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THE NEW GEOGRAPHIES OF CORPORATE GOVERNANCE

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ABSTRACT

Today, the business corporation is ubiquitous. Incorporated according to local and national laws, it exists and functions in an almost borderless physical and digital space that regulators find hard to penetrate. As a global actor of enormous economic and political weight, the corporation is both immersed in and shaped by borderless financial flows. In response, over the past few decades, corporate governance has continued to evolve as a complex assemblage of laws, regulations, guidelines, standards, and corporate self-regulation. But, given the corporation's powerful position in society, corporate governance is no longer perceived to only concern relationships between managers and investors, but to also encompass a much wider range of the firm's stakeholders, including employees, contractors, suppliers, communities and the environment. In light of these developments, this Article focuses on corporate governance as a transnational field of regulatory norm-production, policymaking and political contestation. With the corporation itself as the key organizational and financial vehicle for global markets, questions regarding political, democratic engagement with the corporation continue to produce frustrating answers. In our Article, we develop an analysis that combines a

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historical, sociological, and political economy investigation into how the corporation has been governed by law over time. The research featured in this Article reveals a significant proliferation, nationally and transnationally, of norm producers in and around the corporation, offering important insights into the relationship between markets and political governance, and into the way in which, going forward, we might rethink existing notions of public and private authority, accountability, and responsibility.

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I. INTRODUCTION

Corporate governance today is a transnational field of regulatory norm-production, policymaking, and political contestation. To begin with, we must ask what follows from the proposal that corporate governance should today be understood as a transnational field of regulatory norm-production, policymaking, and political contestation. More specifically, we must determine the consequences of our engagement with the political field of corporate governance, what our environmental responsibilities are, and the place of corporate law in the democratic nation-state. The sociological lens we are suggesting in this Article reveals a fundamentally changed regulatory landscape for corporate governance today. It constitutes the interplay between both public and private actors, which include states, a wide range of global investment funds, multinational corporations, unions, corporate and public policy think tanks, as well as diverse civil society interest groups. Despite long-standing attestations to the contrary,[1] its key normative foundations are continuously and, recently, with increasing intensity, scrutinized and challenged.[2] Today, the transnational spaces in which the publicly held corporation's role in society, its function, and its purpose are being scrutinized, mirror the cross-border organizational scope of corporations as governance institutions, lawmakers and wielders of enormous power and influence.[3] In other words, the ongoing and intensifying debates

[1] *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("There should be no confusion . . . of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders . . . ."); Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 1.

[2] *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1873 (2017) ("The republic upon which typical Americans depend is one where the debate is between corporate-manager agents and money-manager agents, both of whom have different interests than ordinary human investors.").

[3] *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L. L.J. 229, 231 (2015) ("[C]orporations have developed the capacity to negotiate with states to create norms of international law—norms that bear a particular kind of relationship of priority to the state party's domestic legal order."); Christopher May, *Who's in*

Charge? Corporations as Institutions of Global Governance, PALGRAVE COMMC'NS., Dec. 22, 2015, at 5 ("[C]orporations construct regimes of private law to govern the relations between the various elements, while also seeking to influence public law institutions. . . . The use of private law (contract provisions and arbitration agreements) often utilises public international law as a background justification but equally is crafted to serve the needs of the particular corporate network in which it is deployed . . . ."); *see also* David L. Levy & Rami Kaplan, *Corporate Social Responsibility and Theories of Global Governance: Strategic Contestation in Global Issue Arenas*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 432, 432-33 (Andrew Crane et al. eds., 2008) (discussing the increasing importance of corporate social responsibility and calls for multinational corporations to use their authority to establish new governance structures).

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around corporate governance,[4] corporate social responsibility,[5] "corporate stewardship,"[6] and "corporate purpose"[7] illustrate the

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[4] *See* Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV., Oct. 14, 2019, at 2, https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance [https://perma.cc/3UQY-J67L] (noting the diversification of corporate governance debates in light of growing public concern around companies' roles in mitigating or accelerating climate change, fighting income inequality, responding to digitalization, and the rise of populism). For an earlier, comprehensive analysis of different conceptions of and approaches to corporate governance see Gregory Jackson & Andreas Moerke, Guest Editorial, *Continuity and Change in Corporate Governance: Comparing Germany and Japan*, 13 CORP. GOVERNANCE 351, 352 (2005) (comparing the different degrees of adaptation to global financialization in Germany and Japan's corporate governance systems), and Thomas Clarke, *The Continuing Diversity of Corporate Governance: Theories of Convergence and Variety*, 16 EPHEMERA 19, 20-21 (2016) (doubting that the pressure of financial markets will ultimately result in a global, uniform model of corporate governance). This contention, of course, has to be viewed against the background of the claim made by other scholars that such a convergence has already taken place. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) (arguing that worldwide triumph of the principle of shareholder value maximization is assured).

[5] *See* Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 238 (2015) (analyzing the development of the "Business & Human Rights" approach in recent years as a response to the "Corporate Social Responsibility" framework).

[6] *See* Iris H-Y Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. CORP. L. 983, 1001-12 (2014) (critically reviewing the UK's approach to improving corporate stewardship and accountability through transparency regulation); Dionysia Katelouzou, *Shareholder Stewardship: A Case of (Re)Embedding the Institutional Investors and the Corporation?*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 581 (Beate Sjåfjell & Christopher M. Bruner eds., 2019) (showing how shareholder stewardship is moving from the periphery to the mainstream of policy making around the world and conflating stewardship with the concurrent topic of corporate sustainability).

[7] *See* Michael Bradley, Cindy A. Schipani, Anant K. Sundaram & James P. Walsh, *The Purposes and Accountability of Corporations in Contemporary Society: Corporate Governance at a Crossroads*, 62 L. & CONTEMP. PROBS. 9, 77 (1999) ("[T]he purpose of the corporation should continue to be to maximize the value of its residual claimants—stockholders—within the constraints imposed by law, social norms, customs, and mores. Furthermore, there is no need to jettison the basic tenets of the contractarian view of the corporation to achieve this purpose."). *See also* Leo E. Strine, Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 177 (2017) (arguing that more should be done to make corporations assume responsibility for non-shareholder constituencies); Malcolm S. Salter, *Rehabilitating Corporate Purpose: How the Evolution*

degree to which such contentions are not only about the corporation as a matter of corporate law, but about its actual scope of operation in a changing socio-economic, cultural, and political environment and in spaces that are not confined to the borders of nation-states. As the scope of the corporation's activities has continued to expand functionally[8] and geographically,[9] questions arise as to how law—and, *which* law, *which* authority, and *which* enforcement regimes—configures, relates to, and enables the corporation to posture itself with particular urgency. We will describe the emerging configuration of corporate governance regimes that results from collaboration and competition among public and private actors from a *legal pluralist* perspective, which challenges existing, more traditional, nation-state-oriented understandings of corporate law. Central to this description is the observation of how corporate governance norms today contain elements of "hard" and "soft," or mandatory and voluntary, rules. As we will show in detail below, these norms are being introduced, disseminated, revised, and

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of Corporate Purpose Has Contributed to a Widening Breach Between Capitalism and Justice . . . and What to Do About It 4 (Harv. Bus. Sch., Working Paper No. 19-104, 2019), https://www.hbs.edu/faculty/Publication%20Files/19-104_fcc0a086-d33c-4c81-a933-b77fb2eb70f7.pdf [https://perma.cc/D92X-AKQS] (criticizing how the emphasis on shareholder value has resulted in the immunization of business corporations from social demands); Paddy Ireland, *Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?*, 23 J.L. & SOC'Y 287, 295-306 (1996) (arguing that because the corporation is, in reality, controlled and its fate decided by financial markets, the idea of a "stakeholder corporation" is bound to fail).

> The company is, and will always be, the personification of industrial capital and, as such, subject to the imperatives of profitability and accumulation. These are not imposed from the outside on an otherwise neutral and directionless entity, but are, rather, intrinsic to it, lying at the very heart of its existence. No amount of fiddling with company law – whether it is with the fiduciary duties of directors or with the structure and composition of company boards – can change this.

Id. at 304.

[8] Bradley, Schipani, Sundaram & Walsh, *supra* note 7, at 15-28.

[9] *See* John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REGUL. & GOVERNANCE 317, 318-26 (2018) (mapping multinational corporations' scope of global operations and impact on regional governmental actors); s*ee also* Gralf-Peter Calliess, *Introduction: Transnational Corporations Revisited*, 18 IND. J. GLOB. LEGAL STUD. 601, 601-02 (2011) (discussing the growth of transnational corporations and need for further analysis of the scope of their global economic activities).

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adapted by both public and private actors, who operate within national legal systems but also through international organizations, non-governmental organizations ("NGOs"), and private corporate business institutions.

Instead of taking these observations as a cue to leapfrog into an abstract or hypothesized "global" understanding, this Article contends that transnational legal pluralism in corporate governance must be studied against the background and, in fact, in the context of continuing state transformation. Our emphasis on both the transnational and legal pluralist dimensions of corporate governance today is based on the belief that such regulatory regimes arise out of state transformation processes that have been occurring for a number of decades in advanced industrial and post-industrial societies. At the heart of these processes has been not a retreat of "the state" *per se*, but a thoroughgoing differentiation of the state's regulatory and institutional architecture towards a higher degree of privatization (of formerly public responsibilities and services) and towards a regulatory infrastructure that complements, rather than replaces, state action with a growing number of private ordering and "self-regulation" processes in numerous areas of governmental activity.[10] As this Article will show, this shift in political economy did not merely affect the role played by the state in economic affairs, but significantly repositioned and repurposed powerful economic actors themselves, and, above all, the business corporation.[11]

If, in light of competing political visions for the corporation, corporate governance raises challenging questions in the domestic arena, these challenges are exacerbated in the transnational realm. Seen through a public lawyer's eyes, almost everything about the *transnationalization* of corporate governance appears to raise

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[10] *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343-44 (2004) ("In all of these contexts, government harnesses the power of new technologies, market innovation, and civic engagement to enable different stakeholders to contribute to the project of governance."); *see generally* Basak Kus, *Neoliberalism, Institutional Change and the Welfare State: The Case of Britain and France*, 47 INT'L. J. COMPAR. SOCIO. 488 (2006) (comparing the different policy responses in Britain and France following the 1970s oil and financial crisis with the UK opting for a neoliberal stripping of the state and France reforming state strategies in the pursuit of macroeconomic efficiency).

[11] *See infra* Part II.

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questions of legitimacy.[12] In other words, who, if not a democratically elected lawmaker, should create norms that potentially affect hundreds of thousands of workers and significant other parts of society? But which, if any, processes are in place today to ensure adequate societal input into the design of norms, their enforceability, and their amenability to reform or adaptation? Where is the norm-creating authority of these largely private actors located? How must we imagine democratic control of corporate activity, including the creation of governance norms by corporations themselves, in the absence of an effective local or global regulator?[13]

The following analysis intervenes in this debate through three accounts, which we will unfold in detail after presenting the overall argument in concentrated form in Part II. The following Parts III and IV provide an in-depth presentation of the material on which our argument is based, while Parts V and VI argue for a renewed political critique of corporate governance. Our first intervention is a historical one (Part III), our second a sociological one (Part IV), and our third argument draws on the first two and engages corporate law and corporate governance as a matter of political critique (Parts V and VI). Historically, we show how the development of corporate governance norms, first domestically and then increasingly transnationally, have been keeping pace with and must be seen in close connection with particular shifts in the distribution between public and private actors in carrying out essential social functions in modern contemporary democracies. While corporations primarily

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[12] *See* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1745 (2007) ("[A]s economic activity increasingly crossed borders . . . public law, as either substantive rules or as systems of governance, has proven increasingly unable to respond efficiently to the problems of the governance of economic relations."); *Id.* at 1747 ("The ability to disperse ownership and operations across the globe has made it possible for the largest multinational corporations to become essentially self-regulating . . . the absence of regulation might itself be inefficient, at least to the extent that it enhances unpredictability and arbitrary conduct . . . .").

[13] *See* Tim Bartley, *Transnational Corporations and Global Governance*, 44 ANN. REV. SOCIO. 145, 155 (2018) (highlighting the increasing importance of private corporations as "direct providers of global governance"). *See also* Arthur S. Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539, 1550-51 (1960) (addressing "the poverty of constitutional (and political) theory with respect to the place of the corporation in both the domestic and world economies, and to suggest that a need exists for the identification of means whereby the economic power of the large corporation can be tempered 'in the public interest'").

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insulate the owners' assets from liability claims through the creation of a separate legal entity,[14] their larger social and economic role has long been as an investment vehicle for private placements and, in complementing the state's varying protective regimes for old age security, in building a financial cushion for an ageing workforce.[15] Today, corporations assume central and controlling roles in a wide range of public functions, including the delivery of nearly all telecommunication services,[16] health care,[17] municipal waste disposal,[18] and they assume leading roles in urban development and planning,[19] infrastructure financing,[20] and even military warfare

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[14] *See* Salomon v. A. Salomon & Co. Ltd. [1897] AC 22 (HL) 27, https://www.bailii.org/uk/cases/UKHL/1896/1.pdf [https://perma.cc/DR5P-HUBX] ("[I]f the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation.").

[15] *See generally* Mark J. Roe, *The Modern Corporation and Private Pensions*, 41 UCLA L. REV. 75 (1993) (analyzing the state's interest in strengthening the private sector's and, particularly, the corporation's role in securing private pension investments).

[16] *See* Wei Li & Lixin Colin Xu, *The Impact of Privatization and Competition in the Telecommunications Sector Around the World*, 47 J.L. & ECON. 395, 395-96 (2004) (mapping the significant transformation from public to private telecommunications provision since the 1980s and 1990s).

[17] *See* Dikaios Sakellariou & Elena S. Rotarou, *The Effects of Neoliberal Policies on Access to Healthcare for People with Disabilities*, 16 INT'L J. EQUITY HEALTH, 2017, at 1, 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5688676/pdf/12939_2017_Article_699.pdf [https://perma.cc/5TH7-UBCB] ("A series of policy developments – in the areas of health and labour, mainly – have promoted a neoliberal agenda that directly affects the lives of people with disability, causing in many cases material deprivation, insecurity, and stigmatisation.").

[18] *See generally* Carlo Fanelli, *Neoliberal Urbanism and the Assault Against Public Services and Workers in Toronto, 2006-2011*, ARTICULO J. URB. RSCH. (2014), https://journals.openedition.org/articulo/2380 [https://perma.cc/UN3P-4PVT] (discussing how Toronto's pressure on municipal waste workers to agree to lower wages led to the unionized workers voting for a new austerity and privatization government).

[19] *See* Eugene J. McCann, *Collaborative Visioning or Urban Planning as Therapy? The Politics of Public-Private Policy Making*, 53 PRO. GEOGRAPHER 207, 207 (2001), http://www.sfu.ca/~emccann/Professional%20Geographer%20Visioning.pdf [https://perma.cc/7X94-F9R8] ("Planning is increasingly privatized and decentralized in U.S. cities.").

[20] *See* Ronald J. Daniels & Michael J. Trebilcock, *Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier*, 46 U. TORONTO L.J. 375, 375-78 (1996) (discussing the rising proliferation but also the risks

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through extensive sub-contracting arrangements.[21] As the range of corporate activities continues to expand, so does the scope of what is considered to be part of the regulatory-corporate governance framework that companies should comply with. This Article charts these emerging political economies in contemporary corporate law and corporate governance against the background of three central (yet increasingly less convincing) themes in the literature's continuing corporate governance debate over the past four decades. From a historical perspective, we recognize a triple fallacy: first, we take issue with what has turned out to be ultimately inconclusive and less productive competition between shareholder versus stakeholder oriented concepts of the firm. Secondly, we revisit the important work by the "Varieties of Capitalism" school in order to explore the connections today between specific models of corporate governance and, specifically, the political economies of corporate law regulation in different countries. Such polarization is too often predicated on assumptions of economic efficiency that, in turn, result in an overdrawn opposition of two competing models of capitalist organization as demonstrated by the convergence/divergence debate of the 1990s and early 2000s.

While these tensions form an important backdrop of corporate law's history, we contend in Part V that this historical account needs to be complemented by another look at the facts on the ground. It is in this vein that we review the shareholder/stakeholder conflict and the attendant attestations regarding convergence and divergence on the basis of sociological evidence regarding the actual forms, institutions, and processes of norm production in corporate law today. While much of the historical story of this conflict and its trajectories takes a certain institutional regulatory framework of corporate law for granted, we are skeptical as to the accuracy of this framework. We show that, rather than courts and governmental

involved in governments' reliance on private sector financing of public infrastructures).

[21] P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT'L SEC. 186, 186 (2001) ("PMFs [private military firms] are profit-driven organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills—including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military technical assistance.").

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departments acting as the exclusive corporate lawmakers or initiators of corporate governance norms, it is a wealth of non-state actors, such as institutional investors, expert committees, various financial actors, consultancies, business corporations as well as sector-specific and other civil society associations such as the "Business Roundtable,"[22] who are engaged in forging new corporate governance standards. Based on this evidence, we contend that corporate governance can no longer be described only against the background of a nation-state-based political economy and its system of judicial and legislative lawmaking. Corporate governance, by contrast, illustrates a high degree of regulatory differentiation that is displayed across a range of different law-creating actors and institutions and manifests itself across a range of regulatory instruments from statutes to court decisions, recommendations to best practice guidelines, and codes of conduct. Just as these institutions include public and private actors, as well as domestic and international actors, the type of norms that these actors generate encompasses different degrees of "hard" and "soft" law, which are generated through a variety of different lawmaking processes.

From this sociological perspective, these emerging constellations of actors, norms, and processes represent what can most adequately be called "transnational legal pluralism," which we place at the heart of our political economy analysis of what corporate governance is today and in whose hands and in which places it is being shaped.[23] The legal pluralist concept of transnational corporate governance describes and captures the field's hybrid, mixed, and "in-between" nature, but avoids the risk of overstatement in terms of either characterizing these arrangements as non-legal or giving them the misleading label of "global law." As for the former, the transnational legal pluralism of corporate governance is constituted by an overlapping and co-existence of hard and soft, formal and informal, legal arrangements rather than by a neat choice between them. It is therefore more accurate to refer to transnational regulatory arrangements as those that are created by actors that cut across jurisdictional boundaries but also include a mix of public and private institutions than to associate them with a

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[22] BUSINESS ROUNDTABLE, https://www.businessroundtable.org/ [https://perma.cc/HE4T-ZBX4].

[23] *See infra* Parts V, VI.

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"global law" forum and a complementing global institutional infrastructure without explaining more specifically where this infrastructure is located, how it is created, and, furthermore, how it enforces global law.

This evolution of transnational corporate governance arrangements prompts, in our view, the need to rethink the correlation between law creation and political economy. This has two important components. On the one hand, our interest in scrutinizing law's relationship to the political economy to which it contributes and belongs echoes similar recent calls among critical legal scholars to interrogate the role of law in a political economy,[24] which is marked by high degrees of legal, socio-economic, racial, and gender inequality. This prompts a detailed analysis of how law contributes to the perpetuation of these inequalities.[25] We argue that corporate governance is not merely concerned with the regulation of investor-management relations. Rather, it functions, in reality, as a much-contested regulatory forum in which the role of the corporation in society and towards its various stakeholders is scrutinized and negotiated. A political economy analysis of corporate governance can thus help to unpack the separation of the firm as an economic actor, as part of "the market," and of corporate law as belonging to the legal and regulatory system when we ask how corporate law shapes and facilitates and is in turn shaped by the business corporation as it performs its different societal functions. By treating the corporation not as an abstract economic

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[24] David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 8 (2014) ("The questions that neoliberalism addresses at the deepest level, then, are not How much market?, or How much governance?, but Which interests will enjoy protection, whether as property rights, constitutional immunities, or objects of special regulatory solicitude, and which others will be left vulnerable or neglected? Unavoidably, these are contests over the distribution of economic claims and privileges *and even of market discipline itself*.").

[25] *See, e.g.*, KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (investigating the effects on racial inequality by the 1960s federal housing initiatives to promote single-family ownership in Black communities); Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 188-95 (2015) (showing how the facilitation of black homeownership through bank loans and federal regulation resulted in deepened neighborhood segregation and racial discrimination). For an analysis of attempts by white individuals to derive commercial value from including black people in their employee or customer base, see generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

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actor, but in the concrete context of changing societal expectations towards it, the reciprocal effects between law and the corporation become more clearly recognizable.[26] Corporate governance can again be seen in relation to a larger, encompassing debate around the corporation's place in society,[27] and its corresponding social responsibilities.[28]

The analysis in Parts V and VI of this Article aims at recognizing the degree to which the actual space of corporate governance regulation has been expanding beyond the institutional and jurisdictional boundaries of the state. Institutionally, corporate governance is cared for today not just by ministries, parliaments, and courts, but by a public/private assemblage of governmental departments, expert committees, and working groups, as well as stock exchanges, banks, institutional investors, and companies' legal departments.[29] Meanwhile, geographically, the representation of political economy as an integrated system of political and legal governance grounded in the nation-state, which still provided the

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[26] *See, e.g.*, Dana L. Brown, Antje Vetterlein & Anne Roemer-Mahler, *Theorizing Transnational Corporations as Social Actors: An Analysis of Corporate Motivations*, BUS. & POLS., Jan. 2010, at 1 (investigating corporate decisions to commit to social and environmental goals in response to changing societal expectations).

[27] *See generally* ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION (1954) (providing a landmark account of the political significance of large American corporations and their influence on American society).

[28] *See generally* Ruth V. Aguilera, Cynthia A. Williams, John M. Conley & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE & SOC. RESP. 147 (2006) (highlighting the different national approaches to improve corporate law to make it more responsive to social concerns).

[29] *See, e.g.*, Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI* Principles of Corporate Governance, 61 GEO. WASH. L. REV. 871, 873-83 (1992) (mapping the different public and private interest group interventions in the creation of the American Law Institute and the ongoing reform of the ALI Principles); CARY COGLIANESE, THOMAS J. HEALEY, ELIZABETH K. KEATING & MICHAEL L. MICHAEL, THE ROLE OF GOVERNMENT IN CORPORATE GOVERNANCE 6-8 (2004), https://www.innovations.harvard.edu/sites/default/files/2610009.pdf [https://perma.cc/SDB8-XECB] (debating the tensions between "regulation" by government and "self-regulation" by market actors in the area of corporate governance standard setting); Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007) (analyzing Wal-Mart's self-regulatory activities across a variety of issues pertaining to workplace safety, employee relations, and company policy).

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basis for "international political economy,"[30] (IPE) has today given way to shifting transnational assemblages of regulatory regimes that, because they are made up of both public and private, and domestic and international, actors, do not neatly fit into the traditional political economy mold.[31] These new constellations give rise to what we argue should be considered a multiplication and proliferation of transnational political economies of governance. This recognition of a *transnationalization* of political economy is not new, nor is our interest in the multilevel order of different types of regulators distinct.[32] In arguing for the need to embrace the hybrid transnational nature of governance today, we both build on and extend the emerging work in political science, international relations, and critical international political economy. But, by shifting our focus onto corporate governance specifically, we contribute an important area of analysis, especially as, so often, corporate governance is reduced to a site of conflict between shareholders and stakeholders. Our transnational political economy analysis shows that, in reality, corporate governance is a much more complex arena of competing concerns regarding the protection of

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[30] *See* Geoffrey R. D. Underhill, *State, Market, and Global Political Economy: Genealogy of an (Inter-?) Discipline*, 76 INT'L. AFFS. 805 *passim* (2000) (tracing how the newly emerging discipline of "international political economy" resulted in a context of globalizing economic relations and the perceived need of an analytical toolkit to move beyond nation-state grounded political economy understandings in order to study the international interactions between states).

[31] *See* Jean-Christophe Graz, *Hybrids and Regulation in the Global Political Economy*, 10 COMPETITION & CHANGE 230, 231 (2006) ("The role of non-state actors is a key issue; they cooperate across borders to establish rules and standards widely accepted as legitimate by agents not involved in their definition. Despite a fast growing body of scholarship on non-state actors in the global context, there is no clear definition of the relationship between those defining, implementing, recognising and monitoring these rules and those complying with them – global firms, capital markets, states, various non-state actors and, more generally, citizens.").

[32] *See* Jarrod Wiener, *The "Transnational" Political Economy: A Framework for Analysis*, LEX MERCATORIA 1-3 (1996), https://www.jus.uio.no/lm/the.transnational.political.economy.a.framework.for .analysis.jarrod.wiener.ukc/portrait.pdf [https://perma.cc/F2MP-TR5H] (introducing the concept of transnational political economy in response to a surge in "globalisation" studies still too much focused on the role of the state); *see also* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003) (arguing that a powerful transnational corporate elite is able to set their rules of engagement without effective control or intervention by the government).

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different interests in highly volatile economic contexts. From our perspective, then, corporate governance is embedded in a larger framework of critical analysis with regard to the complex political economies that, today, make up corporate governance *regulation*. In that vein, we challenge the prevailing idea of neatly distinguishing between state-made/hard/binding law and non-state/soft/non-binding law, given how transnational corporate governance is characterized by an interpenetration and co-existence of these different types and forms of norms. Corporate governance allows us to scrutinize contemporary market governance arrangements as a political project and, from a historical and sociological perspective, opens up to an investigation of the differently emerging types of norms and processes without trying to qualify these as strictly "public" or "private," or by drawing a line between "hard" and "soft" law.

II. THE ARGUMENT

In order to unpack the significance of the *transnationalization* of corporate governance as a transnational field of regulatory norm-production, policymaking, and political contestation, we advance three arguments: a historical one, a sociological one, and a political economy one. Historically, we argue that the evolution of corporate governance norms must be seen against the background of ongoing and continuing transformations in the relationships between states and markets in the provision of a growing range of formerly "public" services and functions.[33] As the societal role of corporations expands beyond an essentially financial role, corporate governance norm production mirrors the diversification of regulatory concerns associated with the firm's place in society.

From a sociological perspective, we argue that the *transnationalization* of present-day corporate governance regimes constitutes not so much a categorically different state of corporate law in an age of "globalization," but a continuation of corporate law's inherent legal pluralism in terms of coexisting public and private, hard and soft, and formal and informal norms.[34] The legal

[33] *See infra* Part III.
[34] *See infra* Part IV.

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pluralist concept of transnational corporate governance describes and captures the field's hybrid, mixed, and "in-between" nature but avoids the risk of overstatement in terms of either characterizing these arrangements as non-legal or giving them the misleading label of "global law." Our analysis draws attention to the pre-existing *instability* and *unsettledness* of regulatory norms in areas such as corporate law, securities regulation, labor law, or social protection. Legal sociologists have long been emphasizing the prevailing legal pluralist nature of regulatory governance in fields where public and private, formal and informal, "hard" and "soft" norms not only exist side by side, but, in fact, complement one another by addressing different aspects of social or institutional behavior. Today's diversified and cross-border nature, transnational constitution of corporate governance norm-production is not an anomaly of law-making, but a further step in the evolution of legal norms in politically sensitive and continuously changing contexts. By reviewing the development of corporate governance regimes as a particular form of regulatory governance "in context," we argue that the transnational constellations of actors, norms, and processes that constitute today's corporate governance regulation produce new and overlapping political economies. No longer confined to the regulatory prerogative of a domestic lawmaker or regulator but also not (yet) having been reclaimed by an international financial regulator with global governance authority, corporate governance rules, today, appear, instead, as being negotiated, shaped, and disseminated, as well as "hardened," through the interplay of major market players and supranational institutions, in relation to whom states have increasingly assumed the role of mediators or mere facilitators. In our analysis, we show how transnational regulatory arrangements are created by both governmental and non-governmental institutions that act across jurisdictional boundaries. As we focus on the organizations and actors engaged in contesting, creating, and disseminating corporate governance norms today, we reject the idea of an abstract notion of "global law" and of a complementing, global institutional infrastructure. We apply a socio-legal lens to show, more specifically, where this infrastructure is located and how it creates and enforces these newly emerging forms of transnational corporate governance law.

Finally, our political economy argument posits that corporate governance is not merely concerned with the regulation of investor-

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management relations but functions, in reality, as a much-contested regulatory forum in which the role of the corporation in society and towards its various stakeholders is being scrutinized and negotiated.[35] A political economy analysis of corporate governance can thus help to unpack the separation of the firm as an economic actor, as part of "the market," and of corporate law as belonging to the legal and regulatory system when we ask how corporate law both shapes and facilities and is in turn shaped by the business corporation as it performs its different societal functions. Building on the insights of Varieties of Capitalism ("VoC") scholars who distinguish between so-called "coordinated" and "liberal" market economies and on the work in comparative financial regulation,[36] we argue that today's proliferation of public, private, and hybrid processes of corporate governance norm production requires an even more differentiated view on the relationship between states and local, regional, and global markets. It is ultimately, from a pluralized political economy perspective on corporate law that we propose a reconceptualization of corporate law and, in particular, of corporate governance as a transnational field, which can no longer adequately be depicted through the categories that previously applied to corporate law as a domestic law and policy concern.

Our historical, sociological, and political economy approach to the study of the *transnationalization* of corporate governance feeds into a political analysis of *who*, actually, calls the shots in this transnationally fragmented regulatory space. As we map the interactions between public and private actors, it becomes more evident how they operate in part in a pluralistic world, which is not exclusively centered in national political and legal orders but continues to push and exist and proliferate beyond them. At the same time, national corporate governance regulation is being transformed on the inside, above all, by the forces of global financial

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35 *See infra* Parts V and VI.

36 *See, e.g.*, Colin Mayer, *Financial Systems and Corporate Governance: A Review of the International Evidence*, 154 J. INST. & THEORETICAL ECON. 144 (1998) (providing an overview of a surge in the 1990s of scholarly analysis of the correlation between financial regulation and corporate governance in countries including the United States, the United Kingdom, continental Europe, as well as Asia).

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markets.[37] From this perspective, the proposal of a concept of *transnational corporate governance* has two key consequences. On the one hand, it challenges the "end of history" claims regarding the inevitability of a worldwide convergence of corporate governance systems towards a singularly triumphant norm of shareholder value maximization,[38] while, on the other, it pushes back against the idea of regulatory competition among different governments in pursuit of the most attractive and effective corporate governance system. With its origin in the United States' system of competing regulatory charter states,[39] the idea of regulatory competition gained renewed prominence during the years of heated debate over the proposed European Takeover Directive, which pitted competing views of different EU member states against one another.[40] In contrast, our focus on the transnational legal pluralism of corporate governance today goes beyond an analysis that largely remains focused on state actors as we direct attention to the much messier landscape of public and private "norm entrepreneurs" who are acting nationally and transnationally. We question the explanatory value of assertions regarding convergence and divergence as well as regulatory competition, because both are still too moored in a regulatory system presumably governed by state actors. In turn, we want to draw attention to the particular nature and dimension of the political challenges that arise from the distinctly *transnational*, *hybrid*

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[37] *See* Mary O'Sullivan, *The Political Economy of Comparative Corporate Governance*, 10 REV. INT'L POL. ECON. 23 *passim* (2003) (showing how even countries such as Germany and France have been adapting their national corporate governance systems in the hope of making their companies gain access to global capital investments).

[38] Hansmann & Kraakman, *supra* note 4, at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

[39] *See generally* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (discussing states use of regulation to compete for incorporation of companies); *see also* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) ("[S]tates compete to provide firms with . . . corporate charters, in order to obtain franchise tax revenues.").

[40] Directive 2004/25/EC, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142/12). For a discussion of the different position in the debate, see John Armour, *Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition* (European Corp. Governance Inst., Working Paper No. 54, 2005), https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id860444.pdf [https://perma.cc/6XTE-LAC2].

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formation processes of corporate governance in globalized financial markets, characterized by the interplay of governments, institutional investors, but also unions, labor, and community as well as environmental activists. This makes our proposal a crucial political intervention as well. By showing how corporate governance norms are actually *generated*, *administered,* and *implemented* through a complex and transnationally spatialized interaction between financial, state, and civil society actors, we challenge the narrative of an "enabling" corporate law according to which corporate law almost miraculously emerges through market innovation and a more or less hands-off attitude on the side of courts and governments.[41] By asking more specifically which elements in corporate law and corporate governance get regulated and by whom, we begin to see transnational corporate governance as a space for political contestation, intervention, and reform. Our focus on such a space as a *site of contestation and engagement* continues a critical engagement with long-standing ideas and assumptions regarding the separation of state and society and distinctions between the political and non-political, rather than simply refuting them. The significance of a separation of state and society and its accompanying distinction between a "public" and a "private" sphere, associated with which are respective denotations as political and non-political, for corporate law can hardly be overstated. With the corporation constituting the linchpin, backbone, and engine of the economy, it is a key battlefield in the negotiation of social power, state governance and an all-consuming economic rationality.

In our conceptualization of corporate governance as an instantiation of transnational legal pluralism, we build on important work, which connects corporate law theory with a focus on both national and transnational political economy contexts.[42]

[41] *See* Elvin R. Latty, *Why Are Business Corporation Laws Largely "Enabling"?*, 50 CORNELL L.Q. 599, 601-02 (1965) (setting out four features of "enabling" corporate law); *see also* John C. Coffee Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1623-24 (1989) (challenging the idea of unlimited contractual "innovation").

[42] *See, e.g.*, Mark J. Roe & Massimiliano Vatiero, *Corporate Governance and Its Political Economy*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 56 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003) (providing an important comparative law analysis in corporate governance regulation).

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While our approach importantly draws on VoC analysis of how historically evolving political economies form the key context and background for the regulation of economic activities—of which corporate governance is a part—we are going beyond the institutional analysis provided by the VoC scholars in order to shed more light on the emergence of private and self-regulatory regimes in corporate governance against the background of the state transformation that marks the fate of modern nation states in the global era.[43]

A project of transnational corporate governance that takes its cues from history, sociology, and political economy is, furthermore, outright political, because it resists the lure of simplifying, ideological oppositional dualisms. As has already become clear, a key dualism in corporate governance debates has been, and continues to be, that between shareholders and stakeholders. We are critical of how well the juxtaposition of these two, allegedly distinct, groups can actually explain the politics of the modern business corporation. To us, the distinction between a shareholder and a stakeholder approach to corporate governance eludes the actual diversity of interests in, and expectations of, the corporation. While its binary simplicity lends itself to persuasive rhetoric, as in the form of the already mentioned "end of history"[44] claims, or the recurring idea of a "global market for corporate law,"[45] the juxtaposition effectively invisibilizes the scope of power that companies hold over communities and very differently situated and positioned interest holders. It, furthermore, not only avoids a closer scrutiny of the competing forces that lay claim to the corporation and its role in society, but it also keeps out of view the complex political economy changes that impact the socio-economic and political real-world environment in which corporations exist.

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[43] *See* Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 230 (2012) (explaining how domestic state transformation must be studied in relation to the changes in global markets and global political developments).

[44] Hansmann & Kraakman, *supra* note 4 (arguing that shareholder value maximization has emerged as the globally triumphant organizing principle for the modern stock corporation).

[45] ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 1 (2009) (arguing that parties, including individuals and corporations, can "shop for the law").

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While the resistance against the shareholder/stakeholder dualism is a crucial element in our substantive critique, it is also directly connected to our emphasis on the *transnationalization* of corporate governance. By that we mean that a closer analysis of the transnational actors, norms, and processes in corporate governance renders visible the complex constituencies of corporations today and can thus help to recognize a much more differentiated variety of forces that impact the corporation and how it is governed. A transnational legal pluralist approach to corporate governance then engages, but is not limited to, the domestic space as a still important forum for corporate governance creation.[46] It resists drawing categorical lines between the national, the supranational, and the international spheres of norm creation and instead acknowledges the specific processes of norm creation that occur among and through public and private actors within, as well as across, those boundaries.[47] As such, it resists the normative consequentiality of the dominant narrative, which emphasizes the restrained role that governments should play in "regulating" corporate behavior *per se* while embracing the idea that restraint will eventually result in a perfect regulatory regime for corporations on a global scale. The blindspot of this narrative remains the actually much wider political debate about the role that corporations play in modern societies. This debate touches on the immense impact of corporations on employment, social security, the environment, and, increasingly, privacy,[48] and that oftentimes seems to be going on in considerable distance from the specialized corporate law circles.[49] But,

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[46] O'Sullivan, *supra* note 37, at 25 ("To emphasize the importance of economic forces is not to say that the political dimensions of the transformation of systems of corporate governance are unimportant.").

[47] *See* Julia Black & David Rouch, Special Feature, *The Development of the Global Markets as Rule- Makers: Engagement and Legitimacy*, 2 L. & FIN. MKTS. REV. 218 *passim* (2008) (considering the role of markets in the normative rule-making process).

[48] For an excellent and comprehensive analysis of the challenges posed by the digital technology and the quest by powerful corporations to predict and control behavioral patterns, see generally SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019).

[49] *See, e.g.*, David Vogel, *Political Science and the Study of Corporate Power: A Dissent from the New Conventional Wisdom*, 17 BRIT. J. POL. SCI. 385 (1987); Barbara Fryzel, *Governance of Corporate Power Networks*, FIN. & COMMON GOOD, 2005, at 28, 28; Geert de Neve, *Power, Inequality and Corporate Social Responsibility: The Politics of Ethical Compliance in the South Indian Garment Industry*, ECON. & POL. WKLY., May 30,

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financialization has not only transformed the corporation and corporate law.[50] At a time when consumption patterns have become insulated from climatical or geographical facilities and where global exchange, extraction, and sale of data fuels 24/7 availability, informed and willing consumers and corporations hold significant power. Meanwhile, the regulatory theories that focus on corporations and their internal and external relations are lagging behind.

From this follows our central argument, which concerns the emergence of a different, pluralistic political economy of transnational corporate governance. In light of a legal pluralist understanding of corporate governance norm production today, the related institutions of norm production, adjudication, and enforcement are taking on new forms. Legal institutions, like law itself, do not exist in the abstract and ephemeral, but in concrete social contexts. It is from them that they receive affirmation or rejection, impulses for change or continuity. Legal doctrine, in corporate law and beyond, is a child of time, and as such must be understood in the context in which it is relied upon. As we show in our analysis in Part V, this context for corporate law production has been undergoing significant changes with privatization and globalization driving a fundamental reconfiguration of traditional architectures of public lawmaking and administration. As corporate governance codes, codes of conduct, and other best practice standards become more and more woven into the regulatory/self-regulatory fabric of what constitutes corporate law around the world today, legal doctrine is quickly adapting to these new formations. As codes formulate new modes of accountability, transparency, and compliance, doctrinal assessments of corporate and directors' liability or a company's and its investors' reporting

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2009, at 63, 63; George Monbiot, *Taming Corporate Power: The Key Political Issue of our Age,* GUARDIAN (Dec. 8, 2014), https://www.theguardian.com/commentisfree/2014/dec/08/taming-corporate-power-key-political-issue-alternative [https://perma.cc/LAS2-5MAT]; Nicholas Connolly & Manette Kaisershot, *Corporate Power and Human Rights*, 19 INT'L J. HUM. RTS. 663 (2015).

[50] *See* Laura Horn, *The Financialization of the Corporation*, *in* THE CORPORATION: A CRITICAL, MULTI-DISCIPLINARY HANDBOOK 281, 281 (Grietje Baars & André Spicer eds., 2017); *see also* Costas Lapavitsas, *The Financialization of Capitalism: 'Profiting Without Producing'*, 17 CITY 792 (2013).

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obligations change.[51] These adaptations are neither born out of essentialist assertions of legal causality and responsibility nor do they neatly adhere to law and economics principles underlying the "nature of the firm": instead, the new legal doctrines of corporate governance incorporate these continuously evolving standards but evaluate, assess and shape them in light of the changing sociological constellations that constitute the regulatory universe of corporate governance today.

In order to further explicate the particular dynamics that characterize the transnational emergence of corporate governance norms today, we discuss, in Part VII, the evolving law of shareholder stewardship as a case-in-point. We trace the shareholder stewardship movement from its beginnings with internalized self-regulatory processes, which translated into the "soft" UK Stewardship Code and other similar codes across various countries, forward to the time of the amended EU Shareholder Rights Directive (SRD II).[52] We posit that shareholder stewardship, even though it started as a case of enrolling institutional shareholders in corporate governance regulation via soft, market-invoking law based on conventional law and economics assumptions, became increasingly hardened and brought a public coloration into shareholder engagement and investment management integrating sustainability concerns. At the same time, the adoption of stewardship codes across nineteen countries, the SRD II, and the development of supporting stewardship principles and codes of conduct by regional and international investor associations show that the national, regional, and international policy space is currently much more perplexed.

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[51] *See* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 734 (2019) ("Financial analysts increasingly consider environmental, social, and governance (ESG) factors in rating companies . . . . The complication for a fiduciary is that these factors may also reflect benefits or costs beyond a company's financial bottom line." (footnotes omitted)); *see also* Frederick Alexander, *Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission*, J. APPLIED CORP. FIN., Spring 2016, at 66; Frederick H. Alexander, *The Capital Markets and Benefit Corporations*, AM. BAR ASS'N, (July 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/05_alexander/ [https://perma.cc/B4VE-L75R].

[52] Directive 2017/828, of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as Regards the Encouragement of Long-Term Shareholder Engagement, 2017 O.J. (L 132/1) [hereinafter SRD II].

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Our analysis intervenes at a particular intersection. On one side lies the political challenge to the contemporary corporate governance model, which remains tied to a triple fallacy. The first is a vain competition between shareholder-versus-stakeholder-oriented concepts of the firm, the second a polarization between monolithic national models of corporate governance, and the third a binary distinction between state-made/hard/binding law and non-state/soft/non-binding law. On the other side of this intersection we find, in an institutional sense, the increasing proliferation of non-state made corporate governance rules generated by private actors, including institutional investors, corporations, and specialized expert committees. We argue that the resulting pluralization of corporate governance political economies today can only be scrutinized through a more differentiated, analytical lens that focuses on the emerging actors, norms, and processes that constitute the intersecting and overlapping transnational regimes of corporate governance today. This shift in perspective has important repercussions for the forward-going engagement with corporate governance. Instead of being a battle ground for what is often presented as being two irreconcilable sets of interests—shareholders and stakeholders—a socio-legal analysis of how corporate governance norms are created and disseminated, the complex regulatory, transnational regime of corporate governance production becomes a methodological laboratory in itself. As such, it allows us to situate and contextualize corporate governance as part of a critical inquiry into emerging forms of authority and legitimacy of market regulation. By approaching corporate governance *both* as a transnational regulatory landscape that brings together public and private actors in a struggle over regulatory authority *and* as a normative field of political conflict and contestation, an engagement with corporate governance becomes an opportunity to connect sector-specific debates with larger questions of democratic market governance. In trying to better understand what *is* and who *drives* corporate governance rules today, we scrutinize competing assertions of authority and legitimate authorship and claims of accountability and impact.

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III. THE TRANSFORMATION OF CORPORATE GOVERNANCE: A HISTORICAL PERSPECTIVE

It is our contention that an analysis of transnational corporate governance must pay close attention to the changes that have been underway within advanced nation-states since the 1970s. During that time, the world saw the end of the Bretton-Woods system of currency exchange rates pegged to the U.S. dollar and to the price of gold and a rising global competitiveness among states to provide attractive investment destinations while, at the same time, achieve a reduction in public expenditures.[53] While this background is crucial for an understanding of the corporation and its law, we argue that there must be more emphasis placed on the concrete, in-context analysis of corporations and of the legal regimes that address and empower them. This focus on context and, in particular, on the historically evolved environment of the nation state where a corporation is headquartered is a prerequisite for a more adequate appreciation of the different forces that push and pull on the corporation as an object of regulation. It is also an important aspect of present-day corporate governance analysis. We think that even where such analysis takes into account the historical and institutional variations across different countries and their legal cultures with regard to how labor and corporate governance systems are complementing each other as a result of normative,

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> The collapse of the Bretton Woods monetary and financial system was followed by loosened domestic regulations on finance and financial institutions, giving rise to a wave of financial innovations, especially in the U.S. and U.K., as both countries aspired to nurture their financial sectors. The introduction of new market players, such as pension and mutual funds, expanded, deepened, and increased the attractive power of financial markets, so that (for example) borrowing money by selling bonds began to replace traditional bank loans. In order to attract investment and/or loans, or, somewhat later on, to satisfy conditions imposed by the International Monetary Fund (IMF), now repurposed as an instrument of neoliberal "structural adjustment", [sic] developed and developing countries alike had to liberalize their own financial markets.

Glenn Fieldman, *Finance Unchained: The Political Economy of Unsustainability*, SUSTAINABILITY, Mar. 24, 2020, at 1, 2 (footnotes omitted).

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political choices,[54] we must still develop a sharper analytical lens for the transnational variety of public and private, and domestic and international actors that are now shaping corporate governance norms.[55]

This need follows from the ongoing diversification of actors, norms, and processes in the area of corporate governance, a sector-specific development that mirrors analogous trends in other regulatory areas today.[56] The institutional and normative variety of corporate governance today suggests that it does not simply represent a regulatory object or the outcome of a political decision *for* or *against* something. Instead, corporate governance today is a veritable arena for competing visions of market regulation, and as such, the notions of "market" and "regulation" are both under political scrutiny rather than merely being two elements in a cause-effect equation. Markets are, by default, integrative, expansive, and potentially infinite,[57] making the question about law's relationship

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54 *See* Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?* 41 L. & SOC. REV. 865, 871 (2007) ("[T]he timing of industrialization, the structure of firms and of labor unions, the degree of liquidity of capital markets, and more generally the role of the state in regulating economic life, are among the many factors which might be expected to influence the evolution of distinctive legal 'varieties of capitalism.'").

55 *See* Tim Bartley, *Transnational Corporations and Global Governance*, 44 ANN. REV. SOCIO. 145, 155-57 (2018) (mapping transnational corporations' self-regulation in various areas where governmental regulation is absent); *see also* Peer Zumbansen, *Neither 'Public' Nor 'Private', 'National' Nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J.L. & SOC'Y 50 (2011) (highlighting different examples of the state's interaction with market actors in creating corporate governance norms).

56 *See, e.g.*, Lobel, *supra*, note 10; Robert Falkner, *Private Environmental Governance and International Relations: Exploring the Links*, GLOB. ENV'T POL., May 2003, at 72 (discussing the growing significance of corporate actors in devising environmental regulatory instruments); Doris Fuchs & Agni Kalfagianni, *The Causes and Consequences of Private Food Governance*, BUS. & POL., Oct 2010, at 1 *passim* (2010) (offering a critical assessment of the rise in importance and influence of private actors controlling the production and accessibility of food stuffs); John Biggins & Colin Scott, *Licensing the Gatekeeper? Public Pathways, Social Significance and the ISDA Credit Derivatives Determinations Committees*, 6 TRANSNAT'L. LEGAL THEORY 370 (2015) (mapping the interpenetration of public and private authority in licensing credit derivatives).

57 *See, e.g.*, Theodore Levitt, *The Globalization of Markets*, HARV. BUS. REV., May-June 1983, at 92, https://hbr.org/1983/05/the-globalization-of-markets [https://perma.cc/K3FQ-CRA7] ("[There is a] new commercial reality—the emergence of global markets for standardized consumer products on a previously

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to and *in* markets a complex challenge. Given the differences between particular markets and between various ways in which law is used to create obstacles, facilitate activities, or impose rules for product quality or information transparency,[58] terms such as "regulation" or "intervention" do not adequately describe this relationship, nor can they be expected to effectively capture the shortcomings of different regulatory forms.[59] While the differentiation of regulatory processes into "mandatory" or "voluntary" or "optional" mirrors the challenges of addressing historically embedded institutional differences while effectively responding to different companies' abilities to adapt to changing regulatory demands,[60] a more in-depth analysis of the transnational sociology of public and private regulatory governance is still outstanding. Corporate governance, in our view, offers a promising example of such an analysis, not least because of the wealth of research that continues to be done in this area. Corporate governance as a "field" of investigation, policymaking, and law reform, but also one of public contestation and critical political debate, cuts across the theory-practice divide and engages

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unimagined scale of magnitude. Corporations geared to this new reality benefit from enormous economies of scale in production, distribution, marketing, and management.").

[58] *See, e.g.*, Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201-03 (1999) (highlighting a variety of non-financial disclosures of a company's activities, places of operation, and impact); Aaron A. Dhir, *The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47, 57-60 (2009) (explaining the shift from direct intervention and regulation to models of "reflexive" governance in making companies create more transparency); Dan S. Dhaliwal, Oliver Zhen Li, Albert Tsang & Yong George Yang, *Voluntary Nonfinancial Disclosure and the Cost of Equity Capital: The Initiation of Corporate Social Responsibility Reporting*, ACCT. REV., Jan. 2011, at 59, 62-63 (arguing that firms pursue non-financial ("social") reporting in the hope of reducing the cost of attracting equity capital).

[59] *See* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 7 (2019) (listing the reasons why regulators continue to invest in transparency regulation despite known shortcomings).

[60] *See* Gerard Hertig & Joseph A. McCahery, *Optional Rather than Mandatory EU Company Law Framework and Specific Proposals* 1 (European Corp. Governance Inst., Working Paper No. 78, 2007), https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id958247.pdf [https://perma.cc/M6QR-XE3E] (proposing optional regulations which will benefit small and medium size enterprises and will allow for more flexibility).

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regulators, scholars, and civil society actors simultaneously. As these debates are no longer confined to national political economies, the strategies that are being discussed reach beyond the legal confines of "corporate law" in country A or country B. Instead, corporate governance becomes a transnational regulatory concern, highlighting the need to understand the historical, legal, and socio-cultural arguments, on which calls for different types of corporate governance regulation are being formulated.[61] With that, however, arises the need to better understand the historically evolved institutional varieties of corporate governance regulation that we have now come to witness in their adaptation to globalizing financial markets.[62]

This Article intervenes at a critical juncture. We think this juncture is constituted, on the one hand, by a revitalized and burgeoning debate around the social and political significance of the corporation in society and, on the other, by a continuing disconnect between concepts of corporate law associated with the nation-state and the sociological reality of transnational spaces in which the corporation actually operates. The background for this disconnect can be illuminated by contrasting the traditional political economy analysis of corporate law as grounded in the nation-state with a host of emerging sociological studies of transnational governance forms, of which we believe corporate governance is a powerful illustration. An effective intervention in this constellation, in our view, will depend on the degree to which we can show that the political economy of *national* corporate law should be made part of a larger political economy analysis of neoliberal state transformation since the late 1970s. It is since that time that the *private* business

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[61] One of the present authors has investigated this angle in the context of European Company Law Regulation. *See* Peer Zumbansen, *'New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism*, 15 EUR. L.J. 246, 271 (2009) (pointing to the insights from the Varieties of Capitalism analysis in employment, corporate and social welfare law in different EU member states regarding the "embeddedness of regulatory regimes in historically grown cultural, political and economic institutions").

[62] *See, e.g.*, Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (Peter A. Hall & David Soskice eds., 2001); Anthony Gould, Michael Barry & Adrian Wilkinson, *Varieties of Capitalism Revisited: Current Debates and Possible Directions*, 70 INDUS. RELS. 587 (2015) (analyzing both the influence and critique of Hall's and Soskice's *Varieties of Capitalism* approach).

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corporation has increasingly stepped into the shoes of the state in providing key public infrastructure support and delivery across a range of formerly or allegedly "public" services.[63] With the corporation's changing role as a societal actor, however, its legal status has become ever more ambiguous. While corporate law conceives of the corporation as a private entity that comes into being through the surprising, perhaps improbable, combination of contractual agreements between investors and managers[64] and its legal recognition as a "separate legal entity,"[65] we will still need to unpack this paradox as we simultaneously work towards a concept of corporate law that can fully and adequately capture the *reality* of the corporation as a powerful societal actor.[66]

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[63] *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816-17 (2000) ("Contemporary regulation might be best described as a regime of 'mixed administration' in which private actors and government share regulatory roles. In fact, many private actors participate in governance in ways that are rarely recognized by the public, acknowledged by politicians, or carefully analyzed by legal scholars. Private individuals, private firms, financial institutions, public interest organizations, domestic and international standard-setting bodies, professional associations, labor unions, business networks, advisory boards, expert panels, self-regulating organizations, and non-profit groups all help to perform many of the regulatory functions that, at least in legal theory, we assume agencies perform alone." (footnotes omitted)).

[64] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976) (describing the relationship between owners and managers as one of "pure agency").

[65] Murray A. Pickering, *The Company as a Separate Legal Entity*, 31 MOD. L. REV. 481, 481 (1968) ("Under English company law the company is a separate legal entity. Yet, although this is a fundamental concept, it has proved extremely intractable to define and to describe satisfactorily.").

[66] *See, e.g.*, Ronnie Cohen & Shannon O'Byrne, *"Can You Hear Me Now . . . Good!" Feminism(s), the Public/Private Divide, and* Citizens United v. FEC, 20 UCLA WOMEN'S L.J. 39, 40 (2013) ("[A]s feminists sought to challenge the public/private distinction by making the private more public, corporations (representing the hierarchical, male-dominated private sector that feminists were opposing) were also resisting the divide between public and private, but with a pernicious intent. Through lobbying, campaign contributions, sheer economic power, and most recently, by a largely unsolicited boost from the United States Supreme Court in *Citizens United v. FEC*, corporations have worked to privatize much of the public sphere—up to and including the electoral process in the United States."); *see also* I. MAURICE WORMSER, *Corporate Ills and Abuses, and Their Cures*, *in* FRANKENSTEIN, INCORPORATED 137-38 (1931) (highlighting the absence of law suited to address the actually existing disconnect between investors and managers).

IV. CORPORATE GOVERNANCE'S TRANSNATIONAL DNA: A SOCIOLOGICAL PERSPECTIVE

The search for such a law is as important today as it has ever been. Our intervention in this endeavor seeks to show how treating the corporation's legal status solely from within corporate law and its established doctrine is bound to fall short of developing a more comprehensive legal concept of the corporation. It is out of that concern that our analysis places the corporation in the context of a political economy analysis of state transformation, privatization, and globalization. These developments have led to a significant reconfiguration of the landscape in which corporations operate and in which different attempts at regulating corporate activity have been and are being made. Corporate law, then, for us, is part of a larger investigation into the relationship between law and the changing political economy in an age of state transformation. It is from that perspective that we focus our analysis on the connections between the growing disillusionment with the corporation as a seemingly untamable purveyor of power and the transnational fragmentation of regulatory governance. As a result, we are concerned with the challenges for an adequate political governance regime vis-à-vis the corporation. In other words, it is our goal to illustrate the continuities between the transformation of national political economies in the names of marketization, privatization, and globalization, on the one hand, and the emergence of hybrid, public-private regulatory regimes that appear to defy traditional understandings of democratic legitimacy, on the other. Such a project requires that we pay close attention to the "internal" corporate law debates and, equally, look for evidence of *how* the corporation is being *experienced* and *contested* outside that narrow purview. It is here where we find intriguing revelations of governance innovation that mark both corporate law and regulation on a much larger scale. We are bound to learn much about the cause-effect relationship that underlies traditional ideas of regulation and that remains confined to an analysis of how a certain outcome can be brought about by the intervention of A upon B. Contemporary regulatory governance, however, reveals itself as a complex process which involves context-dependent combinations of planning and spontaneity, flexible shifting between strategy and

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improvisation, and the decentering of a designated "author" of a decision by unstable coalitions and compromises among different stakeholders with interests in the result—or, its avoidance.[67]

Seen in this light, corporate governance seems to be about more than how companies are run and managed. Corporations, in fact, are both the target for reform proposals and interventions, while also being the co-producers and co-authors of their own regulatory framework. Corporate governance emerges from an institutional and procedural perspective as a continuously evolving assemblage of norms, which, due to their hybrid nature between obligation and recommendation, public order, and private standard, sit uncomfortably with traditional notions of law as statute, court order, or treaty. Today's corporate governance norms display a significantly broad regulatory focus, ranging from matters such as board composition in terms of gender or race and risk oversight to executive pay, shareholder activism, and non-financial reporting. While this expansion of corporate governance is, at least in part, also a response to changing societal attitudes towards today's corporate business enterprise and its enormous socioeconomic power over its various stakeholders, the legal nature of "social," "green," or "sustainable" corporate norm-making initiatives is by no means settled and remains under-explored.[68] Furthermore, the more recently emerging policy push for increased gender and racial

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[67] *See* Matthew Spitzer & Eric Talley, *On Experimentation and Real Options in Financial Regulation*, 43 J. LEGAL STUD. S121, S123 (2014) ("[A]n issue that continually plagues empirical corporate governance research is the challenge of using observational studies to demonstrate much of anything, much less the likely effects of novel reforms.").

[68] *See* Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 78 (2017) ("Of all the social and economic challenges to the current state of Delaware corporate law, perhaps the most potentially cataclysmic is the shift in attitudes about the very purpose of corporations."); *see also* Martin Lipton, *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/ [https://perma.cc/D7UE-SGMB] ("The effects of short-termism are damaging to the economy as a whole. . . . To provide greater macroeconomic and financial stability and to raise productivity, it is essential that markets work in the public interest and for the long term rather than focusing only on short-term returns.").

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representation on corporate boards[69] and pay transparency,[70] as well as for wider societal engagement with the "purpose" of the corporation,[71] has to be seen against the background of long-standing critiques of mainstream corporate law's blindness to different structural forms of inequality and its alleged objective neutrality.[72]

How does today's corporate governance landscape and its distinctly transnational constitution compare to the prevailing understanding of corporate law as a predominantly domestic concern, while only rarely an international or global concern? While this is not the place for an exhaustive account of the origins of the modern corporation and contemporary corporate governance,[73]

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[69] *See generally* AARON A. DHIR, TOWARDS A RACE AND GENDER-CONSCIOUS CONCEPTION OF THE FIRM: CANADIAN CORPORATE GOVERNANCE, LAW AND DIVERSITY 2-5 (Peer Zumbansen, John W. Cioffi & Lindsay Krauss eds., 2009), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1116&context=clpe [https://perma.cc/9Z4L-AK5H] (highlighting the degree of underrepresentation of females and racial minorities on corporate boards).

[70] *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004) (analyzing the wide degree of discretion for managers to sustain high levels of compensation while preventing improvement regarding transparency); Sébastien Point & Shaun Tyson, *Top Pay Transparency in Europe: Codes, Convergences, and Clichés*, 17 INT'L J. HUM. RES. MGMT. 812 (2006) (providing a critical overview of emerging regulation and corporate self-regulation regarding management compensation transparency).

[71] *See Statement on the Purpose of a Corporation*, *Our Commitment*, BUS. ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/5UQZ-WDXU]; *see also* Dionysia Katelouzou & Peer Zumbansen, *The Transnationalization of Corporate Governance: Law, Institutional Arrangements & Corporate Power*, 37 ARIZ. J. INT'L & COMP. L. (forthcoming 2020), https://ssrn.com/abstract=3601379 [https://perma.cc/L5AA-EFKE] (arguing that the current debate around "corporate purpose" must be understood in light of both historical perspective and the changing societal functions that corporations assume today).

[72] *See, e.g.*, Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 467-68 (2002) (asserting that corporate decisions based on "shareholder wealth maximization" and "efficiency" often remain blind to their impact on perpetuating gender inequalities).

[73] For a historical account of the modern corporation, see, for example, Oscar Gelderblom, Abe de Jong & Joost Jonker, *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623*, 73 J. ECON. HIST. 1050 (2013); Ron Harris, *Law, Finance, and the First Corporations*, *in* GLOBAL PERSPECTIVES ON THE RULE OF LAW, 145 (James J. Heckman, Robert L. Nelson & Lee Cabatingan eds., 2010); Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West,

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there are two stories to follow here, and the distinction between them will inform our ensuing analysis.

Within the discipline—the legal field of corporate law—the theme of corporate governance emerged as a field of study in the mid-1970s, and it was throughout the 20th century that corporate governance scholarship and debate have stayed relatively close to the general understanding of the corporation as, above all, an investment vehicle. As a result, discussions among corporate law scholars and practitioners mainly focused on a handful of key themes and issues, including the operation, duties, and composition of the board of directors,[74] as well as on the tension between managerial authority and shareholder rights,[75] on executive remuneration, and, to some degree, on the differences among national systems of corporate governance.[76] The focus here was predominantly on the functional role of corporate law.[77]

The Evolution of Corporate Law: A Cross-Country Comparison, 23 U. PA. J. INT'L ECON. L. 791 (2002).

[74] *See, e.g.*, George W. Dent, Jr., *The Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care*, 61 B.U. L. REV. 623 (1981); Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89 (2004).

[75] *See, e.g.*, Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008); Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45 (2002).

[76] *See*, *e.g.*, REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017) (putting forth a discussion of comparative corporate law that is now considered a classic). For an overview of the differences between the United States and the UK specifically, see CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013). For a discussion on the recent change in the corporate governance debate in the United States see *Our Commitment*, BUS. ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/5UQZ-WDXU]. For one of the most astute and perceptive comparative accounts on comparative corporate governance see John W. Cioffi, *State of the Art: A Review Essay* on Comparative Corporate Governance: The State of the Art and Emerging Research, 48 AM. J. COMP. L. 501 (2000) (offering an in-depth overview of different countries' approaches to corporate governance regulation in the context of financial globalization).

[77] Two classic accounts are FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (putting forth an economic explanation of corporate law building on the law and economics of contracts), and KRAAKMAN ET AL., *supra* note 76, at 2 (analyzing "the role of corporate law in minimizing coordination and agency problems" to make "the corporate form practicable").

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Correspondingly, seeing the law's role with regard to the corporation as "enabling"[78] rather than mandatory, corporate governance norms were measured primarily with regard to their ability to facilitate the attraction of capital.[79] Mirroring the rise in the importance of the idea of shareholder wealth maximization as a firm's definitive performance measure, corporate governance rules have been at the center of a continuing debate over how to best organize and run a company.

Meanwhile, there has been for a long time a parallel corporate governance discourse, which is concerned with the socio-economic context of the actual firm. This discourse is grounded in a political economy analysis of the historically evolving institutional and normative frameworks that constitute the firm's regulatory environment, implicating a much expanded and contextual perspective on the corporation and its manifold stakeholders.[80] A political economy approach to the corporation breaks free from the confines of explaining corporate governance by focusing only on the "separation of ownership and control" which remains the standard focus of corporate law.[81] A political economy analysis of corporate governance sees corporate law rules in relation to the laws that govern industrial relations, social protection, and employment—but also the environment.[82] In that light, scholars of history, economics,

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[78] For an insightful discussion see John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1626 (1989) (arguing that "in an economic environment increasingly dominated by sophisticated institutional investors," deviations from mandatory corporate law standards should anticipate and respond to judicial competence in finding an intermediate position between innovation and protection from opportunism). *See also* Elvin R. Latty, *Why Are Business Corporation Laws Largely "Enabling"?*, 50 CORNELL L.Q. 599, 601 (1965) (discussing the "enabling" philosophy of modern American corporate law).

[79] Hansmann & Kraakman, *supra* note 4, at 441-42. The authors observe that the "standard shareholder-oriented model" has become consensus as it signals to investors that managers should only be accountable to investors. *Id*.

[80] In this regard see Katelouzou & Zumbansen, *supra* note 71, at 13-14.

[81] *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983) (arguing that the separation between ownership, i.e. shareholders who invest in the corporation, and control, i.e. managers who handle that investment as agents of the shareholders, can be observed as standard model in large corporations as well as in a number of other organizations).

[82] *See* Joe DesJardins, *Corporate Environmental Responsibility*, 17 J. BUS. ETHICS 825, 826 (1998) (contrasting the neoclassical economic view of corporate

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sociology, politics, socio-legal change, and climate change situate the study of corporate governance within the transformation context of public and, increasingly, private governance regimes in more and more areas of social, political, and economic areas of life.[83] The difference in perspective between a more conceptual and this contextual approach is crucial, especially when we seek to explain the increasing significance of corporate governance regulation on a global scale.[84]

The global dimension of corporate governance as a contested and fast-evolving policy field is reflected in debates over the organization of the firm, the rules governing the relationships between shareholders and managers, the level of executive pay and of diversity on the board, as well as the firm's philanthropic and environmental engagement, as they are intimately intertwined with the dynamics of global investment.[85] Because a company's

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responsibility shaped by the belief that, ultimately, the corporation needs to respond to and serve market interests with the emerging view among environmentalists that economic growth is not a value in itself); Peter A. Hall & Daniel W. Gingerich, V*arieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis*, 39 BRIT. J. POL. SCI. 449, 452 (2009) (describing how the varieties of capitalism approach considers how firms interact with other external actors); Claire Methven O'Brien, *Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-National Democracy from Labor Law*, 9 GERMAN L.J. 1007, 1031-38 (2008) (discussing the historical relationship between labor law, corporate law, and social rights).

[83] *See, e.g.*, CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 2 (J. Rogers Hollingsworth & Robert Boyer eds., 1997) (arguing "that markets and other coordinating mechanisms are shaped by and are shapers of social systems of production"); *see also* Myria W. Allen & Christopher A. Craig, *Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective,* INT'L J. CORP. SOC. RESP., July 5, 2016, at 1, 1 ("Climate change challenges present organizations (e.g. companies, corporations, nongovernmental organizations (NGOs)), communities, and citizens with the need to redefine current views on corporate social responsibility (CSR) from a voluntary luxury as being a necessity."); Lobel, *supra* note 10, at 343-44 (describing the paradigmatic shift from a regulatory model to a governance model, producing a mutually reinforcing system of economic efficiency and democratic legitimacy).

[84] *See generally* ALAN J. DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE (2009) (examining change and transformation in the corporate governance systems of the UK, the US and Germany as a result of economic globalization).

[85] *See* Douglas Cumming, Igor Filatotchev, April Knill, David Mitchell Reeb & Lemma Senbet, Editorial, *Law, Finance, and the International Mobility of Corporate Governance*, 48 J. INT'L. BUS. STUD. 123, 125 (2017) ("The financial impact of good

corporate governance set-up is received as a signal by the market for corporate investment and translates into the firm's traded value, there is a constant push and pull between a firm's efforts to attract capital and its ability to prove its compliance with the type of corporate governance that markets will reward.

These dynamics unfold across a turbulent history of scandal, crisis, pressure for reform, and a wider debate regarding the place and role of the large business firm in society.[86] The opening decade of the twenty-first century witnessed a series of large-scale corporate scandals, including those of Enron, Royal Ahold, Parmalat, Satyam and Tyco,[87] and market failures, from the bursting of the dot-com bubble in 2000-2001 to the Great Financial Crisis ("GFC") in 2008-2009.[88] While these events have been associated on different scales with poor corporate governance practices or management misconduct, and have significantly eroded public trust in large corporations and businesses more generally, they have also been formative in the creation of the current momentum of public debate about the corporation, its purpose, and its responsibilities.

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governance on the firm is unambiguously positive, both in terms of short-term efficiency outcomes and longer-term sustainability of the business. Perhaps most intuitive is that good governance, which minimizes the chance of managerial tunneling—defined . . . as the expropriation of corporate assets or profits—leads to an enhanced capability of the firm to raise external capital . . . . provide important metrics for the robustness of governance at the firm level and find that good governance firms have higher firm value, profits, and sales growth.").

86 *See* Dorff, *supra* note 68, at 78-82 (discussing the shift in attitude about the purpose of corporations, particularly with the rise of public benefit corporations); Lipton, *supra* note 68 (describing the effects of "the New Paradigm" in corporate governance).

87 For summaries of the scandals see Geeta Anand, *The Satyam Scandal: Friends Try to Reconcile 2 Sides of Indian Executive*, WALL ST. J., Jan. 8, 2009, at A9; Gregory Crouch, *Ahold to Pay $1.1 Billion to Settle Fraud Suits*, N.Y. TIMES, Nov. 29, 2005, at C10; Vanessa Valkin, *Tyco Unwilling to Certify Accounts*, FIN. TIMES, Jul. 24 2002, at 25; *Looking Back at the Rise and Fall of Enron*, HOUS. CHRON. (Nov. 28, 2018, 10:25 AM CST), https://www.chron.com/local/history/economy-business/article/The-rise-and-fall-of-Enron-9712210.php [https://perma.cc/3N8P-Y6LF]; *How Parmalat Went Sour*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2004, 12:00 AM), https://www.bloomberg.com/news/articles/2004-01-11/how-parmalat-went-sour [https://perma.cc/2N3L-Q75A].

88 *See generally* John C. Coffee, Jr., *What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis*, 9 J. CORP. L. STUD. 1 (2009) (attributing the Great Financial Crisis largely to economic dependence on the credit rating agencies and to an increase in self-regulation).

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In trying to better understand the direction of contemporary corporate governance norm-making, whether through the proliferation of private ordering processes or the creation of codes,[89] judicial intervention,[90] or legislative innovation,[91] one must understand that these developments do not occur in a vacuum. Instead, one has to consider the changes in the general political economy after the height of the redistributive welfare state of the 1970s on the one hand, and, on the other hand, the transformation that corporate law and corporate governance systems have undergone since that time under the influence of globalizing capital markets. As the end of "embedded liberalism"[92] followed on the

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[89] *See, e.g.*, Jean J. du Plessis & Chee Keong Low, *Corporate Governance Codes Under the Spotlight*, *in* CORPORATE GOVERNANCE CODES FOR THE 21ST CENTURY 3-20 (Jean J. du Plessis & Chee Keong Low eds., 2017) (reflecting on the extent to which corporate governance codes have contributed to improve corporate governance practices); *see also* Klaus Gugler, Dennis C. Mueller & B. Burcin Yurtoglu, *Corporate Governance and Globalization*, 20 OXFORD REV. ECON. POL'Y 129, 149 (2004) (discussing the introduction of new corporate governance codes in European countries, as well as changes in U.S. and Japanese practices, indicating a convergence toward the Anglo-Saxon corporate governance model).

[90] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 46 (Del. Ch. 2010) (holding that defendant directors' ROFR/Dilutive Issuance failed the price element of the entire fairness test and did not advance a proper corporate purpose, rendering the Issuance invalid and constituting a breach of the directors' duty of loyalty); Gordon Smith, *eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company*, CONGLOMERATE (Sept. 9, 2010), https://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html [https://perma.cc/ALY6-QNMR] (noting the court's "unusual" application of the *Unocal* standard and assessment of threat but its consistency overall with the court's treatment of "minority oppression cases"). *But see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations and unions are free to donate unlimited sums to election campaigns, protected by the constitutional right of free speech).

[91] *See* 79 Del. Laws, c. 122, § 8 (2020) (outlining the obligations of "public benefit corporations" as for-profit corporations organized to produce a public benefit); *see also* Leo E. Strine, Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235 *passim* (2014) (arguing that "public benefit corporation" statutes can create meaningful change in giving corporate managers greater ability and an enforceable duty to "do the right thing"); Council Directive 2014/95, 2014 O.J. (L 330) (requiring large public-interest companies with more than 500 employees to disclose non-financial and diversity information).

[92] *See generally* John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 392, *passim* (1982) (discussing the evolution of the post-World War II economy and defining "embedded liberalism" as "[t]he liberalism that was restored after World War II[, which] differed in kind from that which had been known previously").

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abdication of the gold standard and the powerful take-off of global financial flows, borders between differently legitimated regulatory authorities became increasingly blurred. As public and private regulators have been developing frameworks to more efficiently meet sector-specific demands in a now globally integrated marketplace for goods, services, capital, knowledge, and data, they also raise difficult questions in terms of what they tell us about the relationship between "public authority" and "private power."[93]

Today, twenty years into the twenty-first century, corporate scandals, including those of Olympus, Wells Fargo, Nissan, and Sports Direct, continue to expose corporate governance gaps in recent reforms and business practices[94] with regard to, for example, executive compensation, directors' independence, institutional investors, disclosure, or risk management. At the same time, corporate governance debates today have widened significantly and are concerned with the corporation itself and the recognition of and, in fact, the active engagement with claims for gender equality, environmental conservation, and climate change mitigation. [95]

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[93] *See* Black & Rouch, *supra* note 47, at 223-28 (examining issues of legitimacy in the global marketplace under the prevalence of private rulemaking). For a critique of private ordering in a global context, see CUTLER, *supra* note 32.

[94] *See*, *e.g.*, *Olympian Illogic: Europe and US Should Heed Lessons of Japanese Scandal*, FIN. TIMES (Nov. 8, 2011), https://www.ft.com/content/a3f20100-0a26-11e1-92b5-00144feabdc0 [https://perma.cc/8RUG-GLHV]; Rachel Louise Ensign, *Wells Fargo Struggles to Regain Footing*, WALL ST. J., Apr. 10, 2019, at B1; Leo Lewis, *Nissan's Parable of Shoddy Governance,* FIN. TIMES (May 12, 2019), https://www.ft.com/content/d6aca7b8-39d9-11e9-9988-28303f70fcff [https://perma.cc/67QV-G44G]; Deirdre Hipwell, *Weak Pound and Governance Scandal Hits Sports Direct Profits,* TIMES (DEC. 8, 2016), https://www.thetimes.co.uk/article/weak-pound-and-governance-scandal-hits-sports-direct-profits-22prcvb6c [https://perma.cc/JT7D-6RZ6]; *see also* John C. Coffee, Jr., *A Theory of Corporate Scandals: Why the USA and Europe Differ*, 21 OXFORD REV. ECON. POL'Y 198, 206-09 (2005) (examining the Parmalat and Hollinger scandals as examples of gatekeeper failure).

[95] *See*, *e.g.*, Barnali Choudhury & Martin Petrin, *Corporate Governance That 'Works for Everyone': Promoting Public Policies Through Corporate Governance Mechanisms*, 18 J. CORP. L. STUD. 381, 400-03 (2018) (providing an overview of corporate governance codes that increasingly task corporations with a responsibility to promote diversity and with non-financial disclosure requirements); *see also* Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-

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Reflected also in the current and deepening crisis of MBA programs today,[96] it is this wider and more comprehensive engagement with the business corporation and its place in society that shapes much of the debates at the moment, whether that concerns the largely untamed "power" of corporations over labor, consumers, local communities, and the environment, or the growing influence of "big business" on social, economic, and political processes.[97] This contextualization of the corporation not just as an investment vehicle but as a powerful actor in a socio-economic, planetary context in a state of dramatic transformation,[98] prompts an appreciation of the company and its laws through a sociological and historical lens. What now becomes clear is a non-linear, complex trajectory of the business corporation from the time of *Lochner*[99] and

remaking-corporate-law-through-stakeholder-governance/ [https://perma.cc/97S2-BT9A] (arguing that the main theories justifying shareholder-primacy as the "dominant framework" of corporate governance "ignore the reality that other groups of stakeholders beyond shareholders—employees, customers, suppliers, creditors, and taxpayers—have a stake in corporate productivity . . . . Under shareholder primacy, these stakeholders have no voice inside an institution.").

[96] Peter Beusch, *Towards Sustainable Capitalism in the Development of Higher Education Business School Curricula and Management*, 28 INT'L J. EDUC. MGMT. 523, 524 (2014); Ivor Hangout, *The MBA, Disrupted; The Future of Management Education*, ECONOMIST, Nov. 2, 2019, at 14.

[97] *See, e.g.*, John Dunbar, *The 'Citizens United' Decision and Why it Matters*, CTR. FOR PUB. INTEGRITY, (Oct. 18, 2012), https://publicintegrity.org/federal-politics/the-citizens-united-decision-and-why-it-matters/ [https://perma.cc/VB3P-JSUA] (last updated May 10, 2018, 9:40 AM ET) (discussing the political ramifications of the *Citizens United* decision).

[98] *See* Jody Freeman, *The Contracting State*, 28 FLA. STATE UNIV. L. REV. 155, 187 (2000) (noting that prison privatization, an example of government contracting with private actors, has sparked a rigorous legal, political, and policy debate); IAN HARDEN, NORMAN LEWIS & COSMO GRAHAM, THE CONTRACTING STATE (1992) (examining the influence of political party ideology and constitutional rights on the role of contract in local government services in the United Kingdom); Catherine E. Rudder, *Private Governance as Public Policy: A Paradigmatic Shift*, 70 J. POL. 899, 906-09 (2008) (highlighting the expanded role of the private sector in public policymaking and that of multinational corporations in solving "collective problems.").

[99] Lochner v. New York, 198 U.S. 45 (1905) (holding that a state maximum hours statute was unconstitutional as it impermissibly interfered with employees' freedom to contract with employers).

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Dodge[100] through the period of the "affluent society"[101] and the "new property"[102] on through the *transnationalization* of the corporation[103] with its trials and tribulations[104] until the present time as a central nodal point in the acquisition and control of "information," "data," and "knowledge."[105]

The emerging new geographies of corporate governance also mirror in part the reconfiguration of the state whose role is today less and less that of a central anchor of regulatory authority, but a co-regulator in an increasingly diverse constituency of norm makers. Since the 1990s we have seen a surge in the creation of corporate governance codes and best-practice guidelines in countries all around the world,[106] the main drivers for this

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[100] *See* Dodge v. Ford Motor Co., 170 N.W. 668 (1919) (holding that the defendant corporation's decision not to release additional shareholder dividends constituted a breach of fiduciary duty).

[101] *See* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958) (analyzing the increase in economic disparities between the private and public sectors following the rise of consumerism after World War II).

[102] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964) (discussing the growth of "government largess," or the property and "valuables" received from individuals and entities derived from the government).

[103] *See* Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740-44 (1970) (introducing the difficulty posed by the multinational enterprise, stemming from shortcomings in the legal recognition of international corporations).

[104] *See, e.g.*, Jennifer Bair & Florence Palpacuer, *CSR Beyond the Corporation: Contested Governance in Global Value Chains*, 15 GLOB. NETWORK (SUPPLEMENTAL ISSUE) S1 (2015); Ruggie, *supra* note 9; Christina Stringer & Snejina Michailova, *Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains*, 26 MULTINATIONAL BUS. REV. 194, 196-201 (2018); Peer Zumbansen, *What is Economic Law?* 1 (Transnat'l L. Inst., Research Paper 20/2020, 2020).

[105] *See* Jeffrey Ritter & Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 DUKE L. & TECH. REV. 220 (2018) (arguing for a transnational legal framework to govern data ownership and property rights); Ivan Stepanov, *Introducing a Property Right Over Data in the EU: The Data Producer's Right—an Evaluation*, 34 INT'L REV. L., COMPUTS. & TECH. 65 (2020) (advocating for the recognition of formal data producer's rights under EU law). *See also* VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, REINVENTING CAPITALISM IN THE AGE OF BIG DATA 179 (2018) ("The system, even if perhaps appearing to promote liberal values, would make George Orwell blush and the East German Stasi salivate: seeming freedom on the outside but total state control on the inside.").

[106] RHYS JENKINS, CORPORATE CODES OF CONDUCT: SELF-REGULATION IN A GLOBAL ECONOMY 1 (2001), https://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A8

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development, arguably, remained the attempt on the part of different sovereign states to render their corporate governance regimes more amenable and, effectively, more attractive for capital flows and investment practices which have become increasingly volatile and impatient. In recent years, however, states have come under even greater pressure from powerful private actors that administer enormous financial funds and have begun to claim a growing stake in setting the regulatory parameters for world-wide corporate investment, often in concomitance with market-driven regulatory incentives.[107]

The new and continuously evolving processes of regulatory innovation are generating a diversified and particular set of norms, which go far beyond the governance scope that had still characterized the first-generation corporate governance codes.[108] Today, there is no doubt that, despite the shareholder value maximization idea's fast rebound after the GFC, the discourse has begun to shift in a number of directions.[109] Leaving behind a somewhat stale and never fully satisfactory track record of corporate social responsibility ("CSR") initiatives, at least since the 1960s, it appears that today CSR is being transformed into a more ambitious and more comprehensive governance idea.[110] This new generation

86F80256B5E00344278/$file/jenkins.pdf [https://perma.cc/Q8Z7-ZZKF] ("The 1990s saw a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility. This was a result of economic developments in the 1980s, which saw a major shift away from the social democratic and Keynesian interventionism of the postwar period in the North, and from import substituting industrialization and statism in the South. The emphasis on monetarist economic policies and increased integration of international markets for goods and finance, the massive privatization of state assets and, in developing countries, the shift to trade liberalization and export promotion, all served to redefine the economic role of the state.").

[107] *See infra* Part VI.

[108] *See infra* Part V.c.

[109] *See infra* Part V.a.

[110] *See, e.g.*, Banu Ozkazanc-Pan, *CSR as Gendered Neocoloniality in the Global South*, 160 J. BUS. ETHICS 851, 856-57 (2019) ("CSR initiatives in the Global South focus on 'giving' factory workers a particular set of rights that mimic those we might see in developed nations in the West, such as safe working conditions."); Dirk Matten & Jeremy Moon, *Reflections on the 2018 Decade Award: The Meaning and Dynamics of Corporate Social Responsibility*, 45 ACAD. MGT. REV. 7, 9 (2020) ("First, many CSR issues are concerned with the wider responsibilities that companies take for some of their potential negative impacts in their supply chains and even their

of CSR no longer pits shareholders against stakeholders as representatives of two neatly distinguishable constituent groups of the modern business corporation, but is grounded in the societal transformation that companies have been involved in the context of the privatization of formerly public functions on the level of the nation state and beyond.

What emerges before our eyes is both a *fragmented*—in terms of the specific regulatory authority of various involved actors—and, at the same time, *spatialized*—in terms of the global reach of relevant regulatory regimes—assemblage of corporate governance architectures. While their focus is still on the business corporation and its core concerns as an investment vehicle, corporate governance norms today take on board a diverse and pluralistic set of concerns and interests, which are in turn promoted by traditional (state) and non-traditional (private) "lawmaking" actors. The proliferation of the latter is grounded in different countries' particular histories of state transformation and privatization, on the one hand, while developing in tandem with a global rise of private ordering and standard setting, on the other.[111] It is this co-existence of public and private normative institutional frameworks of contemporary corporate governance that gives rise to a transnational multiplication of hybrid, public and private, national and international corporate law production.[112] Given the extensive role that corporations play in the context of an almost infinite number of societal affairs and in consideration of the variation of

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value chains (e.g., unsafe working conditions, slavery-like terms of employment, pollution, resource depletion). Second, many companies are increasingly focused on the impacts of their operations on the planet at large (e.g., policies related to climate change, species diversity, natural resource depletion)." (citation omitted)).

[111] *See* NILS BRUNSSON & BENGT JACOBSSON, A WORLD OF STANDARDS 46-47 (2002) (arguing that private standards embody expert knowledge which is used for governance purposes); *see also* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 5 (2013) (arguing that in a number of regulatory areas governments continue to delegate regulatory authority to private sector bodies).

[112] *See generally* Bastiaan van Apeldoorn, Andreas Nölke & Henk Overbeek, *The Transnational Political Economy of Corporate Governance Regulation: A Research Outline* (Vrije Universiteit Amsterdam, Working Papers Political Science No. 5, 2003), https://research.vu.nl/ws/portalfiles/portal/74100928/137F9259-D62F-46C8-AC0A5F4C6F592E4B [https://perma.cc/8J4J-5PAK] (outlining a research project to analyze what led to the hybridization of public and private corporate regulation).

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specific instruments and institutional forms that corporate governance rules take on in different parts of the world, we can speak of *a plurality of political economies of corporate governance* today.

In the context of this newly emerging transnational geography of corporate governance, the traditional corporate governance narratives, which have their foundation in a law and economics understanding of the corporation, have limited analytical value. By contrast, while the contextual approach suggested here places corporate governance in a field of contestation, that arguably extends beyond organizational matters related to executive pay or board composition, it also seems the only way to effectively address the corporation in its actual operational environment. It is in that regard that we argue for a reconceptualization of corporate law and corporate governance as a *transnational* regulatory concern which is part of a law and political economy analysis of how corporations are regulated as part of a larger critical engagement with the relationship between states and markets.[113] Corporate governance regulation must, in our view, be described as transnational because it cuts across the boundaries between the domestic and the international, the public and the private. Transnational as a category, then, is of lesser value in neatly demarcating jurisdictional borders than it is in exposing the doctrinal and conceptual premises based on which an issue is associated with the domestic or the international arena. By instead focusing on the transnational landscape of different *actors, norms,* and *processes*, which include, but are not limited to, states, laws, court decisions, and parliamentary lawmaking, it becomes possible to understand the transnational law of corporate governance as a methodology of (or a particular area of) law *in a global contex*t.[114]

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[113] *See* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 13-14 (Edward J. Balleisen & David A. Moss eds., 2010) (identifying a number of financial disasters caused by the lack of governmental regulation and oversight); YVES TIBERGHIEN, ENTREPRENEURIAL STATES: REFORMING CORPORATE GOVERNANCE IN FRANCE, JAPAN, AND KOREA 1 (2007) (contrasting stakeholder or coordinated economies with liberal Anglo-Saxon systems concerning the different approaches towards regulating corporations).

[114] Peer Zumbansen, *Transnational Law, Evolving*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, 898, 898-925 (Jan M. Smits ed., 2d ed. 2012) (arguing that transnational law is global and interdisciplinary); Peer Zumbansen, *Transnational Law, With and Beyond Jessup*, *in* THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL 1 (Peer Zumbansen ed., 2020).

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V. THE POLITICS OF CORPORATE GOVERNANCE I: MISCONCEPTIONS, DEAD ENDS, AND CIRCULARITY

In this Part, we set out to chart the emerging political economies of contemporary corporate governance against the historical and sociological background of corporate governance regulation and state transformation over the past four decades. We will do so through a critique of the three aforementioned scholarly binds which have largely determined corporate law debates through the present moment. The first one concerns the juxtaposition of shareholder primacy and stakeholder-oriented theories of corporate governance. The second bind results from a dualistic, either-or thinking that has been shaping much of the debate around convergence/divergence and harmonization versus so-called "regulatory competition." Finally, the third one, which we will critically review, concerns the distinction between so-called "hard" and "soft" law. In each case, we will try to show how a more differentiated, less oppositional thinking can bring the analysis much closer to the actual reality of corporate governance today.

a. "Scholarly Bind One": The Vain Competition between Shareholder Versus Stakeholder Conceptions of the Corporation

The emergence of corporate governance as a topic of interest among scholars, policymakers, and practitioners of corporate law and the political economy of the firm coincided with the fading of the "business stateman"[115] and the rising prevalence of what has variously been termed as the "contractarian," "nexus of contracts," or "private ordering" theory of the firm.[116] During a period when economic theories prevailed, corporate governance was mainly

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[115] A magisterial presentation can be found in BERLE, *supra* note 27.

[116] *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization,* 62 AM. ECON. REV. 777, 778 (1972) (arguing that in a corporation decisions are based on a contractual arrangement as part of a team productive process); Jensen & Meckling, *supra* note 64, at 311 ("The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.").

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studied through the neoclassical economic lens of agency theory.[117] For the proponents of agency theory, corporate governance mainly deals with the balance of power between "the three key players—the executives, the board of directors and the shareholders,"[118] while the aim of analysis is to reduce the organizational costs of running business through corporations,[119] and to maximize shareholder value on the basis of shareholders' residual claims on the corporation.[120] Agency theory, along with other economic theories of the firm,[121] had far-reaching effects on the study of the internal organization and power structure of the corporation, the functioning and interrelationships among the allegedly key corporate actors (board of directors, shareholders, and management), and their relationships with other stakeholders—particularly labor and creditors.[122]

For the time being, however, much of the political contestation surrounding corporate governance continues to be organized around the dualistic poles of shareholder primacy versus stakeholder welfare. From this opposition follows the assertion of whether and, if so, which countries have "converged" towards

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117 *See generally* Fama & Jensen, *supra* note 81 (analyzing the separation of management and risk-bearing functions, a characteristic of corporations, in non-corporate entities).

118 ROBERT A.G. MONKS & NELL MINNOW, CORPORATE GOVERNANCE xvii (5th ed. 2011). For a recent account of corporate governance, see Marianna Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 *passim* (2016).

119 *See*, *e.g.*, Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1200-01 (1984) (examining the issue of corporate governance as that of "transaction cost economics" which approaches "the transaction as the basic unit of analysis and contends that a leading but widely neglected purpose of economic organization is to economize on the costs of transacting over time").

120 Fama & Jensen, *supra* note 81, at 302-03.

121 Transaction cost economics also supported shareholder governance, perceiving shareholders as the only corporate constituents that cannot protect themselves from firm-specific risk. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985); *see also* Benjamin M. Oviatt, *Agency and Transaction Cost Perspectives on the Manager-Shareholder Relationship: Incentives for Congruent Interests*, 13 ACAD. MGMT. REV. 214, 216-23 (1988) (using agency and transaction cost theories to propose ten hypotheses to explore the relationship between top managers and shareholders and stimulate further research).

122 *See* JOHN ROBERTS, THE MODERN FIRM: ORGANIZATIONAL DESIGN FOR PERFORMANCE AND GROWTH 120-26 (2004) (discussing the role of "agency problems" in corporate decision-making).

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shareholder value or continue to "diverge" in that regard. But in the post-GFC world the convergence theorists' claim of shareholder primacy's quasi-universal status has come under attack in both theory and practice circles.[123] While the "normative" embers of both the shareholder primacy norm and the stakeholder theory still smolder even after more than ten years since the GFC, one of the key aspects of corporate governance regulation of the 21st century is the increasing emphasis on the what might (again) be called the "public" dimension of the corporation and of the law relating to it in the unfolding political economies of regulatory corporate governance.[124] As we see in the increasingly heated discussion around the "purpose" of the corporation, the calls for a reconceptualization of the corporation and of corporate law have come a long way from the CSR stand-offs in the early 1930s[125] and the convergence/divergence discussion in the 1990s and early 2000s.[126]

Looking at the United States as a case in point for the dominance of the shareholder primacy view, much of American corporate law scholarship in the last fifty years is aimed at finding a mechanism to minimize the agency costs that arise from separation of ownership and control and bolstering better corporate governance through hostile takeovers, independent directors, performance-based remuneration, and activist shareholders.[127] At the same time, from a teleological perspective, three alternative analytic models, that is

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[123] *See, e.g.*, BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING (César Rodriguez-Garavito ed., 2017); BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS (Surya Deva & David Bilchitz eds., 2017).

[124] *See supra* Part II.

[125] For a discussion of CSR during the 1930s, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

[126] *See infra* Part V.b.

[127] *See*, *e.g.*, BEBCHUK & FRIED, *supra* note 70; Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 868-71 (1991); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965).

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shareholder primacy,[128] director primacy,[129] and team production,[130] prevailed (and still do, to a large extent) in U.S. scholarship, offering differing views on what should be seen as the proper purpose of the corporation. Both shareholder primacy and director primacy models—derived from neoclassical views of the firm—privilege shareholders relative to other corporate constituents and are consistent with shareholder wealth maximization,[131] even though they take contrary positions to the retention of the status quo of managerial control in U.S. companies and the merits of shareholder governance.[132] By contrast, the team production theory of Margaret M. Blair and Lynn A. Stout[133] insulates directors from shareholders' direct control, exposing shareholder primacy as a myth.[134] Even though the team production theory seems to align with stakeholder theories of corporate governance,[135] Blair and Stout focus only on

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128 *See* Lucian A. Bebchuk, *The Myth of Shareholder Franchise*, 93 VA. L. REV. 675, 680-82 (2007) (analyzing the checks available to shareholders over directorial power).

129 *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 548 (2002) ("Managerialism perceives the corporation as a bureaucratic hierarchy dominated by professional managers."); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 616-18 (2006) (arguing that shareholders, in practice, have little power over corporate decision-making).

130 *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (noting that under the team production approach, the purpose of concentrating managerial powers in the board of directors is to "protect the enterprise-specific investments of *all* the members of the corporate 'team'"). *But see* Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 142 (2009) (arguing that the team production theory does not account for the varying degrees of shareholder influence over corporate decision-making).

131 STEPHEN M BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 65-72 (2008).

132 *See, e.g.*, Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 655-56 (2011).

133 Blair & Stout, *supra* note 130. This theory is built on Raghuram C. Rajan and Luigi Zingales' theory of the firm which is based on the property rights approach. *See* Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387, 390-91 (1998).

134 *See* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002).

135 Blair & Stout, *supra* note 130, at 280-81 (arguing that directors are "trustees for the corporation itself").

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the firm-specific contributions of numerous constituencies. A "mediating" board, meanwhile, does not necessarily protect stakeholders,[136] as it "remain[s] subject to equity market pressures."[137] Critics of shareholder value maximization in the United States advanced the argument that the firm-specific contributions of *all* corporate constituents should be considered.[138] In the same vein, they championed the board's superior decision-making freedom to weigh various interests in the balance defending (perhaps paradoxically for the non-U.S. audience) the status quo of managerial control.[139]

Economic literature associated the stakeholder perspective with the property rights analysis of the firm in asserting that not only shareholders but also other corporate constituents, such as employees, can be residual claimants in investing in specific human capital.[140] Alternative arguments in support of a stakeholders mandate in the firm have often been associated with the CSR movement,[141] while being mainly derived from the stakeholder theory of the corporation. Even though the classic stakeholder theory statement can be traced to Dodd's writings in the early 20th century,[142] stakeholder theories made their way into academic circles (mainly in management literature) after the 1980s,[143] relying

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[136] David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 *passim* (2000); George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213 *passim* (2008).

[137] Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 435 (2001).

[138] Blair & Stout, *supra* note 130, at 253 ("Boards exist not to protect shareholders per se, but to protect the enterprise-specific investments of all the members of the corporate "team," including shareholders, managers, rank and file employees, and possibly other groups, such as creditors.").

[139] *See* Gelter, *supra* note 132, at 646 (elaborating that "pro-stakeholder" arguments served completely different aims in the US from similar theories in France and Germany).

[140] *See*, *e.g.*, Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1765-73 (1989); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1121-22 (1990).

[141] The CSR literature is voluminous. For a good summary of the CSR literature, see Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U. C. DAVIS L. REV. 705, 711-17 (2002).

[142] *See* Dodd, *supra* note 125.

[143] The literature is voluminous. For a landmark publication, see R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

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on a range of theoretical bases and evidently displaying varying definitions of normative and policy purpose.[144] Under the stakeholder perspective, corporations engage with a variety of different stakeholders including insiders—shareholders, managers, and employees—and outsiders—creditors, suppliers, and customers. "Progressive" U.S. corporate scholars have advanced a multi-stakeholder concept of the corporation under which corporate managers and directors can be understood to owe consideration (and perhaps even fiduciary duties) to a wider range of corporate constituents than shareholders, including obligations to employees, consumers, suppliers, communities, and the environment.[145] Yet, such a broad stakeholder approach has mostly remained on the sidelines and stakeholders mainly refer to non-shareholder constituencies who bear the risk of the firm's activities. At the same time, the predominant academic assumption in the United States—except for the middle decades of the century (1940's-1970's) where managerialism in North America and Europe coincided with public, societal interests—maintains that corporations as private, economic entities should be run for the collective benefit of shareholders.

Corporate governance in the UK, like the United States, has been largely occupied by the assumptions of neoclassical economics and the agency problems between investors and management,[146] and has, in general, privileged shareholders among all the corporate constituents. Departures from the doctrine of shareholder value can be found in the work of the Bullock Committee in the 1980s and, more recently, in reforms addressing the directors' account to wider stakeholders.[147] The latter has its roots in the statutory

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[144] *See, e.g.*, Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications*, 20 ACAD. MGMT. REV. 65, 66-67 (1995); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 *passim*.

[145] *See* LAWRENCE E. MITCHELL, PROGRESSIVE CORPORATE LAW: NEW PERSPECTIVES ON LAW, CULTURE & SOCIETY (1995); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006).

[146] For a comprehensive law and economics analysis of English company law, see BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION (1997).

[147] *See* ALAN BULLOCK, REPORT OF THE COMMITTEE OF INQUIRY AND INDUSTRIAL DEMOCRACY (1977); DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, CORPORATE GOVERNANCE REFORM, GREEN PAPER 34-43 (2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf

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reformulation of the common law directors' fiduciary duty to act *bona fide* for the interest of the company[148] into the "enlightened shareholder value" (ESV) principle encapsulated in section 172 of the UK Companies Act 2006.[149] Section 172 provides a legislative imperative blended with improved information flow and greater disclosure that enables directors to consider wider stakeholder interests when making decisions.[150] The UK stance, therefore, parts course to some degree from the counterpart United States shareholder-oriented model,[151] but section 172 lags behind in terms of setting a true stakeholder mandate.[152] This is despite the recent strengthening of the reporting requirements relating to section

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[https://perma.cc/BV8X-Q3AB] (offering approaches to strengthening a wider stakeholder voice); DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, CORPORATE GOVERNANCE REFORM: THE GOVERNMENT RESPONSE TO THE GREEN PAPER CONSULTATION 24-35 (2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf [https://perma.cc/T7AE-TR8D] (discussing efforts to strengthen wider stakeholder voices).

148 Percival v. Wright [1902] 2 Ch. 421, 425 (UK) ("Directors must dispose of their company's shares on the best terms obtainable, and must not allot them to themselves or their friends at a lower price in order to obtain a personal benefit. They must act bona fide for the interests of the company.").

149 The Companies Act 2006, c. 46, § 172 (UK). Note that UK policymakers have rejected the pluralist approach, a variant of stakeholder theory based on a property analysis of the firm. *See* COMPANY LAW REVIEW STEERING GROUP, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: DEVELOPING THE FRAMEWORK 83-150 (2000); 1 COMPANY LAW REVIEW STEERING GROUP, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: FINAL REPORT 43 (2001) (referring to paragraph 3.16 addressing liability upon insolvency); DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 135-38 (2009) (referencing Annex 3, discussing broadening statutory responsibility of the board to place employees and others on par with shareholders).

150 For recent empirical evidence on the effectiveness of strategic reporting in the UK, see Irene-Marie Esser, Iain MacNeil & Katarzyna Chalaczkiewicz-Ladna, *Engaging Stakeholders in Corporate Decision-Making Through Strategic Reporting: An Empirical Study of FTSE 100 Companies*, 29 EUR. BUS. L. REV. 729 (2018).

151 For a distinction between the UK stance and the United States shareholder-oriented model, see BRUNER, *supra* note 76, at 29-65.

152 On the effectiveness of the ESV, see Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?*, 17 INT'L CO. & COM. L. REV. 329, 341-43 (2006); Georgina Tsagas, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures*, *in* SHAPING THE CORPORATE LANDSCAPE: TOWARDS CORPORATE REFORM AND ENTERPRISE DIVERSITY 131-50 (Nina Boeger & Charlotte Villiers eds., 2018).

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172,[153] which aims to assist non-shareholder groups in holding company directors accountable as part of a broader framework to enable more effective board engagement with the workforce and wider stakeholders in order to gain a better and more grounded understanding of their views.[154] Neither, however, fundamentally changed the UK corporate governance system due to the lack of consensus regarding the desirability of employee participation on company boards.[155] As one of us has argued elsewhere,[156] the recent reforms cannot alone strengthen the way in which the interests of employees, customers, and wider stakeholders are considered at board level. This is partly because increasing the stakeholder orientation of UK companies will require a more fundamental "cultural" change, and partly because UK corporate governance still mainly relies on the combination of transparency, disclosure, and market participants' actions to remedy undesirable outcomes. Qualifying such reform as impossible, given the supposedly overwhelming requirement of a wholesale transformation of the prevailing "culture," echoes the corporate governance debate of the late 1990s, which was steeped in seemingly uncompromising positions of ideological opposition.[157] Over time the circumstances of the opposition of the "convergence" and "divergence" camps have continued to change. While it is too early to provide any reasonable assessment of what a post-Brexit UK culture of corporate

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[153] *See* FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE Provision 5, at 5 (2018); The Companies Act 2006, c. 46, § 414CZA (UK).

[154] This link between ESV and board composition is manifested in Provision 5 of the 2018 UK Corporate Governance Code itself, *supra* note 149, which combines the reporting requirements relating to § 172 with three alternative mechanisms to engage with the workforce: a director appointed from the workforce, a formal workforce advisory panel, or a designated non-executive director.

[155] For more on this long-standing debate, see Andrew Gamble & Gavin Kelly, *Shareholder Value and the Stakeholder Debate in the UK*, 9 CORP. GOVERNANCE 110 *passim* (2001).

[156] Dionysia Katelouzou, Aditi Gupta & Gerhard Schnyder, *'More Teeth Needed for Corporate Governance Reforms': Response to the Dept. BEIS Green Paper on Corporate Governance Reform* 3 (2017), https://ssrn.com/abstract=2921800 [https://perma.cc/RQ5J-XQXY].

[157] *Compare* Hansmann & Kraakman, *supra* note 4, *with* Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE 11 *passim* (2005).

governance could look like,[158] the example of Hong Kong's surprising tenacity in opposing a centralist Chinese government in the drawn-out summer of 2019 might serve as a reminder of how cultures can change and adapt.[159]

In addition, what requires our attention is that despite the predominantly shareholder-oriented perspective of corporations and business performance, the UK debate has often arrived at different conclusions in relation to the corporation's obligations and duties to society, which are explained by the fact that UK company law, unlike U.S. corporate law, is conceptually built on shareholder governance,[160] and UK shareholders—particular institutional investors that have dominated UK public equity since the 1990s—have been portrayed as "stewards"[161] of the companies in which they invest. Yet, what the UK example shows is that scholarly arguments in support of a broader stakeholder mandate were deeply influenced by economic theories. The dissenting pluralist approach in the UK,[162] similar to the team production theory in the United States, supports the allocation of governance rights to all the

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158 *But see* John Armour, Holger Fleischer, Vanessa Knapp & Martin Winner, *Brexit and Corporate Citizenship*, 18 EUR. BUS. ORG. L. REV. 225, 231-47 (2017) (evaluating the future possibilities of the legal status of corporate citizens of the EU in light of the Brexit decision). *See also* Peter Swabey, *Corporate Governance: The Brexit Effect*, CHARTERED GOVERNANCE INST. BLOG, https://www.icsa.org.uk/knowledge/blog/corporate-governance-the-brexit-effect [https://perma.cc/7ZUZ-6REQ] (suggesting Brexit will have a minimal impact on corporate governance but emphasizing the highly uncertain nature of such impact).

159 *See* Jean-Philippe Béja, *Is Hong Kong Developing a Democratic Political Culture?*, 2 CHINA PERSP. 4 *passim* (2007); Francis L. F. Lee & Joseph M. Chan, *Making Sense of Participation: The Political Culture of Pro-democracy Demonstrators in Hong Kong*, 193 CHINA Q. 84, 84-90 (2008); Chuanli Xia & Fei Shen, *Political Participation in Hong Kong: The Roles of News Media and Online Alternative Media*, 12 INT'L J. COMMC'N. 1569 (2018); Peter Pomarantsev, *The Counteroffensive Against Conspiracy Theories Has Begun,* ATLANTIC, (Aug. 7, 2019), https://www.theatlantic.com/international/archive/2019/08/evolution-protests-conspiracy-theories-disinformation/595639/ [https://perma.cc/89TL-TUW4].

160 *See, e.g.*, BRUNER, *supra* note 76, at 29-36.

161 *See infra* Part VII.

162 *See* JOHN E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW (1993) 23, 32-50 (viewing companies as "social enterprises" and arguing that companies purpose is to create "social wealth" on the basis of a revised property rights theory); *see also* Andrew Gamble & Gavin Kelly, *Shareholder Value and the Stakeholder Debate in the UK*, 9 CORP. GOVERNANCE 110, 115 (2001).

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corporate constituents that bear firm-specific risk and is, therefore, normatively different from the more "societal" stakeholder theories of company law as these developed in Continental Europe and Japan in the 20th century.

In Germany and France, for instance, institutional theories of corporate law had a great appeal for most of the 20th century as they were seen as a tool to protect the firm and all of its stakeholders against controlling shareholders' opportunism, an issue that was of little significance in countries with dispersed ownership structures such as the United States and the UK.[163] However, institutionalism along with the idea of stakeholderism that tends to be associated with it seems to have been losing some of its once important status as German corporate governance gradually shifted in the 1990s away from state control and further towards capital markets.[164] One explanation for this could be the internationalization of the debate in the wake of the ECJ case law following the *Centros* case,[165] the rise of regulatory competition and other forces of international convergence.[166]

Japan's corporate governance system, on the other hand, displayed a high degree of "institutional isomorphism," particularly from the 1960s to 1990s, with a strong emphasis on maintaining firm-specific capabilities generated by the investment of

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[163] For a good overview of the influence of the theory of the German corporation as "enterprise in itself" (*Unternehmen an sich*) and the French doctrine of the "interest of the association of the corporation" (*intérêt social* or *intérêt de la société*) to the stakeholder orientation of Germany and France, respectively, see Gelter, *supra* note 132, at 678.

[164] *See* Jackson & Moerke, *supra* note 4, at 352-53; Gregory Jackson, *Stakeholders Under Pressure: Corporate Governance and Labour Management in Germany and Japan*, 13 CORP. GOVERNANCE 419, 419-25 (2005) (evaluating the linkage between changes in corporate governance and labour management in Germany and Japan); *see also* PHILIPP KLAGES, THE CONTRACTUAL TURN: HOW LEGAL ACADEMICS SHAPED CORPORATE LAW REFORMS IN GERMANY (2008), https://www.semanticscholar.org/paper/The-Contractual-Turn-%3A-How-Legal-Academics-Shaped-Klages/36c0182a983dbbc638bff07847ea807abc85ac9b [https://perma.cc/57FE-LCUH] (detailing the evolution of Germany's corporate governance regime and the role of legal scholarship in such reforms).

[165] Case C-212/97, Centros Ltd v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459.

[166] *See infra* Part V.b.

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stakeholders, such as employees.[167] Despite the substantial changes in corporate governance practices and the related reforms in the past thirty years that aimed to help Japanese firms to adapt their stakeholder model of corporate governance to market pressures, such reforms mainly serve a symbolic function. As a result, a complete shift to a shareholder-oriented model of corporate governance is unlikely to take place in Japan.[168]

Having already pointed to some of the limitations of insisting on the "comparative advantages" of different national corporate governance systems without taking into account the consequences of financialization and hybridization of transnational corporate law norm creation, the just offered glimpses into the cases of German and Japanese corporate governance suggest that, in effect, context matters. As such, it is important to keep at least some cautious distance from an overly self-fulfilling law and economics argument whereby the rise of shareholder value maximization is not only inevitable, but also comprehensive and without alternatives. Scrutinizing the tunnel vision of the dominant shareholder value-oriented understanding of corporate governance, Lynn Stout found, for instance, that such thinking "drives directors and executives to run public firms like [British Petroleum] with a relentless focus on raising stock price."[169]

More recent literature, especially in the context of transnational human rights litigation against multinational corporations ("MNCs") and with regard to corporations as part of global value chains, underscores the importance of local context and emphasizes the need to closely scrutinize the relations between corporations and

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[167] For a detailed account of the traditional Japanese corporate governance system, see Gregory Jackson & Hideaki Miyajima, *Introduction: The Diversity and Change of Corporate Governance in Japan*, *in* CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 1 *passim* (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds., 2007).

[168] *See* SANFORD M. JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN AND THE UNITED STATES 166-67 (2007) (empirically elaborating that "[t]hose who think that the large Japanese corporation will gradually morph into its American counterpart are mistaken" and concluding that "there is a symbolic motivation behind some of the governance reforms being adopted by Japanese companies, who wish to appear sensitive to foreign shareholders even when – or because – the reforms do not cut deep").

[169] LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 3 (2012).

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local communities.[170] This orientation casts a new light, on the one hand, on who must be considered as a "stakeholder" and as being affected by the corporation and, on the other, which wider societal and environmental interests may be considered to be in the scope of a corporation's "sphere of influence," a term which, since the failure of the U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, was widely perceived as needing further specification and contributed to the mandate for John G. Ruggie as the then newly appointed U.N. Special Representative of the Secretary-General for Business and Human Rights.[171] What both VoC and post-VoC critiques of corporate governance developments show is a much more differentiated and layered landscape of norm production, which cannot adequately be depicted on the basis of uni-directional normative assessments.[172] The same critique can apply to part of the comparative corporate governance literature where it evolves around the adaptation of purportedly global standards as we will explore further in the next section.

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170 *See, e.g.*, POOJA PARMA, INDIGENEITY AND LEGAL PLURALISM IN INDIA: CLAIMS, HISTORIES, MEANINGS (2015); Christiana Ochoa, *Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands*, *in* NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT: INTERNATIONAL ECONOMIC LAW PERSPECTIVES 142 (Celine Tan & Julio Faúndez eds., 2017); Lauren Coyle, *Tender Is the Mine: Law, Shadow Rule, and the Public Gaze in Ghana*, *in* CORPORATE SOCIAL RESPONSIBILITY? HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY 297 (Charlotte Walker-Said & John Dunham Kelly eds., 2015).

171 A helpful, critical discussion is provided by Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q. 371 (2010). *See also* John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* 11 (Harv. Kennedy Sch. Corp. Resp. Initiative, Working Paper No. 67, 2017) ("The mandate was modest: to identify and clarify standards and best practices in the area of business and human rights, for both states and business enterprises; to clarify such concepts as 'corporate complicity' in human rights abuses committed by a related party, as well as 'corporate sphere of influence . . . .'").

172 *See* Ruth V. Aguilera & Cynthia A. Williams, *"Law and Finance": Inaccurate, Incomplete, and Important*, 2009 BYU L. REV. 1413, 1428-34 (approving of Rafael La Porta's, Francisco Lopez-de-Salinas's, Andrei Shleifer's, and Robert Vishny's research noting evidence of some companies with controlling shareholders outperforming those without); *see also* Ronald Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 1, 18 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (arguing that such "one-factor corporate governance models are too simple to explain the real-world dynamics we observe").

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b. "Scholarly Bind Two": Convergence versus Divergence and Harmonization Versus Regulatory Competition

Comparative work in corporate governance has been largely shaped by the shareholder value oriented agenda.[173] Despite a widely shared appreciation of corporate law being both an ingredient as well as a product of a national legal culture, the last twenty years at least have seen an enormous boost of the idea of there being an overarching set of principles in corporate law which contribute to what many scholars have been describing as a global convergence of corporate governance principles. The law and economics narrative has been crucial here as it has been emphasizing agency costs as a core problem being faced across different corporate governance systems.[174] In the background of this debate lies the older and more fundamental distinction of corporate governance systems along the degree to which they may be categorized as being either "outsider"/arm's length or "insider"/control-oriented systems.[175] The received wisdom is that the former—characterized by publicly held companies with diffuse share ownership structures—exist in the United Kingdom and the United States, while the latter—characterized by fewer publicly traded companies per capita and more ownership concentration—predominates in different forms in Continental Europe and Pacific Asia.[176] Under agency theory, the primary principal-agent conflict unfolds in a different manner across the two corporate governance

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173 *See*, *e.g.*, Donald C. Clarke, *"Nothing But Wind"? The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMP. L. 75, 105-09 (2011). For an insightful discussion of the different institutional environments that shape the shareholder value norm, see John Armour, Simon Deakin & Suzanne J. Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. REL. 531 *passim* (2003), and Margaret M. Blair, *Shareholder Value, Corporate Governance, and Corporate Performance: A Post-Enron Reassessment of the Conventional Wisdom*, *in* CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY 53 (Peter K. Cornelius & Bruce Kogut eds., 2003).

174 *See, e.g.*, COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch & Stefan Prigge eds., 1998).

175 *See* Marco Becht & Colin Mayer, *Introduction, in* THE CONTROL OF CORPORATE EUROPE 1 (Fabrizo Barca & Marco Becht eds., 2001).

176 *Id.* at 1-3.

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systems.[177] The conflict between shareholders and the board of directors is predominant in outsider systems, while in insider systems the dominant agency problem is generated by the conflict between minority and majority shareholders.[178] Despite the agency problem being different, comparative corporate governance literature, especially in the late 1990s, focused on the core agency problem between management and shareholders even in countries with prevailing block holders, such as Germany,[179] even though a separation of ownership and control is the exception worldwide rather than the rule.[180] More recently, the now eleven authors of *The Anatomy of Corporate Law* argue that one of the functions of corporate law (irrespective of the laws of specific jurisdictions) is to minimize coordination costs and agency problems among corporate constituents, including those between managers and shareholders, minority and majority shareholders, and other stakeholders.[181] They emphasize the "functional"[182] commonality of legal responses to these problems across different jurisdictions.[183]

The law and economics approach to comparative corporate governance and the associated advancement of the social norm of

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177 *See*, *e.g.*, Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSPS. 117, 137-38 (2007) (exploring the impact of different corporate governance reforms in Continental Europe and the United States).

178 Becht & Mayer, *supra* note 175, at 7.

179 *See*, *e.g.*, Stefan Prigge, *A Survey of German Corporate Governance, in* COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH 943 (Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch & Stefan Prigge eds., 1998).

180 *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 502-05 (1999) (finding the controlling shareholder does not have another large shareholder in the same firm in seventy-five percent of the cases, and this number is seventy-one percent for family controlling shareholder).

181 KRAAKMAN ET AL., *supra* note 76, at 2-3. This latest edition focuses on seven countries, namely Brazil, France, Germany, Italy, Japan, the UK and the United States.

182 *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW, 34-40 (Tony Weir trans., 3d ed. 1998); Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 340, 340-43 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (providing a detailed overview of the functional method of comparative law).

183 KRAAKMAN ET AL., *supra* note 76, at 2-3.

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shareholder primacy[184] was famously epitomized by Hansmann and Kraakman in their highly influential article, "The End of History for Corporate Law."[185] Published just at the turn of the 21st century, the two leading corporate law scholars proclaimed the dominance of the economic-oriented analysis of corporate law and corporate governance, and the convergence towards what they describe as the "Anglo-American shareholder-oriented model" of corporate governance.[186] Hansmann and Kraakman emphasized economic (efficient) market considerations based on accelerated competition among firms over "best practices" triggered by globalization forces and the rise of the "shareholder class."[187] They referred to both *functional* and *formal* convergence with the latter following rather than leading the former.[188] The convergence thesis was met with immediate attention and led to voluminous literature attacking and replying to it. An early criticism came from Douglas Branson who argued that the "The End of History for Corporate Law" consists of "bald assertions" and that any convergence in corporate governance is more likely to be regional rather than global.[189] In a similar vein, Curtis Milhaupt argued—on the basis of a property rights

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184 For a distinction between the social norm of shareholder primacy and the legal requirement of shareholder value maximization in the UK and other jurisdictions, see Beate Sjåfjell, Andrew Johnston, Linn Anker-Sørensen & David Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, *in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 79 (Beate Sjåfjell & Benjamin J. Richardson eds., 2015).

185 Hansmann & Kraakman, *supra* note 4.

186 *Id.* at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

187 *Id.* at 450-53. On the impact of globalization on comparative corporate governance, see Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT'L L.J. 477, 485-91 (2005).

188 Hansmann & Kraakman, *supra* note 4, at 455 (predicting that "the reform of corporate governance practices will generally precede the reform of corporate law, for the simple reason that governance practice is largely a matter of private ordering that does not require legislative action"). For further information on functional convergence, see John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 *passim* (1999); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 *passim* (2001); John C. Coffee, Jr., *Convergence and its Critics: What are the Preconditions to the Separation of Ownership and Control?*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 83 (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers & Luc Renneboog eds., 2002).

189 Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 328, 362 (2001).

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analysis—that any convergence of national corporate governance systems will be "slow, sporadic, and uncertain."[190] William Bratton and Joseph McCahery also recognized the possibility of an "improved variety of governance systems" or a "set of viable distinctive governance systems" rather than a complete convergence,[191] while, more recently, Franklin Gevurtz has contended that corporate convergence through imitation and transplant is occurring but in an incomplete and impermanent rather than linear fashion.[192] On the other side of the spectrum, Hansmann and Kraakman defended the convergence thesis in subsequent writings even after the Enron scandal and the GFC,[193] while additional support for the convergence thesis came from the law and finance literature and the influential "legal origin matters" thesis.[194] Yet, subsequent "leximetric" research has challenged the claim that there has been a significant Americanization of other countries' laws and shows that, despite global trends, lawmakers are able to deviate from influential models in corporate law and corporate governance.[195]

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[190] Curtis J. Milhaupt, Essay, *Property Rights in Firms*, 84 VA. L. REV. 1145, 1185 (1998).

[191] William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and Barriers to Global Cross Reference*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 23, 30 (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers & Luc Renneboog eds., 2002).

[192] Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 WASH. L. REV. 475, 479 (2011).

[193] Henry Hansmann & Reinier Kraakman, *Toward a Single Model of Corporate Law?*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 56 (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers & Luc Renneboog eds., 2002); Henry Hansmann, *How Close is the End of History?*, 31 J. CORP. L. 745, 748 (2005).

[194] *See*, *e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1151-52 (1998) (concluding that the quality of legal protection of shareholders helps determine ownership concentration).

[195] *See* Mathias M. Siems, *Convergence in Corporate Governance: A Leximetric Approach*, 45 J. CORP. L. 729 *passim* (2010) (using leximetrics to conclude that whether there has been convergence, divergence, or persistence of the legal rules that shape country-level differences in corporate governance depends on the area of law); Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013*, 15 J. CORP. L. STUD. 127, 160 (2015) ([A]ll legal origins now have about the same level of shareholder protection on average . . . .").

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Similarly, and as we have already discussed in the context of showcasing the contribution made by the VoC school to the corporate governance debate, a number of prominent political theories of comparative corporate governance challenged the main assumptions of the convergence argument. Most prominently, Lucian Arye Bebchuk and Mark Roe posited that the social forces and structures that shape legal rules, including history, politics, and ownership structures, are path dependent and will constrain the globalized forces pushing for corporate governance convergence.[196] Extending this line of thought, Reinhard Schmidt and Gerald Spindler added the concept of complementarity to the analytical mix of path dependence, which relates to the internal "fit" of the institutional components of a governance system.[197] Because of the complementarity found in both insider and outsider corporate governance systems, Schmidt and Spindler rule out a rapid convergence towards a universally best corporate governance system.[198]

While Schmidt and Spindler analyzed the aspect of complementarity within a (national) corporate governance system, VoC scholars such as Peter Hall and David Soskice have elaborated path-dependent, institutional complementarities between different sub-systems of a country's or a region's political economy.[199] By distinguishing, as we discussed,[200] the political economies of developed Western countries as between Liberal Market Economies (LMEs) and Coordinated Market Economies (CMEs), they were able to paint an arguably more differentiated picture of what *actually* marked up the landscape of corporate governance and its attendant

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[196] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 129-32 (1999).

[197] Reinhard H. Schmidt & Gerald Spindler, *Path Dependence, Corporate Governance and Complementarity*, 5 INT'L FIN. 311, 318, 325 (2002) (introducing the concept of complementarity as a reason for path dependence).

[198] *Id.* at 325-28 (demonstrating through multifactor analysis of complementarity why it is unlikely that individual innovators and national politicians could bring about a change of corporate governance systems which would ultimately lead to convergence).

[199] *See* Hall & Soskice, *supra* note 62. An important, earlier contribution to this field was J. Rogers Hollingsworth and Robert Boyer, *Coordination of Economic Actors and Social Systems of Production*, *in* CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 1 (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

[200] *See supra* Part II.

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trials and tribulations. Importantly, they inquired how firms *coordinate* their activities in five sub-systems of the political economy, including industrial relations, vocational training and education, corporate governance, inter-firm relationships and employees and, based on their findings, argued that the level of coordination between the different sub-systems would make national corporate governance systems (especially CMEs) resilient to convergence.[201] The VoC approach has been criticized on various grounds, including for concentrating too much on firms while paying less attention to other actors such as the state,[202] for focusing only on Western, developed countries,[203] for lumping together common law countries,[204] and for disregarding the tension between path dependency and the need for a particular variety (or sub-variety) of capitalism to adapt to changes in markets and products.[205] Despite these criticisms, VoC had a profound impact on the larger debates around the then still very undecided fate of national political economies under the threat of what Joseph Stiglitz famously called "*The Roaring Nineties.*"[206] With a focus on institutional diversity, the VoC scholars explicitly addressed the embedded, historically-grown socio-political and cultural national corporate governance systems and thus underlined the relevance of competitive advantages of national differences.[207] Based on these comprehensive findings, which themselves were the result of extensive empirical and quantitative work, they argued against a

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201 *See* Hall & Soskice, *supra* note 62, at 62-66.

202 On the central role that the state still plays in political economies such as France, see Vivien A. Schmidt, *French Capitalism Transformed, Yet Still a Third Variety of Capitalism*, 32 ECON. & SOC'Y 526, 531-32 (2003).

203 *But see* Andreas Nölke & Simone Claar, *Varieties of Capitalism in Emerging Economies*, 81/82 TRANSFORMATION 33, 33-34 (2013) (noting that the VoC inspired approach has been extended to emerging economies).

204 *But see* Michael A. Witt & Gregory Jackson, *Varieties of Capitalism and Institutional Comparative Advantage: A Test and Reinterpretation*, 47 J. INT'L BUS. STUD. 778, 797 (2016) (suggesting that at least two different institutional configurations are associated with comparative advantage in the presence of radical innovation).

205 *See* Gilson, *supra* note 188.

206 JOSEPH E. STIGLITZ, THE ROARING NINETIES: A NEW HISTORY OF THE WORLD'S MOST PROSPEROUS DECADE (2003).

207 *See, e.g.*, Hall & Soskice, *supra* note 62, at 56 (arguing that "[c]omparative institutional advantages tend to render companies less mobile than theories that do not acknowledge them imply," thereby calling into question the assumptions of globalization).

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one-way convergence towards the Anglo-American market-oriented corporate governance system.[208]

While the convergence/divergence conundrum clearly left its mark on the scholarly and policy debates in the late 1990s and early 2000s, being furthermore associated with efforts to "export" Anglo-American corporate governance principles internationally, a slightly different debate began to unfold on the European front, which would soon dominate scholarly discussions for years to come. Just as "quite" in the United States means something else than "quite" in the United Kingdom, federalism, harmonization and regulatory competition meant very different things in the United States and the European Union. From an early point onwards, the varied history of European corporate law exposed the challenges of harmonization,[209] given the extensive differences in locally rooted and historically grown and consolidated company law systems across Europe.[210] In comparison, this constellation looked very different from the history and experience of U.S.-style regulatory competition.[211] While the polarities between the United States

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[208] *See, e.g.*, Hall & Gingerich, *supra* note 82, at 478-480 (empirically showing that despite some liberalization of institutional practices CMEs have not converged towards LMEs).

[209] The failed attempts to harmonize board structures in the EU with the 5th company law directive, the tumultuous history of the Takeover Directive, and the European Company Statute, respectively, tell an important story in that regard. *See, e.g.*, Martin Gelter, *EU Company Law Harmonization between Convergence and Varieties of Capitalism* (Eur. Corp. Governance Inst., Working Paper No. 355, 2017), https://ecgi.global/sites/default/files/working_papers/documents/3552017.pdf [https://perma.cc/N6HM-DJ9U]; Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOB. STUD. L. REV. 867 *passim* (2004).

[210] *See* Antoine Réberioux, *European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement*, 40 J. COMMON MKT. STUD. 111, 117-20 (2002) (exploring the main competing economic theories that explain international diversity in corporate governance); *see also* GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 181, 196 (2010) (noting that the intricate embeddedness of regulatory innovation in locally defined governance structures alongside their integration in transnationally unfolding rule-making processes is characteristic of the current regulatory landscape in corporate governance).

[211] *See, e.g.*, David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423, 456 (1991) (highlighting the institutional differences behind the regulatory systems in United States and European Communities).

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pattern of competitive federalism and the different conflict of laws regimes of the EU Member States had occupied scholars for a long time, the debate over the exportability of U.S.-style regulatory competition took a different turn in light of the European Court of Justice's case law on the free movement of companies. Following the *Centros* line of cases around the turn of the 21st century, the introduction of a Delaware-type form of inter-jurisdictional competition among EU Member States' company laws metamorphosed into a pressing actuality, with severe repercussions on EU Member States' diversity.[212] As a result, European corporate law and European corporate governance tended to be squeezed into an uncomfortable either-or position with choices between harmonization and regulatory competition or between shareholder primacy and stakeholder theories, largely reflecting the tension between the market integration project, on the one hand, and the ambition of (certain) Member States to boost national champions, on the other.[213]

c. "Scholarly Bind Three": Private Ordering and the Binary Distinction between "Hard" and "Soft" Law

There can be no doubt that, along with its impact on national, international, and comparative debates about the purpose of the corporation and corporate governance reforms, the law and

[212] Simon Deakin, *Two Types of Regulatory Competition: Competitive Federalism Versus Reflexive Harmonisation. A Law and Economics Perspective on* Centros, 2 CAMBRIDGE. Y.B. EUR. LEGAL STUD. 231, 232 (1999-2000) (arguing harmonization standards are needed to provide the conditions under which diversity is preserved). *But see* John Armour, *Who Should Make Corporate Law? EC Legislation* Versus *Regulatory Competition*, 58 CURRENT LEGAL PROBS. 369, 370 (2005) (arguing regulatory competition between Member States' company laws is a better way to stimulate the development of appropriate legal rules than is the European legislative process).

[213] For an insightful, retrospective assessment, see Stefano Lombardo, *Regulatory Competition in European Company Law. Where Do We Stand Twenty Years After Centros?* (Eur. Corp. Governance Inst., Working Paper No. 452, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392502 [https://perma.cc/S88V-T26C]. With regard to the "Volkswagen" landmark decision by the European Court of Justice, see Peer Zumbansen & Daniel Saam, *The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism*, 8 GERMAN L.J. 1027 *passim* (2007).

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economics approach to corporate governance provided strong support for the argument regarding the superiority of private and decentralized methods of internal governance at the micro (individual firm) level over public policy. One of the principal normative achievements of the "private ordering" or "contractarian" theory of the firm is the treatment of corporate law and corporate governance regulation as contractually determinable and market facilitative private law, rather than public regulatory law.[214] The explicitly anti-regulatory bias fit the time and did not have much trouble prevailing in policy and scholarly circles, as corporate governance regulation displayed an increasing reliance on market-based, privately created best practice norms, codes, standards, and recommendations. The proliferation of national as well as company-specific corporate governance codes,[215] codes of conduct,[216] statements of "good" or "recommended" practices by international organizations,[217] and, more recently, stewardship codes for institutional investors[218] testify to the growing consensus around a more indirect approach to "regulating" corporate actors by enabling, encouraging, and nudging them to use their internal structures and processes, particularly the board of directors and, more recently, the shareholders to formulate self-regulatory regimes rather than turning to "the state" to issue strong commands.

Where did it start? Arguably, the UK Cadbury Report[219] is seen as an important milestone in the more recent history of corporate governance regulation. Shortly after being issued, the Cadbury

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[214] For a famous and biting critique, see William W. Bratton Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 410-11 (1989).

[215] *See, e.g.,* Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, 25 ORG. STUD. 415, 419 (2004) (detailing the exponential rise of national corporate governance codes in the 1990s).

[216] *See, e.g.*, Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEGAL STUD. 617 *passim* (2011) (advancing various arguments that corporate codes feature functions, structures, and institutions of genuine constitutions).

[217] *See, e.g.*, ORG. FOR ECON. COOP. & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015), https://www.oecd.org/corporate/principles-corporate-governance.htm [https://perma.cc/UD27-2VLN].

[218] *See infra* Part IV.

[219] ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE 1992, https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf [https://perma.cc/Q9EC-S45R].

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Report resonated around the world, triggering a true surge of comparable "regulatory" initiatives.[220] Corporate governance codes have developed out of the interactions of governmental or quasi-governmental entities, stock exchanges, and business, academic and industry communities, and investor-related groups as a response to corporate catastrophes,[221] and have proliferated across more than sixty countries recommending detailed governance frameworks mostly for publicly-listed companies.[222] Even though they vary considerably in terms of content, legal status, and origin, a distinctive feature of these codes is their extensive resort to (perceivably, at least) non-statist, non-binding "soft-law" techniques, which provide flexibility and responsiveness to individual, firm-level circumstances while keeping regulating detail to a minimum. This feature is prominently manifested in the 2018 UK Corporate Governance Code (and its previous versions), the enforcement of which rests on the investor-driven practice of "comply or explain."[223] The "comply or explain" enforcement mode, in turn, rests upon two pillars: sufficiently high-quality disclosure by companies and an informed evaluation of the perceived compliance or non-compliance by the companies' shareholders (especially institutional ones) and the market.

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[220] *See* Cally Jordan, *Cadbury Twenty Years On*, 58 VILL. L. REV. 1, 4-7 (2013) (exploring how the Cadbury Report quickly gained worldwide popularity and its effects on international corporate governance initiatives).

[221] *See* HOLLY J. GREGORY & ROBERT T. SIMMELKJAER, COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES 285 (2002) (providing a comparative analysis of corporate governance codes in the fifteen EU member states), https://ecgi.global/code/comparative-study-corporate-governance-codes-relevant-european-union-and-its-member-states [https://perma.cc/2KWU-YX6T]. *See also* Dimity Kingsford Smith, *Governing the Corporation: The Role of Soft Regulation,* 35 UNSW L.J. 378 (2012) (exploring the role of soft regulation in the development of corporate governance codes); Aidan O'Dwyer, *Corporate Governance after the Financial Crisis: The Role of Shareholders in Monitoring the Activities of the Board*, 5 ABERDEEN STUDENT L. REV. 112 (2014) (discussing the foundations of UK corporate governance along with the developments that have come about since the 2008 financial crisis).

[222] The European Corporate Governance Institute maintains a list of most of the corporate governance codes that have been released worldwide. *Codes*, ECGI, https://ecgi.global/content/codes [https://perma.cc/HZN9-9ZT4].

[223] FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 1-3 (2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF [https://perma.cc/M4HR-L735].

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"Comply or explain" is, therefore, an "obligation" to shareholders (not regulators) to make an informed evaluation as to whether non-compliance is justified given the company's particular circumstances and then to take action in cases of non-conformance or poor explanations. While much ink has been spilled on the effectiveness of the "comply or explain" system with many good arguments on both sides,[224] what is less explored is the degree of coerciveness of this investor-determinable norm production and enforcement, which is generally assumed to be entirely voluntary.

Prior literature notably speaks in binary terms by distinguishing between "soft" and "hard" law and mostly associates the former with informal, non-binding norms generated through non-statist processes.[225] The lack of any state involvement in initiation and/or monitoring and enforcement is for most seen as critical to "soft" norms, and has sometimes raised concerns about the legitimacy of non-state-made, "soft," law.[226] Others emphasize the nature of legal norms and equate "soft" law with voluntary, non-binding rules.[227] This presumable lack of express legalization of "soft" law (namely

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224 *See, e.g.*, Andrew Keay, *Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?*, 34 LEGAL STUD. 279 (2014) (weighing the benefits and costs of introducing a hard regulatory enforcement scheme for corporate directors). For an analysis of the introduction of the comply-or-explain rule in the German Stock Corporation Law, see David Seidl, Paul Sanderson & John Roberts, *Applying 'Comply or Explain': Conformance with Codes of Corporate Governance in the UK and Germany* (Ctr. for Bus. Rsch., Univ. of Cambridge, Working Paper No. 389, 2009), https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp389.pdf [https://perma.cc/7ZPR-QVWA].

225 *See, e.g.*, Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE 197, 198 (Stephen Martin ed., 1994); Sylvia I. Karlsson-Vinkhuyzen & Antto Vihma, *Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework*, 3 REG. & GOVERNANCE 400 (2009) (developing an analytical framework for comparing norms on different positions along the continuum of "hard" and "soft" law).

226 *See* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 171-72 (1996) (asserting it is not all that obvious that states can conclude agreements yet at the same time deny that such agreements would amount to hard law).

227 Snyder, *supra* note 225, at 198. *See also* Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 EUR. L.J. 334, 342 (1999) ("In the governance of global economic networks, however, both soft law and legally binding norms, or 'hard law', are important. Indeed, the relationship between hard law and soft law has long been controversial, and today it is one of the most interesting—and difficult—questions currently raised by the governance of globalization.").

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its alleged lack of enforceability) has been the key dimension between the early corporate governance codes and best practices, on the one hand, and traditional company law, on the other, with the latter being highly regulatory in nature, containing many mandatory rules.[228] Crucially, the binary distinction between "hard" and "soft" law must be seen and relativized in the context of institutional and normative pluralism[229] that has emerged from the fundamental transformation of the regulatory state through decentralization, privatization, and marketization. Seen against that background, "soft" legal norms can be both weaker regulatory instruments that might or might not be *hardened* at some point through parliamentary or governmental law making[230] and, simply, alternative governance modes that complement and co-exist with stronger, harder ones less distinguishable through an either-or but marking choices along a continuum.[231]

"Soft" legal norms, whether or not they emanate from the state or civil society, have become an important regulatory tool in corporate governance regulation with far-reaching and often more coercive implications than traditional regulatory theories suggest. "Soft" corporate governance norms do not lack force and effect and continue to raise difficult questions as to whether they can be flouted without consequences.[232] For example, a common misapprehension

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[228] On this dichotomy in the context of United States corporate law, see Coffee, Jr., *supra* note 78 at 1653-64.

[229] *See* Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, *in* THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY NORMS FOR THE AGE OF GOVERNANCE 145, 149 (Jacint Jordana & David Levi-Faur eds., 2004).

[230] *See* Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?*, 15 BRAZ. J. INT'L L. 65, 67-68 (2018) (providing an overview of some of the recent corporate social disclosure and due diligence legislative initiatives aimed at increasing transparency in global supply chains and illustrating how these laws are hardening the human rights expectations of business that have previously and predominantly been set out in soft law frameworks).

[231] Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 716 (2010) ("[H]ard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum.").

[232] *See, e.g.*, Keay, *supra* note 224. *See also* Peer Zumbansen, *The Privatization of Company Law? Corporate Governance Codes and Commercial Self Regulation*, 3 JURIDIKUM 136, 139-41 (2002),

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regarding the UK Corporate Governance Code has long been that it is an example of "private" law making or self-regulation. It's important to note, however, that while the code is promulgated and administered by the Financial Reporting Council, which itself has no statutory footing (at least for now[233]), it is still dependent on the regulatory state, insofar as it is expressly sanctioned by the government, through the UK's Listing Authority, the Financial Conduct Authority (FCA).[234] Therefore, despite the apparent voluntariness of the Code's provisions and the market-dependency of its enforcement, the FCA's delegated statutory powers to enforce the "comply or explain" obligation have a significant coercive element.[235] This approach to corporate governance regulation is, therefore, incorrectly described as private or self-regulation, and can be more appropriately regarded as "associationism," "co-regulation" or as a form of "regulated autonomy," which is exercised by the market but is supported by state-ordered

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https://www.juridikum.at/fileadmin/user_upload/ausgaben/juridikum%203-2002.pdf [https://perma.cc/VA84-HTUM] (arguing that the different layers of norms that can be found in the code, the recommendations, as well as the reformulations of otherwise codified law, show that this form of norm setting cannot be detached from its socio-legal environment).

[233] The current transition from the FRC to the new regulator, the Audit, Reporting and Governance Authority (ARGA) will be accountable to the Parliament. JOHN KINGMAN, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL: INITIAL CONSULTATION ON THE RECOMMENDATIONS 13 (2019), https://www.gov.uk/government/consultations/independent-review-of-the-financial-reporting-council-initial-consultation-on-recommendations [https://perma.cc/JX95-9CVE]. *See also* FIN. REPORTING COUNCIL, PLAN & BUDGET 2019/20, at 3-4 (May 2019), https://www.frc.org.uk/getattachment/44ad6509-5fb8-4645-b945-5fcee5689290/Final-FRC-Plan-Budget-May-2019.pdf [https://perma.cc/R6GN-D79Y].

[234] FIN. CONDUCT AUTH., LISTING RULES, CH. 9: CONTINUING OBLIGATIONS, https://www.handbook.fca.org.uk/handbook/LR/9.pdf [https://perma.cc/LBN9-C3RW].

[235] Regarding the low degree of enforced sanctions by the FCA, see John Armour, *Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment* (Eur. Corp. Goverance Inst., Working Paper No. 106, 2008), https://ssrn.com/abstract=1133542 [https://perma.cc/UXV5-7TQZ]. By comparison, see the regulatory practice in the context of the German Stock Corporation Act. AKTIENGESETZ [German Stock Corporation Act] §161 (1), Sept. 6, 1965, *translated in* Norton Rose LLP (2016); s*ee also* Holger Fleischer, *A Guide to German Company Law for International Lawyers – Distinctive Features, Particularities, Idiosyncrasies* 3, 12 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597062 [https://perma.cc/H4EY-B2LW].

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regulation.[236] The occasional tendency among corporate governance scholars[237] to overlook these implications reflects, we believe, both an incomplete understanding of "soft" law—with regard to its impact on individual companies and on stakeholders at the micro (individual firm) level as well as on financial markets at the macro level, and a more deeply rooted bias towards market-based private ordering and against state intervention. This overlapping of sociological, empirical markers ("how things are") and normative choices ("how I believe they ought to be") constitutes the complex institutional-symbolic space of corporate governance that can never be fully grasped by focusing only on one aspect.

VI. THE POLITICS OF CORPORATE GOVERNANCE II: WHO AND WHERE IS THE ARCHITECT?

Today, "corporate governance," which for years had been depicted as a decidedly shareholder-driven regulatory area, is being reshaped by a comprehensive and far-reaching critique of what the corporation *is*, *does,* and *for whom* it operates.[238] As part of this renewed emphasis on the social role and purpose of the corporation, it is being rediscovered as belonging to historically and socio-culturally evolved, national corporate governance systems, something that VoC scholars had long been demanding. This interest in the embeddedness of the corporation in a complex political economy is reminiscent of Karl Polanyi's influential observation of a "double movement" in modern market economies in which laissez-faire economics result in an expansion of self-regulating markets, against which efforts ensue to (re)-embed

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[236] *See*, *e.g.*, John Holland, *Self Regulation and the Financial Aspects of Corporate Governance*, (1996) J. BUS. L. 127 (using case study data to conclude that considerable "behind the scenes" efforts by companies and financial institutions to avoid financial malpractice fraud occurs).

[237] For a notable exception, see MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE 168 (2013) (highlighting that the UK Corporate Governance Code "whilst formally classifiable as non-governmental in nature nevertheless operate[s] within the substantial shadow of the regulatory state").

[238] Lipton, *supra* note 68.

market forces in social institutions.[239] But despite mounting evidence that the corporate governance terrain continues to expand in a significant manner in terms of its substantive scope and its geographical relevance, there remain considerable misconceptions and communication gaps between the conventional debate, as it were, and the increasingly diversified camp of critics. For instance, while the VoC approach and its refinements has made an immensely important contribution to the sometimes too acontextual comparative study of corporate governance, we contend that VoC's dominant focus on national institutional structures is ill-suited to address the challenges posed by the significant transformation of corporate law-making. This transformation is marked by substantial privatization of norm-making in corporate law and corporate governance in recent years and has to be interpreted in light of not only the rising influence of international actors, such as the Organization for Economic Co-operation and Development (OECD), the World Bank, and the United Nations, but also private actors and wider civil society in corporate governance law-making. At the same time, while not always directly related to corporate governance rules, the intensifying public critique directed at Western multinationals and their entanglements with egregious labor and human rights violations in their supply chains has been an important factor in driving regulatory and adjudicatory initiatives in recent years.[240]

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[239] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 138 (2d ed. 2001). *See also* Fred Block, *Polanyi's Double Movement and the Reconstruction of Critical Theory*, 38 REVUE INTERVENTIONS ÉCONOMIQUES, 2008, at 2, https://journals.openedition.org/interventionseconomiques/274 [https://perma.cc/8FK4-HV5W] (attempting to develop a theoretical reconstruction of Polanyi's double movement concept by exploring its theoretical foundations and arguing that this reconstructed theory has the potential to be an important element of a 21st century critical theory).

[240] *See* LAURA KNÖPFEL, CSR COMMUNICATION IN TRANSNATIONAL HUMAN RIGHTS LITIGATIONS AGAINST PARENT COMPANIES 2-4 (2019), https://ssrn.com/abstract=3311545 [https://perma.cc/PX4F-3H4P] (examining how courts reacted to corporate social responsibility communication, which had not been intended for a judicial context); *see also* Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices*, 24 AUSTRALIAN J. HUM. RTS. 44 (2018), https://www.tandfonline.com/doi/full/10.1080/1323238X.2018.1441610 [https://perma.cc/5N96-R358] (focusing on emerging legislative disclosure

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While there is no doubt that the privatization of norm-making in the field of corporate governance will continue to deepen, it is important to recognize how public actors continue to both intervene and steer but also engage with private actors in carving out a redefined role in facilitating new relationships between corporate actors, labor groups, and consumers.[241] In addition, while corporate law scholars began recognizing the growing prominence of "soft" law in corporate governance regulation (especially with regard to corporate governance codes and codes of conduct), only rarely was the step taken to actively embrace "soft" law as a new mechanism of regulation.[242] This is particularly important in the transnational context, where we can observe a high degree of interpenetration between "hard" and "soft" law and domestic and international norms.[243] Given the increasing reliance on public monitoring, "governance through disclosure," and transparency, it comes as little surprise that "soft" law norms aimed at companies' self-imposed (or mandated) obligations to disclose their activities,

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regimes as a mechanism for regulating modern slavery in supply chains and considering how regulatory frameworks could be crafted to maximize their effectiveness).

[241] Examples of multi-stakeholder processes of negotiating and developing regulatory reform often emerge in contexts where the relationship between state and private actors is already shaped by the dynamics and constraints of foreign investment. *See, e.g.*, Manoj Dias-Abey, *Using Law to Support Social Movement-Led Collective Bargaining Structures in Supply Chains*, 32 AUSTRALIAN J. LAB. L. 123 (2019); Ronald C. Brown, *Up and Down the Multinational Corporations' Global Labor Supply Chains: Making Remedies that Work in China*, 34 UCLA PAC. BASIN L.J. 103 (2017).

[242] *See* Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 48 (2010) ("Soft law is a novel mechanism for constraining corporate behavior. In reconciling financial and social imperatives, firms must consider its impact on reputational capital.").

[243] *See, e.g.*, INT'L BAR ASS'N, REFERENCE ANNEX TO THE IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 2 (2016), https://www.ibanet.org/LPRU/Reference-Annex-to-the-IBA-Practical-Guide.aspx [https://perma.cc/7LCW-4VZJ] (amplifying and focusing in detail on some of the potential implications for the legal profession of the UN Guiding Principles on Business and Human Rights); John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement [https://perma.cc/F9LD-H4HG].

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earnings, as well as their labor practices, down to their subsidiaries and contractors are more and more under public scrutiny.[244]

But how helpful are the categories of "hard" and "soft" law in this context? The expansion of "soft" law into a growing number of areas of corporate conduct prompts us to review the seemingly too stark choice *between* "hard" and "soft" law. As John Ruggie, then Special Rapporteur of the U.N. Special Secretary on Business and Human Rights and responsible author of the *Guiding Principles*,[245] observed: "in light of the multinationals power, authority, and relative autonomy, the time-worn mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with the challenges posed by corporate globalization."[246] In effect, today's regulatory toolbox of corporate governance does not really reflect a neat separability of "hard" and "soft" law instruments. Instead, contemporary governance dynamics unfold in a transnational realm in which states, private actors, civil society groups, and a myriad of interest groups are interacting and competing with one another. As a result, traditional *national*, *comparative* or *international* law do not yet adequately offer the necessary analytical and conceptual categories and tools to unpack the complex regulatory landscape which has been forming before our eyes and which is marked by a proliferation of hybrid norm-making processes in the context of highly specialized, sector-specific, and yet functionally structured, spatial, de-territorialized regimes, which are not confined to national or regional boundaries. Nation states no longer have—if they ever did—a monopoly on regulating the way companies, both MNCs and domestic alike, are controlled and held accountable, while the shift from state-centered government to an increasingly fragmented system of self-steering by public and private actors continues.[247]

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[244] *See* Dhir, *supra* note 58, at 72 (emphasizing social disclosure as a means of strengthening the position of human rights-conscious shareholders, rather than as a process that will result in self-correcting behavior modification on the part of corporate decision makers); *see also* Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L. L.J. 419, 421 (2015) (analyzing the effectiveness of using domestic law to regulate global supply chains with respect to human rights and labor practices).

[245] Ruggie, *supra* note 243.

[246] Ruggie, *supra* note 9, at 329-30.

[247] GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE (1997).

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Still, while the binary categorization of norms as "hard" or "soft" remains relevant in distinguishing between different enforcement mechanisms and with regard to the legitimacy basis that is being claimed for a particular norm,[248] it is less effective in regard to the actual *performative* role played by these norms and the actors engaged in their production.[249] Corporate governance regulation, like any other arena with a complex history and pitting competing policies against one another, encompasses both a host of institutional/normative and symbolic dimensions. In other words, there is a complex relationship between the law (and the policies a lawmaker might pursue at a given moment) and the culture which is both shaping these policies and which has been and will be shaped by them.[250] As such, the institutionally-regulated as well as the symbolic-cultural *spaces* of corporate governance have different material qualities: while they are shaping and are being shaped by various public and private actors in the actual creation of new and innovative processes of norm-generation, these spaces are also epistemic realms which consist of self-referential discursive processes and logics. The framing of corporate law from the perspective of shareholder value maximization[251] can hardly capture these materialities. An adequate analysis of these materialities must draw on insights by governance and regime scholars who emphasize not only that "hard" and "soft" law are best seen as choices along a continuum[252] but also emphasize that "soft" law can no more remain confined to rules of conduct which are

[248] *See supra* Section V.c.

[249] For a critical assessment, see Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 34 J.L. & SOC'Y 116 (2007).

[250] Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 489 (2003) ("[L]aw does not merely reflect the norms of a pre-existing culture, but is instead itself a medium that both instantiates and establishes culture.").

[251] *See* Hansmann & Kraakman, *supra* note 4. *But see* Armour, Deakin & Konzelmann, *supra* note 173.

[252] *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436 (2000) (arguing that states face tradeoffs in choosing levels of legalization, and that choices along this continuum of tradeoffs determine the "hardness" of legalization, both initially and over time); Shaffer & Pollack, *supra* note 231, at 716 (2010) (agreeing with the approach that hard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum).

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believed to have no legally binding force.[253] In addition, we must acknowledge the power which is concentrated in and perpetuated by—dominant—discursive regimes, which, as we saw in the example of the law and economics narrative of corporate governance, effectively create a justification framework seen as value neutral and objective. As has been shown again and again,[254] the so-called "end of history" and its related allegation of a global triumph of shareholder value maximization "works" because its narrow premises are hidden from view.

Meanwhile, beyond the scholarly debate around corporate law and corporate governance, a broader, richer, and growing literature aims at addressing the increasingly profuse normative and regulatory mosaic that forms against the background of the state's changing regulatory role,[255] and prompts the reconceptualization of law and regulation through notions of transnational law,[256] global law,[257] and legal pluralism.[258] Irrespective of the terminological

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253 *See* Klaas Hendrik Eller, *Private Governance of Global Value Chains From Within: Lessons From and for Transnational Law*, 8 TRANSNAT'L LEGAL THEORY 296, 301 (2017) (demonstrating that transnational law has not yet risen to the challenge of projecting and rearranging institutional guarantees of national democratic lawmaking beyond the state).

254 *See, e.g.*, STOUT, *supra* note 169; Armour, Deakin & Konzelmann, *supra* note 173.

255 *See* Shaffer, *supra* note 43. *See also* Peer Zumbansen, *Rethinking the Nature of the Firm: The Corporation as a Governance Object,* 35 SEATTLE U. L. REV. 1469, 1470 (2012).

256 *See, e.g.,* PHILIP JESSUP, TRANSNATIONAL LAW (1956) (unpacking the notion and concept of transnational law); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 305 (2012); César Arjona, *Transnational Law as an Excuse. How Teaching Law Without the State Makes Legal Education Better* (ESADE, Working Paper No. 219, 2011), https://ssrn.com/abstract=1940274 [https://perma.cc/G88T-MZRZ].

257 *See generally* GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW (2008) (investigating, *inter alia*, the role of international organizations in contributing to a global repository of commonly shared values and norms); RAFAEL DOMINGO, THE NEW GLOBAL LAW (2010) (pursuing the idea of a global people as a source and legitimate foundation of legal order that addresses humanity's pressing problems).

258 *See* Teubner, *supra* note 216, at 626; *see generally* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012) (providing a comprehensive account and analysis of distinct, coexisting, and overlapping normative orders inside and beyond national jurisdictional systems).

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debate,[259] legal, social and political thinkers have been mobilizing a rich array of approaches to address the changing face of legal (private and public) regulation in globally integrated markets. Arguably, corporate governance regulation has been a latecomer to this dynamic scholarly discussion of the dynamic nature of private regulation, which has mainly focused on other non-public law fields, including consumer protection, labor regulation, finance, banking, human rights, environmental regulation, accounting standards, and e-commerce.[260]

The suggestion of thinking of corporate governance as a *transnational regulatory field* and of approaching it from a legal pluralist perspective [261] builds on the insights of VoC and comparative political economy scholars but reads them against the background of a longer-standing critique of the all-too-often assumed exclusionary status of law as originating in and from the state. In contrast, when we study corporate governance through the lens of transnational legal methodology and legal pluralism with a focus on the *actual* actors, norms, and processes that make up the field, the intricate relations between formal and informal, "public" and "private," "hard" and "soft" law norms which make up the multiple and spatialized political economies of corporate governance regulation today become visible.[262] The transnational dimension of public and private actors, the newly emerging legal and social forms of norms and the multi-level rule-setting processes

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[259] For an insightful critique, see Frank J. Garcia, *Globalization's Law: Transnational, Global or Both?, in* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2015 at 31 (Giuliana Ziccardi Capaldo ed., 2016).

[260] For a transnational discourse of other areas of private law, see Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT'L L. 875 (2015).

[261] *See, e.g.,* Zumbansen, *supra* note 61, at 248; Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141 *passim* (2010).

[262] *See, e.g.,* Peer Zumbansen, Lochner *Disembedded: The Anxieties of Law in a Global Context*, 20 IND. J. GLOBAL LEGAL STUD. 29 *passim* (2013) (exploring the challenges facing the theory of transnational governance today); Peer Zumbansen, *The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGES OF GLOBAL AND LOCAL LEGAL PLURALISM 84 (Michael A. Helfand ed., 2015) (discussing how developments in privacy law "address the normative challenges of transnational private regulatory governance").

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radicalize the "semi-autonomous" nature[263] of transnational corporate governance regulation and reveal the tension between binding state-law, on the one hand, and market-based, but still not necessarily non-binding "law," on the other.[264]

It is against this background that earlier scholarly depictions of the traditional corporate governance debates of the past decades need to be read more critically. We suggest revitalizing the idea of the "embeddedness" of corporations within the social and political system, albeit under present-day conditions.[265] In that regard, we have to acknowledge the challenges that arise for a project which seeks to track and trace the corporation in a complex, historical, cultural, political, and legal context. This inevitably leads to difficult questions of sociology in a context that sociologists such as Niklas Luhmann and others[266] have called the "world society"—namely a world which is both multi-level and trans-territorialized and whose defining feature is the radical fragmentation of systems across different governing rationalities.[267] While being partially grounded in the VoC story of corporate law and corporate governance as regulatory regimes that are shaped by the national, historically

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[263] Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719, 720 (1973).

[264] *See* Jaakko Salminen, *Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities*, IND. J. GLOBAL LEGAL STUD. 709, 710 (2016) (using the term "contract-boundary-spanning governance" to refer to "the increasingly sophisticated mechanisms that are used by private actors to govern chains or networks of contracts for a particular purpose"); Eller, *supra* note 246; Zumbansen, *supra* note 55, at 66.

[265] *See* Sabine Frerichs, *Transnational Law and Economic Sociology*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed., forthcoming 2020); Sabine Frerichs, *Re-embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law, in* KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 65 (Christian Joerges & Josef Falke eds., 2011); *see generally* POLANYI, *supra* note 239; Robert Boyer & J. Rogers Hollingsworth, *From National Embeddedness to Spatial and Institutional Nestedness, in* CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 433 (Robert Boyer & J. Rogers Hollingworth eds., 1997).

[266] *See* Niklas Luhmann, *The World Society as a Social System*, 8 INT'L J. GEN. SYST. 131, 131-38 (1982); *see also* John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOCIO. 144 *passim* (1997); CALLIESS & ZUMBANSEN, *supra* note 210.

[267] *See* Peer Zumbansen, *The Next 'Great Transformation'? The Double Movement in Transnational Corporate Governance and Capital Markets Regulation, in* KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 181 (Christian Joerges & Josef Falke eds., 2011).

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evolving political economies of their times, our focus on the "*transnationally* embedded firm" goes beyond the VoC account. Because we place the corporation in the context of domestic and transnational state transformation with its attendant rise of diverse and hybrid forms of norm creation and implementation, on the one hand, and in the context of a globally financializing economy,[268] on the other, corporate governance is for us always "already" transnational—that is, it is embedded in processes of regulatory transformation and market dynamics which are never fully confined by the state and its territory.

This, then, is the main reason why a corporate governance analysis that alludes to the connections between the corporation and global capital markets but reduces the political analysis of the corporation to the juxtaposition of shareholders and stakeholders is not only misleading, but, in the end, unproductive. In both respects, much of the current analysis of corporate governance transposes the corporation into a realm that is simultaneously abstract and politically charged. By contrast, we side with those scholars who insist on and invest in the messy, detailed work of political economy analysis as it promises to show how the financialized corporation today is both the object and subject in a complex and changing physical, geographical legal environment.[269] The political economy analysis allows us to study corporate governance not as a distinct field of ideological warfare over directors' duties or a corporation's "social responsibilities," but in the context of the rise and ensuing transformation of the "post-regulatory," globalizing state since the 1980s. While any conversation about the corporation and about corporate law carries the seed of a larger investigation into the relationship between state and market in it, it is really only when we take the concrete political economy changes into account, which shape our engagement with corporations, that we can hope to arrive

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[268] *See* Ronald Dore, *Financialization of the Global Economy*, 17 INDUS. & CORP. CHANGE 1097, 1101-02 (2008) ("This vast superstructure of gambling transactions is built on the needs of the producers and consumers of goods and non-financial services for (i) credit, (ii) insurance against uncertainty, and (iii) profitable ways of using their savings.").

[269] *See, e.g.*, JACOBY, *supra* note 168, *passim* (discussing the embeddedness of corporations and corporate governance systems); THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM (Cynthia A. Williams & Peer Zumbansen eds., 2011) (providing a detailed discussion of the embeddedness of corporations and corporate governance systems).

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at a more comprehensive understanding of what corporate governance is really about. And it is at that point that the inseparability between corporate law and these ominously "bigger" questions of democracy, equality, and justice show themselves.[270] When we speak of corporate governance as part of a national discourse on how corporations should be run[271], we believe that it should become normal to consider the very wide range of social constituencies that make up the stakeholders of a corporation—rather than having to fight for an occasional, exceptional acknowledgement of the corporation's impact on and exclusion of vulnerable interests as has long been the main orientation of CSR work.[272] When we speak of multinational or transnational corporations and of corporate governance as a transnational site of regulatory conflict we want to direct attention to the complex interplay between a corporation's locally embedded stakeholders, including respective host governments, on the one hand, and an immensely diversified, as well as spatially diffused, transnational set of claimants of rights towards and in the corporation, on the other. In both respects, we argue that the corporation should no longer be treated as a token in a relatively clean-cut ideological struggle between "state" and "market" à la Friedrich Hayek, Milton Friedman, or Mark Zuckerberg, but rather as a crucial organizational platform and policy arena which is rife with regulatory potential and vivacity.

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[270] *See* Wolfgang Merkel, *Is Capitalism Compatible with Democracy?*, 8 ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 109, 128 (2014), https://link.springer.com/article/10.1007/s12286-014-0199-4 [https://perma.cc/5AMN-V5W6]; DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY (2011).

[271] *See, e.g.*, Lipton, *supra* note 68.

[272] *See* Charles Eesley & Michael J. Lenox, *Firm Responses to Secondary Stakeholder Action*, 27 STRAT. MGT. J. 765, 765 (2006) ("While firms are not contractually obligated to these secondary stakeholders, anecdotal evidence suggests that these groups can bring pressures to bear to induce firms to respond to stakeholder requests. In particular, outside stakeholder groups can engage in a set of actions such as protests, civil suits, and letter-writing campaigns to advance their interests. These actions can provide strong incentives for firms to meet stakeholder demands . . . .").

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VII. THE EMERGING LEGAL DOCTRINE AND LEGAL THEORY OF TRANSNATIONAL CORPORATE GOVERNANCE: SHAREHOLDER STEWARDSHIP AS CASE IN POINT

As is often said, *verba docent, exempla trahunt*. As such, we shall now turn to our case study. The recent regulatory initiative around the concept of shareholder stewardship, which we will now focus on, is illustrative of the fundamentally transnational nature of the normative evolution of corporate governance today. The meteoric growth in the presence of institutional investors—such as pension funds, open-end mutual funds, index funds and hedge funds—in global equity markets in the last three decades and changing corporate governance practices (ranging from informal forms of shareholder engagement to more aggressive forms of hedge fund activism[273]) prompted the resurrection of the old corporate governance scholarly dogma of "shareholders as monitors."[274] Inspired by law and economics theories, scholars put forward the idea that institutional shareholders, especially pension funds, have the skills and incentives to engage in efforts to influence or discipline managerial activity.[275] Post-GFC, however, such benign assumptions with regard to an effective monitoring function attributed to institutional shareholders have not always fared so well. While some were concerned with the purported ability of institutional investors, especially hedge funds, to influence

[273] *See*, *e.g.*, Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 VA. L. & BUS. REV. 459 (2013) (providing original empirical data on activist hedge fund campaigns outside the United States and dismantling some of the key myths surrounding hedge fund activism). For a recent account of shareholder activism, see Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971 (2019).

[274] For an analysis of the changed nature of shareholders in recent decades, see Dionysia Katelouzou, *Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Stewardship*, *in* UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 117 (Barnali Choudhury & Martin Petrin, eds., 2017).

[275] *See*, *e.g.*, John C. Coffee Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 *passim* (1991); Gilson & Kraakman, *supra note* 127. Note, however, that team production theorists and those who view directors as stewards do not see the role of shareholder monitoring as being essential to the health of a company's corporate governance. *See*, *e.g.*, Blair & Stout, *supra* note 130; James H. Davis, F. David Schoorman & Lex Donaldson, *Toward a Stewardship Theory of Management*, 22 ACAD. MGMT. REV. 20 (1997).

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companies at their own benefit,[276] others have been pressing the need to address investors' short-termism and myopia as well as the challenges posed by the increasing equity intermediation.[277] This transformed the prevailing narrative relating to the corporate governance role of institutional shareholders,[278] and currently it is widely accepted, especially in policy circles, that institutional shareholders' engagement is a desirable corporate governance attribute only when it ensures long-term returns for both beneficiaries (investment management) and shareholders (corporate governance) and advances social responsibility.[279]

It is within this ideological and institutional framework that post-GFC corporate governance reforms aimed at encouraging institutional shareholders to actively engage with their investee companies while promoting long-term corporate performance and becoming active "stewards" have emerged. Inaugurated by Sir David Walker in his 2009 review of corporate governance in UK banks and other financial institutions,[280] and manifested in the UK Stewardship Code, (hereinafter UK Code) introduced in 2010 and revised in 2012 and 2020,[281] shareholder stewardship refers to

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[276] *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1283-92 (2008) (portraying the activist minority shareholders as "conflicted" ones and proposing a widening of fiduciary duties so that they apply to activist minority shareholders).

[277] *See, e.g.*, Alan Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639, 653 (2013). *But see* Joseph McCahery, Zacharias Sautner & Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN. 2905, 2915 (2016) (reporting recent findings in support of the view that shareholder activism is not driven by short-term myopic investors).

[278] For one of the competing narratives about shareholders, see Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506-13 (2018).

[279] On the dualistic nature of investment stewardship as consisting of both corporate governance and investment management elements, see Dionysia Katelouzou, Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship (2021) (unpublished manuscript) (on file with author).

[280] WALKER, *supra* note 149.

[281] FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2012) [hereinafter UK CODE 2012], https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf [https://perma.cc/5ZJ8-RFSA]. For the 2020 version, see FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2020) [hereinafter UK CODE 2020], https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf [https://perma.cc/BKS8-VN4C].

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constructive shareholder engagement and monitoring of companies on the part of asset managers and asset owners for the long-term interests of their beneficiaries, their investee companies, and society as a whole. This idea that institutional investors should behave as long-term oriented "stewards" has caught on globally. Ten years after the launch of the landmark UK Code, stewardship codes can be found in a number of other countries in Europe, e.g. Denmark,[282] Italy,[283] the Netherlands,[284] Norway[285] and Switzerland,[286] and as a basis for the amended EU Shareholder Rights Directive 2017 (SRD

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[282] COMM. ON CORP. GOVERNANCE, STEWARDSHIP CODE (2016) [hereinafter DANISH CODE], https://corporategovernance.dk/sites/default/files/erst_247_opsaetning_af_anbefalinger_for_aktivt_ejerskab_uk_2k8.pdf [https://perma.cc/JG3U-VMPX].

[283] ASSOGESTIONI, ITALIAN STEWARDSHIP PRINCIPLES FOR THE EXERCISE OF ADMINISTRATIVE AND VOTING RIGHTS IN LISTED COMPANIES (2016) (It.) [hereinafter ITALIAN CODE], https://www.assogestioni.it/sites/default/files/docs/principi_ita_stewardship072019.pdf [https://perma.cc/958Y-H895].

[284] EUMEDION, DUTCH STEWARDSHIP CODE (2018) [hereinafter DUTCH CODE], https://www.eumedion.nl/nl/public/kennisbank/best-practices/2017-09-consultatiedocument-stewardship-code.pdf [https://perma.cc/MJ5G-TPQE].

[285] VERDIPAPIRFONDENES FORENING [NORWEGIAN FUND & ASSET MANAGER ASS'N], BRANSJEANBEFALING FOR MEDLEMMENE I VERDIPAPIRFONDENES FORENING: UTØVELSE AV EIERSKAP [THE PRINCIPLES OF THE INDUSTRY RECOMMENDATION ON EXERCISE OF OWNERSHIP] (2020) [hereinafter NORWEGIAN CODE], https://vff.no/assets/Bransjeanbefaling-ut%C3%B8velse-av-eierskap-januar-2020.pdf [https://perma.cc/KML2-ZAEP].

[286] SWISS ASS'N OF PENSION FUND PROVIDERS, ET AL., GUIDELINES FOR INSTITUTIONAL INVESTORS GOVERNING THE EXERCISING OF PARTICIPATION RIGHTS IN PUBLIC LIMITED COMPANIES (2013) [hereinafter SWISS CODE], https://swissinvestorscode.ch/wp-content/uploads/2013/06/Richtlinien_16012013_e.pdf [https://perma.cc/QVD6-75PC].

II),[287] but also as far as Australia,[288] Brazil,[289] Canada,[290] Japan,[291] Hong Kong,[292] India,[293] Kenya,[294] Korea,[295] Malaysia,[296]

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287 *See* SRD II, *supra* note 52.

288 In Australia two different industry bodies have issued stewardship codes, one for asset managers and another for asset owners. *See* FIN. SERVS. COUNCIL (FSC), FSC STANDARD 23: PRINCIPLES OF INTERNAL GOVERNANCE AND ASSET STEWARDSHIP (2017) [hereinafter FSC CODE], https://www.fsc.org.au/web-page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship [https://perma.cc/LF96-8D67]; AUSTRALIAN COUNCIL OF SUPERANNUATION INV. (ACSI), AUSTRALIAN ASSET OWNER STEWARDSHIP CODE (2018) [hereinafter ACSI 2018], https://acsi.org.au/wp-content/uploads/2020/01/AAOSC_-The_Code.pdf [https://perma.cc/CF52-E6L9].

289 ASSOCIAÇÃO DE INVESTIDORES NO MERCADO DE CAPITAIS, AMEC STEWARDSHIP CODE (2016) [hereinafter AMEC CODE], https://en.amecbrasil.org.br/wp-content/uploads/2016/11/Amec-Stewardship-Code-Final-Draft.pdf [https://perma.cc/8KFG-DLY4].

290 CANADIAN COAL. FOR GOOD GOVERNANCE, STEWARDSHIP PRINCIPLES (2017) [hereinafter CANADIAN CODE], https://www.ccgg.ca/wp-content/uploads/2019/03/Stewardship-Principles-2019-update.pdf [https://perma.cc/XQL9-8Q8E].

291 COUNCIL OF EXPERTS ON THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS "JAPAN'S STEWARDSHIP CODE" (2017), https://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf [https://perma.cc/3Y8B-U4ZX]. The Code was amended in 2020, see COUNCIL OF EXPERTS ON THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS "JAPAN'S STEWARDSHIP CODE" (2020) [hereinafter JAPAN CODE], https://www.fsa.go.jp/en/refer/councils/stewardship/20200324/01.pdf [https://perma.cc/6RGE-TX5L].

292 SEC. AND & FUTURES COMM'N, PRINCIPLES OF RESPONSIBLE OWNERSHIP (2016) [hereinafter HONG KONG CODE], http://www.sfc.hk/web/EN/files/ER/PDF/Principles%20of%20Responsible%20Ownership_Eng.pdf [https://perma.cc/37KZ-38XJ].

293 In India, three stewardship codes each with a different scope have been introduced. *See* Insurance Regulatory and Development Authority of India, Guidelines on Stewardship Code for Insurers in India, IRDA/F&A/GDL/CMP/059/03/2017 (Issued on March 20, 2017) (amended in 2020); Pension Fund Regulatory and Development Authority (PRFDA), Common Stewardship Code, PFRDA/2018/01/PF/01 (Issued on May 4, 2018) [hereinafter PFRDA], https://www.pfrda.org.in/writereaddata/links/circular-%20common%20stewardship%20code%2004-05-186ec9a3b4-566b-4881-b879-c5bf0b9e448a.pdf [https://perma.cc/7XUE-TDUY]; Securities and Exchange Board of India (SEBI), Stewardship Code for all Mutual Funds and all Categories of AIFs, in Relation to Their Investment in Listed Equities, CIR/CFD/CMD1/168/2019 (Issued on December 24, 2019) [hereinafter SEBI], https://www.sebi.gov.in/legal/circulars/dec-2019/stewardship-code-for-all-mutual-funds-and-all-categories-of-aifs-in-relation-to-their-investment-in-listed-equities_45451.html [https://perma.cc/R6PR-QRW6].

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Singapore,[297] South Africa,[298] Thailand,[299] Taiwan,[300] and the United States,[301] and advocated globally by the International Corporate Governance Network (ICGN),[302] and other regional investor

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294 CAP. MKTS. AUTH., THE STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS (2017) [hereinafter KENYA CODE], https://www.manifest.co.uk/wp-content/uploads/2017/06/Stewardship-Code_for-Institutional-Investors-Gazetted.pdf [https://perma.cc/3G4V-N9EQ].

295 KOREA STEWARDSHIP CODE COUNCIL, KOREA STEWARDSHIP CODE: PRINCIPLES ON THE STEWARDSHIP RESPONSIBILITIES OF INSTITUTIONAL INVESTORS (2016) [hereinafter KOREA CODE], http://sc.cgs.or.kr/eng/about/sc.jsp [https://perma.cc/3MJ7-WZ2G].

296 MINORITY S'HOLDER WATCHDOG GRP. & SEC. COMM'N MALAYSIA, MALAYSIAN CODE FOR INSTITUTIONAL INVESTORS (2014) [hereinafter MALAYSIA CODE], https://www.sc.com.my/api/documentms/download.ashx?id=9f4e32d3-cb97-4ff5-852a-6cb168a9f936 [https://perma.cc/GN8M-PN7G].

297 STEWARDSHIP ASIA, SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS (2016) [hereinafter SINGAPORE CODE], http://www.stewardshipasia.com.sg/sites/default/files/2020-09/Section%202%20-%20SSP%20%28Full%20Document%29.pdf [https://perma.cc/P5XE-5VB4]. In October 2018, Stewardship Asia introduced the first-of-its-kind stewardship code for family owners. *See* STEWARDSHIP ASIA, STEWARDSHIP PRINCIPLES FOR FAMILY BUSINESSES, http://www.stewardshipasia.com.sg/sites/default/files/2020-09/SPFB-brochure-0913.pdf [https://perma.cc/6E4Y-7PP7]. For an in-depth analysis of the complexities of Singapore-style stewardship, see Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 VAND. J. TRANSNAT'L L. 989 (2020).

298 INST. OF DIRS. S. AFR., THE CODE FOR RESPONSIBLE INVESTING IN SOUTH AFRICA (2011) [hereinafter CRISA], https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/crisa/crisa_19_july_2011.pdf [https://perma.cc/6HDH-CCD6].

299 SEC. & EXCH. COMM'N, INVESTMENT GOVERNANCE CODE FOR INSTITUTIONAL INVESTORS (2017) [hereinafter THAILAND CODE], https://www.sec.or.th/cgthailand/EN/Documents/ICode/ICodeBookEN.pdf [https://perma.cc/49XV-4GE7].

300 TAIWAN STOCK EXCH., STEWARDSHIP PRINCIPLES FOR INSTITUTIONAL INVESTORS (2016), http://cgc.twse.com.tw/static/stewardship_en.pdf [https://perma.cc/HZ43-DUX5]. The Principles were amended in 2020, see TAIWAN STOCK EXCH., STEWARDSHIP PRINCIPLES FOR INSTITUTIONAL INVESTORS (2020) [hereinafter TAIWAN CODE], https://cgc.twse.com.tw/docs/Revision%20of%20Stewardship%20Principles%20for%20Institutional%20Investors-20200810.pdf [https://perma.cc/5QL8-XGT8].

301 INV. STEWARDSHIP GRP., STEWARDSHIP FRAMEWORK FOR INSTITUTIONAL INVESTORS (2017), https://ecgi.global/code/stewardship-framework-institutional-investors-2017 [https://perma.cc/4G5Z-2D8H].

302 INT'L CORP. GOVERNANCE NETWORK (ICGN), ICGN GLOBAL STEWARDSHIP PRINCIPLES (2016) [hereinafter IGCN CODE], https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf [https://perma.cc/KBY3-M83C].

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associations, such as the European Fund and Asset Management Association.[303] This gradual internationalization, and at the same time fragmentation, of shareholder stewardship as a body of "soft" law for institutional investors has led to a substantial but still far from comprehensive body of literature in recent years, focusing primarily on the effectiveness of the inaugural UK Code and its exportability to other jurisdictions.[304] Here, we examine the development of the law of shareholder stewardship under the lens of transnational regulatory governance, focusing on four key issues which we believe are critical for norm-creation: functions, authorship, nature and enforcement.

In general, stewardship codes are relatively short collections of principles and best practices that are accompanied by recommendations and suggestions directed to institutional investors (mainly asset owners and asset managers) and, by extension, to service providers, or in some cases, to the lawmaker.[305] They concern the corporate governance role of investment institutions and asset managers, including engagement and monitoring of investee companies (corporate governance aspects) as well as their responsibilities towards the ultimate investors (whether pension fund beneficiaries, mutual fund investors, insurance beneficiaries or hedge fund investors). This can include strategies to avoid conflicts of interests as well as reporting duties (investment management aspects).[306] Coming into existence with the 2010 UK

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[303] EUR. FUND & ASSET MGMT. ASS'N (EFAMA), EFAMA STEWARDSHIP CODE, PRINCIPLES FOR ASSET MANAGERS' MONITORING OF, VOTING IN, ENGAGEMENT WITH INVESTEE COMPANIES (2018) [hereinafter EFAMA CODE], https://www.efama.org/Publications/Public/Corporate_Governance/EFAMA%20Stewardship%20Code.pdf [https://perma.cc/Q5MB-PWFF].

[304] *See*, *e.g.*, David William Roberts, Note, *Agreement in Principle: A Compromise for Activist Shareholders from the UK Stewardship Code*, 48 VAND. J. TRANSNAT'L L. 543, 549-561 (2015).

[305] *See, e.g.*, ICGN Code, *supra* note 302, at 7.

[306] While stewardship was initially developed as a corporate governance concern aimed at transforming "rationally apathetic" institutional investors into actively engaged shareholders, stewardship had important investment management aspects from the outset as many stewardship codes' principles are dealing with the relationships between the investors and their beneficiaries, including conflicts of interests and transparency. These investment management aspects are becoming more pronounced now as stewardship codes increasingly promote ESG and interests beyond shareholder value maximization. *See* Katelouzou, *supra* note 279.

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Code, stewardship codes espoused investor-led governance as a positive regulatory mechanism. For instance, one of the key objectives of the first two versions of the UK Code, which traces back to the 2010 *Code on the Responsibilities of Institutional Investors* of the since dissolved Institutional Shareholders' Committee (ISC Code),[307] is to promote "the long term success of companies in such a way that the ultimate providers of capital also prosper."[308] Such an objective reflects the rationale whereby "shareholders" function "as monitors."[309] Meanwhile, the (rebuttable) assumption is that such monitoring of corporate affairs by institutional investors should not only improve the governance and performance of investee companies, but should also assist in the efficient operation of the markets while strengthening the credibility of the market economy as a whole. But the objectives of stewardship codes are more perplexing. Shareholder stewardship (perhaps optimistically) conceptualizes investors as performing a two-fold function: (1) a *monitoring (corporate governance) function* promoting long-term shareholder value and broader stakeholder welfare; and (2) an *accountability function* protecting the interests of the investors' clients and ultimate investors (investment management) as well as the shareholders and stakeholders of their investee companies (corporate governance). Under the spell of this so-called investor paradigm,[310] which dovetails with the theory of "universal

[307] FIN. REPORTING COUNCIL, CONSULTATION ON A STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS (2010), https://ecgi.global/sites/default/files/codes/documents/frc_stewardship_code_consultation_jan2010.pdf [https://perma.cc/Q9CQ-NLE2].

[308] UK CODE 2012, *supra* note 281, at 1.

[309] It is noteworthy, however, that the current 2020 UK Code defines stewardship as "the responsible allocation, management and oversight of capital to create long-term for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society" and therefore prioritizes the investment management perspective of stewardship to the corporate governance one. *See* UK CODE 2020, *supra* note 281, at 4.

[310] *See* Katelouzou, *supra* note 274, at 122 ("Within this paradigm, institutional investors are expected to act . . . as a monitoring mechanism promoting shareholder value maximization and . . . as an accountability mechanism protecting the interests of other shareholders and the economy as a whole through the promotion of shareholder stewardship.").

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owners", [311] the key tenets of the institutions' investment management and corporate governance functions and how they relate to institutions' long-term liabilities and long term corporate performance are regarded as blessed by a broader public interest in the creation of social value, beyond the maximization of profits. Clearly, the (perhaps) magic regulatory formula of stewardship is aimed at protecting the private interests of ultimate clients and beneficiaries, while at the same time promoting long-term corporate governance and sustainability coalescing shareholder with stakeholder interests and private with public interests.

On a substantive level, this important institutional characteristic of stewardship codes is exemplified in their corresponding regard for public policy concerns, which are extraneous to considerations of shareholder welfare. Even though there are differences in terms of the specific content, authorship, and nature across the various stewardship codes,[312] they all reflect the view that engagement by institutional investors is an enforcer of good corporate governance, while they recognize that powers come with responsibilities at both the investment management and corporate governance levels, thereby, tapping into a major problem with increasing solicitude for shareholders, namely the rise of financialization and short-term shareholder value processes at the expense of other stakeholders.[313] In addition, all the current twenty-three national stewardship codes link the interests of ultimate investors with those of the stakeholders of the investee companies, despite variations in emphasis, substantive details, and context.[314] Further, the overwhelming majority (sixteen) clearly links stewardship to the creation of long-

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[311] For a criticism of the theory of universal owners, see Benjamin J. Richardson & Maziar Peihani, *Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory*, 30 BANKING & FIN. L. REV. 405 (2015).

[312] For a detailed comparative and empirical analysis of these differences, see Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes* (Eur. Corp. Goverance Inst., Working Paper No. 526, 2020), https://ssrn.com/abstract=3616798 [https://perma.cc/YYU9-MGXH].

[313] *See* Katelouzou, *supra* note 6, at 582-87 (examining how eighteen stewardship codes around the world view shareholder engagement).

[314] For instance, the Japanese Stewardship Code tends to emphasize shareholders' interests rather than the interests of the ultimate beneficiaries and wider stakeholders. On a detailed comparison between the UK and Japanese Stewardship Codes, see Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 BERKELEY BUS. L.J. 365 (2018).

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term sustainable value for the investee companies.[315] Sixteen stewardship codes specifically refer to environmental, social, and governance (ESG) considerations thereby re-bundling "sustainable and responsible investment" (SRI)[316] into shareholder stewardship.[317] This trend of advocating long-term and ESG-aware investing through stewardship codes and principles is also supported by the ICGN Global Stewardship Principles,[318] and the EFAMA Code,[319] while the recently revised UK Code elevated social and environmental factors, including climate change, to central components of stewardship.[320]

In a similar vein, the SRD II is very much premised on the acceptance that an active corporate governance role for institutions will be aligned with the interests of their beneficiaries and the wider stakeholders of their portfolio companies.[321] Article 3(g) of the SRD II requires institutional investors and asset managers to develop an

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315 *See* ACSI 2018, *supra* note 288, at 5; CANADIAN CODE, *supra* note 290, at 7; CRISA, *supra* note 298, at 4, 7; DANISH CODE, *supra* note 282, at 3; DUTCH CODE, *supra* note 284, at 1; FSC CODE, *supra* note 288, at 3; HONG KONG CODE, *supra* note 292, at 1; ITALIAN CODE, *supra* note 283, at 16; JAPAN CODE, *supra* note 291, at 3; KENYA CODE, *supra* note 294, at 2892; KOREA CODE, *supra* note 295, at 3; MALAYSIA CODE, *supra* note 296, at 4; SINGAPORE CODE, *supra* note 297, at 3; SWISS CODE, *supra* note 286, at 4; TAIWAN CODE, *supra* note 300, at 2; and UK CODE 2020, *supra* note 281, at 1.

316 For more information on the meaning of SRI, see EUROSIF, EUROPEAN SRI STUDY 2016, at 9 (2016), http://www.eurosif.org/wp-content/uploads/2016/11/SRI-study-2016-HR.pdf [https://perma.cc/YB9R-2XNZ].

317 *See* AMEC CODE, *supra* note 289, at 4; CANADIAN CODE, *supra* note 290, at 7; CRISA, *supra* note 298, at 4; DUTCH CODE, *supra* note 284, at 7; FSC CODE, *supra* note 288, at 10; HONG KONG CODE, *supra* note 292, at 3; ITALIAN CODE, *supra* note 293, at 16; JAPAN CODE, *supra* note 291, at 2; KENYA CODE, *supra* note 294, at 2892; MALAYSIA CODE, *supra* note 296, at 13; PFRDA, *supra* note 293, at 1; SEBI, *supra* note 293, at 3; SINGAPORE CODE, *supra* note 297, at 6; TAIWAN CODE, *supra* note 300, at 8; THAILAND CODE, *supra* note 299, at 37; UK CODE 2020, *supra* note 281, at 15. For information on how stewardship codes around the world can support sustainability finance, see Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential* (Eur. Corp. Goverance Inst., Working Paper No. 521, 2020), https://ssrn.com/abstract=3578447 [https://perma.cc/L56G-NDWE].

318 *See* ICGN CODE, *supra* note 302, at 5, 11.

319 *See* EFAMA CODE, *supra* note 303, at 5.

320 *See* UK CODE 2020, *supra* note 281, at 4, Principles 4, 7 (Environmental, particularly climate change, and social factors, in addition to governance, have become material issues for investors to consider when making investment decisions and undertaking stewardship.").

321 SRD II, *supra* note 52, at Recitals 14 & 15.

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engagement policy with the aim of improving both the financial and non-financial performance of their investee companies, including the reduction of social and environmental risks and compelling institutional investors and asset managers to engage with stakeholders (in particular employees) in developing a balanced, long-term framework of corporate governance.[322] The directive, therefore, reflects a broad-based public interest in making institutional shareholders accountable for broader concerns in respect of companies' operations and to wider constituents in the exercise of their engagement powers.[323] Public disclosure imposed on institutional investors and asset managers[324] also seems to indicate the imposition of accountability on institutions beyond the private contours of their investment management relationship with their beneficiaries.

Overall, the development of stewardship codes and principles bring a "public" coloration into a shareholder engagement, which is essentially a "private" matter and can be seen as an effort, but arguably an optimistic one, to realign the relationship between ownership and control of public companies, which had become increasingly divorced in the post-war decades and reinforced corporate governance and investment management into society.[325] For transnational corporate governance regulation, the rise and expansion of stewardship codes reflect the significant change over the past ten years concerning the question of output legitimacy: more than ever are questions asked today that focus on who is "affected" by institutional investors' behavior and, by consequence, by the promotion or the absence of relevant stewardship codes.

The expansion of the stewardship codes' regulatory prerogatives and directions further mirrors the transformation of its associated constituencies. It is important to note in this respect that

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322 SRD II, *supra* note 52.

323 On the public interests of the SRD II, see Iris H.-Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?, in* SHAREHOLDERS' DUTIES 131 (Hanne S. Birkmose ed., 2017). This is part of a broader and deepening connection between corporate regulation and the public. *See* BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC (2019).

324 *See* Directive 2017/828, of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132/1) 3(g), 3(h), 3(i).

325 *See* Katelouzou, *supra* note 274.

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with regard to corporate governance's "input legitimacy," numerous private and public actors have become direct intervenors in the design of the stewardship codes and investors' sustainability compliance regimes.[326] Increasingly, we witness a cross-fertilization and a deterritorialized production of norms produced by various private and public actors and the implications of such norm-production for the nature and enforcement of these codes.[327] For instance, as noted above, the UK Code evolved out of the 2010 Code of the now dissolved ISC, which was set up at the behest of the Bank of England in the 1970s as part of the Heath government's attempts to improve the relationships between institutional investors and public companies.[328] The members of the ISC were originally the four major UK institutional investors' associations, i.e. the National Association of Pension Funds and the associations (then separate) representing investment trusts, unit trusts, and insurers.[329] In 1991, the Institutional Shareholders' Committee ("ISC") published a statement on the "Responsibilities of Institutional Shareholders"[330] which set out non-binding, best practices for institutional investors and agents in relation to their responsibilities in respect of their UK

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[326] For an analysis of the nature of the issuers of stewardship codes around the world, see Katelouzou & Siems, *supra* note 312, and Hill, *supra* note 278.

[327] For an approach in that direction, see Ruth Aguilera & Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants*, 28 ACAD. MGMT. REV. 447 (2003).

[328] *See* ALED DAVIES, THE CITY OF LONDON AND SOCIAL DEMOCRACY: THE POLITICAL ECONOMY OF FINANCE IN BRITAIN 1959-1979, at 42-52 (2017) (analyzing the role of the Heath conservative government in developing effective relationships between institutional investors and public companies).

[329] *See* FIN. REPORTING COUNCIL, *supra* note 307, ¶ 2.2. "The Institutional Shareholders' Committee (ISC) is a forum of UK trade associations formed to allow the UK institutional shareholding community to exchange views and, on occasion, co-ordinate their activities in support of the interests of UK investors. It currently [as of 2010] consists of the Association of British Insurers, the Association of Investment Companies, the Investment Management Association and the National Association of Pension Funds." *Id.* It is noteworthy that the Investment Management Association (IMA) was created in 2002 with the merger of the previously separate Association of Unit Trusts and Investment Funds with the Fund Managers' Association. In 2014 IMA merged with the investment department of the Association of British Insurers to create the Investment Association. For a brief history of the Investment Association, see *About Us*, INV. ASS'N, https://www.theia.org/about-us [https://perma.cc/Y6RX-4RB5].

[330] *Id.* ¶ 2.3.

investee companies.[331] This statement was revised in 2002, 2004, and 2007 before being upgraded to its status as a Code in 2009 (revised in 2010) that applied to institutional investors on a "comply-or-explain" basis.[332] The ISC's principles were an attempt by the institutional investors to self-regulate and thereby push back any governmental intervention in respect of institutional shareholder engagement,[333] especially following the Myners Review's recommendation in 2001 to impose a statutory duty on asset managers "to intervene in companies—by voting or otherwise—where there is a reasonable expectation that doing so might raise the value of the investment."[334] UK policymakers had long regarded institutional shareholder engagement as vital to the corporate governance of public companies, but had deliberately sought (especially since the 1990s) to induce institutional shareholders to develop their own self-regulatory responses to public concerns arising from the reluctance of institutional investors to take an active stance in relation to corporate underperformance.[335] Notably, the Cadbury Report fully endorsed the ISC's 1991 statement and called on institutional investors to play a more active role in the corporate governance of UK public companies.[336] The Combined Code and subsequent versions of the UK Corporate Governance Code (now 2018) invariably encouraged institutional investors to engage constructively with the board of directors and to use their ownership influence to pressure companies towards compliance with the

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331 *Id.* ¶2.6.

332 *Id.* ¶¶ 2.4-2.7.

333 *See id.* ¶¶2.4-2.6.

334 PAUL MYNERS, INSTITUTIONAL INVESTMENT IN THE UNITED KINGDOM: A REVIEW 14 (2001), http://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf [https://perma.cc/Y6VJ-FB5N].

335 *See, e.g.*, CADBURY, *supra* note 219, § 6.10, https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf [https://perma.cc/Q9EC-S45R] ("Given the weight of their votes, the way in which institutional shareholders use their power to influence the standards of corporate governance is of fundamental importance.").

336 *Id.* §§ 4.59, 6.11, 6.12 & 6.16; *see also* Holland, *supra* note 236.

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Code's provisions,[337] while the Myners Review[338] and Higgs Review both endorsed the ISC's principles.[339]

The upgrade of the ISC's principles to a soft Stewardship Code introduced by the FRC in 2010[340] is an example of "enforced self-regulation,"[341] otherwise referred to as "meta-regulation,"[342] and is part of an emerging market-oriented governance landscape which is closely associated with the long tradition of corporate governance codes. The 2010 (and 2012) UK Code, like the UK Corporate Governance Code, adopted the "comply or explain" approach, that voluntary signatories to the Code should comply or else explain why they do not comply with the Code's seven principles.[343] In a significant break with the long tradition of "comply or explain" in the area of corporate governance regulation, the 2020 UK Code adopts the stricter apply and explain approach emphasizing stewardship outcomes rather than policies.[344] Both approaches, however, are investor-led based on what UK regulators envisage as a "market for stewardship."[345] Stewardship signatories are expected to provide good annual reporting on stewardship, while asset owners are expected to monitor the stewardship activities of their

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337 FIN. REPORTING COUNCIL, *supra* note 223, at 2.

338 MYNERS, *supra* note 334, § 5.73-5.94 (endorsing institutional shareholder activism); HM TREASURY, UPDATING THE MYNERS PRINCIPLES: A CONSULTATION § 4.10-.11 (2008), https://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/consult_myner_310308.pdf [https://perma.cc/VBC9-4ELF].

339 DEREK HIGGS, REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS 70 (2003), https://webarchive.nationalarchives.gov.uk/20121106105616/http://www.bis.gov.uk/files/file23012.pdf [https://perma.cc/8DPH-FSHQ].

340 Fin. Reporting Council, *supra* note 307, ¶ 2.6.

341 *See* John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1467 *passim* (1982) (outlining the concept of "enforced self-regulation" and "its application in the context of corporate accounting standards").

342 Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, *in* THE OXFORD HANDBOOK OF REGULATION 146 (Robert Baldwin, Martin Cave, & Martin Lodge eds., 2010).

343 UK CODE 2012 , *supra* note 281, at 4.

344 UK CODE 2020, *supra* note 281, at 4.

345 *See*, *e.g.*, FIN. CONDUCT AUTH. & FIN. REPORTING COUNCIL, BUILDING A REGULATORY FRAMEWORK FOR EFFECTIVE STEWARDSHIP 11-12 (2019) (defining stewardship and discussing generally the market for stewardship), https://www.fca.org.uk/publication/discussion/dp19-01.pdf [https://perma.cc/7RDR-ZHH4].

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asset managers. This emerging "market for stewardship" in the UK is supported by the facilitating role of the FRC's tiering exercise,[346] as well as the support provided by the Investor Forum[347] and the Investment Association's Public Register and Long-term Reporting Guidance.[348] At the same time, social enforcement (reputation) mechanisms, such as public esteem or shaming carried out by investors themselves,[349] the media,[350] and civil society groups,[351] are becoming a key device for promoting stewardship and sustainability, especially climate change. Correspondingly, the enforcement of stewardship becomes an example of "dynamic accountability" within what Michael Dorf, Charles Sabel, and Jonathan Zeitlin call "experimentalist" governance where public and private (market and social) actors work together to create

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[346] *Tiering of Signatories to the Stewardship Code*, FIN. REPORTING COUNCIL (Nov. 14, 2016), https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code [https://perma.cc/93FA-EKQW].

[347] The Investor Forum was established in 2014 following the 2012 Kay Review to promote long-term shareholder engagement with UK companies. For more information about the role and activities of the Investor Forum, see INV. F., https://www.investorforum.org.uk/ [https://perma.cc/5F6A-GA92].

[348] The Investment Association introduced the public register to shareholder dissent in December 2017 at the request of the UK Government. Also, following the introduction of a new reporting requirement by the 2018 UK Corporate Governance Code, for companies that see twenty percent or more of votes being cast against the board recommendation for a resolution, the Investment Association published guidance on long-term reporting. For more information regarding the requirements, see *Public Register*, INV. ASS'N, https://www.theia.org/public-register [https://perma.cc/5LBB-KAEN].

[349] *See, e.g.*, *Larry Fink's Letter to CEOs, A Fundamental Reshaping of Finance*, BLACKROCK (2017), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/Z2MY-X8Z2]; Letter from Ronald P. O'Hanley, CEO, State St. Glob. Advisors, to Bd. Members (Jan. 26, 2017), https://www.ssga.com/investment-topics/environmental-social-governance/2017/Letter-and-ESG-Guidelines.pdf [https://perma.cc/34BW-MVX2]. For the potential shaming capacity of regulators, see Andrew Pearce, *FRC Threatens to 'Shame' Fund Managers Over Stewardship*, FIN. NEWS (Dec. 14, 2015, 12:32 PM), https://www.fnlondon.com/articles/frc-threatens-to-shame-fund-managers-over-stewardship-code-20151214 [https://perma.cc/U5AD-5QLR].

[350] *See, e.g.*, Michal Goldstein, *Does Flight-Shaming Over Climate Change Pose An Existential Threat to Airlines?*, FORBES (June 4, 2019, 2:45 PM EDT), https://www.forbes.com/sites/michaelgoldstein/2019/06/04/does-flight-shaming-over-climate-change-pose-an-existential-threat-to-airlines/#204458b83cfc [https://perma.cc/86LS-CRZD].

[351] *See, e.g.*, CERES, https://www.ceres.org/ [https://perma.cc/H9UZ-ARMR].

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regulatory arrangements and support enforcement.[352] This accountability-through-peer-review has a more coercive effect for all UK-authorized asset managers as it is backed by the FCA's Code of Conduct Handbook.[353] This element of coerciveness of the UK Code through the introduction of an associated disclosure obligation on asset managers authorized by the FCA is broadly equivalent in effect to the effect of the UK Listing Rules for public companies, albeit different in scope and detail.

Similar to the UK Code, all the other national stewardship codes are voluntary, "soft" law developments based on self-proclamation and market enforcement, but the degree of their softness largely depends on the issuing body. From the twenty-three total national stewardship codes, twelve have been issued by regulators or quasi-regulators and they all adopt a variant of the "comply or explain" or "apply and explain" enforcement model.[354] Yet from these, the UK, Dutch, Indian (SEBI) and Japanese Codes are supported in their function from an underpinning body of mandatory rules and/or institutions as there is an obligation on the part of domestic investors to comply or (apply and) explain.[355] From the other eleven codes, which have been issued by various industry participants or investors themselves, six adopt the comply (apply) or explain

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[352] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L. J. 271 *passim* (2008).

[353] FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK, § 2.2.3, http://fsahandbook.info/FSA/html/handbook/COBS/2/2 [https://perma.cc/WFM5-M7FD].

[354] DANISH CODE, *supra* note 282, HONG KONG CODE, *supra* note 292, PFRDA, *supra* note 293, and SEBI, *supra* note 293, JAPAN CODE, *supra* note 291, KENYA CODE, *supra* note 294, MALAYSIA CODE, *supra* note 296, SINGAPORE CODE, *supra* note 297, TAIWAN CODE, *supra* note 300, THAILAND CODE, *supra* note 299, and the UK CODE 2020, *supra* note 281.

[355] *See, e.g.*, JAPAN CODE, *supra* note 291, at 6. It is expected that this coercive element will be expanded in the EU following the transposition of the SRD II. For a comprehensive analysis of the enforcement parameters of stewardship, see Dionysia Katelouzou & Konstantinos Sergakis, *Shareholder Stewardship Enforcement* (Eur. Corp. Goverance Inst., Working Paper No. 514, 2020), https://ecgi.global/sites/default/files/working_papers/documents/katelouzosergakisfinal.pdf [https://perma.cc/JR6C-NK2A].

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principle,[356] one has a mandatory element,[357] while the rest are completely voluntary in nature.[358]

At the supranational level, Article 3(g) of the SRD II also adopts the "comply or explain" approach.[359] However, it has been argued elsewhere that the SRD II is not far short of imposing a duty to demonstrate engagement, as there is a duty on the part of asset owners and asset managers to publicly disclose the implementation and achievement of such engagement under Articles 3(h) and 3(i).[360] Arguably, the disclosure-based regulation requires that certain engagement conduct needs to be carried out in order for there to be sufficient matters to report and moves away from treating shareholder engagement as a voluntary practice, as is the case under national stewardship codes. The SRD II, in a "capital market regulation facet,"[361] is, therefore, a step towards legalizing or juridifying shareholder engagement and stewardship as a response to the social appetite for increasing regulation after the GFC. Moreover, Article 14(b) enables—but not obliges—Member States to provide for public enforcement of violations of the SRD II provisions transposed into national law.[362] While only Italy and the Netherlands have introduced such penalties for violations of engagement and disclosure duties, the directive does not operate in a normative vacuum since four Member States—Denmark, Italy, the Netherlands, and the UK—have their own domestic soft-law stewardship codes. These different approaches in enforcing stewardship are reflective of the increasing poly-centricity of stewardship norms and raise important questions about the future

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356 ASCI 2018, *supra* note 288, ITALIAN CODE, *supra* note 283, DUTCH CODE, *supra* note 284, CRISA, *supra* note 298, SWISS CODE, *supra* note 286, and KOREA CODE, *supra* note 295.

357 ACSI 2018, *supra* note 288.

358 AMEC CODE, *supra* note 289, CANADIAN CODE, *supra* note 290, NORWEGIAN CODE, *supra* note 285, and the United States, INV. STEWARDSHIP GRP., STEWARDSHIP FRAMEWORK FOR INSTITUTIONAL INVESTORS (2017), https://ecgi.global/code/stewardship-framework-institutional-investors-2017 [https://perma.cc/4G5Z-2D8H].

359 SRD II, *supra* note 52.

360 Chiu & Katelouzou, *supra* note 323.

361 For a critical approach, see Alessio M. Pacces, *Shareholder Activism in the CMU*, *in* CAPITAL MARKETS UNION IN EUROPE 507, 523 (Danny Busch, Emilios Avgouleas & Guido Ferrarini eds., 2018).

362 SRD II, *supra* note 52.

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symbiosis of soft and semi-hard law norms.[363] Finally, in terms of "output legitimacy," while it is questionable whether "soft" law can efficiently serve more paternalistic objectives, subjecting institutional investment management to standards and scrutiny is arguably a form of re-regulation, in order to ensure that the privatized and financialized form of social welfare provision may deliver public interest objectives in due course.

Our analysis shows that the development of the law of shareholder stewardship over the last decade is a powerful example of the complex intricacies between shareholder primacy and broader stakeholder welfare as regulatory objectives, and between internalized, self-regulatory processes of market-invoking regulation and official law making at both domestic and supranational levels. The development of stewardship codes also confirms the inseparability of corporate governance regulation and investment management regulation (and wider law-making reform) when it comes to introducing standards of optimal institutional shareholders' behavior. Shareholder stewardship can also be seen as an example of an increase in the national "policy space" in the global economy.[364] Following in the steps of the development of corporate governance codes, the rapid diffusion of stewardship principles through replication and adaptation is a powerful illustration of how private ordering walks a fine line in relation to the embedded, institutional frameworks for official law-making. While some convergence towards universally acceptable stewardship principles can arguably arise from the operation of institutional investors, the stewardship codes themselves are embedded in the complex emerging political economies of corporate governance. The development of stewardship in countries with various shareholder, legal, institutional, economic, and cultural environments suggests that stewardship codes may have taken on a different role—perhaps multiple different roles—than the original "investor paradigm" underpinning the UK Code. Indeed, a few examples suggest that this may be occurring in myriad ways, with

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363 Katelouzou & Sergakis, *supra* note 355.

364 *See* Charles F. Sabel & Jonathan Zeitlin, *Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms* 7 (GR:EEN, Working Paper No. 3, 2011), http://cris.unu.edu/sites/cris.unu.edu/files/WP%203_GREEN_Sabel%20and%20Zeitlin.pdf [https://perma.cc/PZ3J-99RP].

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important implications for norm creation and law-making processes yet to be explored. In South Africa, CRISA appears to prioritize responsible investment and ESG factors over all other ownership responsibilities.[365] In Japan, the Code appears to be a policy tool aimed at fulfilling a political and economic goal of reorienting governance away from its traditional lifetime employee stakeholder form of corporate governance. In effect, it is geared towards a more shareholder focused form of governance to promote risk taking and to improve returns on capital, while distinctly lacking, it seems, the public interest orientation that we have identified in other codes.[366] In Singapore, stewardship principles developed and promoted by a government supported entity, Stewardship Asia, have set the rules of the game for how institutional investors should engage with listed companies—yet many of the most important listed companies are themselves government controlled.[367] In Europe, it is unlikely that the SRD II will facilitate a convergence movement towards a single, harmonized set of stewardship principles as it engages in open competition with pre-existing domestic stewardship codes or principles.[368] At the same time, the ICGN Principles still have to play the role of an international benchmark for good stewardship similar to the global relevance of the OECD Principles of Corporate Governance.

At the end of this exemplary case study, we find that the evolving *law* of shareholder stewardship can shine some light on the new forms of transnational embeddedness of regulatory innovation in locally defined governance structures on the one hand, and their integration in spatially unfolding rule-making processes, on the other. Regarding the relevant actors, norms, and processes, we find a tension that has long been growing between private and state, domestic and international actors, between shareholder primacy

[365] CRISA, *supra* note 298, at 4.

[366] Goto, *supra* note 314.

[367] Puchniak & Tang, *supra* note 297 (arguing that the development of the Singaporean Code serves the function of "halo signaling" demonstrating commitment to global standards of good corporate governance).

[368] *See* Dionysia Katelouzou & Konstantinos Sergakis, *When Harmonisation is not Enough: Shareholder Stewardship in the European Union*, EUR. BUS. ORG. L. REV. (forthcoming) (on file with author); *see also* Gen Goto, Alan K. Koh & Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829 (2020) (arguing that the development of stewardship codes in Asia leads to the phenomenon of "faux convergence").

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and broader stakeholder welfare, and between market-invoking and official-law making processes. Correspondingly, the development of the law of shareholder stewardship is a powerful illustration of the promise of a new methodology of transnational corporate governance in offering the necessary tools and the required analytical framework for understanding corporate governance regulation in the 21st century.

VIII. CONCLUSION: THE TRANSNATIONALIZATION OF CORPORATE GOVERNANCE AND THE POLITICAL STAKES OF NORM CREATION

The development of stewardship codes and principles by private and public actors to define institutional investors' and asset managers' responsibilities is part of an emerging market-oriented governance landscape which has seen a significant rise in corporate governance codes and codes of conduct, a development which still begs an important explanation of cause, agency and, certainly, legitimacy. To simply attribute the expansion of private corporate governance norm production to the "retreat" of the state or to mounting public pressure on the state and on corporations to embrace the idea of "corporate (social, environmental) responsibility" and more recently "stakeholderism," falls short of fully capturing the regulatory dynamics which have been shaping this field. But their very nature—their blended private and public objectives, their oscillation between "hard" and "soft" law and between state intervention and market ordering—has begun to fundamentally alter the already demarcated regulatory landscape of corporate governance and poses difficult questions, which are not confined to the issues of regulatory governance in the area of corporate regulation. Effectively, the attempt undertaken in this Article to focus on the emerging *plurality* of political economies of corporate governance as a transnational regulatory problem has opened up perspectives on the bigger picture of which corporate governance is but a part.

We used shareholder stewardship to illustrate the expansion and, at the same time, the deepening of national and regional policy spaces in a global economy. It is here where we came up with unexpected results. The development of stewardship codes speaks to the emergence of legal regimes that can no longer adequately be

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explained with reference to the "state" or the "market," and is an example of intricate, domestic, and transnational, multi-level processes of norm generation involving different national, supranational, and private actors, using non-traditional processes through which norms are being generated, which do not wholly comply with categories of statute, rule or treaty. We also found that in times of perceived and increasingly critically scrutinized market failures, the generation of "soft" law in the form of not always non-binding norms is being outsourced, but not to the markets directly. Instead, the task of coming up with a suitable regulatory regime is uploaded and relegated to supranational actors. The SRD II is an example of pursuing the harmonization of an area of law which had for a long time been perceived as overly privatized and, normatively, market focused. In the SRD II, the originally soft, investor-driven law of shareholder stewardship appears to coalesce into hard, regulatory law after arriving at a state of what Luhmann, referred to as "counterfactually stabilised behavioural expectations."[369] Given the continuously growing pressure of global securities markets and their attendant rules on the normative architecture of corporate law, a key question we need to ask is whether we are indeed facing a re-bundling of "soft" law corporate governance norms into "hard" law capital markets law.

A related question concerns the normative assessment of emerging transnational corporate governance regimes such as the stewardship one. The so-called and endlessly abused "public interest" might function as a reference point when calling private investment management of financialized social wealth to account. But, more likely is the re-characterization of any future stewardship legalization as a form of regulatory accountability framework which goes beyond the traditional, law and economics approach to the corporate governance role of institutional shareholders to a broader "regulatory ecology" serving both private and public interests.[370]

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[369] *See* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 33 (Martin Albrow ed., Elizabeth King-Utz & Martin Albrow trans., 2d ed. 2014) ("Norms are *counterfactually stabilized behavioral expectations*. Their meaning implies unconditional validity, in so far as the validity of the norm is experienced, and thus institutionalized, as independent of actual fulfilment or non-fulfilment.").

[370] *See* Beate Sjåfjell & Mark B. Taylor, *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose,* 13 INT'L & COMP. CORP. L.J. 40 *passim* (2019)

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There is also the issue of the chosen enforcement mode. Unlike the tradition of market-invoking regulation in the area of corporate governance which is based very much on the premise of enabling, private and market-driven regulatory modes, the development of shareholder stewardship serves more paternalistic objectives of aligning institutional investors' corporate governance role with long-term corporate wealth creation as a social good. But if this is the purported regulatory aim behind the development of shareholder stewardship, the adoption of soft "comply or explain" or "apply and explain" enforcement approaches seems out of step. While market discipline has long served as the default enforcement mode in corporate governance regulation and has been extensively examined within the context of corporate governance codes, allowing asset owners and other market participants to be the only monitors of the veracity of both the signatory statements and the actual outcomes of stewardship is not only of questionable effectiveness but is also out of step with the stated "public" regulatory objectives.[371]

It is therefore necessary to ask whether this infused paternalism and the gradual hardening of the shareholder stewardship norms in the SRD II is but a superficial change or whether, instead, we should welcome it as an opportunity to place the institutional investors and the corporation more broadly in a post "embedded liberalism" context. From the perspective of transnational corporate governance, the development of stewardship codes shows how the tradition of "market-focused" corporate governance regulation can and should no longer rely on the path-dependent trajectories of national law-making processes. The emergence of transnational corporate governance is characterized by an intricate combination of public and private agency, but also of a variety of evolving regulatory instruments where "hard" law is not stable. In that sense, domestic corporate governance reform must be seen as part of an

(examining the interaction of corporate regulation with the social norms of shareholder primacy and sustainability and the development of a regulatory ecology of corporate purpose).

[371] *See* Iris H.-Y. Chiu & Dionysia Katelouzou, *Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles*, 2018 J. Bus. L. 67 *passim* (examining the inadequacies of the UK regulatory regime to address the public interests of investor-led governance and stewardship and proposing ways to address this via mandatory securities and investment management regulation).

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emerging transnational legal pluralism, which is shaped by continuing normative legacies as well as institutional and processual path-dependencies of particular local political economies. But, at the same time, the legal pluralism of transnational corporate governance reveals itself in the co-existence, interpenetration, and interaction of different regulatory forms.

Seen in this light, the case of shareholder stewardship is illustrative of how "soft" law recommendations can enter a regulatory realm which is occupied by both public and private norm-entrepreneurs. While the former includes "the state," which pursues corporate law reform, the latter encompasses a wide range of private actors such as banks, investments funds, and expert groups who are calling for new rules to govern investment conduct. But it also includes other stakeholders such as unions and labor activists as well as civil society groups uniting and campaigning under different flags and themes. From this perspective, shareholder stewardship denotes how "soft" law recommendations may grow into widely accepted norms of "good governance" and solidify perceived public interest. Shareholder stewardship is not the only case where we can draw out complex correlations between different actors, levels, and spaces of norm creation or where we can trace the infusion of public stakeholder objectives into shareholder welfare. The well-examined examples of the development of corporate governance codes and corporate codes of conduct already show the "law's poly-contextualization."[372] As for the newly amplified public interest in transnational corporate governance regulation, this traceable trend can be, for example, found in post-GFC corporate governance regulations in the UK and elsewhere where efforts are underway that aim to solidify public policies, such as wealth distribution, equality in the boardrooms and labor force, and various social goals, including long-term enterprise sustainability, wider stakeholder welfare, the protection of the environment, or gender and racial equality in economic organizations. Such policies are concerned with the objectives and outcomes of corporate activity within the wider fabric of the economy and society and go well beyond law and economics perceptions of the corporation and its perceived purpose, effectively feeding into the changing policies of transnational corporate

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[372] CALLIESS & ZUMBANSEN, *supra* note 210.

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governance regulation in globally integrated, yet locally distinct market and regulatory places.

The analysis offered in this Article should be seen as woven into the broader transformative trends in transnational law, global law, and legal pluralism. It seeks to cut through the distinct layers of comparative company law and institutional analysis to shed a new light on the far-reaching reform processes in domestic corporate governance systems worldwide but also on the proliferation of fora where, through new (and old) actors and in reliance on and through the development of new processes of participation, drafting, dissemination, and implementation, new norms are being created. Transnational corporate governance is here rendered as a methodological laboratory to inquire into emerging forms of authority and legitimacy, scrutinizing competing claims of effectiveness and testing the "real world" impact that emerging regulatory forms have on a wider set of stakeholders and "affected" populations. These new actors are directly engaged in negotiating competing interests regarding the economic—but also the larger social—function of the firm, as they all operate in intertwined local and global contexts.[373] They make competing claims regarding participation and control while being equally concerned with accountability, long-term orientation, and the protection of a wide range of local and distant interests.[374] It comes as no surprise then that the scope of corporate governance regulation—whether it is the state or particular market actors who are taking the lead—continues to expand significantly. Concerns around environmental, social and economic sustainability, risk and reputation, equality and minority protection have become part of the field's "common lexicon,"[375] while technological advances have an impact not only on the way

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[373] *See, e.g.*, David Monciardini, *The 'Coalition of the Unlikely' Driving the EU Regulatory Process of Non-Financial Reporting,* 36 SOC. & ENV'T ACCOUNTABILITY J. 76 (2016).

[374] Zumbansen, *supra* note 243, at 1469-98; *see also* Shaffer, *supra* note, 41 at 249-56.

[375] *See, e.g.*, Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, VAND. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441375 [https://perma.cc/5QT9-LWT2].

both boardrooms and shareholder operate,[376] but also, with regard to artificial intelligence's fundamental transformation of financial markets operation.[377] In that vein, a critical project of transnational corporate governance promises an inclusive and transformative reconceptualization of the corporation and its key actors and constituents in a world, which is marked by a growing disillusionment among the marginalized, excluded, and most vulnerable populations.

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[376] *See, e.g.*, Florian Möslein, *Robots in the Boardroom: Artificial Intelligence and Corporate Law, in* RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE 649 (Woodrow Barfield & Ugo Pagallo eds. 2018); Anne Lafarre & Christoph Van der Elst, *Blockchain Technology for Corporate Governance and Shareholder Activism,* (Eur. Corp. Governance Inst., Working Paper No. 390, 2018), https://ssrn.com/abstract=3135209 [https://perma.cc/8PTP-FJ96].

[377] WORLD ECON. F., THE NEW PHYSICS OF FINANCIAL SERVICES: UNDERSTANDING HOW ARTIFICIAL INTELLIGENCE IS TRANSFORMING THE FINANCIAL ECOSYSTEM (2018), http://www3.weforum.org/docs/WEF_New_Physics_of_Financial_Services.pdf [https://perma.cc/8YU9-HR3L].

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