

# Corporate Enterprise as Commonwealth

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*Deepening ecological crisis alongside a half century of widening inequality and economic instability are evidence that Business as Usual cannot go on. Transformation is required, particularly in the realm of corporate activity, the business of business. Shareholder primacy is a powerful social norm that constrains transformation. It positions publicly traded corporations as compelled by competitive necessity and bound by law to place shareholder returns first. This paper reviews critical legal theory that questions the historical precedence, legal coherence and practical consequence of shareholder primacy in corporate law. I consider Deakin's (2011) suggestion that it might be more appropriate to think of the corporation as a commons managed for the benefit of multiple parties. In my view Deakin's conceptualisation might be further elaborated by turning to other traditions in enterprise formation, most notably those that have shaped the cooperative form in Italy and elsewhere.*

## INTRODUCTION

The first two decades of the 21<sup>st</sup> century are marked by a growing recognition that Business as Usual (BaU) cannot continue. A growing list of symptoms defines the horizon of its impossibility. Some people point to the failure of three decades of post-cold war economic globalisation to deliver generalised prosperity, which have produced instead a world where less than a dozen people control nearly half of planetary wealth.<sup>1</sup> William Streeck describes the past half century as a time in which 'normality' is a fluctuation between economic instability and crisis, where each convulsion diminishes the social capacity to respond effectively to the next one—arguing in effect that the end of capitalism has already arrived with nothing to take its place.<sup>2</sup> Others argue that we are at the end of the long summer of the climatic stability of the Holocene, and that the last seventy-five years marked a 'great acceleration' that catapulted us into the Anthropocene: a period defined by a warmer and more volatile climate, acidified oceans, depleted resources and a planet wide sixth mass extinction.<sup>3</sup>

More hearteningly, this same stretch of time is characterised by a global profusion of social movements and experiments directed at imagining and enacting just and sustainable economies and ecologies, including other ways of understanding the organisational form and purpose of enterprise.<sup>4</sup> There are many names for this emergent-alternative: solidarity, sharing, and peer to peer economies, new economies, and de-growth economies.<sup>5</sup> Further, these movements to remake

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<sup>1</sup> G. DeMartino, *Global Economy, Global Justice: Theoretical and Policy Alternatives to Neoliberalism* (2002); D. Hardoon, 'An Economy for the 99%: It's Time to Build a Human Economy that Benefits Everyone, Not Just the Privileged Few' (2017) <<http://policy-practice.oxfam.org.uk/publications/an-economy-for-the-99-its-time-to-build-a-human-economy-that-benefits-everyone-620170>>; T. Piketty and L.J. Ganser, *Capital in the Twenty-First Century* (2014).

<sup>2</sup> W. Streeck, *How Will Capitalism End?* (2014).

<sup>3</sup> W. Steffen et al., 'The Trajectory of the Anthropocene: The Great Acceleration' (2015) 2(1) *The Anthropocene Rev.* 81; D. Dumanoski, *The End of the Long Summer: Why We Must Remake Our Civilization to Survive on a Volatile Earth* (2010).

<sup>4</sup> G. Roelvink, *Building Dignified Worlds: Geographies of Collective Action* (2016); G. Roelvink et al., *Making Other Worlds Possible: Performing Diverse Economies* (2015).

<sup>5</sup> See, for example, J. Ageyman, *Introducing Just Sustainabilities: Policy, Planning and Practice* (2013); M. Safri, 'Mapping Non-Capitalist Supply Chains: Toward an Alternate Conception of Value Creation and Distribution' (2015) 22(6) *Organization* 924; RIPESS, 'Global Vision for a Social Solidarity Economy: Convergences and Differences in Concepts, Definitions and Frameworks' (2015) <[http://www.ripess.org/wp-content/uploads/2015/02/RIPESS\\_Global-Vision\\_EN.pdf](http://www.ripess.org/wp-content/uploads/2015/02/RIPESS_Global-Vision_EN.pdf)>; S. Bergeron and S. Healy, 'Beyond the Business Case: A Community Economies Approach to Gender, Development and Social Economy' in *Social and Solidarity Economy: Beyond the Fringe?*, ed. P. Utting (2015) 72; B. Morgan and D. Kuch, 'Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy' (2015) 42(4) *J. of Law and Society* 556; J. Lepawsky et al., 'Best of Two Worlds? Towards Ethical Electronic Repair, Reuse, Repurposing and Recycling' 81(2017) 87; D.

economies variously interact with efforts to transform the conditions of work, exchange, consumption, and investment.<sup>6</sup> There is a manifest desire to underwrite these new possibilities. In the United States 20% of investment dollars are earmarked for socially responsible investment, amounting to more than eight trillion dollars.<sup>7</sup> In Australia nearly half of total assets under management are directed to social and ecologically oriented enterprise.<sup>8</sup>

There is a seemingly sincere desire to inject ethical commitments, social and ecological values into the day-to-day of business but also serious doubts, circulating in popular and academic discourse, about whether this is possible. For example, what has been popularly referred to as 'green washing' reflects Milne and Gray's critique of triple bottom line social accounting's tendency to highlight only 'win-win' scenarios where profit, ecology and society are always reconciled.<sup>9</sup> What this implies is that society and ecology can only 'win' if the corporate bottom line 'wins' as well. Banerjee concludes that the current corporate social and ecological responsibility discourse is inadequate,<sup>10</sup> while others see such efforts as mere comforting palliative fantasies that actually enable BaU to continue.<sup>11</sup>

Why does it sound so unbelievable that business could be repurposed? The position I take in this paper is that this un-believable-ness stems from the deeply held belief that individuals, enterprises and the larger economy work on the basis of self-interest. This preconception is what Bruni and Sugden describe as a 'pre-analytical' common-sense and is a testament to the power of the stories Adam Smith told about the emergence of post-feudal societies.<sup>12</sup> Centuries later, this same thinking is expressed in the social norm of shareholder primacy: an enterprise-imperative to make profit for shareholders—appears to be at once natural, rational *and*, so we are told, lawful.<sup>13</sup>

If shareholder primacy is part of a larger narrative, stretching back to Smith, constituting a pre-analytic understanding of BaU, what if it were possible to pick a different starting point as the basis for telling another story about economy and the business of business? Bruni and Sugden suggest that one promising starting point is the civic cooperative tradition in Italy and the writings of Antonio Genovesi, Adam Smith's contemporary.<sup>14</sup> For Genovesi the end of feudalism and the emergence of market economies opened up possibilities for cooperative, joint-enterprises generative of a larger commonwealth. If our shared understanding of the business of business is

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Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (2014); M. Bauwens, 'Class and Capital in Peer Production' (2009) 33(1) *Capital & Class* 121.

<sup>6</sup> J.K. Gibson-Graham et al., *Take Back the Economy: An Ethical Guide for Transforming Our Community Economies* (2013).

<sup>7</sup> USSIF, 'SRI Basics' (2017) <<http://www.ussif.org/sribasics>>; G. Unruh et al., 'Investing for a Sustainable Future' (2016) *MIT Sloan Management Rev. Research Report* <<http://sloanreview.mit.edu/projects/investing-for-a-sustainable-future/>>.

<sup>8</sup> RIAA, 'Responsible Investment Benchmark Report 2016 Australia' (2016) <[http://responsibleinvestment.org/wp-content/uploads/2016/07/RIA41\\_Benchmark\\_Report\\_A4\\_OZ\\_v4.pdf](http://responsibleinvestment.org/wp-content/uploads/2016/07/RIA41_Benchmark_Report_A4_OZ_v4.pdf)>.

<sup>9</sup> D. Milne and R. Gray, 'W(h)ither Ecology? The Triple Bottom Line, the Global Reporting Initiative, and Corporate Sustainability Reporting' (2013) 118 *J. of Business Ethics* 13.

<sup>10</sup> S. Banerjee, 'A Critical Perspective on Corporate Social Responsibility' (2014) 10(1/2) *International Business* 84.

<sup>11</sup> M. Davidson, 'Sustainable City as Fantasy' (2012) 5(2) *Human Geography* 14; S. Žižek, 'Fat-free chocolate and absolutely no smoking: Why our guilt about consumption is all-consuming' *Guardian*, 21 May 2014 <<https://www.theguardian.com/artanddesign/2014/may/21/prix-pictet-photography-prize-consumption-slavoj-zizek>>.

<sup>12</sup> L. Bruni and R. Sugden, 'Fraternity: Why the Market Need Not Be a Morally Free Zone' (2008) 24(01) *Economics and Philosophy* 35. Another term that might be useful here is Castoriadis's concept of social imaginary, a term which denotes how some concepts and ideas play a central role in generating a shared coherence (see Y. Stavrakakis, *Lacanian Left* (2007)).

<sup>13</sup> B. Sjäfjell, 'Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a Sustainable Market Actor' (2017) 16-20 *Nordic & European Company Law: LSN Research Paper Series*.

<sup>14</sup> Bruni and Sugden, op. cit., n. 12.

the generation and care of a commonwealth then what follows, as Massimo De Angelis (2010) puts it, is an entirely different historical trajectory where social and ecological aims have a new and different relationship with enterprise activity.<sup>15</sup>

The initial premise of this paper is that it is possible to challenge the beast of shareholder primacy by doing battle with it in the protean swamp of law, politics and common sense that spawned it. Once this idea is cleared away it becomes far more meaningful to imagine a new relationship between enterprise activity, social and ecological concerns. To that end, the paper proceeds as follows. In the first section, I review the origins of the concept of shareholder primacy and then move onto consider the range of arguments against it. Critical legal theorists over the past two decades have shown how the idea of shareholder primacy is inconsistent with the historical evolution of the corporation, logically incompatible with the corporate form, and further has negative practical, social and ecological consequences when taken seriously as a governing principal.

In the second half of the paper I explore Deakin's (2011) suggestion that corporations are better conceived as a commons managed for collective benefit.<sup>16</sup> Deakin develops his argument in relation to Ostrom's seminal work but in this paper, I speculate on what might happen if we carried his idea further, connecting his conceptual framework to De Angelis's other historical trajectory: the Italian tradition of civic cooperativism. While Italy has a long cooperative tradition, supported by law, these ideas have begun to travel. In the conclusion of this essay I trace how these ideas have travelled circuitously to the US, and how thinking enterprise and commons together may enable innovative responses to the 21<sup>st</sup> century's wicked problems.

## QUESTIONING SHAREHOLDER PRIMACY: LAW, CONSEQUENCES AND OTHER POSSIBILITIES

### 1. *The Case for Shareholder Value*

At the end of the 20<sup>th</sup> century many theorists 'predicted the convergence of corporate law and practice around the norm of shareholder primacy'.<sup>17</sup> Deakin points out that in both academic and popular discourse shareholder primacy is presumed to be the most efficient enterprise orientation. Firms place shareholders first and compete to attract and retain them by delivering maximum returns. This competition in turn creates innovation, reduces costs and improves social welfare. For many, this efficiency is sufficient justification for the assertion that shareholder primacy *ought* to be a legal norm.

The twentieth century argument for the primacy of shareholders emerged at a moment in history when large share trading corporations had sharply delineated the roles between investors and the class of managers who ran the corporation. It is instructive to note that the argument for shareholder primacy was initially put forward during the economic crisis of the 1930s and was further developed during the tumultuous 1970s. When Berle and Means first put forward the idea that the primary concern of corporate management should be to ensure profits for the shareholder, it was in response to a historical context where professional management was in control and

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<sup>15</sup> M. de Angelis, 'On the commons: a public interview with Massimo de Angelis and Stavros Stavrides' *E-Flux*, June 2010 <<http://www.e-flux.com/journal/17/67351/on-the-commons-a-public-interview-with-massimo-de-angelis-and-stavros-stavrides/>>.

<sup>16</sup> S. Deakin, 'Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2011) 37 *The Queen's Law J.* 339.

<sup>17</sup> Deakin, *id.* p. 341.

investors were 'merely passive recipients of dividends with no creative input and real claim to ownership rights' and no control over management prerogative (Talbot 2010, 227).<sup>18</sup> In the midst of the great depression, their hope was that greater involvement from investors would restore capitalism's dynamism and improve social welfare. By the 1960s Berle had conceded that 'maximising the interests of owners (shareholders) had become a limited priority of managers and gave way to stability and good labour standards'.<sup>19</sup> Large manager controlled corporate organisations had become so dependent upon state intervention, in capital-labour relations and other matters, that they could no longer be considered private property, but were instead quasi-public entities.

The managerial-sided argument carried the day until the 1970s—when macro-economic crisis, declining economic growth, and the geopolitics of oil 'opened the door to doubts about managerialism's efficiency'.<sup>20</sup> One response to this crisis was a radical reconceptualisation of corporate enterprise. Alchain and Demsetz reconceived the firm as a set of internalised markets with each player acting in their own interest, where the shareholder's market-demand for a return on their investment acts as an overarching imperative. Jensen and Meckling in a similar fashion recast the firm as nothing more than a 'nexus of contracts,' with the agreement between the firm and investor first amongst equals.<sup>21</sup> Both of these ideas emerged in response to global instability but also a moment in corporate history when iconic firms like US Steel were divesting themselves of single industries and places melting not into air, but into the digital ledger of financial conglomerates.<sup>22</sup>

This 1970s version of shareholder primacy seems to anticipate a world in which it was defensible for Milton Friedman to say that the moral responsibility of corporate enterprise was profits for shareholders, and Margaret Thatcher could assert that society does not exist.<sup>23</sup> It is in the context of this social and moral vacuum that Reagan and Thatcher's neoliberal ideological project took hold as a concerted effort by the capitalist class to recapture economic, cultural, and political dominance.<sup>24</sup> Here shareholder primacy is one expression of a broader neoliberal ethos—stealthily displacing all other forms of valuation save cost-benefit.<sup>25</sup> While Ireland,<sup>26</sup> and Stout remind us that shareholder primacy is a norm and not a legal concept,<sup>27</sup> Sjäfjell points out that powerful norms performatively shape both law and behaviour.<sup>28</sup> For example, by 1993 U.S. Legal reforms allowed top managers' pay to be tied to 'objective performance metrics' and encouraged compensation to take the form of stock options, partially erasing the divide that had disconcerted Berle and Means decades earlier.<sup>29</sup>

During the exuberant 1990s with post-cold war globalisation in full swing and a booming US economy, the belief that what was good for shareholders was good for 'everybody' may have been forgivable. Ten years after the global financial crisis, in an increasingly conflict-ridden world

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<sup>18</sup> L. Talbot, 'Of Insane Forms. From Collectives to Management Controlled Organisations to Shareholder Value Organisations: Building Societies a Case Study' (2010) 11(3) *J. of Banking Regulation* 223.

<sup>19</sup> Talbot, id. p. 227.

<sup>20</sup> L.A. Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161(7) *University of Pennsylvania Law Rev.* 2003, at 2008.

<sup>21</sup> Talbot, op. cit., n. 18, p. 228.

<sup>22</sup> D. Harvey, *A Brief History of Neoliberalism* (2005).

<sup>23</sup> Harvey, id.

<sup>24</sup> See J. Peck, *Constructions of Neoliberal Reason* (2010); W. Streeck, 'The Return of the Oppressed' (2017) 104 *New Left Rev.* 5.

<sup>25</sup> W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015).

<sup>26</sup> P. Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *The Modern Law Rev.* 32.

<sup>27</sup> L.A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public* (2012).

<sup>28</sup> Sjäfjell, op. cit., n. 13.

<sup>29</sup> Stout, op. cit., n. 20, p. 2009.

where climate change is a present reality this position is no longer defensible. And yet, the performative power of shareholder primacy is not so easily cast off. There has been a sustained argument for the past two decades by a number of critical legal theorists who point to the incompatibility of shareholder primacy with the historical evolution of the corporation, its inconsistency with core concepts of corporate law, and the problematic economic, social and ecological consequences when the idea is taken seriously. Reviewing these arguments is an important step towards generating both a coherent alternative, one that might retain what is of value in the corporate form.

## 2. *Historical Development and the Logical Coherence of Corporate Enterprise*

Blair and Stout returning to Coase's 1937 theory of the firm write that the key feature of production in a firm is a 'hierarchical' structure under which an entrepreneur who needs to acquire materials and services retains the right to direct the exact details of what and how products and services are delivered... Firms emerge, Coase speculated, when it would be too costly and complicated to write contracts that give the buyer or services the necessary degree of control.<sup>30</sup>

Following Coase, Blair and Stout provide here a minimum rationale for the enterprise to take corporate form. For Coase the form only makes sense *if* it is more efficient than short-term contracts between individual producers. This isn't always the case: for example, general contractors coordinate residential construction through a system of contractors and subcontractors. In contrast, the corporation is a purpose-built arrangement that is meant to endure through time. For Deakin the corporate form is a 'legal mechanism, or set of mechanisms' that ascribes 'legal personality to the firm,' one that can 'hold property, make contracts and so on in much the same way that a natural person can' but on a scale and temporal duration beyond the capacities of natural persons.<sup>31</sup> The corporate legal form composes the body, pulling together assets, people and know-how for the long haul.

For Deakin, the corporate-body differentiates itself from other bodies as it pulls itself together. The nature of this separation varies across sectors, location and historical context. For example, the early corporate charters that governed trading vessels did not separate personal and corporate wealth--when a goods laden ship sank the investor's personal fortune went down with it. As Ireland argues, shared risk was a crucial feature of the joint stock corporation because that was what distinguished the purchase of a share from immoral/illegal usury.<sup>32</sup> The unlimited liability of these early corporations persists in some industries to this day: for example, claims from Hurricane Andrew in 1992 also wiped out the personal fortunes of some Lloyds of London backers.<sup>33</sup>

A defining innovation of the modern publicly traded corporations is the separation of corporate assets from the personal wealth of investors. Stocks that could easily be (re)converted into cash arose in the 1830s and by 1860s shares became a property totally distinct from the assets that comprised the corporation.<sup>34</sup> The corporate body held the assets, the managers directed the affairs of the business, and investors purchased 'shares.' In this more abstract version of the public

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<sup>30</sup> M.M. Blair and L.A. Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Rev.* 247, at 257.

<sup>31</sup> Deakin, *op. cit.*, n. 16, p. 352.

<sup>32</sup> Ireland, *op. cit.*, n. 26.

<sup>33</sup> C. Herweijer et al., 'Adaptation to Climate Change: Threats and Opportunities for the Insurance Industry' (2009) 34(3) *The Geneva Papers on Risk and Insurance Issues and Practice* 360.

<sup>34</sup> Ireland, *op. cit.*, n. 26, p. 42.

corporation investors were shielded from risk but the price they paid was a diminishment of their power.

Shareholders have many rights, ranging from voice and voting rights to rights in relation to distributions, which stem from the property they have in their shares. However, none of these rights either derives from or confers a right to property in the firm itself or its assets, nor do any property claims which shareholders might have give them a right to manage the assets of the firm. Ownership of a share does not confer the right to a pro-rata portion of the corporation's assets while it is a going concern.<sup>35</sup>

Ultimately this arrangement protects shareholders as well. One cannot walk into a business and lay claim to the copy machine or a hydraulic press as his share. In the present context, even the ownership of their share is conditional. Corporations are entitled to buy back shares if, for example, they decide to delist as a publicly traded entity. Management typically decides both the size and timing of any dividend payments, balanced against all other going concerns and responsibilities of the corporation that allow it to remain a stable, functional entity through time.<sup>36</sup> Management must also be at liberty to respond to other concerns which may negatively affect profitability—from environmental protection to health and safety considerations. In the US, this discretion is legally enshrined in the 'Business Judgement Rule', in which the legal system defers to management judgement unless there are obvious conflicts of interest.<sup>37</sup>

### 3. *Principal Agent theory and the Practical Consequences for Corporate Governance*

While acknowledging the logic that gives form to the corporation, Blair and Stout point out that advocates of shareholder primacy base their arguments on how a corporation should conduct itself in relation to shareholders drawing on principal agent theory.

The principal is understood to be the owner of the firm, as well as the residual claimant who receives all of the profits—that is, economic rents—left over after all her contractual obligations to the agents below her have been met.<sup>38</sup>

Principal agent theory allows shareholder primacy proponents to argue that making investor demand a primary concern ensures effective coordination of effort down through the hierarchical chain. Prioritising shareholder demand ensures a measure of performance and is a bulwark against any shirking of responsibilities (see also Stout 2013a, 2013b).<sup>39</sup> In theory, this model sees each level of the firm's hierarchy carrying out the will of an external principal that is indifferent to internecine conflict within the firm.

According to Blair and Stout, in actual practice principal agent theory misunderstands how corporations function in ways that can distort effective performance.<sup>40</sup> In prioritising the principal it gives scant attention to the fact that it is 'the agents' job [is] to figure out what needs to be done'.<sup>41</sup> Principal-agent theory, like shareholder primacy more broadly, treats the corporation as a 'bundle of assets' and thus misses the fact that

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<sup>35</sup> Deakin, op. cit., n. 16, p. 356.

<sup>36</sup> Deakin, id., p. 357.

<sup>37</sup> Stout, op. cit., n. 27, p. 29.

<sup>38</sup> Blair and Stout, op. cit., n. 30, p. 262.

<sup>39</sup> Stout points out that 'shareholders are residual claimants only when failed companies are being liquidated into bankruptcy.' Residual claimant status does not apply so long as the corporation is a going concern. L.A Stout, 'The Shareholder Value Myth' (2013) April-May *European Financial Review* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277141)>.

<sup>40</sup> Blair and Stout, op. cit., n. 30.

<sup>41</sup> Blair and Stout, id., p. 259.

the key asset a corporation uses in production is its intellectual capital—that is the knowledge and experience residing in the minds of its employees, rather the hands of its shareholders.<sup>42</sup>

This is no minor point as intellectual capital cannot exist apart from the relationships and practices that cohere in the corporate form (or any enterprise form) and it cannot be disposed of in the same way that capital stocks or equipment might be sold off as part of a cost-cutting measure. Blair and Stout, ironically making use of Alchian and Demsetz's team production model, argue that complex outputs, such as a new pharmaceutical, are not merely the sum of inputs—but a product of collaborative relationships that only exist within a given corporate enterprise. While Alchian and Demsetz used the team production model to justify shareholder primacy as a guard against in-firm freeloading, Blair and Stout simply point out that

Because shirking and rent-seeking can erode or even destroy the gains that can be had from team production, it is also *in the collective interest of the team members* to minimize such behaviour (emphases in original).<sup>43</sup>

The simple point they make is that employees and management invested in the success of an enterprise want to cooperate and will police bad behaviour. This provides an entirely different rationale for corporate governance where it is the difficulties of adjudicating between team members that lead them to 'relinquish control over both the team's assets and output to a third party—a 'mediating hierarch'—whose primary function is to exercise that control in a fashion that maximises the joint welfare of them as a whole'.<sup>44</sup> For Blair and Stout, the impetus for the formation of a structure that enforces discipline and encourages cooperation comes from inside the enterprise and does not require the shareholder to act as an outside principal. Indeed, another proof here is that non-shareholder corporations work on this basis. In fact, they conclude 'the law of public[ly traded] corporations appears to actually *eliminate* the role of the principal, imposing in its place an internal governance structure' that uses vertical accountability to create the conditions for horizontal collaboration.<sup>45</sup>

Shareholder primacy is inconsonant with the historical evolution, logical purpose and practical management of the corporate form and this goes a long way towards explaining why the legal case for shareholder primacy is weak. According to Stout, the case most frequently referred to by academic and popular primacy advocates is *Dodge v. Ford* in the Michigan State Court.<sup>46</sup> In 1919 the Dodge brothers successfully sued Ford for a distribution of share dividends which they then used to establish a rival company.<sup>47</sup> The problem here is that this ruling was not about the relationship between shareholders and a board of directors, but an adjudication of a dispute between what was then a closely held company. Further, *Dodge v. Ford* was not actually meant to establish a legal precedent and has only been cited once in Delaware State Court—a state home to nearly 50% of US publicly traded corporations and 65% of Fortune 500 companies.<sup>48</sup>

None of these arguments—historical, logical, practical or legal—deny the fact that shareholder primacy is a powerful social norm, an ideological construct that has shaped popular and political discourse, economies and corporate behaviour, particularly over the last three

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<sup>42</sup> Blair and Stout, *id.*, p. 261.

<sup>43</sup> Blair and Stout, *id.*, p. 271.

<sup>44</sup> Blair and Stout, *id.*, 271.

<sup>45</sup> Blair and Stout, *id.*, p. 265.

<sup>46</sup> *Dodge v. Ford Motor Company* 204 Mich. 459, 170 N.W. 668.

<sup>47</sup> Stout, *op. cit.*, n. 27, p. 25.

<sup>48</sup> Stout, *id.*, p. 26. See also Harvard Business Services Inc, 'Delaware Inc' (2017) <<https://www.delawareinc.com/corporation/>>.

decades. And yet with three decades experience it's now possible to conclude that shareholder primacy, taken literally, undermines the capacities and durability of the corporation form.

#### 4. *Consequences of Shareholder Primacy as Ethos*

The past decade has revealed the full economic, social and ecological consequences of the shareholder primacy ethos that has encouraged corporations to satisfy investors first and exhorted management to think and act like investors. This reorientation has encouraged risk taking. In an understated way Deakin observes that 'empirical research suggests that evidence of a link between shareholder oriented corporate governance and bank failure is more than just circumstantial,' that a culture of reckless risk taking prevailed in the lead up to the crisis.<sup>49</sup> This same recklessness has ecological consequences as well. For example, BP engaged in a deliberate cost-cutting strategy that compromised the safety and durability of offshore drilling rigs in the hopes that it would have a positive impact on share price. These decisions directly led to the 2010 disaster in the Gulf of Mexico:

When the tragedy finally struck, the BP oil spill damaged not only the price of BP shares, but BP bonds, other oils companies operating in the Gulf, and the Gulf tourism and fishing industries.<sup>50</sup>

Not on this list are the people who died in the explosion as well as countless forms of marine life that were impacted by this disaster. The irony, as Stout explains, is that even the 'shareholder' at the centre of shareholder primacy may be counted as a victim too. For it is not unreasonable to assume that if these same shareholders were invested in other going concerns—other oil companies or businesses associated with tourism—they would have been negatively impacted. This same shareholder may also have liked to go to the beaches or to eat prawns from the gulf.

The analogy that Stout uses to describe the shareholder primacy ethos is fishing with dynamite. In the short term, of course, the strategy works. As a long-term strategy fishing with dynamite is poor form and the more people that engage in it, the quicker it turns into a disaster. It might be reasonably objected that this analogy is a hyperbolic version of Garrett Hardin's famous tragedy of the commons. But perhaps not, since 2000 (when it was predicted shareholder-oriented enterprise would be the norm) the number of publicly traded corporations have declined by 40% while their life expectancy has dropped from seventy-five years to just five.<sup>51</sup> Indeed, it would seem in the era of shareholder primacy the corporation is indeed becoming an ephemeral nexus of contracts.

Given the extent of the damage some might celebrate the demise of the corporation. However, there may be some reason to consider whether the corporate form could be repurposed. If the wicked social, economic and ecological problems of the 21<sup>st</sup> century demand a sustained, large scale effort for several generations, might some form of the corporation, with its capacity to marshal resources and coordinate activities in a sustained effort through time for generations be of some use?

#### 5. *An Alternative Trajectory*

Deakin offers an alternative theory of the firm that rejects shareholder primacy or, indeed, any prioritised claim on firm ownership.<sup>52</sup> Returning first to the definition of the corporation he points out the corporate-personality is a 'no-body.' It is precisely this 'no-body' that prevents shareholders (or anyone else for that matter) from making a *pro rata* claim on assets. Given this, it

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<sup>49</sup> Deakin, op. cit., n. 16, p. 34.

<sup>50</sup> Stout, op. cit., n. 39.

<sup>51</sup> Stout, id.

<sup>52</sup> Deakin, op. cit., n. 16.

becomes reasonable to ask: 'Does this imply that the business firm is 'ownerless'?' Deakin's answer is that 'the firm as such cannot be owned but in the context of the modern business enterprise, there are multiple, overlapping and conflicting property rights or property-type claims which the legal system is meant to adjust and reconcile'.<sup>53</sup> One could imagine an open-ended list of potential claimants including founders, management, shareholders and other creditors, landlords, the state, service providers, even workers and community members who could lay claims of ownership by virtue of having a stake—with law in the middle of them all. Here Deakin's analysis resonates with Gibson-Graham and O'Neil's depiction of the radically decentred enterprise, the site of ongoing political contestation among stakeholders.<sup>54</sup>

Deakin makes a radical suggestion that the corporation is better conceived of as a commons managed by and for these multiple constituencies. Inspired by Ostrom's pioneering work he defines the commons as 'in essence a theory about the conditions under which collective action to preserve and sustain resources of value to a society becomes possible'.<sup>55</sup> As with other commons theorists, Deakin places property rights in relation to the 'institutional conditions that that are capable of generating those rights'.<sup>56</sup> This is what Linebaugh refers to as the sociality of the commons.<sup>57</sup> This sociality includes typical business concerns, what Ostrom calls the transferability of rights and the rights of alienation, but sets these business concerns in relation to a larger sociality.

Building on this concept, my work with Gibson-Graham and Cameron simplified Ostrom's formulation defining a commons as a biophysical, cultural, or knowledge resource where a broad community accesses, uses, and benefits from a commons but also where the processes of care and responsibility are widely distributed.<sup>58</sup> This sociality distinguishes commons from private property where access, use, care, benefit and responsibility are tightly defined (a gated community) and from open access resources where these rules are not yet established (the open ocean). Crucially important is that commoning becomes a social process of rule setting, allowing for a partial commoning of private resources wholly or partially (opening a private forest to gathering or bush care) or the commoning-care of what is currently open access (humanity's effort to care for the atmosphere).<sup>59</sup> What this implies is a broader politics: one where enterprises might be involved both as what is commoned (the redirection of corporate profits or assets for wider social purpose), or as a commoner—from using and supporting open source software (a knowledge commons) to switching to renewables to lower their carbon footprint (atmospheric commons).

For Deakin, the commons offer a way of imagining how social and ecological concerns might be given equal consideration since their inclusion aligns with corporate continuity, providing a way of responding to Sjäfjell's call for a vision of business fit for 21<sup>st</sup> century problems.<sup>59</sup> However, he also admits that equal consideration of all shareholders interacting with the corporate-commons 'is radically at odds with the shareholder-oriented, market-focused and globally-driven model' and that accommodating the concerns of workers in particular might require a more fundamental reorganisation of the corporate form.<sup>60</sup> This theorisation of the corporate commons offers a way of repurposing the corporation, but how might we translate this idea into a believable alternative to the shareholder-centric vision of the corporation? As it stands, Deakin's theorisation of the corporate commons seems merely speculative. However, it might appear much more

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<sup>53</sup> Deakin, id., p. 367.

<sup>54</sup> J.K. Gibson-Graham and P. O'Neill, 'Exploring a New Class Politics of the Enterprise' in *Re/Presenting Class: Essays in Postmodern Marxism*, eds. J.K. Gibson-Graham et al., (2001) 56.

<sup>55</sup> Deakin, op. cit., n. 16, p. 368.

<sup>56</sup> Deakin, id., p. 369.

<sup>57</sup> P. Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (2008).

<sup>58</sup> Gibson-Graham et al., op. cit., n. 6.

<sup>59</sup> Sjäfjell, op. cit., n. 13.

<sup>60</sup> Deakin, op. cit., n. 6, p. 379.

credible if we were to find examples of enterprises that already govern themselves in this way: and in my view the civic cooperative movement in Italy, and the various places where this model has spread, is a good place to start.

In the last section of this paper I establish a set of resonant connections with corporate-commons theorists emanating from a distinctive cultural and institutional context that might serve to exemplify how the corporation might be governed as a commons. I go on to suggest how this idea has travelled to other locations, most notably the United States, and how enterprises may become both commons and commoners, working to ensure ecological and social wellbeing in the broader community.

## OTHER TRAJECTORIES, ENTERPRISE COMMONS, ENTERPRISE COMMONERS

Italy's mountainous Emilio Romagna region is home to thousands of large and small enterprises operating in many sectors—including the manufacture of high end consumer goods. Many of these enterprises are organised as mutual benefit or cooperative organisations. Bruni and Sugden suggest that this cooperative ethos has deep cultural roots and in tracing its history they identify Antonio Genovesi as a central figure.<sup>61</sup> Like his contemporary Adam Smith, Genovesi was concerned with the structure of post-feudal society and economy, but he had a radically different understanding of how market economies functioned, theorizing market economies as a space of joint-enterprise rather than self-interest. For Bruni, Genovesi's thinking is but one point in a longer history that connects the common grounds of 11<sup>th</sup> century monasteries to 19<sup>th</sup> century Catholic social doctrine to progressive 20<sup>th</sup> century governments that promoted cooperative development.<sup>62</sup>

Following this same thread Tortia uses Ostrom's commons-theory to understand corporations operating in the Emilio Romagna.<sup>63</sup> In Italy it is 'mutual benefit organisations, mainly cooperatives' that 'have shown the greatest compatibility with the interpretation of the firm as a nexus of common pool resources'.<sup>64</sup> Tortia argues that the keys to their success are the accumulation of capital as a non-divisible reserve, the democratic control over the disposition of that reserve and its reinvestment in the enterprise as a going concern and in the larger society for common benefit.<sup>65</sup> In his vision it is the commoning of capital—both its use and custodial care—that is the key to success.

Tortia explains that the indivisible reserve allows for self-capitalisation, solving a common problem for cooperative enterprises. Further, for much of the twentieth century these capital reserves were exempt from taxation.<sup>66</sup> The capital reserve allows the business to operate, invest, innovate and engage in joint ventures with other enterprises, but it also poses a risk. In Anglo countries, particularly the UK, the accumulation of large reserves posed a threat of demutualisation—cooperative owners simply selling out to realise windfall gains. In contrast in Italy (and also in Spain) legal frameworks require the indivisible reserve to be reinvested in the business, constraining the temptation to demutualise. Further, should a firm dissolve, Italian law requires that a portion of its capital go to a fund to capitalise new cooperatives.<sup>67</sup> Even in

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<sup>61</sup> Bruni and Sugden, op. cit., n 12.

<sup>62</sup> L. Bruni, *The Wound and the Blessing: Economics, Relationships, and Happiness* (2012). See also V. Zamagni, 'Learning from Emilia Romagna's Cooperative Economy' *Next System Project*, 18 February 2016 <<https://thenextsystem.org/learning-from-emilia-romagna>>.

<sup>63</sup> E.C. Tortia, 'The Firm as a Common. The Case of Accumulation and Use of Common Resources in Mutual Benefit Organizations' (2011) *University of Toronto Discussion Paper* (12/11).

<sup>64</sup> Tortia, id., p. 5.

<sup>65</sup> Tortia, id., pp. 5-6.

<sup>66</sup> Zamagni, op. cit., n. 63.

<sup>67</sup> Many of these requirements and tax exemptions were softened a bit during the Berlusconi years: Zamangi, id.

dissolving, the enterprise continues to contribute to the commonwealth. We might see in this example a more fully realised version of Deakin's corporate commons where the assets of enterprise are managed to ensure longer term success. We could also see a version of Stout and Blair's understanding of corporate governance—the cooperatives rely on horizontal collaboration but also cede some control to a 'mediating hierarch', the law, to militate against particular kinds of bad behaviour. However, we can extend our analysis of the enterprise commons further than this. What the Third Italy became most famous for was the ability of cooperative networks to coordinate relationships between cooperatives, enabling small producers to successfully compete in global markets, particularly for high end products. Here we might see the cooperatives not as commons in themselves but also as commoners working to constitute still larger regional commons.

In the 1990s economic and industrial geographers, economists and organisation management theorists looked to what was then called 'the Third Italy' as an example of a different, post-fordist, approach to manufacturing and regional development and as a way of reinventing capitalism.<sup>68</sup> What captured people's imagination was the power of networks of SMEs to coordinate their activities in a way that scaled up to meet market demand, offering a model of regional development later popularised as flexible specialisation, that circulated globally.<sup>69</sup> What the model left behind back then was the cooperative enterprise structure of the firms in Italy. In the wake of Global Financial Crisis the Third Italy is garnering new attention, this time as a way beyond capitalism and BaU.

## CORPORATE COMMONS AS A TRAVELLING CONCEPT

The 10<sup>th</sup> anniversary of the 'Cleveland Experiment' in the United States is rapidly approaching. It is the first and most famous of the 'anchor institution' led approaches to cooperative development and municipal revitalisation. The 'Cleveland Experiment' is the name the Democracy Collaborative gave to the three Cooperatives launched to provide commercial goods and services to the Universities and hospitals within the University Circle starting in 2009. Drawing inspiration from the Basque country's Mondragon Cooperatives the founders of the Cleveland Experiment aimed to find a common solution for two problems: the need to find more sustainable ways for meeting institutional demand for goods and services—clean linens, electric power, food—with the problem of persistent poverty in the neighbourhoods that surround the University Circle.<sup>70</sup>

The solution they came up with was to develop cooperatives that would capture some of the University Circle's \$3 billion per annum aggregate institutional demand for goods and services. These cooperatives were capitalised with help from Shore Bank—a legacy institution from the Community Reinvestment Act of 1979. Each of these cooperatives opened in the years following the Global Financial Crisis (between 2009 and 2011) have provided worker ownership opportunities to residents from the majority-minority community. With the Cleveland Experiment we can see cooperative enterprises being conceived and managed for the long-term benefit of worker owners, the communities in which they reside and the institutions they serve. Like the SMEs of the Third Italy, they are Deakin's enterprise commons come to life in practice. The institutional demand of a variety of large institutions (mostly non-profits) created the condition of

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<sup>68</sup> See J.K. Gibson-Graham. *The End of Capitalism (as We Knew It): A Feminist Critique of Political Economy* (1996/2006).

<sup>69</sup> M. Porter, *The Competitive Advantage of Nations* (1990).

<sup>70</sup> N. Iuvencio et al., *Sustainable Economic Democracy: Worker Cooperatives for the 21st Century* (2010) White Paper MIT CoLab.

possibility for cooperative enterprises that, as they become successful, will support its further expansion. Version of this 'anchor institution led cooperative development model' are now in various stages of development in Richmond California, Washington DC, Cincinnati Ohio, Pittsburgh Pennsylvania, Springfield, Worcester and Boston in Massachusetts. All have been instituted as community wealth building strategies.<sup>71</sup> An idea, spread from Italy and Spain to the US, implemented and improved over time, constitutes a commonwealth in its own right.<sup>72</sup>

In the past, 'flexible speculation' circulated globally as a coin of the realm, but in the process of translation the cooperative nature of the enterprise was rubbed out. In contrast, now the 'anchor led cooperative institutional model' have etched new ideas into the coin as it changes hands, from city to city. In the context of National Science Foundation funded research on the US Solidarity Economy, I had the opportunity to interview many of the principals involved in CERO (zero in English), an anchor-institution like experiment in the poorest communities around downtown Boston (NSF Grant # 1339748). It too was explicitly inspired by Cleveland's experiment. Here once again the idea was to develop cooperative enterprises and markets simultaneously. In this case the market was the more than 150 urban farms in the Boston area that supplied local greens to a burgeoning foodie culture. CERO, a majority minority worker owned commercial composting service was started in 2013 to satisfy this demand. CERO's market position was good given recent state laws that required the composting of food waste from large institutions. The sticking point was, as it often is, capital. They lacked access to a progressive lender like Shore bank but it was in this context that Boston activists tried something innovative. With help from Boston Impact Investing (a progressive/local investment fund) the newly formed CERO cooperative made a direct public offering (DPO) to local investors in exchange for non-voting shares in the cooperative.

With this DPO-vehicle CERO rapidly met its capital requirements to make the business operational. CERO aims to provide worker-ownership opportunities to around twenty or so people, a small business like most enterprises in the US. However, CERO sees its prospects for survival in the context of a larger joint-enterprise with other cooperatives, food based ventures and sticky institutions.<sup>73</sup> As in Italy, CERO's fate as a commons is bound to its relation with a still larger financial commons and community (Boston) that is taking shape alongside it. CERO, the enterprise, is a commons in its own right—accessed, used, and cared for to benefit of members of majority low income community of colour. In turn, CERO, as the beneficiary of an innovative capitalisation scheme in Boston and as an organisation dedicated to building food solidarity economy in Boston, becomes a new kinder of commoner.

## CONCLUSION

The present moment seems to be characterised by an increasingly widespread desire for an economy that reflects and embodies social and ecological values, taking shape in economic experiments, including a global renewed interest in the cooperative as part of a larger solidarity economy.<sup>74</sup> This and many other efforts are in part an effort to rethink the business of business. Hampering the further development of these efforts is the continued widespread belief in the myth

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<sup>71</sup> M. Kelly et al., 'Politics of Place/Politics for Place, Community Wealth Building: America's Asset-based Approach to City Economic Development' (2016) 24(2) *Renewal* 51; see also P. Loh and B. Shear, 'Solidarity Economy and Community Development: Emerging Cases in Three Massachusetts Cities' (2015) 46(3) *Community Development* 244.

<sup>72</sup> Given the institutional context in which I am writing I feel compelled to point out that this reconceptualization of corporate purpose could travel further still. Apps (2016) notes that Australia is currently attempting to work out legal frameworks for cooperative enterprise at the national scale: A.E. Apps, 'Legislating for Co-Operative Identity: The New Co-Operatives National Law in Australia' (2016) 34 *Company and Securities Law J.* 6.

<sup>73</sup> See also P. Loh and J. Agyeman, 'Boston's Emerging Food Solidarity Economy' in *The New Food Activism: Opposition, Cooperation and Collective Action*, eds. A. Alkon and J. Guthman (2017) 257.

<sup>74</sup> RIPESS, op. cit., n. 5.

of shareholder primacy, not only a belief that corporations must prioritise shareholder interests but when they do they always win in competitive markets. Critical legal theory can play a crucial role in breaking the hold this myth has in popular and political discourse and in the process open up the discussion for other ideas about how enterprise might be organised for the long haul.

The civic-cooperative tradition offers an alternative starting point and way of thinking beyond this myth. From the time of Genovesi, the premise is that corporations are a site of cooperative 'joint enterprise' which in turn are sustained by the larger commonwealth of the market economy. What has come to sustain these cooperative ventures is a long tradition of cooperation amongst cooperatives, sustained by law as well as by different strategies for capitalisation and governance. This idea has begun to circulate in the US (and elsewhere) not just as a flexible-specialisation strategy but as a way of thinking about how to develop enterprises that contribute to a larger commonwealth. The Evergreen cooperatives and CERO coop in Boston demonstrate how the corporate form, but also the larger societies including investors and shareholders themselves, can constitute and care for commonwealth.