Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes

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Thanks go to all the participants in a symposium on Transnational Fiduciary Law at the University of California Irvine in September 2019. I benefited immensely from everyone's comments and contributions at this symposium. I would also like to thank Cally Jordan and Iain MacNeil for helpful comments and Mitheran Selvendran for excellent research assistance. Finally, I am grateful to Monash University for providing funding for this research under a Networks of Excellence (NoE) Research Grant on "Enhancing Corporate Accountability"

Abstract

This paper explores the intersection of transnational law with contemporary corporate governance laws and principles. Transnational law, it must be said, is a far from settled concept. There is uncertainty as to what the term actually means, and how it differs from other concepts, such as national legal ordering or global law. For early theorists, the essence of transnational law was whether it regulated conduct or events that crossed national boundaries. More recent scholarship, however, has focused not on what is being regulated, but rather on how laws and norms are transmitted between supranational and local levels.

Corporate governance, with its complex array of public and private actors, fits naturally within the modern conception of transnational law as a species of law that "can no longer be viewed through a purely national lens". Financial markets today are global and interconnected and events, such as the 2007-2009 global financial crisis and the current COVID-19 crisis, exemplify the risk of contagion across those markets.

Not only can corporate governance problems transcend national boundaries, so too can their solutions, which often involve regulatory efforts that operate at a transnational level. In this environment, the corporation has taken on a greater societal role. Indeed, according to The British Academy's influential Future of the Corporation project, the main purpose of business today is "to solve the problems of people and planet profitably".

This paper explores, from a transnational perspective, the transmission of laws and norms that are designed to constrain directors' conduct and enhance corporate accountability. It focuses on two key examples of such accountability mechanisms —fiduciary duties and corporate codes.

The paper begins with a comparative and historical examination of directors' fiduciary duties in the United States, the United Kingdom and Australia, analyzing the extent to which the transfer of fiduciary law to these common law jurisdictions has resulted in a unified approach to directors' duties, as is often assumed by studies such as the law matters hypothesis. The paper then moves on to discuss the modern phenomenon of codes, such as corporate governance codes and shareholder stewardship codes. Corporate codes originated in the United Kingdom in the early 1990s, but have subsequently spread throughout the world. The paper explores the global transmission of these codes, which constitute powerful "norm creators". The rise of corporate codes epitomizes the fact that transnational legal ordering occurs "multi-directionally and recursively up from and down to the national and local levels". It also demonstrates the importance of "who writes the rules", because this can affect the substance of those rules and result in significant divergence between national codes.

The paper assesses these various developments against the backdrop of convergence and path dependence theories in corporate governance.

Keywords: transnational law, transnational legal ordering, fiduciary duties, comparative law, Delaware corporate law, UK company law, Australian company law, corporate governance codes, stewardship codes, norms, shareholders, stakeholders

JEL Classifications: G30, G34, G38, K10, K19, K22, N4, N20, M14

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Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes

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1. Introduction

Transnational law is a far from settled concept.[1] There is uncertainty as to what the term actually means,[2] and how it differs from other concepts,[3] such as national legal ordering or global law.[4] For early theorists in the field, the essence of transnational law was its role in regulating conduct or events that crossed national boundaries.[5] More recent scholarship, however, has focused not on *what* is being regulated,[6] but rather on *how* laws and norms are transmitted between supranational and local levels.[7] Nonetheless, a common theme

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1 *See*, *e.g.*, Ralf Michaels, *State Law as Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 141, 143 (2016) (describing transnational law as "vague" and outlining different possible meanings of transnational law). See also Peer Zumbansen, *Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 473, 478 (Emilios Christodoulidis et al. eds., 2019) (arguing that "the jury is still out with regard to its verdict on whether transnational law should be considered a field, a concept or a (likely pro-market, neoliberal) ideology").

2 *See* Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 232 (2016) (noting that references to transnational law or legal ordering are often vague, resulting in academic literature becoming "a jungle without a map").

3 *See generally* Ralf Michaels, *State Law as Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 141 (2016); Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3, 3–4, 11*ff* (Terence C. Halliday & Gregory Shaffer eds., 2015) (discussing what is distinctive about transnational legal ordering).

4 *See*, *e.g.*, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 15 (2005) (referring to the "unnoticed rise of global administrative law").

5 PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

6 *See*, *e.g.*, Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 10 ANN. REV. L. & SOC. SCI. 231, 232 (2016).

7 *See*, *e.g.*, Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 3, 3 (Terence C. Halliday & Gregory Shaffer eds., 2015) (describing how transnational law "shifts attention from a dualist orientation toward international law and national law to a focus on

underpinning most conceptions of transnational law is that it involves social problems and solutions that transcend any individual state,[8] and that, as a result, "[l]aw can no longer be viewed through a purely national lens".[9]

Corporate governance, with its array of public and private actors,[10] fits naturally within the concept of transnational law.[11] Financial markets today are global and interconnected,[12] and transnational law provides a valuable framework for examining a range of contemporary corporate governance issues. Although capital market structures across jurisdictions vary significantly,[13] globalization increases the risk of similar or shared problems, which can be exacerbated via contagion across financial markets.[14] In this environment, the corporation has

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how legal norms are developed, conveyed, and settled transnationally"); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 10 ANN. REV. L. & SOC. SCI. 231, 237 (2016); Ralf Michaels, *State Law as Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L AND COMP. L. 141, 144–47 (2016).

8 Nonetheless, according to Halliday and Shaffer, the nation-state remains a central feature of law making, and therefore transnational law and state law are closely connected. *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS, 3, 13 (Terence C. Halliday & Gregory Shaffer eds., 2015). *See also* Ralf Michaels, *State Law as Transnational Legal Order*, 1 U.C. Irvine J. Int'l, Transnat'l and Comp. L. 141, 147 (2016). Major shifts can occur in the political balance between transnational and national legal orders. *See e.g.* Peer Zumbansen, *Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY, 473, 473 (Emilios Christodoulidis et al., 2019) (citing Doug Stokes, *Trump, American Hegemony and the Future of the Liberal International Order*, 94 INT'L AFF. 133, 133 (2018) for the proposition that the 2016 election of Donald Trump as President of the United States constituted "a rearticulation of the primacy of the nation-state").

9 Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS, 3, 63 (Terence C. Halliday & Gregory Shaffer eds., 2015).

10 *See* Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Law Production* U. PA. J. INT'L L. (forthcoming 2020) (discussing the interplay between public and private actors in corporate governance).

11 *Id*. (describing today's corporate governance landscape as having a "distinctly transnational constitution").

12 *See e.g.* WORLD ECONOMIC FORUM, THE FINANCIAL DEVELOPMENT REPORT 2009, xi (2010); INT'L ORG. SEC. COMM'N (IOSCO), *Remarks by David Wright, Secretary General of IOSCO, The Atlantic Council, Washington, DC*, Dec. 10, 2012, 5, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf.

13 Capital market structure lies across a spectrum, from concentrated ownership to widely dispersed ownership. *See*, *e.g.*, OECD, OECD CORPORATE GOVERNANCE FACTBOOK 2019, 17; John C. Coffee, *A Theory of Corporate Scandals: Why the US and Europe Differ*, 21 OX. REV. ECON. POL. 198, 200; Rafael La Porta et al., *Law and Finance*, J. POLIT. ECON. 1113, 1145*ff* (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 471–72 (1999).

14 *See*, *e.g.*, WORLD ECONOMIC FORUM, THE FINANCIAL DEVELOPMENT REPORT 2009, xi; INT'L ORG. SEC. COMM'N (IOSCO), *Remarks by David Wright, Secretary General of IOSCO, The Atlantic Council, Washington, DC*, Dec. 10, 2012, 5, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf. The 2020 COVID-19 crisis demonstrates that the risks attending globalization are by no means restricted to financial risks. *See* European Corporate Governance Institute (ECGI) and Global

taken on a greater societal role.[15] Indeed, according to The British Academy's influential *Future of the Corporation* project, the main purpose of business today is "to solve the problems of people and planet profitably".[16]

A spate of corporate law scandals and crises have highlighted the transnational nature of contemporary corporate governance. At the beginning of the 21st century, scandals, including Enron and WorldCom in the United States,[17] occurred around the world.[18] Although these scandals appeared in multiple jurisdictions, they were, nonetheless, arguably isolated events with different origins and motivations.[19] The same cannot be said of the 2007-2009 global financial crisis, which exemplified the risk of contagion across interconnected financial markets.[20] This risk is again apparent in the inevitable economic fall-out from the 2020 COVID-19 crisis.[21]

Corporate Governance Colloquia (GCGC), *The COVID-19 Crisis and Its Aftermath: Corporate Governance Implications and Policy Challenges*, 24 Hour Global Webinar (Apr. 16, 2020), https://ecgi.global/content/covid-19-crisis-and-its-aftermath-corporate-governance-implications-and-policy-challenges (discussing the global implications of COVID-19 for corporate governance).

15 *See*, *e.g.*, Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* FIRM GOVERNANCE: THE ANATOMY OF FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., forthcoming 2020); Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Law Production*, U. PENN. J. INT'L L. (forthcoming 2020).

16 *See* THE BRITISH ACAD., FUTURE OF THE CORPORATION: PRINCIPLES FOR PURPOSEFUL BUSINESS, 8 (2019) (U.K.).

17 *See e.g.* Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002); John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Geoffrey P. Miller, *Catastrophic Financial Failures: Enron and More*, 89 CORNELL L. REV. 423 (2004).

18 These scandals included, for example, Royal Ahold in the Netherlands, Elan in Ireland, Kirch in Germany, and One.Tel and HIH Insurance in Australia. *See generally* Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WISC. INT'L. L. J. 367 (2005).

19 See, John C. Coffee, *A Theory of Corporate Scandals: Why the US and Europe Differ*, 21 OX. REV. ECON. POL. 198 (arguing that the scandals in Europe and the United States had different origins and motivations attributable to their divergent capital market structures).

20 *See* WORLD ECONOMIC FORUM, THE FINANCIAL DEVELOPMENT REPORT 2009, xi (2010).

21 *See*, *e.g.*, Panel 1, Monash University: *The differential health, economic and financial effects of the COVID-19 crisis*, European Corporate Governance Institute (ECGI) and Global Corporate Governance Colloquia (GCGC), *The COVID-19 Crisis and Its Aftermath: Corporate Governance Implications and Policy Challenges*, 24 Hour Global Webinar (Apr. 16, 2020) https://ecgi.global/content/covid-19-crisis-and-its-aftermath-corporate-governance-implications-and-policy-challenges (comparing and contrasting the impact of the global financial crisis with the likely economic impact of the COVID-19 crisis).

Not only can corporate governance problems transcend national boundaries, so too can their solutions, which often involve regulatory efforts at both a national and transnational level.[22] Discerning the causes of these crises is often no easy feat, yet the framing of the underlying problems can be critical to the particular legal solutions adopted.[23]

Corporate governance today is highly fragmented – it has been described as "a braided framework encompassing legal and non-legal elements".[24] These elements operate to "constrain and enable" the behavior of key corporate players, which is a key aspect in the study of transnational legal orders.[25] This chapter explores, from a transnational perspective, the transmission of laws and norms that constrain directors' conduct and enhance corporate accountability,[26] focusing on two key examples of such accountability mechanisms - fiduciary duties and corporate codes. The chapter begins with a comparative and historical examination of directors' fiduciary duties in the United States, the United Kingdom and Australia. It analyzes whether the transfer of fiduciary law to these common law jurisdictions has resulted in a unified approach to directors' duties, as is often assumed by studies such as the *law matters* hypothesis.[27] The chapter then moves on to discuss the modern phenomenon of corporate codes, which originated in the United Kingdom in the early 1990s. The chapter considers the global

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22 *See* Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PENN. J. INT'L. L. 1147 (2009). The quest for financial stability in the wake of the global financial crisis is a classic example of how the legalization of social orders increasingly occurs at a transnational level. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015).

23 See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL explanations for the collapse of Enron and the global financial crisis, which resulted in different regulatory responses to these crises. *See generally* John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WISC. INT'L. L. J. 367 (2005); EILIS FERRAN et al., THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (2012).

24 Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

25 *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS, 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015) (describing a key issue for scholars in this field as the extent to which transnational legal orders "rise or fall in their capacity to constrain and enable behaviors in diverse spheres of social life").

26 John Armour et al., *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29 (3rd ed., Kraakman et al. eds., 2017).

27 *See generally* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

transmission of these codes and their role as "norm creators". It also assesses the transmission of these laws and norms against the backdrop of convergence and path dependence theories in corporate governance.

2. Transmission of Law Through Legal Transplantation and Imitation: Uncommon Common Law Approaches to Directors' Fiduciary Duties

Fiduciary duties constitute one of the most important legal mechanisms for constraining the conduct of company directors. The law of fiduciary duties was, from a historical perspective, a distinctly national affair.[28] The classification of company directors as "fiduciaries" represented a central pillar of early British law, developing by analogy to trustees and agents,[29] who were considered archetypical fiduciaries.[30] The famous 1742 U.K. decision, *Charitable Corp v. Sutton* ("Sutton's case"),[31] laid the groundwork for modern directors' duties, with Lord Hardwicke LC stating that directors were bound to execute their responsibilities with "fidelity and reasonable diligence".[32]

There are strong similarities in the approach to directors' fiduciary duties across common law jurisdictions, such as the United Kingdom, the United States and Australia.[33] This is hardly surprising, given the United Kingdom's colonial past.[34] The similarities are often clear

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28 *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis, in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 306–07 (D. Gordon Smith & Andrew S. Gold eds., 2018). *See also* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 3, 3 (Terence C. Halliday & Gregory Shaffer eds., 2015) (noting that there has been a close relationship between law and nation-states, since the time of the rise of sovereign nation-state in the seventeenth century).

29 *See* Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW 23, 23–24 (Evan J. Criddle et al. eds., 2018).

30 *Hosp. Prods Ltd v. US Surgical Corp.* (1984) 156 CLR 41, 68 (Austl.).

31 Charitable Corporation v. Sutton (1742) 2 Atk. 400 (U.K.).

32 *Id.*, 406. See also Joseph W. Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1096–97 (1968).

33 These similarities also extend to a number of common law jurisdictions in Asia, such as Singapore, Hong Kong, Malaysia and India.

34 *See, e.g.*, Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony,* 31 AM. U. INT'L. L. REV. 253, 258 (2016) (noting Indian corporate law's colonial roots).

historical examples of legal transplantation [35] of British law to other common law jurisdictions.[36] In Delaware, the most important U.S. state for the purposes of corporate law,[37] directors' duties of loyalty and care today are the direct descendants of Lord Hardwicke's description of 18th century British directors' responsibilities.[38]

Similarities between common law jurisdictions were an important aspect of La Porta et al.'s influential *law matters* hypothesis, promulgated two decades ago.[39] This hypothesis had significant implications for the "settlement and unsettlement of legal norms"[40] within a transnational legal ordering framework. The hypothesis claimed that investor legal protection is directly linked to a jurisdiction's financial development,[41] and predicted that jurisdictions with superior investor protection would develop deep dispersed capital market structures, such as those in the United States and the United Kingdom.[42] "Legal origins" played a central role in the hypothesis, since the study concluded that common law jurisdictions within the British

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35 *See generally* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015). For discussion of some of the difficulties in transplanting law, see, for example, Otto Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1 (1974); Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L. L. 195 (2004); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

36 *See* Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008) (arguing that, historically, legal traditions were spread around the globe primarily by conquest and colonization. The early spread of British common law principles exemplifies the latter mode of transmission).

37 Delaware is the dominant state for incorporation of public companies, and the Delaware courts and corporations code occupy a special position within U.S. corporate law. *See, e.g.*, Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VIRGINIA L. REV. 935, 939 (2012).

38 The Delaware Court of Chancery acknowledged directors as fiduciaries in the 1926 decision in Bodell v General Gas and Electric Corp., 132 A. 442 (Del. Ch. 1926) (aff'd, 140 A.2d. 264 (Del. 1927)), providing the basis for Delaware law's equitable duties of loyalty and care. *See generally*, Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 680–81 (2009). Australia also took its lead from the United Kingdom with regard to corporate law, including directors' duties. *See*, *e.g.*, Rosemary Teele Langford et al., *The Origins of Company Directors' Statutory Duty of Care*, 37 SYDNEY L. REV. 489, 507–08 (2015).

39 *See* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

40 Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS, 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015).

41 Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008).

42 *See*, *e.g.*, ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), OECD CORP. GOVERNANCE FACTBOOK 17 (2019).

"legal family"[43] provided stronger investor protection than civil law jurisdictions.[44] One feature of the common law system that the study viewed as particularly advantageous was the central role of independent judges, who relied on legal reasoning to decide cases.[45] Judicial reasoning is a central feature of the development of fiduciary law.

The *law matters* hypothesis contributed to a major debate in comparative corporate governance as to whether corporate law regimes would converge[46] or whether, as path dependence theorists argued, legal differences around the world would persist.[47] The *law matters* hypothesis provided powerful support for convergence theory,[48] since it assumed that jurisdictions with substandard legal rules would follow the siren song of economic efficiency and adopt superior rules by means of voluntary imitation.[49]

The *law matters* hypothesis proved to be extraordinarily influential in defining a set of problems and their solutions.[50] It also had real world consequences in terms of changes to legal rules and norms. On the premise that good corporate governance can improve national

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43 Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1119 (1998) (analyzing 18 common law jurisdictions in their original sample, including United States, Canada, Australia, India).

44 *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1544–45 (2004).

45 *See generally* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 118–20 (2015).

46 *See*, *e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO L. J. 439, 468 (2001) (famously stating "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured").

47 Path dependence provided a clear counterpoint to the *law matters* hypothesis. *See generally* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

48 For an overview of convergence theory and the convergence-divergence debate, *see generally, id.*; Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

49 *See* Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 SYDNEY L. REV. 743, 744 (2005).

50 *See* Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development—An Update*, 10 GLOBAL CORPORATE GOVERNANCE FORUM FOCUS 1, 11 (2012); Cally Jordan, The Conundrum of Corporate Governance, 30 BROOK. J. INT'L L. 983 (2005); Steve Kaplan & Luigi Zingales, *How "Law and Finance" Transformed Scholarship, Debate*, CHI. BOOTH REV (Mar. 5, 2014), https://review.chicagobooth.edu/magazine/spring-2014/how-law-and-finance-transformed-scholarship-debate.

economic performance, major international organizations, such as the Organisation for Economic Co-operation and Development ("OECD"), developed model corporate governance rules for ready international transplantation.[51] The World Bank also adopted the methodology of the *law matters* study, applying it to a number of working papers, including the bank's *Doing Business* reports.[52] These supranational organizations sometimes required corporate governance reforms as a condition of financial assistance.[53]

In spite of its influence, the *law matters* hypothesis attracted widespread academic criticism.[54] Much of the censure related to study's Manichean divide between common law and civil law

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51 *See, e.g.,* ORG. FOR ECON. CO-OPERATION AND DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (2015) (stating that the principles "help policymakers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability"); Cally Jordan, The Conundrum of Corporate Governance, 30 BROOK. J. INT'L L. 983, 986, n. 5 (2005). *Cf.* Amir N. Licht, *Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L. L. 195, 196 (2004) (arguing that, in the "long and checkered" history of legal transplantation, "direct transplantation efforts were largely futile in generating Western-like economic growth").

52 *See* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 120 (2015).

53 The World Bank and the International Monetary Fund (IMF) were already interested in the connection between corporate governance and economic outcomes prior to La Porta et al.'s *law matters* hypothesis. During the 1997 East Asian Financial Crisis, for example, these institutions included corporate governance reform as a condition to financial assistance. *See* Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 5 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand*, 178 Int'l Monetary Fund Occasional Paper 1, 72–73 (1999); John M. Broder, *Asia Pacific Talks Vow Tough Action on Economic Crisis*, N.Y. TIMES (Nov. 26, 1997), A1.

54 *See* Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development—An Update*, 10 GLOBAL CORPORATE GOVERNANCE FORUM FOCUS, 1, 12 (2012). This included criticism of the study's methodology. *See, e.g.,* Holger Spamann, *The "AntiDirector Rights Index" Revisited*, 23 FIN. STUD. 467 (2010). La Porta et al. responded to methodological criticism of their original study in several later papers. *See* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 123 (2015).

systems.[55] Another, albeit less prominent, criticism was that the hypothesis overstated the similarities within the common law world.[56]

Although it is often assumed that there is a unified common law approach to fiduciary duties, there are, in fact, significant differences at a more granular level. These differences across common law jurisdictions illustrate how supposedly shared laws and norms can diverge in their operation across jurisdictions and over time.[57]

For example, although U.S. corporate law descended from English company law, each legal system had a different organizational starting point.[58] These different starting points radically altered U.K. and U.S. corporate law trajectories. Modern U.K. company law derives from the unincorporated joint stock company, which was a quintessentially private body, with strong contractual elements.[59] U.S. corporate law, on the other hand, developed from a very different type of organization, the British royal chartered corporation, which had strong quasi-public roots and strict mandatory rules limiting directors' actions.[60] The effect of these different

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55 *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1546 (2004); Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L. ECON. L. 791, 799 n.27 (2002). Commentators were particularly critical of the sharp distinction made in the *law matters* hypothesis between supposedly flexible judge-made law under a common law system and rigid codification in civil law jurisdictions. *See* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 117–118 (2015); Cally Jordan, *The Conundrum of Corporate Governance*, 30 BROOKLYN J. INT'L. L. 983, 1005, nn. 66–68 (2005). Consistent with these critiques, the idea that directors' fiduciary duties constitute a unique feature of the common law may be misleading, given that functional equivalents to fiduciary duties exist in civil law jurisdictions. *See*, *e.g.*, Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 583 (Evan J. Criddle et al. 2019). In the East Asian civil law context, *see* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189 (2000).

56 *See*, *e.g.*, Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the U.K. and US*, 14 CORP. GOVERNANCE INT'L 147, 147–48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and U.K., 1950–2000*, 47 Bus. HIST. 267, 267–68 (2005).

57 Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1, 8–9 (2010).

58 *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 541–47 (2019).

59 Unincorporated joint stock companies (or "deed of settlement companies") were effectively large partnerships with strong contractual elements, which also made creative use of trust law to artificially replicate the benefits of incorporation. *See id.* at 544–47; John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2157–66 (2016).

60 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–34 (2005); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering*

organizational starting points – and subsequent backlash against those starting points – affected the scope of directors' discretion and the role of fiduciary duties.[61] Whereas, for instance, early American general incorporation law statutes tightly constrained directors' conduct,[62] this changed in the late 19th century era of competition for corporate charters.[63] It was during this period, that Delaware substituted the corporation, rather than the state, as primary "law-maker",[64] resulting in a new vision of U.S. corporate law as inherently "enabling".[65]

Another difference across common jurisdictions relates to the sources of modern directors' duties. In Delaware, directors' fiduciary duties, true to their historical roots, are purely equitable.[66] There has been a shift, however, under modern U.K. and Australian law toward statutory directors' duties.[67] U.K. directors' statutory duties, which were introduced in 2006,[68] eradicate and replace common law and equitable duties,[69] whereas Australia's statutory duties[70] operate in addition to the general law.[71]

Combat, U. ILL. L. REV. 507, 541–44 (2019); L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370–72 (1956). British royal chartered companies reflected the theory that the corporate form was a body, approved by the state to act in "the national interest." *See* C.A. COOKE, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 78 (1950).

61 *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 541–61 (2019).

62 *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History,* 116 COLUM. L. REV. 2145, 2163 (2016).

63 *See generally* Charles M. Yablon, *The Historical Race – Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323 (2007).

64 Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899,* 1 DEL. J. CORP. L. 249, 258, 273 (1976).

65 Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 549–53 (2019).

66 *See generally*, Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678 (2009).

67 *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 309–12 (D. Gordon Smith & Andrew S. Gold eds., 2018).

68 *See* Companies Act 2006, c. 46 pt. 10 c. 2 (U.K.).

69 *See* Companies Act 2006, c. 46 § 170(4) (U.K.).

70 *See Corporations Act* 2001 (Cth) ss. 180–184 (Austl.)

71 *See* G.F.K. Santow, *Codification of Directors' Duties*, 73 AUSTL. L.J. 336 (1999).

The jurisdictions also adopt different approaches as to which directors' duties should, and should not, be classified as "fiduciary". U.S. corporate law tends to regard all directors' duties, including the duty of care, as fiduciary in nature, however, U.K. and Australian courts only characterize proscriptive duties (or duties requiring "self-denial")[72] as fiduciary.[73] The jurisdictions differ too on the extent to which stakeholder interests are implicated in directors' duties. Whereas Delaware and Australia have traditionally adopted a shareholder-centred approach to directors' duties, the United Kingdom now applies an "enlightened shareholder value"[74] approach to corporate governance, which requires directors to consider the interests of a wide range of stakeholders when making business decisions.[75] India, another common law jurisdiction, goes even further in this regard, adopting a "pluralist approach" that recognizes the interests of both stakeholders and shareholders, "without necessarily indicating a preference to either".[76]

The stringency of fiduciary duties is affected by the scope of certain safe harbors available to directors.[77] A disparity across jurisdictions in this regard is particularly evident in the context

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72 Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 583, 583 (Evan J. Criddle et al. 2019).

73 *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 307–08 (D. Gordon Smith & Andrew S. Gold eds., 2018).

74 *See* Companies Act 2006, § 172 (U.K.). *See generally* PAUL L. DAVIES & SARAH WORTHINGTON, GOWER'S PRINCIPLES OF MODERN COMPANY LAW (10th ed. 2016) 502–503. *See also* Andrew Keay, *The Duty to Promote the Success of the Company: Is it Fit for Purpose in a Post-Financial Crisis World?*, *in* DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS 50, 60 (Joan Loughrey ed., 2013); Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach*", 29 SYDNEY L. REV. 577 (2007).

75 In spite of this apparently "public" focus in § 172(1), however, the duty remains firmly shareholder-oriented in practice, because the U.K. statutory directors' duties are owed to the company, and enforceable only by the company, or its shareholders in derivative suit. *See* Companies Act 2006, § 170(1) (U.K.); Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder- Stakeholder Divide*, 36 J. CORP. L. 59, 79 (2010).

76 *See* Companies Act 2013, § 166(2) (India); Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony,* 31 AM. U. INT'L L. REV. 253, 315 (2016).

77 *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

of the duty of care.[78] In Delaware, for example, directors receive a high level of protection against monetary liability for breach of the duty of care as a result of the generous U.S. business judgment rule.[79] Even gross negligence will not generally attract liability,[80] given the operation of Del GCL § 102(b)(7), which expressly authorizes the inclusion of exculpation clauses in corporate charters.[81] It also seems that the bedrock of Delaware fiduciary law,[82] the duty of loyalty, can itself now be waived in some circumstances.[83] The same is certainly not true of the U.K. and Australian legal regimes, which offer far less protection to directors for breach of their duties.[84]

Enforcement of directors' duties is another important way in which these jurisdictions differ from one another. Although private enforcement is the norm in the United States and the United Kingdom,[85] Australian corporate law relies predominantly on a public enforcement regime, whereby the business regulator, the Australian Securities and Investments Commission ("ASIC"), is responsible for enforcing statutory directors' duties. It appears that this mode of

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78 *See, e.g.,* Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519 (2012).

79 *See*, *e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Gagliardi v. Trifoods International, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996).

80 *See*, *e.g.*, Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).

81 Some U.S. states, however, go further than Del. Code tit. 8, § 102(b)(7) regarding the scope of permissible exculpation. For example, Del. Code tit. 8, § 102(b)(7) only authorizes exoneration of directors, while other states, such as Nevada, Louisiana and New Jersey, also authorize protection of company officers. *See, e.g.*, Nev. Rev. Stat. § 78.037(2) (2013); LA Stat. Ann. § 12:24(C)(4) (2011); N.J. Rev. Stat. § 14A:2–7(3) (2013). The breadth of this protection for breach of the duty of care has attracted criticism in recent times. *See, e.g.,* John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 61 (2014); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 339 (2016).

82 *See* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PENN. J. BUS. L. 675, 687 (2009).

83 *See* Del. Code tit. 8, § 122(17); Gabriel V. Rauterberg & Eric L. Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017).

84 *See* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis, in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 326–29 (D. Gordon Smith & Andrew S. Gold eds., 2018).

85 The United Kingdom does, however, include some aspects of public enforcement. *See* John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J EMPIRICAL LEGAL STUD. 687, 716–17 (2009). The United Kingdom is a considerably less hospitable jurisdiction for private corporate litigation than Delaware as a result of a number of key procedural differences between the two jurisdictions. *See id.*, 692–96.

enforcement has also affected the substance of directors' duties in Australia, shifting them from the realm of private duties to public duties.[86]

These differences relating to fiduciary duties in jurisdictions that share a common law heritage sit uneasily with the *law matters* hypothesis. Furthermore, the kind of global convergence in corporate law rules, and the accompanying shift in capital market structure, which was predicted by the *law matters* hypothesis, has not eventuated. Concentrated share ownership continues to be a far more common capital market structure around the world than dispersed ownership.[87]

These fiduciary duty differences are more consistent with a path dependence theory of legal development.[88] Path dependence stresses the importance of historical, political and social factors in the settling of laws and norms.[89] Each of these factors is important in explaining fiduciary duty differences across common law jurisdictions. Legal change in this area has also often occurred as a result of commercial backlash strategic responses of regulated parties themselves.[90]

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86 *See ASIC v. Cassimatis (No 8)* [2016] FCA 1023, [455], [461], [503] (Austl.); *Cassimatis v. ASIC* [2020] FCAFC 52, [27], [240] (Austl.). *See* generally Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* FIRM GOVERNANCE: THE ANATOMY OF FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., forthcoming 2020); Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 223–28 (2014).

87 *See* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), CORP GOVERNANCE FACTBOOK 17 (2019) (classifying only four countries, namely the United States, the United Kingdom, Australia and Canada, as having a dispersed ownership structure for listed companies).

88 *See generally* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

89 *Id*.

90 *See, e.g.*, David A. Skeel, Jr., *Governance in the Ruins*, 122 HARV. L. REV. 696, 697 (2008); Curtis J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (2008). For instance, the statutory authorization of exculpation clauses in Delaware in 1986 and the adoption of a statutory business judgment rule Australia in 2000 were both the result of legislative reform in response to business community backlash and political pressure, following high profile cases, which were considered to heighten liability risks for directors. *See* Smith v. Van Gorkom, Del.Supr., 488 A.2d. 858 (1985) (U.S.) and *Daniels v. Anderson* (1995) 37 NSWLR 438 (Austl.).

Finally, corporate scandals and crises are prime drivers of legal change. They often result in jurisdictionally tailored regulatory responses,[91] which can differ depending upon the framing of the underlying problem that needs to be addressed.[92] Transmission of law by means of transplantation or voluntary imitation is, therefore, by no means the end of the story. The transmitted law will remain dynamic and continually evolving.

3. The Transnational Impact of Corporate Codes as Norm Creators

The behavior of corporate actors is not only shaped by enforceable national laws. It is also shaped by social norms[93] and governance practices, which may indeed be more important than formal legal rules in affecting the behaviour of certain corporate actors, including directors.[94]

Corporate codes are powerful norm creators.[95] These codes, which provide a sharp contrast with state-made law,[96] have become an important feature of modern corporate governance, and the norms they create are in a state of continuous development.[97] Two types of code are particularly significant in this respect – corporate governance codes ("governance codes") and shareholder stewardship codes ("stewardship codes").

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91 *See generally* Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L. L.J. 367 (2005); EILIS FERRAN et al., THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (2012).

92 See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 3, 7–8 (Terence C. Halliday & Gregory Shaffer eds., 2015). There were multiple possible explanations for the collapse of Enron and the global financial crisis, which resulted in different regulatory responses to these crises. *See generally* John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WISC. INT'L. L.J. 367 (2005); EILIS FERRAN et al., THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (2012).

93 *See* Matthew Harding, *Fiduciary Law and Social Norms*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW, 797, 797 (Evan J. Criddle et al. eds., 2018) (describing social norms as "norms that guide conduct with reference to social expectations").

94 *See generally* John C. Coffee Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2154*ff* (2001).

95 *See, e.g.*, Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2020*)* (discussing the ability of shareholder stewardship codes to create, and to change, norms).

96 Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Law Production* (U. PA. J. INT'L L., forthcoming 2020).

97 *Id*.

In creating norms associated with governance procedures and practices, these codes operate in a parallel universe to corporate law. However, they can also interact in complex ways with mandatory corporate law rules, such as fiduciary duties,[98] to drive greater international convergence or divergence. Whereas fiduciary law constitutes an *ex post* species of regulation, corporate governance codes operate as a form of *ex ante* self-regulation, which can determine and transmit societal expectations of corporate actors.[99] Such codes can affect the scope of directors' discretion; the balance of power within the corporation; the nature of the directors' obligations; and enforcement mechanisms.

Corporate codes epitomize the movement away from "legal rules standing alone to legal rules interacting with non-legal corporate processes and institutions",[100] which characterizes modern corporate governance. Furthermore, the lines between formal legal rules and norms can sometimes be blurred and hard to define,[101] and there can be movement in either direction between hard law, comprising enforceable legal rules, and soft law, encompassing norms. For example, the appointment of independent directors on U.S. listed public company boards was a prevalent business norm well before it became mandated under the 2002 reforms following Enron's collapse. [102]

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98 *See* Matthew Harding, *Fiduciary Law and Social Norms*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW 797 (Evan J. Criddle et al. eds., 2018); Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Law Production*, 8 (U. PA. J. INT'L L., forthcoming 2020) (noting that "[a]s codes formulate new modes of accountability, transparency and compliance, doctrinal assessments of corporate and directors' liability…change").

99 Iain Macneil, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, Monash University Centre for Commercial Law and Regulatory Studies (CLARS) Seminar (Mar. 30, 2020), https://www.monash.edu/law/news-and-events/events/clars-law-and-business-seminar-series-professor-iain-macneil.

100 Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, 3, 5 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

101 *See* John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151 (2001). *Cf*., however, a recent U.K. corporate governance dispute, which relied on a clear distinction between legal rules and norms. In 2019, Daejan Holdings was the only listed U.K. company, which had never had a woman on its board of directors. It was reported that Sir Philip Hampton wrote to Daejan, calling on the company to alter its all-male board policy, in accordance with prevailing corporate governance norms. According to the report, Daejan responded by stating, "[w]hilst we appreciate the views of your review body they are not enshrined in law or any formal regulation and we are not obliged to comply with them". See Helen Cahill, *Inside the VERY Secret Boardroom that's Firmly CLOSED to Women*, MAIL ON SUNDAY (Jun. 2, 2019).

102 *See* § 301 (3A) Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002); N.Y. STOCK EXCHANGE, Listed Company Manual, § 303A (2003).

Interesting tensions between hard law and soft law are also apparent at an international level. Many common law jurisdictions – though not the United States – protect certain fundamental shareholder rights by mandatory rules in their corporations legislation.[103] The vision of Delaware corporations law as inherently "enabling"[104] has restricted the level of mandatory rules under U.S. state corporations law.[105] As a result, much U.S. corporate law is made, not by the state, but rather by private ordering by corporate actors.[106] In recent times, institutional investors have sought to use private ordering to transplant numerous mandatory shareholder protection rules, embedded by statute in other common law jurisdictions, into the United States on a company-by-company basis.[107] This U.S. trend demonstrates the use of private ordering by shareholders as a self-help mechanism. It suggests that, in an era of globalized investment, institutional investors have become increasingly aware of comparative legal rights across jurisdictions,[108] and it has effectively rendered the United States an importer, rather than exporter, of corporate law.[109] The trend also represents a challenge to transnational law

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103 *See, e.g.*, Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010) (discussing how News Corporation's move from Australia to Delaware in 2004 resulted in reduced governance rights for shareholders). *See also* WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN U.K. BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS, (Nov. 26, 2009), at § 5.8 (emphasizing that "some governance by owners is essential, at least in respect of the selection, composition and performance of boards").

104 The idea that U.S. corporate law (specifically Delaware law) is "enabling" became an important feature of the nexus of contracts theory of the corporation. *See generally* Lucian A. Bebchuk, *The Debate on Contractual Freedom in Corporate Law,* 89 COLUM. L. REV. 1395 (1989) (discussing in detail the mandatory/enabling debate in U.S. corporate law). *See also* Elizabeth Pollman*, Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639**,** 651.

105 *Cf*., however, Robert B. Thompson, *Why New Corporate Law Arises: Implications for the 21st Century, in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS LAW KEEPING UP? 3, 9–11 (Steven Davidoff Solomon & Randall S. Thomas, eds., 2019) (discussing the interplay between mandatory and permissive rules under U.S. corporate law and noting the fact that after the shift to permissive state laws, U.S. federal law assumed the "mantle of regulation").

106 Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law,* 8 HARV. BUS. L. REV. 131 (2018) (critiquing the widely-held view that private ordering promotes efficiency by allowing firms to tailor corporate governance rules to their particular needs).

107 This private ordering is typically effected by shareholder proposals and bylaw amendment. *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 524–29 (2019).

108 Indeed, private ordering in the area of proxy access for shareholders was in response to a failed U.S. law reform attempt, which global institutional investors regarded as "unfinished business". *Id.,* 523–24.

109 *Id*., 541.

assumptions about the meaning of "globalized business interests",[110] since it highlights the fact that there is a power struggle in this regard between formidable global institutional investors and U.S. boards of directors.[111]

Corporate codes have been responsible for the global transplantation of norms over the last few decades. Governance codes can be traced back to the influential 1992 U.K. Cadbury Committee Report.[112] Although the concept of "corporate governance" had entered the U.S. lexicon during the 1970s,[113] it was not embraced in other common law jurisdictions, such as the United Kingdom and Australia, until the beginning of the 1990s.[114] The Cadbury Committee Report was a major catalyst in its uptake.[115]

The Cadbury Committee's Final Report was accompanied by a *Code of Best Practice*.[116] The famous "comply or explain" [117] aspect of governance codes was bolstered shortly afterwards by an amendment to the London Stock Exchange Listing Rules, requiring all listed companies

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110 *See* Peer Zumbansen, *Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 473, 473 (Emilios Christodoulidis et al. eds., 2019) (stating that transnational law is "most commonly seen in close relation to the demographics and institutional formations of globalized business interests").

111 This power struggle has resulted in each group seeking to control the content of corporate law rules via "private ordering combat". *See* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 524–36 (2019).

112 *See* SIR ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Dec. 1992). For background to the establishment of the Cadbury Committee, *see generally* Brian R. Cheffins*, The Rise of Corporate Governance in the UK: When and Why,* 68 CURRENT LEGAL PROBS. 387, 406–08 (2015).

113 *Id*., 389–91 (2015).

114 *See* Brian R. Cheffins, *The History of Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 46, 57 (Mike Wright et al. eds., 2013); Henry Bosch, *The Changing Face of Corporate Governance*, 25 UNSW L.J. 270 (2002).

115 *See* Brian R. Cheffins*, The Rise of Corporate Governance in the UK: When and Why,* 68 CURRENT LEGAL PROBS. 387, 388 (2015). In the Australian context, *see* Henry Bosch, *The Changing Face of Corporate Governance*, 25 UNSW L.J. 270, 274 (2002); WORKING GROUP OF THE AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS, CORPORATE PRACTICES AND CONDUCT (1991).

116 SIR ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Dec. 1992).

117 Interestingly, the Cadbury Committee did not actually use the now-familiar term, "comply or explain". *See* Donald Norberg and Terry McNulty, *Creating Better Boards Through Codification: Possibilities and Limitations in U.K. Corporate Governance, 1992-2010, 55* BUS. HIST. 348, 362 (2013). Not all jurisdictions use the terminology, "comply or explain". For example, Australia's governance code substitutes the phrase, "if not, why not". *See* ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 2 (4th ed., 2019).

to include a statement in their annual reports as to whether they fully adhered to the *Code of Best Practice*.[118] Although adherence to the code was not mandatory, any divergence required an explanation. The current version of this code is the 2018 U.K. Corporate Governance Code.[119]

Since the Cadbury Committee laid down the blueprint for governance codes, their transmission around the world has been remarkable. In 1999, only 24 countries were reported to have a national governance code.[120] This number rose to 64 by 2008 and to 93 by 2015.[121] Almost all of the 49 jurisdictions evaluated in a recent OECD survey[122] has a national governance code or principles[123] and 83% of these operate on a "comply or explain" basis.[124] Yet, the exceptions in the OECD survey are notable. Neither the United States nor India has adopted a national governance code.[125] China is also an outlier,[126] though for different reasons. China has a national governance code in place, but, unlike most other countries' codes, which operate on a voluntary, "comply or explain" basis, the Chinese provisions are mandatory.[127]

What accounts for the success of governance codes as a regulatory technique and their rapid

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118 *See* Brian R. Cheffins, *The Rise of Corporate Governance in the U.K.: When and Why,* 68 CURRENT LEGAL PROBS. 387, 407 (2015); Henry Bosch, *The Changing Face of Corporate Governance*, 25 UNSW L.J. 270, 274 (2002).

119 *See* FIN. REPORTING COUNCIL, THE U.K. CORPORATE GOVERNANCE CODE (Jul. 2018). The 2018 U.K. Corporate Governance Code is supported by the Financial Conduct Authority's Listing Rules. For discussion of the concept of "comply or explain" regulation and what is expected in terms of an explanation for divergence from the Principles in the governance code, *see* FIN. REPORTING COUNCIL, THE U.K. CORPORATE GOVERNANCE CODE, 2 (Jul. 2018).

120 *See* Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 UNSW L.J. 715, 715 (2016).

121 *Id*.

122 The 49 participating jurisdictions included all OECD, G20 and Financial Stability Board members. *See* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), CORPORATE GOVERNANCE FACTBOOK 9, 41*ff* (2019).

123 *Id.*, 29 (2019). A list of current international codes is available on the European Corporate Governance Institute (ECGI) website at https://ecgi.global/content/codes (last visited Jul. 29, 2020).

124 ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), CORPORATE GOVERNANCE FACTBOOK 29 (2019). *See also id*., 30 (discussing some variations to the "comply or explain" reporting model).

125 According to the OECD the United States and India rely instead on "laws, regulations and listing rules as their legal corporate governance framework". *Id*., 29.

126 *Id*.

127 CHINA SECURITIES REGULATORY COMMISSION (CSRC), CODE OF CORPORATE GOVERNANCE FOR LISTED COMPANIES (2018) (China).

transmission? One important factor was timing. The 1990s, which have been described as "the decade of corporate governance",[128] witnessed a decline in capital market segmentation, accompanied by the rise of globalized capital markets and investment strategies.[129] This proved to be a ripe environment for reception of norms relating to improved governance practices and procedures.

The spread of governance codes was also aided by a development involving the vertical transmission of norms. In 1999, when only 24 countries had adopted a U.K.-style governance code,[130] the OECD released the first version of its supranational *Principles of Corporate Governance*.[131] As one scholar has noted, the OECD principles were not plucked "from thin air".[132] Rather, they relied on national governance codes, predominantly from common law jurisdictions like the United Kingdom.[133] As the OECD principles received increased attention at the supranational level, the rate of horizontal transmission of governance codes accelerated. This two-directional dynamic effectively transformed the Cadbury Committee's original governance code into an international standard.[134] Top-down vertical transmission of norms by transnational networks, such as the OECD,[135] became increasingly visible during the 2007-

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128 Moira Conoley, *Moves to Halt Another Decade of Excess*, FIN. TIMES (Aug. 6, 1999), 10 (cited in Brian R. Cheffins, *The History of Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 46, 57 (Mike Wright et al. eds., 2013)).

129 Iain Macneil, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, Monash University Centre for Commercial Law and Regulatory Studies (CLARS) Seminar (Mar. 30, 2020), https://www.monash.edu/law/news-and-events/events/clars-law-and-business-seminar-series-professor-iain-macneil.

130 Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 UNSW L.J. 715, 715 (2016).

131 ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), PRINCIPLES OF CORPORATE GOVERNANCE (1999). The current version of these Principles is ORG. FOR ECON. CO-OPERATION AND DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015).

132 Cally Jordan, *The Conundrum of Corporate Governance*, 30 BROOKLYN J. INT'L. L. 983, 990 (2005).

133 *Id.*, 990–91.

134 Iain Macneil, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, Monash University Centre for Commercial Law and Regulatory Studies (CLARS) Seminar (Mar. 30, 2020), https://www.monash.edu/law/news-and-events/events/clars-law-and-business-seminar-series-professor-iain-macneil.

135 Other prominent networks of financial regulators during the global financial crisis included the Financial Stability Board (FSB), the Basel Committee on Banking Supervision and IOSCO. These networks operated vertically during the crisis, by promulgating informal, non-binding soft law standards, which were subsequently transformed into hard law at a national level. *See, e.g.*, Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* TRANSNATIONAL LEGAL ORDERS 231, 244–49 (Terence C. Halliday & Gregory Shaffer eds., 2015); Jennifer G. Hill,

2009 global financial crisis.[136] These developments in contemporary corporate regulation epitomize the fact that transnational legal ordering occurs "multi-directionally and recursively up from and down to the national and local levels".[137]

Corporate scandals and crises have had a central role in the development of corporate codes. In the case of governance codes, for example, the Cadbury Committee's relevance was heightened by a wave of British business scandals that occurred during the committee's deliberations.[138] The United Kingdom also became the first jurisdiction to adopt a stewardship code,[139] which was a direct response to the global financial crisis.[140] The first U.K. Stewardship Code was adopted in 2010,[141] with revised versions issued in 2012[142] and 2020.[143]

Stewardship codes highlight the important link between problem framing and regulatory outcomes.[144] For example, a common view in the United States in the aftermath of the global

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Regulatory Cooperation in Securities Market Regulation: The Australian Experience, 17 Eur. Co. Fin. L. Rev. 11, 13–17 (2020).

136 *See generally* Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal* Order, *in* TRANSNATIONAL LEGAL ORDERS 231 (Terence C. Halliday & Gregory Shaffer eds., 2015); Jennifer G. Hill, *Regulatory Cooperation in Securities Market Regulation: The Australian Experience*, 17 Eur. Co. Fin. L. Rev. 11 (2020).

137 Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS, 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015).

138 These U.K. scandals included the collapse of Polly Peck International plc with debts of £1.3bn, and the downfall of Robert Maxwell's fraudulent business empire after his death in November 1991. *See* Brian R. Cheffins, *The Rise of Corporate Governance in the U.K.: When and Why*, 68 CURRENT LEGAL PROBS. 387, 409-11 (2015). *See also* Stephen Bates, *How Polly Peck Went from Hero to Villain in the City*, THE GUARDIAN, Aug. 27, 2010; Roger Cohen, *Maxwell's Empire: How it Grew, How it Fell – A Special Report; Charming the Big Bankers out of Billions*, N.Y. TIMES (Dec. 20, 1991), A1.

139 *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE (Jul. 2010).

140 The 2010 U.K. Stewardship Code was adopted on the recommendation of the influential Walker Review on corporate governance and financial institutions following the global financial crisis. *See* WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN U.K. BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS, Nov. 26, 2009, Recommendations 16–18. The 2010 U.K. Stewardship Code was based on an earlier Statement of Principles on the Responsibilities of Institutional Investors, which was prepared by the U.K. Institutional Shareholders' Committee (ISC) in June 2007 and subsequently transformed into a code in November 2009. *See id*. at [5.13], Annex 8.

141 *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE (Jul. 2010).

142 FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE (Sept. 2012).

143 FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE 2020.

144 *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018); Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action:*

financial crisis was that shareholders contributed to the crisis, by exerting pressure on corporate managers to engage in excessive risk-taking to increase profitability.[145] Yet, a very different interpretation of the crisis existed in the United Kingdom. The prevalent U.K. view was that the real problem had been the failure by institutional investors to participate actively in corporate governance and to provide an effective counterweight to managerial risk-taking.[146] The 2010 U.K. Stewardship Code was designed to address this problem.[147]

The horizontal transmission of stewardship codes has, like governance codes, been rapid and widespread. Since 2010, more than twenty countries have followed the U.K.'s lead in adopting stewardship codes, and that number is growing.[148] Like the original U.K. code, most stewardship codes around the world operate on a "comply or explain" basis, and signing up to such codes is also usually voluntary.[149]

The Australian Experience, in GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2020*)*.

145 *See*, *e.g.*, John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 799 (2011).

146 *See, e.g.*, John Plender, *Shut Out*, FIN. TIMES (Oct. 18, 2008) (asking the question "where were the shareholders?"); WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN U.K. BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS, Nov. 26, 2009, § 5.11 (stating that "[w]ith hindsight it seems clear that the board and director shortcomings…would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners"); Andrew G. Haldane, Chief Economist, Bank of England, *Who Owns A Company?*, speech given at University of Edinburgh Corporate Finance Conference, 8, 11 (May 22, 2015), https://www.bis.org/review/r150811a.pdf (stating that "companies tend to have higher valuations when institutional investors are a large share of cashflow, perhaps reflecting their stewardship role in protecting the firm from excessive risk-taking…").

147 A later version of the code made large claims, stating that "[e]ffective stewardship benefits companies, investors and the economy as a whole". *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE, 1 (Sept. 2012).

148 For a list of jurisdictions that have to date adopted stewardship code or analogous initiatives, see Alice Klettner, *Stewardship Codes and Shareholder Participation in Governance*, 70 GOVERNANCE DIRECTIONS 227, 228–29, Table 1 (2018).

149 Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2020*)*.

Asian jurisdictions, in particular, have been eager to embrace stewardship codes.[150] This is in spite of the fact that the structure of Asian capital markets is fundamentally different from the U.K. capital market structure. Unlike U.K. listed companies, where the vast majority of shares are held by institutional investors,[151] Asian listed companies typically have concentrated ownership structures, with family members or the state as controlling blockholders.[152] This underlying difference can skew the operation of these codes, so that any similarity to the original U.K. model is superficial only.[153] For example, it has been argued that Singapore's "near carbon-copy" of the U.K. stewardship code in fact upends the U.K. model's goal of enhancing institutional investor participation.[154] Instead, the Singapore version operates to bolster the existing power of majority shareholders in state-controlled and family-controlled companies, thereby potentially reducing the incentives of institutional investors to participate in corporate governance.[155]

Although the United Kingdom has been the progenitor of governance codes and stewardship codes around the world, the adopted codes are by no means uniform. There is considerable

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150 Jurisdictions in Asia which have adopted a form of stewardship code to date include Japan, Malaysia, Hong Kong, Taiwan, Singapore, South Korea and Thailand. *Id*.

151 In the United Kingdom, around 90% of shares are held by financial institutions and approximately half of these are based outside the United Kingdom. *See, e.g.,* Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance: Fourth Report of Session 2016-17*, Mar. 30 2017 at §§ 13–16.

152 In a controlling blockholder context, which is the main paradigm for Asian listed companies, increasing shareholder rights or responsibilities may be irrelevant, or indeed counterproductive, as an accountability device. *See* Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 572 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Kon Sik Kim, *Dynamics of Shareholder Power in Korea in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 535 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

153 *See* Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829 (2020).

154 Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 VAND. J. TRANSNAT'L L. 989 (2020).

155 *Id.*; ERNEST LIM, SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 188–96 (2020).

divergence in the substance of these codes,[156] which is attributable to a range of factors, including the issue of "who writes the rules".[157]

A range of different organizations have responsibility for the authorship of corporate codes. They include government agencies, stock exchanges and business organizations.[158] These diverse origins can result in major differences concerning the stringency and enforceability of codes.[159] They can also affect the content of the codes, including whether the codes emphasize shareholder or stakeholder interests.[160] For example, the United States does not have a national corporate governance code. However, in 2017 the Investor Stewardship Group ("ISG"),[161] issued the U.S. Corporate Governance Principles,[162] which are a set of purely voluntary, self-regulatory norms concerning governance. ISG is a collective of some of the largest U.S.-based and international asset owners and managers,[163] including several activist hedge funds.[164] Given the identity of the actors behind the U.S. governance principles, it is hardly surprising

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156 Iain Macneil, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, Monash University Centre for Commercial Law and Regulatory Studies (CLARS) Seminar, Mar. 30, 2020 (available at https://www.monash.edu/law/news-and-events/events/clars-law-and-business-seminar-series-professor-iain-macneil) (noting that even when jurisdictions initially adopt very similar governance codes to the U.K. version, differences often develop subsequently).

157 For discussion of the significance of authorship of rules in the M&A context, *see* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Divergence of U.S, and U.K. Takeover Regulation*, 95 GEORGETOWN L. J. 1727 (2007). *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507–13 (2018) (discussing the significance of authorship of stewardship codes).

158 *See generally* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 8 (2011).

159 *Id.*, 8–10.

160 *See* Iain Macneil, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, Monash University Centre for Commercial Law and Regulatory Studies (CLARS) Seminar, Mar. 30, 2020 (available at https://www.monash.edu/law/news-and-events/events/clars-law-and-business-seminar-series-professor-iain-macneil)

161 *See* ISG, *About the Investor Stewardship Group and the Framework for US Stewardship and Corporate Governance,* https://isgframework.org/ (last visited Jul. 29, 2020).

162 ISG, *Corporate Governance Principles for U.S. Listed Companies* (Jan. 2017), https://www.isgframework.org/corporate-governance-principles/ (last visited Jul. 29, 2020).

163 Signatories to the principles include, for example, BlackRock, Vanguard and State Street Global Advisers. For the full list of signatories to the ISG Corporate Governance Principles and Stewardship Principles, see https://isgframework.org/signatories-and-endorsers/ (last visited Jul. 29, 2020).

164 Activist hedge fund signatories include ValueAct Capital and Trian Partners. *See* https://isgframework.org/signatories-and-endorsers/ (last visited Jul. 29, 2020).

that the norms they contain reflect a strongly private, shareholder-focused conception of corporate governance and directors' duties.[165]

These U.S. norms provide a striking contrast with the trajectory of contemporary U.K. and Australian governance codes. The U.K. governance code is administered by an independent government-backed regulator, the Financial Reporting Council ("FRC")[166] and the Australian version is overseen by a governance committee of the Australian Securities Exchange ("ASX").[167] Recent amendments to the U.K. and Australian governance codes represent a far more public conception of the corporation and of directors' responsibilities than the U.S. Corporate Governance Principles.[168] The 2018 U.K. Corporate Governance Code notes, for example, that the role of a successful company is not only to create value for shareholders, but also to contribute to "wider society".[169] Both the U.K. and the Australian governance codes also pay heightened attention to the interests of stakeholders, particularly employees.[170] They exemplify how, in contrast to traditional corporate law, governance norms today cover a pluralistic range of concerns, which are promoted by state and private actors alike.[171]

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165 *See, e.g.,* ISG, *Corporate Governance Principles for U.S. Listed Companies* (Jan. 2017), "Principle 1: Boards are accountable to shareholders". The Principles state, for example, that shareholders should have participatory rights in corporate governance, and boards should be responsive to shareholders' viewpoints. *See id.*, Principle 2: Shareholders should be entitled to voting rights in proportion to their economic interest; Principle 3: Boards should be responsive to shareholders and be proactive in order to understand their perspectives".

166 *See* FIN. REPORTING COUNCIL, *About the FRC,* https://www.frc.org.uk/about-the-frc (last visited Jul. 29, 2020); FIN. REPORTING COUNCIL, *FRC Board Members,* https://www.frc.org.uk/about-the-frc/structure-of-the-frc/frc-board/frc-board-members (last visited Jul. 29, 2020).

167 ASX CORP. GOVERNANCE COUNCIL, AUSTRALIAN SECURITIES EXCHANGE (ASX) CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS, 4th ed. (Feb. 2019), https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf (last visited Jul. 29, 2020). The ASX Corporate Governance Council comprises a group of industry stakeholders. *See About the Council*, *id.* at 1.

168 This tension between a public and private conception of the company and directors' duties reflects the "clash between different visions of corporatism" that underpinned the famous Berle-Dodd debate of the 1930s. *See* William W. Bratton and Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 124 (2008). *See also* Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* FIRM GOVERNANCE: THE ANATOMY OF FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., forthcoming 2020) (discussing the ongoing tension between public and private conceptions of the corporation).

169 FIN. REPORTING COUNCIL, THE U.K. CORPORATE GOVERNANCE CODE, 4, Principle A (Jul. 2018).

170 *See generally* Jennifer G. Hill, *Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 163, 178–80 (2020).

171 Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Law Production* (U. PA. J. INT'L L., forthcoming 2020). Indeed, Larry Fink, CEO of BlackRock, one of the world's largest

The issue of "who writes the rules" is also highly relevant to stewardship codes. In some jurisdictions, such as the United Kingdom and Japan, stewardship codes are issued by government regulators or quasi-regulators.[172] In others, such South Korea and South Africa, they are promulgated by industry players.[173] Finally, in some countries, including Australia, Canada and the United States, stewardship codes have been initiated by investors themselves.[174] This divergence concerning "who writes the rules" can influence the content and effectiveness of particular stewardship codes, and can also affect the extent to which shareholder activism, including collective activism, is tolerated and encouraged.[175]

The regulatory goals underpinning the introduction of stewardship codes also vary across jurisdictions. The aim of the 2020 U.K. Stewardship Code was to provide a check on excessive risk-taking in the aftermath of the global financial crisis. Yet, in Japan, one of the earliest jurisdictions to transplant a U.K.-style stewardship code, the policy rationale was quite different. Japan's code was designed to reverse declining profitability and increase investor returns, by creating a "warmer climate" for foreign investors and shareholder activists.[176] Japan's adoption of a stewardship code also demonstrates how localized political friction can affect the content of such codes. Japan's stewardship code adopted a "relatively gentle stance"[177] on shareholder activism compared to the U.K. prototype.[178] It seems that this was a compromise to appease Japanese critics, who resisted the shift effected by the code from a

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institutional investors, has declared that companies "must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate". *See* BLACKROCK, LARRY FINK'S 2018 LETTER TO CEOS A SENSE OF PURPOSE (2018); Peter Horst, *BlackRock CEO Tells Companies to Contribute to Society. Here's Where to Start*, FORBES (Jan. 16, 2018).

172 *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507–08 (2018).

173 *Id*., 508–09.

174 *Id*., 509–13.

175 *See generally* Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action: The Australian Experience, in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2020*)*. *See also* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 OHIO ST. BUS. L. J. (forthcoming, 2020).

176 *See* Ben McLannahan, *Japanese Reformists Face Challenge Over Shake-Up of Corporate Governance Laws*, FIN. TIMES, (May 25, 2014).

177 Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan,* BERKELEY BUS. L. J. (forthcoming, 2020).

178 *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 513–24 (2018).

stakeholder-oriented approach to a stronger shareholder-oriented focus.[179] It has been argued that other Asian jurisdictions, such as Singapore, Hong Kong and Malaysia, have adopted stewardship codes in order to signal their commitment to good corporate governance, thereby attracting foreign investment in global capital markets.[180]

Another factor undermining international convergence of corporate codes is that the underlying U.K. model has itself undergone fundamental changes over time, creating further disjunction across jurisdictions. For example, in 2018, a British regulatory review[181] branded the much-vaunted and imitated U.K. stewardship code a failure.[182] The FRC responded to this damning assessment by adopting a "substantial and ambitious" revised version of the code, the 2020 U.K. Stewardship Code.[183] This new U.K. code emphasizes shareholder stewardship activities and outcomes over aspirational policies.[184] It also includes far broader aims than earlier versions, with a marked shift from stewardship involving protection of shareholder interests toward stewardship that encompasses ESG issues, including climate change.[185]

4. Conclusion

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179 Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan,* BERKELEY BUS. L. J. (forthcoming, 2020).

180 *See* ERNEST LIM, SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 174 (2020).

181 JOHN KINGMAN, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL ("Kingman Review") (2018).

182 According to the Kingman Review, the 2012 U.K. Stewardship Code, which it considered in its review, "whilst a major and well-intentioned intervention, is not effective in practice". *Id.*, 8.

183 *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE 2020. *See also* FIN. REPORTING COUNCIL, REVISED AND STRENGTHENED UK STEWARDSHIP CODE SETS NEW WORLD-LEADING BENCHMARK (Oct. 24, 2019), https://www.frc.org.uk/news/october-2019/revised-and-strengthened-uk-stewardship-code-sets (last visited Jul. 29, 2020).

184 *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE 2020, 11, 13. The 2020 U.K. Stewardship Code followed the recommendations of the Kingman Review in this regard. *See* JOHN KINGMAN, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL, 10 (2018).

185 *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE 2020, 15, 27; Paul L. Davies, *The U.K. Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?* 5–9, 23*ff* (ECGI Working Paper N° 506/2020, March 2020). ESG has become an increasingly important issue in many stewardship codes in recent times. *See* Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2020*)* (discussing the interplay between hard law and soft law, in the form of stewardship codes, in relation to ESG and sustainability issues).

Fiduciary duties and corporate codes, which are designed to constrain directors' conduct and enhance corporate accountability, are key aspects of corporate governance. This chapter discusses some of the complex processes by which these laws and norms have been transmitted nationally and transnationally, and the extent to which this transmission has contributed to a uniform regulatory approach.

It is often assumed that there is a cohesive approach to the law of fiduciary duties across common law jurisdictions. The chapter provides a comparative and historical analysis of three common law jurisdictions, the United States, the United Kingdom and Australia, and shows that, in spite of their common legal heritage, there are, at least a granular level, sufficiently important differences to challenge the existence of any homogeneous law regarding directors' fiduciary duties in these jurisdictions.[186]

The chapter also discusses an important transnational regulatory development, which has occurred in recent decades across both common law and civil jurisdictions. This is the rise of corporate codes, such as governance codes and stewardship codes. These codes are powerful norm creators, and could, in theory, contribute to greater corporate governance convergence around the world. However, a critical issue in relation to corporate codes is "who writes the rules". In fact, a range of different bodies issue and administer these codes, and this can affect the focus of the codes and the norms they contain.

Codes are also constantly evolving and can operate differently depending on the underlying capital market structure of the jurisdictions in which they operate. Not only can these codes differ across jurisdictions, they can also transmute over time, particularly in responding to corporate scandals and crises. For example, some recent codes reflect an image of the corporation as having a far greater societal role.[187] The evolution of both fiduciary duties and corporate codes discussed in this chapter is more consistent with path dependence, rather than convergence, theory in corporate governance.

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186 *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis, in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold eds., 2018).

187 *See* Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* FIRM GOVERNANCE: THE ANATOMY OF FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., forthcoming 2020).

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