the Social Ideal of Donald Trump)' (2018) 7(2) British Journal of American Legal Studies 291

71 O Kahn-Freund, 'Hugo Sinzheimer 1875–1945' in *Labour Law and Politics in the Weimar Republic* (1981) 102

72 AA Berle, 'The Theory of Enterprise Entity' (1947) 47(3) Columbia Law Review 343, 344. See further D Gindis, 'From Fictions and Aggregates to Real Entities in the Theory of the Firm' (2009) 5(1) Journal of Institutional Economics 25, on Berle's tradition.

73 Fair Labor Standards Act of 1938, 29 USC §202, but many exceptions under 29 USC §213.

74 FLSA 1938, 29 USC §203(r)(1), and see the Fair Labor Standards Amendments Act of 1961, in Pub. L. 87–30. Note that contrast in other theories, on which, S Deakin, D Gindis and G Hodgson, 'What is a firm? A Reply to Jean-Philippe Robe' (2021) 17(5) JIE 861

75 Civil Rights Act of 1965, 42 USC §2000e-2(e)

76 In the US, see *Sunkist Growers, Inc* v *Winckler & Smith Citrus Products Co*, 370 US 19 (1962) on cooperatives, and *Copperweld Corp* v *Independence Tube Corp*, 467 US 752 (1984) on a parent and subsidiary. 'Undertaking' is literally the same as the French word *entreprise*.

77 Industrial Relations Act 1971 s 167

78 e.g. European Works Council Directive 2009/38/EC art 2(1)(c), duty to consult employees in transnational enterprises, such as a 'community-scale group of undertakings'. Transfer of Undertakings Directive 2001/23/EC art 1(1)(b) undertaking as an 'organised grouping of resources which has the objective of pursuing an economic activity'.

79 *Höfner and Elsner* v *Macrotron GmbH* (1991) C-41/90, [21] holding that a public employment agency is an 'undertaking'. It was further held under art 106 (now) that failing to satisfy demand would be an abuse.

80 *Viho Europe BV* v *Commission* (1996) C-73/95, [16]. Also Akzo Nobel v Commission (2009) C-97/08P.

81 e.g. Companies Act 2006 ss 339–408 (accounts); Corporation Tax Act 2010, s 141ff (group tax liability relief).

82 F Neumann, *Behemoth* (1942) 23-24 and 366–368. Following this, see the Potsdam Agreement (2 August 1945) art 12 and Gesetz gegen Wettbewerbsbeschränkungen 1957 (BGBl. 1151) §3.

83 JCD Zahn, *Economic Leadership and Contract Ethics in the New Company* Law (1934) 11 and 93.

84 e.g. D Ziegler, ‘After the Crisis: Nationalisation and re-privatization of the German great banks 1931–1937’ (2011) 52(2) *Economic History Yearbook* 55.

85 McGaughey (2016) 23(1) Columbia J of European Law 135

86 Compulsory Cartel Act 1933 or Gesetz uber Errichtung von Zwangskartellen (15 July 1933) RGBl, Part I, 487-8.

87 Centralverband des deutschen Bank- und Bankiergewerbes (1930) BankA 1930-31, 116 and Aktiengesetz 1937 §114.

88 Aktiengesetz 1965 §135

89 e.g. T Raiser, *Das Unternehmen als Organisation: Kritik und Neuformulierung der juristischen Unternehmenslehre* (1969) and T Raiser, ‘Theorie und Aufgaben des Unternehmensrechts in der Marktwirtschaft’ (1981) 14 Zeitschrift für Rechtspolitik 30

90 T Raiser, ‘The Theory of Enterprise Law in the Federal Republic of Germany’ (1988) 36(1) American Journal of Comparative Law 111. *Unternehmen* or undertaking is equally translatable into French as *entreprise*, or English as enterprise.

91 Raiser (1988) 36(1) AJCL 111, 113-114.

92 S Deakin, ‘The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise’ (2012) 37(2) Queen’s Law Journal 339, 365

93 See also in EU law, Commission Small and Medium-Sized Enterprises Recommendation 2003/361/EC art 1

94 General Data Protection Regulation (EU) 2016/679 arts 47 (on binding corporate rules) and 88(2) (on processing for employment within a group of enterprises).

95 GDPR 2016 art 4(18)

96 e.g. Enterprise Act 2002, Companies (Audit, Investigations and Community Enterprise) Act 2004, Enterprise and Regulatory Reform Act 2013, Small Business, Enterprise and Employment Act 2015, Enterprise Act 2016. Also the Oil and Gas (Enterprise) Act 1982 and Enterprise and New Towns (Scotland) Act 1990.

97 e.g. *Catholic Child Welfare Society* v *Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [64]-[76] and see S Deakin, ‘‘Enterprise-Risk’: The Juridical Nature of the Firm Revisited’ (2003) 32(2) ILJ 94

98 e.g. *US* v *Silk*, 331 US 704 (1947) on economic reality, *Catholic Child Welfare Society* [2012] UKSC 56, [64]-[76] on enterprise risk, *Commission* v *France, Italy and UK* (1982) C-188/80, [25] on dominant influence, *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, [35] on bargaining power.

99 *Barcelona Traction, Light and Power Co Ltd* [1970] ICJ 1

100 FS Cohen, ‘The Problems of a Functional Jurisprudence’ (1937) 1(1) Modern Law Review 5, 6

101 cf S Deakin and F Wilkinson, *The Law of the Labour Market* (2005) ch 2, 109, suggesting that the employment contract – and therefore the firm – performs two functions of coordination and risk-distribution. To this we may usefully add the accumulation or finance function.

102 AO Hirschman, *Exit, Voice and Loyalty* (1970) where ‘exit’ is the language of markets and economics and here is expanded into a broader notion of finance; ‘voice’ is the language of political science and here is expanded into a rounded idea of governance; and ‘loyalty’ for Hirschman connoted means of influence by signalling fidelity to an organisation, while here the broader notion of rights encompasses the reciprocal duties that the organisation has to people.

103 Smith (1776) Book II, ch 1, distinguishing property to make ‘revenue’ (i.e. capital) from property for ‘immediate consumption’. Also AA Berle, ‘Property, Production and Revolution’ (1965) 65 Columbia Law Review 1. H Sinzheimer, *Grundzüge des Arbeitsrechts* (1920) ch 2, 22-27. We may equally say ‘resources’, since obligations can be a type of capital.

104 Stiglitz and Rosengard (2015) ch 4. McGaughey (2022) ch 2(2)(a)-(f) discusses these concepts from a legal perspective in more detail.

105 McGaughey (2022) ch 2(2)(h) on market conditions.

106 e.g. Communications Act 2003 s 319(4)(f), though somewhat weak, this requires Ofcom’s use of standard setting powers to have regard to ‘the independence of editorial control over programme content.’

107 e.g. *Siddiqui* v *University of Oxford* [2018] EWHC 184 (QB) and School Standards and Framework Act 1998 ss 1-4

108 e.g. Climate Change Act 2008 s 1 and Energy Act 2013 ss 131-138

109 E McGaughey, *Principles of Enterprise Law: the Economic Constitution and Human Rights* (2022) chs 9, 10, 12, 15, and 16.

110 J Armour, S Deakin, and M Siems, CBR Leximetric Datasets (2016) at www.cbr.cam.ac.uk/datasets/ .

111 M Friedman, 'The Methodology of Positive Economics' in *Essays in Positive Economics* (1953) ch 1, 4-7

112 e.g. M Friedman, 'The social responsibility of business is to increase its profits' (13 September 1970) NY Times

113 e.g. M Friedman, 'The Methodology of Positive Economics' in *Essays in Positive Economics* (1953) ch 1, 4-7

114 e.g. R Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 426-9

115 e.g. DG Baird and TH Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51(1) *University of Chicago LR* 97.

116 e.g. GJ Stigler, 'The Theory of Economic Regulation' (1971) 2(1) Bell Journal of Economics and Management Science 3.

117 FA Hayek, *The Constitution of Liberty* (1960) ch 8, 109.

118 FA Hayek, *Law, Legislation and Liberty* (1973) vol II, ch 9, 227-32

119 Easterbrook [1996] *University of Chicago Legal Forum* 207, 208

120 FH Easterbrook and DR Fischel, 'The corporate contract' (1989) 89(7) Columbia LR 1416, doubting any need for 'some form of public control'.

121 Berle and Means (1932) Book IV, ch IV, 355-6.

122 S Webb and B Webb, *Industrial Democracy* (9th edn 1926) Part IV, ch 4, 847-849

123 *Konkurrensverket* v *TeliaSonera Sverige* (2011) C-52/09, [22]; GlaxoSmithKline Services Unltd v *Commission* (2009) C-513/06, [63]

124 E Warren, 'Bankruptcy Policy' (1987) 54 U *Chicago L Rev* 775, 788

125 Smith (1759) 1. Mill (1848) Book IV, ch 6

126 *Olmstead* v *United States*, 277 US 438 (1928) per Brandeis J