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978-1-316-51764-2 — Principles of Enterprise Law
The Economic Constitution and Human Rights
Ewan McGaughey
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Introduction

What Is Enterprise Law?

Enterprise law is the regulation of the finance, governance and rights in economic life. It includes everything from global tech corporations, to universities, to oil cartels, to arms-makers, to the health service. Enterprise law is probably the dominant cause of the most basic threats that we must resolve in the twenty-first century, namely escalating inequality, climate damage and war, because the enterprise is the primary type of association that stands between polities and families. In its literal sense, enterprise means 'doing' or 'undertaking', after the French word *entreprende*. The ideas of the 'entrepreneur', the 'state-owned enterprise', the 'multinational enterprise' or the 'enterprise state', are powerful psychological and social concepts as well as legal ones, and they are constantly changing. However, across time and space, most enterprises fulfil three main functions. They:

(1) accumulate resources, particularly capital used for production:[1] a finance function
(2) coordinate production, especially by sharing voting power: a governance function
(3) distribute resources, such as goods, services, income or wealth: a rights function.

These three functions of enterprise – of finance, governance and rights – account for the incredible growth, welfare and prosperity of humankind since the Industrial Revolution. Modern enterprise, most often organised in corporations and by the state, gives us the ability to live a life of splendour and holds the promise of a future when poverty may be forgotten. Yet when out of balance, enterprise law also accounts for inhuman levels of squander, abuse of power and exploitation that we constantly witness. Enterprises may allocate resources for everyone's benefit, or they help hoard capital to enrich a few. They may organise efficient, dynamic business and public service, or be a vessel for abuse of power. They may deliver a good livelihood and all universal

[1] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book II, ch. 1, distinguishing property used to make 'revenue' (i.e. capital) from property used for 'immediate consumption'. Also A. A. Berle, 'Property, Production and Revolution' (1965) 65 *Columbia L Rev* 1; H. Sinzheimer, *Grundzüge des Arbeitsrechts* (1926) ch. 2, 22–7.

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human rights, or they may exploit us and evaporate our common wealth. The functions of enterprise law, in a very real sense, shape human destiny.

The notion that we have an 'enterprise law', or that we might even have *Principles of Enterprise Law*, depends upon shifting social views about what is important in life, and where we should place our efforts. Of course, there is no such thing as an *objective* idea of 'enterprise law' that we can reach out, touch and describe, any more than there is some objective concept of 'law' itself. All words have meaning from the context in which we use them,[2] not from some underlying atomic-like fact,[3] and different people can mean different things with the same words. As ideas spread, like language, they often seem to take on a life of their own, but always one in which everybody who thinks and discusses can take part.[4]

So, this book is about the most important enterprises that shape our lives or, as the subtitle says, *The Economic Constitution and Human Rights*. Probably the first time 'enterprise' was defined in law was in the US Fair Labor Standards Act of 1938, to say who is responsible for rights such as the minimum wage. An 'enterprise' was said to mean activities for a 'common business purpose . . . whether performed in one or more establishments or by one or more corporate or other organizational units'.[5] Similarly, in the European Union (EU) General Data Protection Regulation 2016, an 'enterprise' means 'a natural or legal person engaged in an economic activity, irrespective of its legal form'.[6] The UK has passed various 'Enterprise Acts',[7] which include laws on competition, the public interest, insolvency, consumers, regulators, labour rights, education, company law, banking and equality, though none have felt the need to say what an 'enterprise' is. But make no mistake: enterprise law is almost entirely about corporations and states, and their use or abuse of power. The sheer scope of enterprise law is one of its challenges, and the fluidity of its concepts means it has lacked structure. This book's central goal is to answer this question: are there principles of enterprise law, ones that we can use in a practical way to understand our economic constitution today?[8]

This book is organised into four lopsided parts. Part I is history and theory. Throughout modern history, the notion of enterprise law has recurred in legal discourse. In 1947, the great New Deal architect, A. A. Berle wrote in 'The

[2] L. Wittgenstein, *Philosophical Investigations* (1953) §§23, 43, 199–203. Q. Skinner, *Visions of Politics* (2002) vol. I.

[3] E.g. B. Russell, 'The Philosophy of Logical Atomism' (1919) 29(3) *Monist* 345; L. Wittgenstein, *Tractatus Logico-Philosophicus* (1922); H. L. A. Hart, *The Concept of Law* (1961).

[4] Cf. O. Gierke, *The Social Role of Private Law* (1889) 4, trans. E. McGaughey (2018) 19(4) *German LJ* 1017.

[5] Fair Labor Standards Act of 1938, 29 USC, §203(r)(1).

[6] General Data Protection Regulation (EU) 2016/679, art. 4(18).

[7] 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.

[8] See Ch. 2(5) and this book's Conclusion.

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Excerpt
More Information

Theory of Enterprise Entity' that legal forms, like the corporation, take their 'being from the reality of the underlying enterprise', and this was important because 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'.[9] Berle's thinking reflected the norms of the Fair Labor Standards Act of 1938. Thinking of economic institutions laterally, beyond existing strictures of legal form, was and remains a crucial part of reforming competition, tax, accounting, tort and labour regulation. In 1988, writing in a similar tradition from Germany, Thomas Raiser, explained that 'the social purpose of [constitutional] rights and the principle of the social state are of utmost importance in enterprise law'. Nineteenth-century or pre-World War Two views of commercial or company law tended to exclude the public and employee interests, so 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'.[10] In the UK, Simon Deakin has argued 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'.[11]

This is far from the first text on enterprise law,[12] but it adopts a new structure that will be familiar to contract lawyers: with the general and specific. After Part I on history and theory, Part II is 'General Enterprise Law'. Like the four edges of a pyramid, company and investment, labour, competition and insolvency law support most enterprises (see Figure 0.1). Chapter 3 explains the corporate constitution. Company law, at its heart, concerns 'member' rights against a company, its board of directors and reciprocal duties. Chapter 4 concerns shareholders and the real investors, usually beneficiaries of pension or other funds. Chapter 5 explores labour law and the relations of management, workers and unions. Chapter 6 concerns consumers and competition law. Chapter 7 covers rights of creditors near or after insolvency.

These general enterprise laws are basic building blocks of any modern economy, but they are often insufficient to protect the public interest. Part III examines 'Specific Enterprise Law', which aims for just this. Chapters 8–19

[9] A. A. Berle, 'The Theory of Enterprise Entity' (1947) 47(3) *Columbia L Rev* 343, 344.
[10] T. Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' (1988) 36(1) *Am J Comp L* 111, 113–14. Also T. Raiser, *Das Unternehmen als Organisation* (1969).
[11] S. Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2012) 37(2) *Queen's LJ* 339, 365.
[12] E.g. P. T. Muchlinski, *Multinational Enterprises & the Law* (3rd ed. 2021); B. Means and J. W. Yockey (eds.), *The Cambridge Handbook of Social Enterprise Law* (2019); D. Milman (ed.), *Regulating Enterprise: Law and Business Organisation in the UK* (1999).

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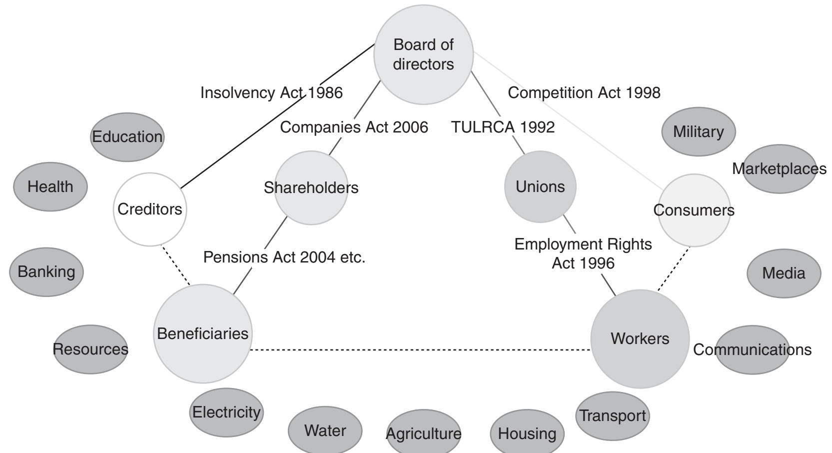

Figure 0.1 The pyramid of general enterprise law and specific enterprise law in the UK

cover the major enterprises in life: in education, health, banking, natural resources, electricity, food and water, housing, transport, communications, media, marketplaces and the military. These enterprises often start with the 'general enterprise law' basics, but specific regulation makes them unique. Think of a furniture shop, and then of a bank. Both are enterprises, but there are no special Furniture Shop Acts. We expect general enterprise law, especially on fair competition, to ensure furniture enterprises follow the consumer or public interest. Not so with banks, where the Bank of England Act 1946 makes the central bank publicly owned; the Bank of England Act 1998 controls monetary policy; the Financial Services and Markets Act 2000 subjects all private banks to licensing and standards; and the Banking Act 2009 created a special bank-bankruptcy system after the global bank crash. For similar reasons we have the Education Act 1996, National Health Service Act 2006, Petroleum Act 1998, Electricity Act 1989, Agriculture Act 2020, Water Act 1989, Housing Act 1985, Railways Act 1993, Communications Act 2003 and Armed Forces Act 2006, to name just a few, and not to mention the array of EU Directives or Regulations, and international treaties, Declarations, Covenants or Conventions that underpin our global economic constitution. Often, general enterprise law is enough to protect the public interest. But most of the time it is not, so we enact specific enterprise laws, and we do it (ideally) based on experience, data and reason.

What enterprises are not in this book? Aside from furniture shops (though they are indeed fascinating[13]) this book also leaves out many enterprises mostly regulated under the general law: manufactured goods, electronics,

[13] E.g. R. B. Handfield, S. V. Walton, L. K. Seegers and S. A. Melnyk, '"Green" Value Chain Practices in the Furniture Industry' (1998) 15(4) *J Operations Management* 293.

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Table 0.1 FTSE and S&P 500 enterprise classifications

FTSE, ICB	Ch.	GISC	Ch.
Oil & gas	11	Oil & gas	11
Chemicals, Forestry, Mining	11	Chemicals, Mining, Forestry	11
Construction, industrials, transport	15	Industrials, transport	15
Auto, food, household goods	15, 13	Auto, consumer, retail	15
Healthcare	9	Consumer staples	13
Retail, media, leisure	17	Healthcare	9
Telecoms	16	Financials	10
Electricity, gas, water	12, 13	IT	16
Banks, insurance, real estate, finance	10, 14	Telecoms, media	17
Computers, software, Internet	17	Electricity, gas, water	12, 13
		Real estate	14

chemicals, restaurants and music, art and entertainment. Yet even in these instances, there are many specifics to be found, particularly in safety or environmental standards. Because of space, there are also no chapters on vitally important specific enterprises, including religious bodies, policing, sports clubs, pubs and breweries, and clothing.[14] However, looking at the standard classifications of industry used in the stock markets, this book succeeds in covering a majority of our economic constitution (see Table 0.1).[15]

Enterprise law is equally concerned with public services and human rights. Indeed, this book covers every major public service and economic and social right (see Ch. 2(4)).

Finally, private finance may work in some enterprises, but public finance proves better elsewhere. This book focuses on those where public finance has become an important part of the law, although it may not always be desirable. Part IV and Chapter 20 concentrates on fiscal and social policy, and takes a macro-legal and macro-economic perspective on enterprise finance, tax and spending, and how budgeting decisions are made. Ultimately this depends on the goals we choose as a polity and the theories of justice we seek to uphold.

***

A question underlying the whole book is whether 'enterprise law' can hold together. This meets a basic challenge from 'Chicago School' theories. In the words of Frank Easterbrook, our law 'courses should be limited to subjects that illuminate the entire law', and not include 'courses suited to dilettantes' like the 'law of the horse' or 'cyberspace'. We should only 'study general rules', such as

[14] These enterprises also engage universal human rights: UDHR 1948, arts. 2–3, 18 and 24–25. Chapters are possible additions for future years. The author has had several brilliant master's dissertations on these very topics.

[15] FTSE Russell, *Industry Classification Benchmark (Equity)* (February 2019) v2.6; S&P Global and MSCI, *Global Industry Classification Standard* (2018).

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'property, torts, commercial transactions',[16] and even corporations should be seen as a contract that ideally avoids 'some form of public control'.[17] But if we must, the Chicago School thinking suggested that other legal subjects should be regarded as having singular purposes: corporate law was for shareholder profit,[18] labour law was for the individual employee, competition law or antitrust for the consumer[19] and insolvency law for the creditor.[20] Absent was any notion of the public interest, or social goals that might combine the interests of the individual investor, worker, consumer or creditor. Yet the majority of this book *is* made up of the so-called 'dilettantes' subjects, and it even includes laws of 'the horse' and 'cyberspace' (Chs. 15 and 16). A central thesis is that a coherent enterprise law does and can exist, and this is superior to the Chicago School thinking. Can that be right? Can enterprise law be a coherent subject?

There are at least four good reasons both to reject the Chicago School theses and be persuaded that enterprise law can be a coherent subject. First, it 'illuminates the entire law' to a far greater extent than systems of legal thinking which attempt to exclude public law from the dimensions of corporate, labour, competition or insolvency law. Doing that makes us less informed about the real world, not more, because in reality that legislation develops inseparably from a web of constitutional and administrative laws. Second, concentrating on 'specific enterprises' matches how modern government works – like, for instance, the departments or ministries that nearly every country sets up for education, health, finance, energy, agriculture, housing, transport, media or defence. Third, and better than debating whether a corporation is like a 'contract' or not, understanding the real world's context helps us to solve real world problems, particularly inequality, climate damage and war. It is fair to say that some people (and Chicago School authors may or may not be included in this) do not want to address these problems. This book is for those who do.

Fourth, enterprise law can have a coherent taxonomy: a grammar that may find common issues across seemingly disparate fields. After giving historical background, each chapter on specific enterprises follows the pattern of examining (1) finance, (2) governance and (3) rights of each stakeholder. As well as each fulfilling an important function (namely accumulating resources, coordinating production and distributing goods, services or wealth), each includes a mechanism of accountability, and this resembles Albert Hirschman's

[16] F. H. Easterbrook, 'Cyberspace and the Law of the Horse' [1996] *U Chicago L Forum* 207, 208.
[17] F. H. Easterbrook and D. R. Fischel, 'The Corporate Contract' (1989) 89(7) *Columbia L Rev* 1416.
[18] M. Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *New York Times* (13 September 1970).
[19] R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 426–9.
[20] D. G. Baird and T. H. Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51(1) *U Chicago L Rev* 97.

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More Information

distinctions between 'exit, voice and loyalty'.[21] 'Exit' is the language of economics, and here it is enlarged to how enterprises are financed, either through markets, prices, regulatory subsidies[22] or taxes. 'Voice' is the language of political science, and here this becomes a broader question of governance, centred upon the right to vote and participation in decisions. 'Loyalty' to Hirschman involved notions of belonging and social influence within organisations, familiar to sociologists, which here are broadened to rights of individuals within an enterprise. This is how human rights, such as to education, health, food, natural resouces, housing or other rights, are enforceable in court, beyond an enterprise's finance and governance. It has been remarked that 'judicial review always has a tendency to fragment into disparate branches of law' like education or housing but 'general principles have emerged'.[23] The same can be said for contract and corporate law principles, which routinely intermingle with administrative law as they each touch enterprise. The goal of a good taxonomy is to give a clear guide to understand a subject's anatomy. How is an enterprise financed? Who governs it? What rights do people have in it? These questions are the grammar and life of enterprise law.

If there is an enterprise law, which unifies our economic constitution, and it does have a conceptual structure, the question then becomes, what principles does it have? The thesis that this book puts forward is that principles of enterprise law, based on the public interest, can be found. Those principles may be contested. They are certainly not always fulfilled. But principles of enterprise law are there. This thesis is taken up at the end of Chapter 2, on theory; it underlies every other chapter and is returned to in the book's conclusion.

[21] A. O. Hirschman, *Exit, Voice and Loyalty* (1970).

[22] A 'regulatory subsidy' is one that exists where costs are externalised by an enterprise onto third parties, and the law fails to make those responsible pay: Ch. 2(2)(c), e.g. D. Coady, I. Parry, N.-P. Le and B. Shang, 'Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates', IMF Working Paper No. 19/89 (May 2019).

[23] A. W. Bradley, K. D. Ewing and C. J. S. Knight, *Constitutional and Administrative Law* (2019) ch. 24, 641.

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Part I
History and Theory

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Excerpt
More Information

1

History: State and Corporate Power

Contents

(1) Ancient and Medieval Enterprise 12
(2) Mercantilism, 1492–1765 19
(3) Industrial Revolution, 1765–1855 23
(4) Corporate Revolution, 1855–1945 30
(5) Global Revolution, 1945–2021 38
(6) Conclusion 46

The history of enterprise law, the evolution of state and corporate power, is essential to know in order to understand why our economic constitution is as we see it today. Why is enterprise financed by a mix of taxes, savings in the stock market or banks, prices and regulatory subsidies, but without any clear consensus on what should be public or privately owned? Why are the votes in our economy partially spread among investors, workers and the public, yet decisively influenced by asset managers and banks? Why are social, economic and political rights enshrined in international law, yet their realisation in national law is so uncertain? Why has enterprise law changed, and where should it go? History does not let us see into the future, but when we learn from the past, we understand our options better for deciding what to change. Change is both a dangerous and marvellous truth: like the serpent said to Eve, some people 'see things' as they are and 'say "Why?"' but we may also 'dream things that never were' and 'say "Why not?"'[1] Knowing our past fortifies our thinking and our imaginations.

Yet there is no shortage of attempts to shut down imagination. When the Iron Curtain fell, a political theorist named Francis Fukuyama argued we had reached 'The End of History', since 'liberal democracy' had (not surprisingly) proved superior to the Soviet dictatorship.[2] Two corporate lawyers soon added we had also reached an 'end of history for corporate law', because the 'force of

[1] Cf. G. B. Shaw, *Back to Methuselah* (1921) Act I, §i; the serpent is incorrect that we dream things that 'never' were.
[2] F. Fukuyama, *The End of History and the Last Man* (1992).

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More Information

logic', 'example' and 'competition' showed that 'shareholder primacy' was superior to all other forms of corporate governance, whether director-dominated, labour or state-oriented models.[3] Ironically, the same game was played by Hegel and Marx.[4] Hegel argued a 'dialectic' process between 'the state' and 'civil society' had led to the peak of human freedom, apparently, under the Prussian monarchy, in 1820.[5] In 1848, Marx argued, no, a dialectical process was still under way, as the world had moved from slavery, to feudalism, to an age of capital, and from this the communist revolution would inevitably follow. Capital's power structure would collapse under the weight of its internal contradictions.[6] Of course, claiming something is 'inevitable' may have a persuasive force, but reality usually defeats rhetoric in time. In 2021, the post-cold war certainties of a liberal, shareholding democracy, appear as fanciful as the 'end' of history, given our state of escalating inequality, the global-warming catastrophe and ongoing armed conflict. History is chaotic and long, but also rich with ideas, and can show remarkable patterns. This chapter charts the broad changes between state and corporate power from the ancient, medieval and mercantile worlds, to the industrial, the corporate and the global revolutions of today.

(1) Ancient and Medieval Enterprise

The modern law of enterprise emerged over the industrial, corporate and global revolutions, and yet all basic questions of our economic constitution – who should finance, govern or have rights in enterprise – are as old as recorded law. History is often only visible to us through fragments, but we know, for example, that Ancient Egypt had a vast slave population for constructing the pyramids, and that the first recorded strike appears around 1150 BC. Workers building the Royal Necropolis for Pharaoh Rameses III (who was later murdered in a coup) downed their tools because they were not being paid their wages.[7] Even earlier, the first recorded insolvency law was in the *Codex Hammurabi*, from Ancient Babylon (today, Baghdad), where merchants who failed to pay their debts could be imprisoned by their creditors and, with their wives and children, be enslaved for three years.[8]

[3] H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' (2000) 89 *Georgetown LJ* 439.

[4] Cf. H. Butterfield, *The Whig Interpretation of History* (1931); Voltaire, *Candide, ou l'optimisme* (1759).

[5] G. W. F. Hegel, *Grundlinien der Philosophie des Rechts or Elements of the Philosophy of Right* (1820); G. W. F. Hegel, *Vorlesungen über die Philosophie der Weltgeschichte or Lectures on the Philosophy of History*, trans. J. Sibree (1857).

[6] K. Marx and F. Engels, *The Communist Manifesto* (1848); K. Marx, *Capital: A Critique of Political Economy* (1867) vol. I, ch. 32. See G. Kitching, *Marxism and Science: Analysis of an Obsession* (1994).

[7] W. F. Edgerton, 'The Strikes in Ramses III's Twenty-Ninth Year' (1951) 10(3) *J Near Eastern Studies* 137. Cf. Genesis 11:9 and Exodus 5:7, recording labour disputes.

[8] *Codex Hammurabi* (1754 BC) cll. 115–19.

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