# In the Name of Shareholder Value: Origin Myths of Corporations and Their Ongoing Implications

*Karen Ho*∗

## INTRODUCTION

Corporate governance and business decisions are constantly made in the name of shareholder value regardless of whether most shareholders actually benefit.[1] Over the past thirty years, the supposed need to maximize shareholder value has helped to justify the financialization of corporations, where corporate resources and priorities have shifted towards the demands of financial markets, financial buyers, and financial measures, and away from other constituents, such as employees and communities. Shareholder value is a powerful idea; it is the cultural belief that the singular and primary purpose of the firm is to create value (in the form of a rising stock price) for the shareholders of a company, who are conceptualized as "the owners," with an inherent right to the assets of the

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∗ Department of Anthropology, University of Minnesota.
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1. It is important to note that in the present moment, shareholding is starkly unequal in the U.S.: the top ten percent of households own eighty-four percent of all stock, and approximately half of all Americans own absolutely none at all. Such unevenness not only belies overblown claims of a shareholder democracy but also demonstrates the extent to which it is mainly the wealthy that directly benefit from shareholder value gains and claims. Of course, it is precisely the instability of share prices during the dot-com and 2008 financial crises that helped to push out many middle-class investors, who had less cushion to withstand financial losses. Moreover, as I argue in this Article, the corporate practices and decisions that are made in the name of generating shareholder value, especially in the short term, have often contributed (ironically) to the share-price volatility that has spooked middle-class investors. As such, the basic workings of Wall Street have contributed to growing inequality even within the investor community. *See* Patricia Cohen, *We All Have a Stake in the Stock Market, Right? Guess Again*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/business/economy/stocks-economy.html [https://perma.cc/MW69-EXL7].

firm, and whose control of corporations presumably benefits the larger social economy.

Beginning in earnest during the 1980s and continuing into the present moment, influential financial actors, led by Wall Street institutions, corporate takeover artists, and investment firms, have worked to downsize the corporation (cut costs and "delayer" as many stakeholders as possible) and redistribute these so-called savings to financiers, institutional shareholders, and financial advisors—at the cost of plummeting reinvestment in research and development, infrastructure, workers, communities, and market innovations, which require large, stable capital investments over time. As a result, corporations that undergo constant financial restructuring in the name of shareholder value are often at greater risk of bankruptcy, employee instability, and organizational volatility, as their long-term productivity is mined for short-term financial gain. Through claims made in the name of shareholder value primacy and immediacy, and the enactment of share price as the sole standard of measurement for corporate success, the entirety of the corporation was brought into the orbit of finance, reduced to a bundle of assets that could be extracted for narrow financial interests and gains. This particular cultural interpretation and deployment of shareholder value led firms to be thought of, and practiced on, as sites of short-term value extraction.

Exemplified by restructured and financialized corporations, socio-economic transformations have catalyzed a massive transfer of income to the wealthy few—engineered largely by the financial industry. Over the past forty years, dominant financial actors have successfully reframed the very purpose of corporations, converting them from stable sources of production and employment (at least for relatively privileged workers) into sites for the extraction of financial wealth. The effects of these practices and values have been staggering, as it is largely the siphoning of financial wealth from corporations that has enabled the richest one percent to capture nearly sixty percent of all income gains from 1993 to 2013.[2]

These massive changes have been justified by the invocations and seductions of what I would call an origin myth—specifically, a set of assumptions about the origins of major corporations, the concept of proprietorship, the rights of ownership, and the roles of primary and secondary markets. Dominant financial interests have capitalized on a set

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2. *See* Emmanuel Saez, Striking it Richer: The Evolution of Top Incomes in the United States (Updated With 2013 Preliminary Estimates), at 4 (Jan. 25, 2015) (update to Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States*, PATHWAYS MAG., Winter 2008, at 6); *see also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

of historical fictions, often packaged and framed in terms of shareholder value, to mobilize and legitimize a set of practices that mainly benefit large-scale investors, such as private equity and leveraged buyout shops that purchase entire corporations, as well as institutions who "advise" in the name of shareholders. The result is that shareholder value—its interpretations and representations, its uses and abuses, its appropriations and mobilizations—has become a lightning rod for critics of socioeconomic inequality and advocates of corporate social responsibility. A growing chorus of voices, from critical legal scholars to climate justice advocates, is critiquing the "shareholder value myth" for its contributions to unsustainable corporate practices and financial crises—even as many lodge full-throated defenses of this same myth.[3]

In this context, then, it is crucial to unpack and differentiate the critiques of practices done *in the name of* shareholder value that mainly benefit dominant finance *from* critiques of the shareholder value myth per se. Oftentimes, in debates over shareholder value, the overwhelming power of the financial sector to push its particular version of shareholder value and to shape the terms of these debates goes unnoticed. At the same time, it would be naïve to presume that the shareholder value myth—in particular, the core ideology of shareholder value primacy, which rests on concepts of shareholder ownership—is not somehow conducive to, and mobilized in the service of, large financial interests.

The work of this Article, then, is to shed light on these debates, to locate problematic appropriations of shareholder value ideologies, and to disentangle abuses of power from more capacious, though still limited, interpretations of shareholder value. To do so, it is necessary to go beyond the shorthand and hackneyed invocations of "shareholder value" to gain a deeper understanding of the ideological building blocks and the underlying cultural and historical assumptions, which imbue declarations of shareholder value with such primacy and generative force. In this endeavor, this Article will engage the taken-for-granted assumptions that somehow corporations "belong" to shareholders because shareholders, in turn, "birthed" them, and, in the same vein, that investors and financial markets in general are the originators of foundational and productive capital that has allowed corporations to thrive and created jobs. It will challenge origin myths and historical misrecognitions of financial markets, shareholding, and proprietorship that have allowed dominant finance to justify its own practices in the name of shareholder value when, in fact, the overall stability and productivity of the underlying corporations

3. *See, e.g.*, Jonathan R. Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 Tex. L. Rev. 911 (2013); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190 (2002).

have been damaged (or liquidated) over the past forty years, and "everyday" shareholders hardly benefit as much as is touted.

Part I of this Article analyzes some of the contemporary critiques of, and debates around, shareholder value in order to illustrate why many of these contestations demonstrate underlying gaps or problematic assertions in the history and politics of shareholder value, especially if they are delimited by the narrow legal frames and neoliberal assumptions of corporations. It also provides the context necessary to explicate and ground why shareholder primacy and ownership assumptions are historically and legally flawed, and how financial values and assumptions continue to be championed (and financial power elided), despite the recent implosions of shareholder value. Part II expands upon several leading scholars' work in showing the paradoxical and ahistorical nature of the shareholder ownership assumption and the conflation of primary and secondary financial markets. Throughout, this Article attempts to differentiate and disentangle multiple problems with the shareholder value interpretation by emphasizing Wall Street's undue influence, the myth and ideology of shareholder value primacy, and the intersections between them.

## I. Background: Shareholder Value Contestations

It would not be an exaggeration to state that shareholder value has been business and legal orthodoxy since the 1980s. It was not until the global financial crisis of 2008, instigated in large part by Wall Street financial institutions, that doubts about the self-evidence of shareholder value began to bubble into the mainstream—beyond the circles of economic justice advocates, social critics, and critical legal, cultural, and social scientific scholars. For example, in the wake of the 2008 financial crisis, Harvard Business School scholars Rakesh Khurana and Nitin Nohria argued the following:

> To regain society's trust, we believe that business leaders must embrace a way of looking at their role that goes beyond their responsibility to the shareholder to include a civic and personal commitment to their duty as institutional custodians. In other words, it is time that management became a profession.[4]

Even the former CEO of General Electric, Jack Welch, one of the strictest adherents to shareholder value primacy, who deployed that logic to radically restructure his firm through massive layoffs and redistribution of "savings" to shareholders, declared, "[o]n the face of it, shareholder

4. Rakesh Khurana & Nitin Nohria, *It's Time to Make Management a True Profession*, HARV. BUS. REV., Oct. 2008, at 70.

value is the dumbest idea in the world. . . . Shareholder value is a result, not a strategy . . . Your main constituencies are your employees, your customers and your products."[5]

The recent surprise announcement by the Business Roundtable on the "Statement on the Purpose of a Corporation" has generated speculation that the era of shareholder value primacy is waning. Composed of almost 200 leading CEOs of major U.S. corporations, the Business Roundtable—pivoting away from its own proclaimed shareholder value orthodoxy, which had unequivocally stated since 1997 that the singular purpose of all corporations is simply to generate shareholder value—pledged that its new purpose was to help create an economy that could "serve[] all Americans."[6] While being mindful of the nationalist undertones borne of the present moment, the "reframing" of the purpose of corporations towards "the benefit of all stakeholders—customers, employees, suppliers, communities, and shareholders"[7] is an important move away from a short-sighted and short-term insistence on shareholder primacy.

At the same time, it is important to approach this apparent merging of stakeholder and shareholder interests with some caution. Historically, when stakeholder and shareholder interests have been translated into one another, or conflated, this move has led to the eventual undermining of other stakeholders' interests in favor of declarations of shareholder value. It would thus be advisable to be circumspect as to the limits of such a declaration, as well as to the problems that can ensue when multiple interests are laid side by side, as if they were nonhierarchical.[8] In other words, we have been through precisely this kind of reframing before, and a particular version of shareholder value won.

When the Business Roundtable was first constituted in 1972, during the peak era of managerial capitalism—when corporations were understood to be long-term social institutions, albeit hierarchical, exclusive, and paternalistic—it declared "social responsibility" to be one of several core functions of a corporation. And yet, soon afterwards and into the 1980s, the Business Roundtable began to justify long-term investments, a commitment to stakeholders, and social responsibility itself *in terms of shareholder value*. This deference was due, in part, to the

5. Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES (Mar. 12, 2009), https://www.ft.com/content/294ff1f2-0f27-11de-ba10-0000779fd2ac (last visited Jan. 23, 2020).

6. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter *Business Roundtable Redefines the Purpose*], https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/R865-HM4A].

7. *Id.*

8. *See id.*

growing dominance of a financialized worldview of the corporation, where both Wall Street and neoliberal economists began to converge on demands that short-term stock price appreciation serves as the key means through which the agents of corporations (understood to be managers) served the interests of the owners of corporations (understood to be the shareholders). Consequently, to justify a more stakeholder-oriented, social-entity view of the corporation to the growing chorus of shareholder value advocates, proponents of managerial or stakeholder capitalism balanced the tension between the immediate insistence to "unlock shareholder value now" with long-term investments in everything from research and development to employee benefits by arguing that all such investments would, in time, generate shareholder value. Of course, such a reductive framing of the multiplicity of the corporation (its responsibility to society at large) was, in hindsight, a slippery slope. This framing was intended to anticipate and fit within the relatively narrow frame and agenda of shareholder value. As I have argued elsewhere, "[t]he danger of this kind of discursive translation is the insertion of shareholder value as baseline measurement for all corporate practice. With some temporal flexibility, stock price was seen as having the ability to stand for and to symbolize all the positive results of corporate choices."[9] One could argue that by adopting the language of shareholder value, social entity proponents helped pave the way for the soon-to-be dominant view of corporations as primarily financial entities.

The Business Roundtable's balancing act between shareholders and stakeholders in the 1980s and 1990s is directly mirrored in its 2019 position. What is crucial to remember is that when shareholder value is framed as the most important measure and shareholders are viewed as key constituents, attempts to negotiate these tensions have historically collapsed the interests of stakeholders into those of shareholders—and shareholders continue to be problematically understood as *the owners* of corporations. Until this ideological assumption of ownership is challenged, shareholder value advocates will continue to claim for shareholders a foundational right to the corporation and advance the (illogical) argument that a focus on stock price should theoretically benefit all constituents.[10] It is thus important to recognize the limits of the Business Roundtable's recent declaration, as throughout the 1980s and into the 1990s they acknowledged the existence of multiple

9. KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 211 (2009).

10. Having said this, it is important to be open to the fact that the 2019 Business Roundtable reframing of corporate purpose could herald a new "common sense," especially given that the theoretical, academic, and on-the-ground virtues of shareholder value have been increasingly challenged since the Great Recession. *See Business Roundtable Redefines the Purpose*, *supra* note 6.

stakeholders—while still subordinating multiple agendas to the pursuit of shareholder value.

Of course, the discursive contestations and translations around shareholder value also evince an architecture of policies, values, decisions, and institutions that has been structured on shareholder value. Shareholder value, after all, is both a myth and a social fact.[11] Here, it would be useful to analyze recent legal debates between a defender of shareholder value, Yale Law School professor Jonathan Macey, and one of its most influential and strident critics, Lynn Stout, a former professor at Cornell Law School. This debate is directly instructive of both the common pitfalls in mainstream and academic debates about shareholder value, and the extent to which the ongoing reproduction of particular interpretations of shareholder value depends upon an entire assemblage of underlying ideas, assumptions, and practices that must be challenged.

In *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*,[12] a tongue-in-cheek and rather reproachful review of Lynn Stout's book *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, Macey deploys dominant and problematic assumptions to criticize Stout for staging a feigned controversy.[13] Specifically, he is confused as to why she would frame shareholder value primacy as a problem, since, as he puts it, shareholder value is "but a sheep in wolf's clothing."[14] As Macey rationalizes, since managers hardly do enough to maximize shareholder value—there is no direct legal requirement to do so, nor are they forced to take any "extreme or socially destructive actions" to achieve it—it can hardly be dubbed a problem or even a primacy, only a laudable "aspiration."[15] Falling prey to the narrow fiction of managers as self-

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11. Anthropologists have long analyzed and approached "myth" not so much as "alternative facts" or "fake news," but as powerful narratives and ideologies that shape community identities, meaning, and social organization. *See generally* BRONISLAW MALINOWSKI, MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS (Robert Redfield ed., 1948); Sylvia J. Yanagisako & Carol L. Delaney, *Naturalizing Power*, *in* NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS 1, 1 (Sylvia Yanagisako & Carol Delaney eds., 1995). In a related vein, we do not examine and understand "facts" in a vacuum: engaging with the term "social facts," we analyze how and in what ways collectively generated beliefs, societal structures, and uneven power relations shape individual and social understandings of truth, facts, and objectivity, and what counts as such. *See generally* Emile Durkheim, *What Is a Social Fact?*, *in* THE RULES OF SOCIOLOGICAL METHOD 1, 50 (Steven Lukes ed., 1965); Karen Ho & Jillian R. Cavanaugh, *What Happened to Social Facts?*, 121 AM. ANTHROPOLOGIST 160 (2019).

12. *See generally* Macey, *supra* note 3. This title betrays his presumption that the shareholder value myth is as "beneficent" as that of the tooth fairy.

13. Here, I mainly focus on Lynn Stout's scholarship with respect to Jonathan Macey's critique. In the next Part, I engage with her important work more directly.

14. Macey, *supra* note 3, at 912.

15. *Id.* at 912, 920.

serving agents of shareholders (who are presumed to be the true principals of the corporation), Macey argues that despite managerial lip service to shareholder value, often belied by their practices, the "shareholder wealth maximization model" at least serves as a countervailing check to prevent managers from "steal[ing] from the company with impunity."[16] Besides, he continues, since Stout claims that "shareholder primacy is a myth," then "she must be wrong in her claim that it is a serious threat or problem. Myths do not pose real threats," as they are only "imaginary."[17]

Meanwhile, Lynn Stout calls shareholder value, specifically shareholder value primacy and its theoretical underpinnings, "myths" for strategic reasons.[18] She recognizes that part of what continues to animate this theory and set of priorities is the assumption that shareholder value primacy is akin to "truth," problematically assumed to be enshrined in corporate law and charter (which she debunks). Dubbing it "myth" serves to challenge its dominance and deconstruct its power. Moreover, any cultural anthropologist would certainly challenge Macey on his misplaced understanding of myth: its constructedness, its historical contingency, and its origins in narrative do not diminish its social power and influence. One need only look to the example of race: the fact that it is a social construction does not make it any less real. In fact, race is probably the quintessential example of a myth—an imaginary concept shaped by historical and material interests—that has had world-changing and ongoing structural effects, illustrating the mutual constitution of discourse and practice. To claim that myth can pose no real threat is therefore contrary to social fact and anthropological understanding.

And yet, Macey's confusion regarding the conundrum—how can shareholder value primacy be harmful to shareholders themselves (not to mention corporations)[19]—is understandable. Why blame shareholder

16. *Id.* at 920.

17. *Id.* at 913, 923.

18. LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 14 (2012).

19. There is longstanding and substantive evidence that short-term shareholder value primacy has damaged and dismantled corporations as social institutions and has often undermined long-term stock price stability and appreciation. As business and management scholar Gerald Davis has demonstrated, "after two decades of 'shareholder value,'" public corporations have faced heightened turnover and faced demise: "only three" corporations "are left" on the Dow Jones industrial index from the original thirty. Gerald F. Davis, *After the Ownership Society: Another World Is Possible*, *in* MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS, 331, 333 (Paul M. Hirsch & Michael Lounsbury eds., 2010). "The number of public corporations in the United States in 2009 was half what it had been in 1997," Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1134 (2011), and "thanks to two decades of restructuring driven by a quest for shareholder value . . . . the career ladder had been replaced by the career Roach Motel as another unexpected consequence of the shareholder value movement," Gerald F. Davis, *The Rise and Fall of Finance and the End of the Society of Organizations*, 23 ACAD. MGMT. PERSP. 27,

value for the ineffectiveness of multiple actors, especially corporate executives?[20] He takes particular issue with Stout's example of the massive BP oil spill, where she hints that "shareholder value thinking" influenced the company's cost-cutting and disregard for safety standards, which in turn catalyzed the resulting explosion, ecological devastation, and decimation of the gulf (not to mention BP's stock price).[21] Yet, Macey is dissatisfied with Stout's explanation:

> [E]ven if one were to fantasize that some misguided notion of shareholder value maximization on the part of BP management somehow was to blame for the Deepwater Horizon disaster in the Gulf of Mexico, it does not stand to reason that shareholder value maximization in general is at fault. In fact, the opposite is true. If BP was trying to maximize value for shareholders, it failed miserably. It failed to such an extent that shareholders in BP . . . can sue BP for its failure to adequately protect shareholders' wealth . . . .[22]

The issue here is a gap in analysis and, I would argue, insufficient attention to financial interests, actors, and institutions, which are key players in these developments.

While Macey is correct to point out that shareholder value per se is not always the culprit, and while Stout is even more on target when she points out more specifically that "shareholder value primacy and thinking" are at fault, neither focus their attention on the elephant in the room: Wall Street financiers, investors, and advisors, whose role as spokespeople of the financial markets and guardians of stock price primacy often serves to prevent scrutiny. Their continual encouragement of and engagement in expedient financial practices (such as increasing corporate debt loads) often undermine the long-term sustainability and stability of the firms they advise, not to mention shareholder value. In other words, the contradictions of shareholder value are thrown into sharp relief for a

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35 (2009). Lynn Stout makes a similar argument. She writes, "Corporate America's mass embrace of shareholder value thinking has not translated into better corporate or economic performance. The past dozen years have seen a daisy chain of corporate disasters, from massive frauds . . . to the near-failure and subsequent costly taxpayer bailout of many of our largest financial institutions . . . ." STOUT, *supra* note 18, at 11.

20. Corporate executives do not always do a competent job of creating shareholder value over time (meaning shareholder value is proclaimed but not always enacted). While shareholder value has the potential to be capacious and could be practiced and interpreted in ways that benefit multiple parties, the issue is that managers are incentivized to be short-term, and oftentimes mortgage the long-term stability and productivity of the organization. Of course, the fact that many high-level corporate executives are compensated through stock options and thus are themselves "shareholders" should give defenders of shareholder value pause and encourage them to ruminate about the potentially short-term, institutionally-extractive effects of shareholder value approaches.

21. STOUT, *supra* note 18, at 1–2.

22. Macey, *supra* note 3, at 922.

number of reasons. The financial market actors charged with promoting and protecting shareholder value often undermine or destabilize companies, preventing them from generating sustained shareholder value in the long term. Corporate executives and managers, through stock option compensation plans, are themselves aligned with financial markets rather than the long-term sustenance of the institution. The very discourse and assumptions undergirding shareholder value are themselves based on problematic assumptions and origin myths of ownership that narrow the purview of corporations and misrecognize their history. Understanding the multiple reasons why shareholder value is so contested—why critics often find it difficult to pinpoint the reasons for their discontent and why proponents of it often experience unsatisfactory trajectories, outcomes, or deferrals—is therefore crucial in order to disentangle the multiple practices mobilized in the name of shareholder value. I now turn to the problematic conceptions embedded in assumptions of shareholder value.

Returning to Macey, we see evidence of these assumptions. Despite his concurrence with Stout that shareholder value is an ideology,[23] he holds steadfast to the notion, which he presumes to be an underlying truth, that somehow shareholders' privileged claims to and status within the corporation are legitimated by the assumption that they contributed original capital to corporations at their founding.[24] In fact, Macey defends shareholder value because he argues that "shareholder money" is "required to capitalize the corporation," and that, therefore, corporate executives and directors should not have broad leeway, according to the business judgment rule, to manage the corporation according to multiple shifting demands, as they would otherwise be "free to do virtually anything they want with and to shareholders' money and never have to say they are sorry to shareholders, courts, workers, or anybody else."[25] While "anybody else" is thrown in to conjure safety in numbers, Macey's core presumption is that the corporation is really just an instantiation of "shareholders' money."[26] This origin myth has generated its own effects and logics that, I would argue, have warped the narrative order of things: the myth of shareholder ownership has in turn engendered a logic of entrepreneurship based on an ahistorical misreading of shareholder risk taking.

For example, Macey argues that downplaying shareholder value primacy would eliminate the all-important corporate activity of "risk taking":

23. *See id* at 917.
24. *See id.* at 912.
25. *Id.* at 921.
26. *See id.* at 917.

> If we diminish, much less eliminate, shareholders from our list of constituencies that corporate managers are supposed to serve, we are left only with the interests of fixed claimants, i.e., those claimants like workers, creditors, and local communities who enter into specific contractual relationships with corporations. For solvent companies, meeting the obligations owed to these constituencies does not require marginal risk taking. Marginal risk taking benefits only shareholders. Thus, Professor Stout's eliminating the myth of shareholder value also would eliminate the reality of risk taking, which is the critical component of entrepreneurship.[27]

As I will unpack further in the next Part, equating current shareholder equity with the risk-taking, entrepreneurial "founder-capital" that germinated the corporation is a historical misreading that confuses primary markets with secondary financial markets. Historically, most shareholders only engage with corporations through shares introduced and traded in the secondary markets *after* corporations have already been founded and are already operational through their own retained earnings. In fact, the anthropologist Alexandra Ouroussoff has demonstrated that the intense pressure corporate managers face from financiers and financial advisors to extracted short-term shareholder value has actually *prevented* corporations from taking risks, as shareholder primacy privileges immediate returns, *not* the long-term risks necessary for innovation.[28] The dense assemblage of seemingly self-evident logics scaffolded onto shareholder value necessarily blinds scholars to its mythical qualities, to recognizing that shareholder value is a myth imbued with great social power.

## II. CHALLENGING THE ASSUMPTION OF SHAREHOLDER OWNERSHIP

The basic assumption of shareholder ownership, that shareholders are foundational to the corporation, must be actively challenged by scholarship from multiple disciplines, in a variety of business and industry circles, and in the area of public education and understanding. For example, June Carbone and Nancy Levit, in a recent 2017 *Minnesota Law Review* article entitled *The Death of the Firm*, insightfully observe that "the firm as entity is disappearing as a unit of legal analysis" and argue that it is "an ideological shift in the treatment of the firm" that has collapsed and reduced the firm into a social organization "greater than the sum of its parts," beholden to multiple stakeholders, into "the narrowly

27. *Id.* at 920.

28. *See* ALEXANDRA OUROUSSOFF, WALL STREET AT WAR: THE SECRET STRUGGLE FOR THE GLOBAL ECONOMY (2010).

defined interests of a company's immediate *owners*," who turn to the financial markets to measure the value of their holdings.[29] The entity is continually liquidated, so to speak, in order to maximize in the name of the shareholder. While Carbone and Levit importantly and astutely question the societal impact of this ideological turn in the purpose and governance of a corporation, they too hold intact the core notion of ownership, specifically that shareholders do, in fact, "own" the corporation.

In this vein, it might be instructive to further engage and extend the work of the legal scholar Lynn Stout, who had been at the forefront of the critique against these interrelated, co-dependent logics. In a 2002 *Southern California Law Review* article, Stout maintained that the "worst" yet "most common" defense of shareholder primacy is the "bad argument" that "the public corporation 'belongs' to its shareholders."[30] The logic is as follows: because shareholders own the corporation, they are entitled to all the firm's earnings and assets, and moreover, the managers must work to maximize the owners' wealth through stock price appreciation. It is, therefore, important to question and dismantle the building blocks of this logic.

Stout points out that the primacy of shareholder value depends on a problematic conflation: shareholders own shares or stock, a corporate security, *not* the corporation itself.[31] Given this social fact, we must then ask ourselves what the ownership of a stock means, and what the rights conferred upon this kind of ownership are. Again, Stout argues that these ownership rights are "quite limited," as public company shareholders neither have the "right to exercise control over the corporation's assets" nor the "right to help themselves to the firm's earnings"; these are decided by the board of directors.[32] As Stout further clarified in 2013:

> Although laymen sometimes have difficulty understanding the point, corporations are *legal entities that own themselves*, just as human entities own themselves. What shareholders own are shares, a type of contract between the shareholder and the legal entity that gives shareholders limited legal rights. In this regard, shareholders stand on equal footing with the corporation's bondholders, suppliers, and

29. June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 963–64 (2017) (emphasis added).

30. *See* Stout, *supra* note 3, at 1190.

31. *See* STOUT, *supra* note 18, at 13; Stout, *supra* note 3, at 1191.

32. Stout, *supra* note 3, at 1191.

> employees, all of whom also enter contracts with the firm that give them limited legal rights.[33]

Empirically then, "equity holders" have a similar status to bondholders, and yet the presumption of ownership, not to mention their privileged positionality as central claimants and direct principals of the corporation, holds steadfast. As Stout astutely observes, "The notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply is not true. There is no solid legal support for the claim that directors and executives in U.S. public corporations have an enforceable legal duty to maximize shareholder wealth. The idea is fable."[34]

As such, it is important to unpack why such a problematic claim has had such enduring power, as well as how the deployment of shareholder value primacy since the 1980s—while entirely new and unprecedented in its reach and its generation of socio-economic inequality—depended on the coming together of multiple and longstanding discursive strands from finance, the state, academia, neoliberal and conservative ideologies, and so on. Here, I track these convergences.

In the late 1970s and early 1980s, a particular strand of neoliberal and financial economic ideology developed in academia to address contestations around corporate governance tilted the narrative of corporate purpose in Wall Street's favor by advocating for the righteousness of the "shareholder-as-owner" myth. Perhaps the most influential academic catalyst was Milton Friedman's ubiquitously cited, infamous argument in *The Social Responsibility of Business Is to Increase Its Profits*, where he presents the following ideas and beliefs as facts: that shareholders own corporations; that corporations are created solely by shareholders' money; that shareholders are the ultimate employers; and, therefore, that *not* acting primarily in the interest of shareholders betrays the very tenets of a free society and is tantamount to "preaching pure and unadulterated socialism."[35]

In addition, financial economists and business school professors promoted a view of the corporation called "agency theory": seductive in its simplicity, it was a theoretical model based on an origin myth concerning shareholders' historically fictive role in the founding of modern corporations, and promoted the notion that managers should be

33. Lynn A. Stout, *The Shareholder Value Myth*, *in* BUSINESS IN ETHICAL FOCUS: AN ANTHOLOGY 79, 80 (Fritz Allhoff et al. eds., 2d ed. 2016).

34. STOUT, *supra* note 18, at 25.

35. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32; *see* STOUT, *supra* note 18, at 18–19; Stout, *supra* note 3, at 1190–92; Stout, *supra* note 33, at 2.

the "agents" of the true principals of a corporation, which were presumed to be the shareholders. The seductive appeal of this seemingly tight and coherent argument—which fulfilled capitalist, individualist, and democratic impulses because the owners of capital received the spoils of industry, and yet technically *anyone* could buy stock and be an owner—cannot be underestimated. Importantly, Lynn Stout critiques this ensuing generation of neoclassical and neoliberal economic adherents who repeated Friedman's theoretical assertions so constantly and uncritically that these ideological arguments took on the status of fact.[36]

It would not be too far-fetched to state that the Friedman article, which begat the perennially-cited 1976 Michael Jensen and William Meckling article *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, established a genealogy of the financialized firm that, through the iterative process, made shareholder value seem natural and self-evident.[37] Both articles, and countless others, promoted the "erroneous belief that shareholders 'own' corporations" and the corollary idea that shareholders are the corporation's residual claimants, thereby building up from these problematic assumptions an ideological foundation for imperatives of shareholder maximization and narratives of managerial betrayal.[38] As legal scholars such as Lynn Stout and sociologists such as Frank Dobbin and Dirk Zorn have noticed, the key proponents of these seductive ideas had little to no background in corporate law or in the daily workings and navigations of industry and business. As such, they "failed to capture the real economic structure of public companies with directors, executives, shareholders, debtholders, and other stakeholders"[39]; these theories were ironically "widely influential, considering that [they were] cooked up by a couple of business school professors at the University of Rochester and not by a titan of industry."[40]

Given the enduring hold of the myth of shareholder ownership, it comes as no surprise that it works in concert with and influences two other legally erroneous arguments that are used to uphold the notion of shareholder primacy. For example, Stout argues that the shareholders as "residual claimants" argument is a faulty rationale used to construct a

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36. *See* STOUT, *supra* note 18, at 18; Stout, *supra* note 33, at 2.

37. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

38. Stout, *supra* note 33, at 3; *see also* STOUT, *supra* note 18, at 36–41; Stout, *supra* note 3, at 1192.

39. STOUT, *supra* note 18, at 28.

40. Frank Dobbin & Jiwook Jung, *The Misapplication of Mr. Michael Jensen: How Agency Theory Brought Down the Economy and Why It Might Again*, *in* MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS 29, 32 (Paul M. Hirsch & Michael Lounsbury eds., 2010).

privileged position for shareholders. She explains that, in fact, "[s]hareholders are residual claimants only when failed companies are being liquidated in bankruptcy," and that, thus, this framing should not be used to determine corporate purpose in the regular course of business.[41] Specifically, "[t]he law applies different rules to healthy companies, where the legal entity *is its own* residual claimant, meaning that the entity is entitled to keep its profits and to use them as its board of directors sees fit."[42] Similarly, a corollary legal error that similarly supports the mistaken claim that corporations must be governed strictly for the benefit of shareholders is the belief that corporate executives serve as agents for the shareholder, who is understood to be the principal, when, in fact, there is no right of the latter to control the former.[43] This understanding is based upon a historical misconception that shareholders founded corporations, and thus that all ensuing stakeholders must serve shareholder needs. Specifically, Stout argues that "[s]hareholders lack the legal authority to control directors or executives"[44] and "[t]he business judgement rule ensures that, contrary to popular belief, the managers of public companies have no enforceable legal duty to maximize shareholder values."[45]

Shareholder primacy is thus, a societal, academic, and managerial choice promoted by financiers and other powerful actors, but "not a legal requirement."[46] There must, therefore, be other factors and explanations, beyond the law, to explain how the ideologies and interests of Wall Street, shareholder value advocates, and neoliberal economists became common sense in American business. Additional historical and societal intersections and contexts are at play. It is no accident that agency theory and particular framings of capitalist ownership have acquired such authority in American society, despite their failure to address inequalities.

To further understand how shareholder value arguments gained traction as part of larger historical and socio-economic processes, mobilizations, interests, and events, it is crucial to engage with historian Julia Ott's work on the history of capitalism in the United States. In *When Wall Street Met Main Street: The Quest for an Investor's Democracy*, Ott argues that financial and "equity" ownership through the selling of bonds and stocks has long captured the American imagination and fueled and legitimated conservative and nationalist notions of property ownership and wealth accumulation. She painstakingly shows how, in the early twentieth

41. Stout, *supra* note 33, at 3.
42. *Id.* (emphasis added).
43. *See* STOUT, *supra* note 18, at 42.
44. Stout, *supra* note 33, at 3.
45. *Id.*
46. *Id.*

century, many of the largest corporations, such as AT&T, capitalized on Americans' newfound patriotic interest in securities (fueled by the sale of Liberty Bonds during WWI) to promote the sale of corporate stock.[47] Using the rationale of "shareholder democracy"—that the nation consisted of a community of property owners—these companies sought to roll back the regulatory state and to curtail protections for employees by postulating to the public that, since employees and others could become shareholders and shareholders were "owners," corporations did not need to extend protections to these potential "proprietors" (of stock), who were in reality mostly "propertyless wage-laborers."[48]

Of course, during this time, owners of a few shares with meager protections did not have access to wealth accumulation as did individual property owners of land or business, and yet, in order to market and promote the purchase of securities among the masses, the financial securities industry leveraged their deep-seated aspirations to construct a false similarity between the ownership of shares and the ownership of the means of production. As the flourishing pre-1929 stock market masked growing inequality, Ott shows how shareholder value maximization came to be utilized by large corporations, with significant support and buy-in from the state, to tell stories of mass investment, harmonize class interests, and deflect corporations from regulatory oversight. Even in the wake of the Great Depression, which dealt shareholder capitalism a severe blow, New Deal policies and compromises not only rescued American capitalism but also rehabilitated the notion of mass investment in the financial markets as a way for key players to continue promoting securities ownership, capital investments, and dominant notions of property and proprietorship.[49]

This historical context of shareholder value justifications in the name of investor democracy is germane because it illustrates the multiple ways in which assumptions about ownership, proprietorship, and property have been mobilized in situations that were often quite different from each other, and where one tenuous claim was often used to give strength to another tenuous claim. Specifically, the equating of corporate stock ownership with independent proprietorship in order to solidify cultural and economic legitimacy for capitalism in the early-to-mid-twentieth century reveals two origin myths. First, there was a paucity of individual proprietorships, as the stark and growing inequalities in the U.S. between Wall Street financiers and corporate leaders on the one hand and the

47. *See generally* JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY (2011).

48. *Id.* at 3–6, 25.

49. *See id.* at 214–216.

majority of employees and the left-out masses on the other[50] were more characteristic of the time. Second, stock ownership allowed neither proprietorship nor control of the company itself, as shareholding of public corporations was created—in the first instance—to enable owners of stock to "play" in the stock market. This historical context is crucial to unpacking shareholder value origin myths.

The stock market in the U.S. was deliberately created to separate stockholding from the day-to-day business of the corporation, and to separate stockholders from control of the firm and access to its retained earnings. Stockholders engaged in the separated space of the stock market, not the corporation itself, and therefore, "the very notion of returning to a time when shareholders owned and controlled their enterprises is itself a fantasy."[51] In fact, shareholders historically did not invest in the value-creating capabilities of the company. They traded in the secondary markets, in the realm of finance and the capital markets—Wall Street's domain—where liquidity, short-termism, and separation from the everyday life and control of the corporation were the historical context. It is instructive to note that the stock market was a vehicle that allowed founders to cash out *after* corporations were already a going concern; the secondary markets (i.e., the stock market) did not seed the corporation. The excision of this history is crucial to the belief in the shareholder's righteous possession of the spoils of the company. It all depends on the incorrect assumption that shareholders were actually the original fountain of capital, the original investors who created the innovation-producing capabilities of the modern corporation. In fact, the modern corporation was built and sustained from retained earnings, the work of multiple stakeholders, especially employees, and various inputs from founders; most shareholders entered the picture after the fact, after corporations were already a going concern, and mainly exchanged shares in the secondary markets, with liquidity being their primary concern.

Moreover, despite financial interests rallying in the name of shareholders in the 1980s and beyond, "Wall Street and corporate executives historically advocated for widespread shareholding, not as a vehicle to give shareholders control (as public shareholding was understood and actualized to be a dilution of control), but as cultural rehabilitation" to promote greater societal buy-in for multiple capitalist

50. It is important to mention that among the left-out masses were people of color and indigenous peoples for whom the processes of enslavement, settler colonialism, and/or alien land laws, among other exclusionary (or extractive) policies, prevented multiple communities from achieving prosperity and security. At the same time, it was through the capture of their land and labor that individual proprietorships were made possible in the first place.

51. HO, *supra* note 9, at 182.

projects.[52] In other words, the past forty years of intense financialization advocated for a return to a "past that never was."[53] The 1980s corporate takeover movement was framed as a restoration of shareholders' ownership and control of corporations. It catalyzed and operationalized the shareholder value worldview by tearing corporations from the multiple stakeholder communities in which they were embedded and placing them in a commoditized space of exchange where their stock price became their single most important aspect. Because it was only through appreciation of the stock value that corporations could avoid being taken over (higher stock prices make a firm more expensive to purchase and thus offer some protection from takeovers), the takeover movement effectively promoted stock price as the singular obsession of the corporate world.

Of course, institutional investors on Wall Street have long viewed corporations as stock prices in portfolios because, as spokespeople, advisors, and players in the financial markets, their viewpoint has been shaped by the stock market. Stock price has long been *finance's* vantage point: the difference between most of the twentieth century and the contemporary moment is that this worldview has only recently become pervasive and dominant. The stock market and the corporation were historically separated and protected from each other. Wall Street specialized in the stock market, meaning that it played with stocks and owned shares, not corporations themselves. It was only with the 1980s takeover movement that Wall Street ideologies crossed over to serve as a rationale for reshaping corporate governance in the name of the shareholders. Successive takeover movements fueled the past four decades of financial deal-making, as corporations were increasingly treated as sites of shareholder value extraction. Wall Street simply did not have the power to do this before the Chicago School of neoclassical economic thought, led by Friedman, and agency theory, championed by Jensen and Meckling, provided academic legitimacy to the project,[54] and before the flood of investment money that came into mutual, pension, and retirement accounts gave Wall Street billions of additional dollars to bolster its claims to speak for all investors.

The origin myths of shareholder value primacy and ownership were also made possible, dare I say subsidized, by the State. The extent to which the U.S. has enacted policy (particularly tax policy) based on these myths shows the social construction of both markets and state actions, how each is centrally influenced by the other, and how these effects compound

52. *Id.* at 183.

53. *Id.* at 184.

54. *See* Jensen & Meckling, *supra* note 37, at 309; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

unequal capital accumulation. Julia Ott, in a recent article in *Dissent* titled *How Tax Policy Created the 1%*, shows that for over a century, U.S. tax policy not only "advanced the accumulation of white wealth," but also reproduced the similar problematic assumption that equated shareholding with proprietorship.[55] Ott makes a crucial connection: the corresponding narrative (often told by dominant financial actors and advocates) that shores up the link between shareholding and corporate proprietorship is based on the mistaken equation of secondary securities markets with primary inputs and investments in a company.

These larger cultural interpretations (and misapprehensions), Ott argues, are evident in comparatively lenient tax policies that favor profits made from the buying and selling of stocks and bonds. The problematic rationale for low taxes on capital gains emerges from the assumption that these profits are generated from direct investment in the primary, "productive" markets, and that they are continually re-invested to create jobs and fund new ventures. Key historical examples are the Congressional justifications and contestations around the Revenue Act of 1921, when a consensus emerged in Congress that investment income should be taxed at a "preferential or reduced tax rate" compared to regular income.[56] This development was due in part to a national marketing campaign during WWI that promoted the sale of war bonds by linking "citizenship and investment," specifically national and individual independence with the notion of investment in bonds *as* property ownership.[57] By 1921, then, Congress was determined to "protect . . . the investor" (rather than seeing the investor as plutocrat), and "[b]ased upon this consensus, the Revenue Act of 1921 separated different forms of income and honored investors with a 12.5 percent rate on capital gains income, well below the top rate of 50 percent for ordinary income from wages and salaries."[58] Even after the Great Depression, the NYSE resisted attempts to levy taxes on the wealthy by continuing to capitalize on these assumptions, framing investment in stocks as productive of national growth and as an expression of "the courage of private capital."[59] Not surprisingly, this discourse was deployed in direct contradistinction to New Deal policies to help the poor: investment incentives were framed as courageous, responsible, and productive, while social welfare measures were characterized as the opposite.

55. Julia Ott, *How Tax Policy Created the 1%*, DISSENT MAG. (Apr. 18, 2017), https://www.dissentmagazine.org/online_articles/tax-policy-history-by-for-1-percent [https://perma.cc/LDS3-BJC6].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

These tax policies and preferences demonstrate the deep ramifications of the logic that links the buying of stocks and other securities and the income generated by their sale with production and, correspondingly, portrays the stock market as an accurate proxy for the work of capital *and* labor to establish and maintain institutions. As I mentioned above, modern corporations have historically depended on their own retained earnings generated from infusions of time, money, and labor from founders and stakeholders, rather than on the investments of shareholders in the secondary markets. And yet, financial representations and logic attempt to re-write this historical context. As Ott argues, such revisionist history has little empirical support:

> Then as now, when investors trade stocks and bonds, money passes from those who wish to buy to those who wish to sell. Corporations and others who issue securities receive nothing from these trades (except during an initial public offering). Those who earn capital gains by profitably trading stocks or bonds (or selling a home, a business, a barrel of oil, a derivative contract) *might* reinvest in new and promising ventures that create jobs and grow the economy. But history suggests they are more likely to spend those gains, or to reinvest them in an asset bubble.[60]

The preference for capital gains, then, derives from the same fiction as the origin myths undergirding shareholder value primacy. The Presidents of the NYSE in the 1930s, Richard Whitney, and 1940s, Emil Schram, rallied and lobbied politicians, financial interests, and managerial associations, arguing that lowering capital gains taxes would lend "confidence to capital," which was crucial because "free equity capital" would stimulate private enterprise and "achieve maximum production and maximum employment."[61] Ott argues, quoting the post-WWII NYSE Chairman Robert Boylan, that dire warnings of socialism were continually mobilized when critics highlighted the elitist mythologies upon which capital gains preferences rest: "If the capital that is required for industrial expansion and maintaining full employment . . . is not provided by private investors . . . then the alternative is Government financing."[62] Yet, as Ott demonstrates, "[d]espite what the NYSE claimed, corporate reinvestment of retained earnings continued to fund the bulk of economic expansion."[63]

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

## BY WAY OF CONCLUSION

Since the 1980s, Wall Street financial institutions and actors have engaged in a decades-long process of downsizing and restructuring previously stable corporations in order to transform them into financial assets whose earnings were largely redistributed to the very investors, executives, and financial advisors who advised and brokered these transformations. These massive shifts have played a central role in widening socio-economic inequality in the U.S. and were justified, in no small part, by the seeming righteousness of shareholder value and investor dominance. Given the extent to which shareholder value has been used to legitimize the right of dominant finance to shape what a corporation is for and to whom it belongs, this Article attempts to lay bare the problematic foundational assumptions upon which multiple shareholder value arguments rest. While it is important to recognize that Wall Street's institutional power and access to large swaths of capital allow it to use and abuse shareholder value justifications for its own benefit, there is also something about the building blocks of shareholder value assumptions that renders them particularly useful for dominant financial interests. In this Article, I have argued that the origin story of corporate "ownership" by shareholders (which undergirds the key justifications for shareholder value primacy) is based on a series of ahistorical misrecognitions and underlying myths, such as the problematic assertion that shareholders provided original capital for the formation of modern public corporations as well as the deliberate conflation of primary and secondary markets. As Julia Ott cogently clarifies, these financial market constructs and ideas do the following:

> Neoliberal theory collapses any distinction between primary markets (where enterprises obtain funding) and secondary markets (where investors trade existing assets). Lumping these functions together, neoliberal thought identifies "investment" and "investors" as *the* sources of economic growth and progress. Corporations exist to maximize returns to shareholders.[64]

The constructed importance of investors and the priority of investment in neoliberal thought, from NYSE presidents to Milton Friedman and Michael Jensen's writings, played an outsized role in justifying and catalyzing financial influence as well as shareholder value primacy. What this Article attempts to unpack is the centrality of a

64. Julia Ott, *Words Can't Do the Work for Us*, DISSENT MAG. (Jan. 22, 2018), https://www.dissentmagazine.org/blog/neoliberalism-forum-julia-ott [https://perma.cc/NR58-NKM2].

problematic concept of "ownership" to neoliberal policy and practice related to financialization and the financial markets.

In the decade since the financial crisis of 2008, many scholars, social critics, and policymakers have investigated how and why finance continues to exert undue influence on corporations, nations, and economies after such a massive challenge to their legitimacy. I would argue that one of the key reasons for Wall Street's resurgence and continued dominance is not only the fact that the U.S. social safety net, at least for the middle class, has largely been outsourced to Wall Street (which thus acquired the leverage to request bailouts in the name of Main Street), but also that the concept of "Wall Street as investor = owner" has not been sufficiently disputed. It is therefore crucial that we fundamentally challenge the concept of ownership. This would allow us to imagine what a post-shareholder value world might look like: What are the legal and policy implications of challenging shareholder ownership? What would our socio-economic values be? Whose interests should corporations serve?

To think more broadly and critically, it is important to draw from diverse philosophies. For example, future scholarship should take inspiration from scholars in critical race and indigenous studies[65] who have heterogeneously questioned the very meanings of ownership, property, and possession that inform mainstream Western thought, and who use their insights to inform studies of corporations, markets, and capitalism. Given that the dominant logic of "proprietary and commoditized models of social relations"[66] as well as the initial infrastructures of accumulation in the U.S. were made possible by the colonization of indigenous peoples and the enslavement of African Americans, the very notion of ownership is necessarily problematic. In other words, if the very "market for land was, after all, predicated upon the military conquest of Indigenous peoples, their forced removal from the territories in question, and their *de jure* and *de facto* exclusion from the market through legislation explicitly designed to ensure Indians could not compete with white settlers when it came time to (re)purchase land at auction,"[67] then it is incumbent upon us to question the politics and uneven power relations that undergird both the concept and the conditions of "ownership" itself.

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65. *See, e.g.*, CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (2d ed. 2000); AUDRA SIMPSON, THEORIZING NATIVE STUDIES (Andrea Smith ed., 2014); Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 CRITICAL HIST. STUD. 163 (2016); Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUD. 76 (2015).

66. *See* Robert Nichols, *Theft Is Property! The Recursive Logic of Dispossession*, 46 POL. THEORY 3, 3 (2018).

67. *Id.* at 20.