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Corporate law and corporate governance are often called upon to address problems in international and transnational contexts. Financial markets are global and the problems in those markets are often similar, if not identical, even though the capital market structure across jurisdictions differs significantly. The beginning of the twenty-first century was marked by a spate of international corporate scandals, and the 2007–2009 global financial crisis reflected the global interconnectedness of contemporary international capital markets.

These events highlighted the issue of accountability for wrongful conduct by company directors and officers. Modern corporate governance is highly fragmented, encompassing an array of techniques to control the improper exercise of discretion and conflicts of interest. According to Professor Gilson, it is "a braided framework" that encompasses, not only autonomous legal rules, but also non-binding norms.

This Article analyzes, from a comparative perspective, two core aspects of this "braided framework." First, the Article considers fiduciary duties. It argues that, although there are broad similarities in the scope and operation of fiduciary duties in common law jurisdictions, such as the United States, United Kingdom and Australia, at a more granular level, there are important differences, which may affect the accountability of directors and officers.

Secondly, the Article examines corporate codes. Although generally non-binding, corporate codes can create powerful norms concerning the role of directors and officers and the exercise of their powers. These codes may also interact with fiduciary duties in complex and interesting ways, either complementing, or creating tensions with, those duties. Yet, such codes are by no means homogeneous, and substantive differences can often be traced to the identity of the actors responsible for writing them.

I. INTRODUCTION

Corporate law and corporate governance are often called upon to address problems in international and transnational contexts. Financial markets are global and the problems in those markets are often similar, if not identical, even though the capital market structure across jurisdictions differs significantly. The beginning of the twenty-first century was marked by a spate of international corporate scandals,[1] including Enron and WorldCom in the United States.[2] These scandals were similar but isolated events. The same cannot be said of the 2007–2009 global financial crisis, which exemplified the global "interconnectedness" of contemporary international capital markets.[3]

These corporate crises prompted significant financial market reforms.[4] Discerning the causes of these crises was no easy feat, yet the framing of the underlying problems was critical to the regulatory responses. For example, the collapse of Enron had multiple possible explanations, from board failure, to conflicts of interest of auditors and other reputational intermediaries, to defective remuneration structures.[5] In relation to the global financial crisis, opinion was divided as to whether shareholders were part of the problem, or a potential solution, to excessive risk-taking in corporate law.[6]

These crises highlighted the issue of accountability for improper conduct by company directors and officers. Modern corporate regulation today "occurs in many rooms."[7] It is highly fragmented, encompassing an array of techniques to

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1. These scandals included, for example, Royal Ahold in the Netherlands, Parmalat in Italy, Elan in Ireland, Kirch in Germany, and One.Tel and HIH in Australia. *See, e.g.*, Guido Ferrarini & Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case*, *in* AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US 159 (John Armour & Joseph A McCahery eds., 2006); Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367 (2005).

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

3. *See* Tony D'Aloisio, Chairman, Austl. Sec. & Inv. Comm'n, Presentation at the Asia Securities Forum in Sydney: Regulatory Response to the Financial Crisis, 13 (Oct. 12, 2009).

4. Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PA. J. INT'L L. 1147 (2009). Professor Enriques describes the response to the global financial crisis in these terms, however, the same can also be said for the earlier set of scandals, including Enron. *See* Hill, *supra* note 1.

5. *See generally* Coffee, *supra* note 2. *See also* Gordon, *supra* note 2.

6. *See, e.g.*, Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018).

7. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

control improper exercise of discretion and conflicts of interest, to ensure accountability. According to Professor Gilson, corporate governance is "a braided framework encompassing legal and non-legal elements"[8] – not only autonomous legal rules, but also non-binding principles, processes, and institutions.[9]

This Article discusses two core aspects of this "braided framework", which provide constraints on how directors and officers exercise their powers and discretion. The first of these is the law relating to directors' fiduciary duties, which occupies a central role in common law jurisdictions. This Article examines the fiduciary duties of directors and officers from a comparative law perspective in three common law jurisdictions: the United States, the United Kingdom, and Australia. It shows that although, at a general level, there are broad similarities across these countries, at a more granular level, there are important differences which may affect the accountability of directors and officers.

Fiduciary duties were once the primary constraint on the powers and discretion of company directors and officers. Today, however, they are only part of that "braided framework"[10]—one of a number of relevant sources of regulation.[11] Corporate codes have become a particularly important aspect of contemporary corporate governance. These codes, although generally non-binding, create powerful norms concerning the role of directors and officers and expectations regarding their use of power. Fiduciary duties and corporate codes operate holistically and interact in complex and interesting ways. Corporate codes, for example, provide a matrix in which fiduciary duties operate, and can complement, or create tensions with, those duties. Yet, as this Article shows, corporate codes are by no means homogeneous, and substantive differences can often be traced to the identities of the actors behind the relevant codes.

This Article is structured as follows. Part two provides a snapshot of the historical basis for classifying company directors and officers as fiduciaries and the transmission of broadly similar fiduciary law principles applying to company directors and officers across common law jurisdictions. Part three discusses the influential *law matters* hypothesis, and critiques its assumption that there are major differences between common law and civil law approaches to corporate regulation, but a unified Anglo-American common law. As part three demonstrates, there are many significant differences relating to fiduciary duties in the corporate law context in the United States, the United Kingdom, and Australia. Part four shifts focus to examine soft law, specifically the rise of corporate codes and their function as "norm creators." It considers the complex ways in which these codes can interact with directors' and officers' duties. Part five concludes, noting that there can be tensions between the law of fiduciary duties and corporate codes in, for example, the area of

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

9. *Id.*

10. *Id.*

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

shareholder versus stakeholder interests and rights. The Article concludes by suggesting that corporate governance codes are likely to increase, rather than decrease, jurisdictional differences relating to the duties of directors and officers.

II. THE COMMON HERITAGE OF COMMON LAW DIRECTORS' DUTIES IN CORPORATE LAW

The law relating to fiduciary duties of company directors was historically a national affair.[12] The classification of company directors as "fiduciaries" was a central pillar of early British law, developing, by analogy, to agents[13] and trustees[14] who were considered archetypical fiduciaries.[15] The famous 1742 U.K. decision in *Charitable Corp. v. Sutton*,[16] laid the groundwork for modern directors' duties. In that case, Lord Hardwicke L.C. stated that "by accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence."[17] Throughout the nineteenth century, British company law was notoriously *laissez-faire*[18] and fiduciary duties served as the primary constraint on directors' discretion and conduct.[19]

Numerous rationales and justifications have been given for the imposition of fiduciary duties on particular social actors. Some scholars have stressed the role of trust, dependence, and vulnerability of the beneficiary in the relationship.[20] From a historical perspective, the imposition of fiduciary duties on company directors and officers was justifiable under this rationale. At the time of Berle and Means' seminal 1932 text, *The Modern Corporation and Private Property*,[21] for example, shareholders were viewed as a dispersed and vulnerable group, in need of legal protection due to

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

13. *See* Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW (Evan J. Criddle et al. eds., 2018) (stating that, under the common law, "agency relationships are categorically treated as fiduciary" and noting that the fiduciary character of the agency relationship is directly linked to the potentially "grave impact" for the principal of the agent's actions).

14. Matthew Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 CO. & SEC. L.J. 403, 404–05 (2013).

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

16. Charitable Corp. v. Sutton (1742) 2 Atk. 400.

17. *Id.* at 406; *see also* Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1096–97 (1968); *ASIC v. Cassimatis [No. 8]* (2016) FCR 1023, [417] *ff* (Austl.). According to *Sutton's* case, the touchstone for assessing whether directors had acted with reasonable diligence was the standard of "gross neglect." *See supra* text accompanying note 16.

18. *See* Brian R. Cheffins, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED, 35, 194, 273 (2008); L. C. B. Gower, *The English Private Company,* 18 L. & CONTEMP. PROBS. 535, 536–37 (1953).

19. *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507, 553–56 (2019).

20. *See, e.g.*, Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011).

21. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

their inability to act collectively.[22] Today, however, the dominant shareholders in some jurisdictions, including the United States and United Kingdom, are powerful institutional investors.[23] Although these shareholders are hardly vulnerable, the imposition of fiduciary duties on directors and officers can still be justified on other rationales, such as the breadth of their discretionary powers[24] and their control of "critical resources belonging to the beneficiary."[25]

There are strong similarities in the approach to modern fiduciary duties of company directors and officers across common law jurisdictions, such as the United Kingdom, the United States and Australia. Each has equitable and common law ("general law") duties applying to directors, that are designed to address Adam Smith's classic problems of "negligence and profusion",[26] or, in modern economic parlance, "agency costs."[27]

These broad jurisdictional similarities regarding the duties of company directors and officers are hardly surprising. They are clear historical examples of legal transplantation[28] whereby the U.K. model of directors' duties was transmitted to common law countries around the world.[29] In the United States, for instance, the Delaware Court of Chancery acknowledged directors as fiduciaries in the 1926 decision in *Bodell v. General Gas and Electric Corp.*,[30] providing the basis for Delaware law's equitable duties of loyalty and care.[31] Australia also took its lead from the

22. Although Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928), concerned a two-man joint venture, its language encapsulates a "shareholder vulnerability" rationale for the imposition of fiduciary duties on company directors and officers. *Meinhard* is, however, rarely cited in the public corporation context by the Delaware courts.

23. *See, e.g.*, Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy,* 119 COLUM. L. REV. 2029 (2019).

24. Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 367, 379 (Evan J. Criddle et al. eds., 2019).

25. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002). In the corporate law context, technically those resources "belong" to the corporation, which is also the beneficiary of fiduciary duties.

26. ADAM SMITH, AN INQUIRY INTO THE WEALTH OF NATIONS, 313 (1776).

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

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

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

30. Bodell v. Gen. Gas & Elec. Co., 132 A. 442 (Del. Ch. 1926), *aff'd*, 140 A.2d 264 (Del. 1927). *See generally* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. 675, 680–81 (2009).

31. Under modern Delaware law, there was some uncertainty as to whether there existed a third duty, namely the duty of good faith. It is now accepted, however, that the so-called "duty of good faith" is not a stand-alone duty, but is rather a component of the broader duty of loyalty. *See generally*

United Kingdom with regard to corporate law, including directors' duties. The 1925 U.K. decision, *Re City Equitable Fire Insurance Co.*,[32] for example, represented the leading decision in Australia in the area of directors' duty of care for over 70 years. Directors' "no conflict" and "no profit" duties in Australia were also firmly based on U.K. case law.[33]

III. THE *LAW MATTERS* HYPOTHESIS AND UNCOMMON COMMON LAW APPROACHES TO DIRECTORS' FIDUCIARY DUTIES

The broad jurisdictional similarities between the United Kingdom, United States, and Australia accord with the influential *law matters* hypothesis, promulgated by La Porta et al. approximately 20 years ago.[34] This hypothesis claimed that the structure of capital markets around the world is directly linked to a country's corporate governance regime. According to the hypothesis, "legal investor protection is a strong predictor of financial development,"[35] and it forecast that jurisdictions with a high level of minority shareholder protection would develop deeply dispersed ownership structures.[36] "Legal origins" played a central role because the study concluded that common law jurisdictions, within the British "legal family,"[37] provided stronger minority shareholder protection than civil law jurisdictions.[38] One feature of the common law that the study viewed as particularly advantageous—and which is central to the development of the law of fiduciary duties—was the important role of independent judges, who relied on legal reasoning to decide cases.[39]

The *law matters* hypothesis provided support for convergence theory[40] via a process of horizontal imitation. One of the implications of the hypothesis was that

Holland, *supra* note 30, at 679. For a detailed analysis of the historical development of directors' fiduciary duties in the United States, see Marcia M. McMurray, Special Project, *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605 (1987).

32. Re City Equitable Fire Ins. Co. [1925] Ch 407. *See generally* Rosemary Teele Langford et al., *The Origins of Company Directors' Statutory Duty of Care*, 37 SYDNEY L. REV. 489, 507–08 (2015).

33. Pivotal U.K. cases in this area included, for example, Aberdeen Ry. Co. v. Blaikie Bros. (1854) UKHL 1 Paterson 394; Transvaal Lands Co. v. New Belgium (Transvaal) Land and Dev. Co. [1914] Ch 488; Cook v. Deeks [1916] 1 AC 554; Regal (Hastings) Ltd. v. Gulliver [1967] 2 AC 134; Indus. Dev. Consultant Ltd. v. Cooley [1972] 1 WLR 443.

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

35. La Porta et al., *supra* note 29.

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

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

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

39. *See generally* Cabrelli & Siems, *supra* note 28, at 118–20.

40. For an overview of the convergence theory and the convergence-divergence debate, see generally CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28 (Jeffrey N. Gordon & Wolf-

jurisdictions with substandard legal rules would follow the siren song of economic efficiency by voluntarily adopting superior rules.[41] The study proved to be extraordinarily influential in defining a set of problems and solutions[42] and had real world consequences. On the premise that good corporate governance can improve national economic performance, major international organizations, such as the OECD, developed model corporate governance codes for ready international transplantation.[43] The World Bank also adopted the methodology of the *law matters* study, applying it to a number of working papers, including the bank's *Doing Business* reports.[44]

In spite of its influence, the *law matters* hypothesis attracted widespread academic criticism,[45] including criticism of its methodology.[46] Commentators also disputed the study's stark divide between common law and civil law legal systems,[47] and between supposedly flexible judge-made law under a common law system and rigid codification in civil law jurisdictions.[48] Consistent with these critiques, the idea that directors' fiduciary duties constitute a unique feature of the common law may

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Georg Ringe eds., 2018); Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 SYDNEY L. REV. 743 (2005).

41. *See* Hill, *supra* note 40, at 744.

42. *See e.g.*, Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development—An Update*, 10 GLOBAL CORPORATE GOVERNANCE FORUM FOCUS, 1, 11 (2012); Steve Kaplan & Luigi Zingales, *How 'Law and Finance' Transformed Scholarship, Debate*, CHI. BOOTH REV. (Mar. 5, 2014), https://review.chicagobooth.edu/magazine/spring-2014/how-law-and-finance-transformed-scho larship -debate.

43. *See, e.g.*, ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], G20/ OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (2015) (stating that the principles "help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability"). *But cf.* Licht, *supra* note 28, at 196 (arguing that in the "long and checkered" history of legal transplantation, "direct transplantation efforts were largely futile in generating Western-like economic growth").

44. *See* Cabrelli & Siems, *supra* note 28, at 120. The World Bank and the International Monetary Fund (IMF) were already interested in the connection between corporate governance and economic outcomes. During the 1997 East Asian Financial Crisis, the World Bank and the IMF included corporate governance reform as a condition to financial assistance. *See* Gilson, *supra* note 8, at 5; Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand*, 178 Int'l Monetary Fund Occasional Paper 1, 72–73 (1999); John M. Broder, *Asia Pacific Talks Vow Tough Ac tion on Economic Crisis*, N.Y. TIMES (Nov. 26, 1997), *available at* https://www.nytimes.com/19 97/11/26/world/asia-pacific-talks-vow-tough-action-on-economic-crisis.html.

45. *See* Claessens & Yurtoglu, *supra* note 42, at 12.

46. *See, e.g.*, Holger Spamann, *The "AntiDirector Rights Index" Revisited*, 23 REV. FIN. STUD. (ISSUE 2) 467 (2010). La Porta et al. responded to methodological criticism of their original study in several later papers. *See* Cabrelli & Siems, *supra* note 28, at 123.

47. *See* Skeel, *supra* note 38, at 1546; Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 799 n.27 (2002).

48. *See* Cabrelli & Siems, *supra* note 28, at 117–18 (arguing that common law and civil law are regarded as diverging with respect to "their relevant sources of law and legal methods" and stating that whereas common law judges are considered to solve individual disputes by deductive reasoning, civil law judges are regarded as "law-appliers", who are expected to follow codified rules); *see, e.g.*, Cally Jordan, *The Conundrum of Corporate Governance*, 30 BROOK. J. INT'L L. 983, 1005, nn.66–68 (2005) (arguing that the distinction between common law and civil law under the *law matters* hypothesis is over-generalized, and that the jurisdictional line between these two forms of regulation is far more blurred in practice).

be misleading, given that functional equivalents to fiduciary duties exist in civil law jurisdictions.[49]

In addition to exaggerating the differences between common law and civil law legal families, the *law matters* hypothesis also arguably overstated the similarities within the common law world itself.[50] Although it is often assumed that there is a unified Anglo-American approach (and a unified Anglo-Australian approach), significant differences appear across these jurisdictions when one shifts from a general, to a more granular, level.[51]

First, U.S. and U.K. corporate law had different organizational starting points, which led to different corporate law trajectories, including in the area of directors' duties.[52] Whereas the organizational origins of U.S. corporate law were British royal chartered corporations, which had strong quasi-public roots,[53] British company law derived from unincorporated joint stock (or "deed of settlement") companies, which were quintessentially private bodies.[54] These different organizational origins affected the scope of directors' discretion and the role of fiduciary duties.[55]

Second, whereas under Delaware law, all duties owed by directors, including the duty of care, tend to be classified as "fiduciary",[56] U.K. and Australian judicial decisions have adopted a narrower view of fiduciary duties,[57] emphasizing that only proscriptive duties (or duties requiring "self-denial")[58] are fiduciary in nature.[59] On

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49. *See*, *e.g.*, Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 583 (Evan J. Criddle et al. eds., 2019). In the Asian civil law context, see Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189 (2000).

50. *See*, *e.g.*, Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and US*, 14 CORP. GOVERNANCE INT'L (NUMBER 3) 147, 147–48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950–2000*, 47 BUS. HIST. (NUMBER 2) 267, 267–68 (2005).

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

52. *See generally* Hill, *supra* note 19, at 541–47.

53. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 159 (2019); Hill, *supra* note 19, at 541–44; L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. (NUMBER 8) 1369, 1370–72 (1956). As a result, most early U.S. chartered businesses were regarded as "public agencies." *See* Samuel Williston, *History of the Law of Business Corporations Before 1800: Part I*, 2 HARV. L. REV. 105, 110–11 (1888); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945). In Britain, royal chartered companies reflected the theory that the corporate form was a body, approved by the state to act in "the national interest." *See* C.A. COOKE, CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY 78 (1950).

54. Unincorporated deed of settlement companies were effectively large partnerships with strong contractual elements, which also made creative use of trust law to artificially replicate the benefits of incorporation. *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. 2145, 2157–66 (2016). *See generally* Hill, *supra* note 19, at 544–47.

55. *See generally* Hill, *supra* note 19, at 541.

56. *See* MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 13 (2010).

57. *See* Conaglen, *supra* note 14, at 405.

58. Gelter & Helleringer, *supra* note 49.

59. *See also* Honourable T.F. Bathurst, Chief Justice, Supreme Court of New South Wales, Director's, Trustee and Fiduciary Duties in the Context of Domestic Corporate Arrangements, Address

this more restrictive interpretation, only the "no conflict" and "no profit" duties qualify as fiduciary. Other duties, including the duty of care[60] and the duty to act in good faith in the best interests of the company, are non-fiduciary in nature.[61] This difference in classification can affect the remedies available for breach of duty.

Third, in relation to the duty of loyalty, there is no equivalent under U.K. or Australian case law to the U.S. concept of "entire fairness."[62] U.K. and Australian courts are simply not permitted to evaluate directors' conduct from the perspective of fairness.[63] Also, whereas independent directors in the United States, have played a significant role as a sanitizing device for approving conflicts of interest,[64] U.K. and Australian company law primarily reserved this role for shareholders.[65]

Fourth, the sources of directors' duty vary in contemporary corporate law across common law jurisdictions. In Delaware, directors' fiduciary duties, in accordance with their ancestry, are purely equitable.[66] Modern U.K. and Australian law, on the other hand, encompass statutory directors' duties, which interact differently with general law fiduciary duties.[67] Under the U.K. model, directors' statutory duties, which were introduced in 2006,[68] eradicate and replace the general law principles,[69] but are not necessarily co-extensive with those general law principles. Section 172(1) of 2006 U.K. Companies Act,[70] for example, creates a statutory directors' duty that appears to lack any prior general law counterpart. The provision requires directors to act in the way that they consider, in good faith, is "most likely to promote the success of the company for the benefit of its members

at the Annual Family Law Conference Hobart, Tasmania (Oct. 13, 2012) (citing *Breen v Williams* (1996) 186 CLR 71, 93, 137 (Austl.); *Pilmer v Duke Grp Ltd* (2001) 207 CLR 165, 270–71 (Austl.)).

60. *Cf.* J.D. Heydon, *Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?*, *in* EQUITY IN COMMERCIAL LAW 185 (Simone Degeling & James Edelman eds., 2005); William M. Heath, *The Director's "Fiduciary" Duty of Care and Skill: A Misnomer*, 25 CO. & SEC. L.J. 370 (2007).

61. *See, e.g.*, Aequitas Ltd v AEFC Leasing Pty Ltd [2001] NSWSC 14, 284 (Austl.).

62. *See generally* Deborah A. DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions*, 62 L. & CONTEMP. PROBS. 243 (1999). *Cf.*, however, Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019) (arguing that the divide between the U.K. and the U.S. approaches to the duty of loyalty in relation to self- dealing is less sharp in practice than often assumed).

63. Aberdeen Ry. Co. v Blaikie Bros., (1854) 1 Macq 461.

64. *See* James D. Cox, *Corporate Governance in the United States: The Evolving Role of the Independent Board*, *in* CORPORATE GOVERNANCE: AN ASIA-PACIFIC CRITIQUE 379, 388 (Low Chee Keong ed., 2002) (stating that "[t]he most noticeable aspect of American corporate governance is the law's repeated resort to the independent director as a cleansing agent.").

65. *See* Regal (Hastings) Ltd. v Gulliver [1967] 2 AC 134; *Furs Ltd. v Tomkies* [1936] 54 CLR 583 (Austl.); *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 (Austl.); *see also Corporations Act 2001* ch 2E (Austl.) (regarding authorization of related party transactions).

66. *See generally* Holland, *supra* note 30, at 677–78.

67. *See generally* Hill & Conaglen, *supra* note 12.

68. *See* Companies Act 2006, c. 46 pt. 10 ch. 2 (UK).

69. Yet, in an interesting example of statutory interpretation, the U.K. legislation states that the statutory directors' duties should be interpreted in accordance with these now-defunct general law principles. *See* Companies Act 2006, c. 46 § 170(4) (UK).

70. *See* Companies Act 2006, c. 46 § 172(1) (UK).

as a whole."[71] Adopting an "enlightened shareholder value" approach to corporate governance,[72] the section states that, in fulfilling this duty, directors must consider the interests of a non-exhaustive list of stakeholders and the impact of corporate actions on the community and the environment.[73] Australia's statutory directors' duty scheme is quite different from the U.K. model in that its statutory duties[74] are "additive to the general law rather than substitutionary."[75] Also, Australian lawmakers considered, but rejected the need to introduce any statutory duty involving stakeholder interests, akin to section 172(1) of the U.K. Act.[76]

Fifth, the scope of the safe harbors providing protection for breach of duty by directors differs across these jurisdictions.[77] This disparity is particularly evident in the context of the duty of care.[78] In Delaware, directors receive a high level of protection against monetary liability for breach of the duty of care as a result of the capacious U.S. business judgment rule,[79] combined with legislative approval, under

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71. *See id. See generally* GOWER: PRINCIPLES OF MODERN COMPANY LAW 501–04 (Paul L. Davies & Sarah Worthington eds., 10th ed. 2016) [hereinafter GOWER].

72. *See* GOWER*, supra* note 71, at 502–03; *see also* Andrew Keay, *The Duty to Promote the Success of the Company: Is it Fit for Purpose in a Post-Financial Crisis World?*, *in* DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS 50, 60 (Joan Loughrey ed., 2013); Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach,"* 29 SYDNEY L. REV. 577 (2007).

73. *See generally* GOWER, *supra* note 71. In spite of this apparently "public" focus in § 172(1), however, the duty remains firmly shareholder-oriented in practice, because the U.K. statutory directors' duties are owed to the company, and enforceable only by the company, or its shareholders in derivative suit. Companies Act 2006, c. 46 § 170(1) (UK); Virginia E. Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder- Stakeholder Divide*, 36 J. CORP. L. 59, 79 (2010).

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

75. *See* G.F.K. Santow, *Codification of Directors' Duties*, 73 AUSTL. L.J. 336 (1999) (noting that, historically, Australia has placed more emphasis on corporate legislation than the United Kingdom). Australian corporate legislation explicitly preserves the operation of directors' general law duties alongside the statutory duties. *See Corporations Act 2001* s 185 (Austl.). Also, the duties in these parallel regimes are not necessarily coterminous. *See* Jason Harris et al., *Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?*, 26 CO. & SEC. L.J. 355, 361 et seq. (2008).

76. Two Australian government reports rejected calls to introduce a statutory provision like § 172(1) of the U.K. Companies Act (2006), on the basis that the U.K. provision was overly prescriptive, unnecessary, and would result in confusion in the Australian context. *See* Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services ("PJC"), *Corporate Responsibility: Managing Risk and Creating Value* (2006); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations: Report* (2006).

77. *See generally* Hill & Conaglen, *supra* note 12.

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

79. The U.S. business judgment rule assumes that the directors, in making a business decision, have acted "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); s*ee also* Gagliardi v. Trifoods International, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (stating that the U.S. business judgment rule will protect directors, provided they "act in good faith and meet minimal proceduralist standards of attention"). There has been academic debate in the United States as to whether the duty of care is shaped by the business judgment rule, or is doctrinally separate from, and merely protected by, the business judgment rule. For the latter approach, see Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW 625 (2000); D. Gordon Smith, *The Modern Business Judgment Rule*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

Del GCL § 102(b)(7), of charter exculpation provisions that exclude liability for negligence, including gross negligence.[80] The breadth of this protection has attracted criticism in recent times.[81] Indeed, even aspects of the duty of loyalty, long treated as the immutable core of fiduciary obligation in Delaware,[82] can now be waived under Delaware law.[83]

In the United Kingdom and Australia, the protection offered to directors for breach of fiduciary duty, including the duty of care, is far less generous. The United Kingdom has no business judgment rule[84] and Australia's statutory business judgment rule,[85] although ostensibly modeled on the U.S. version,[86] operates in an extremely narrow way as a result of judicial interpretation.[87] Whereas U.S. statutory provisions, such as § 102(b)(7) of the Delaware code, expressly authorize companies to exculpate directors from liability for negligence, U.K. and Australian legislation expressly prohibits such exoneration.[88]

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80. *See*, *e.g.*, Malpiede v. Townson, 780 A.2d 1075 (Del. 2001). Some U.S. states, however, go further than Del. Code tit. 8, § 102(b)(7) regarding the scope of permissible exculpation. For example, Del. Code tit. 8, § 102(b)(7) only authorizes exoneration of directors, while other states, such as Nevada, Louisiana and New Jersey, also authorize protection of company officers. *See, e.g.*, Nev. Rev. Stat. § 78.037(2) (2013); LA Stat. Ann. § 12:24(C)(4) (2011); N.J. Rev. Stat. § 14A:2–7(3) (2013).

81. *See, e.g.*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 61 (2014) (arguing that that where systemic risk exists, the U.S. business judgment rule can promote excessive risk-taking by directors and officers of financial institutions, justifying the imposition of liability rules); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 339 (2016) (arguing that the complete exclusion of liability for breach of the duty of care in the United States is not necessarily justified by standard policy rationales and should be reassessed).

82. *See* Holland, *supra* note 30, at 687.

83. Del. Code tit. 8, § 122(17) was amended in 2000 to permit waiver of the corporate opportunity doctrine. *See generally* Gabriel V. Rauterberg & Eric L. Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017). *See also* Leo E. Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11, 12 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (discussing the growing trend toward waiver of the corporate opportunity doctrine in the context of limited liability companies (LLCs) and limited partnerships (LPs)).

84. Although the concept of a business judgment rule is alien to U.K. company law, U.K. judges are, however, reluctant to hold directors liable for honest mistakes of judgment. *See, e.g.*, Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] AC 821, 835; Turquand v. Marshall, (1869) LR 4 Ch App 376, 386; Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 c. 392; *see also* M.J. Trebilcock, *The Liability of Company Directors for Negligence*, 32 MOD. L. REV. 499, 500 (1969); André Tunc, *The Judge and the Businessman*, 102 L.Q.R. 549 (1986).

85. *Corporations Act 2001* s 180(2) (Austl.).

86. Australia's statutory business judgment rule, which was introduced in 2000, is found in 180(2) of the Corporations Act 2001. For background regarding the introduction of the statutory business judgment rule in Australia, see Mark Byrne, *Directors to Hide from a Sea of Liabilities in a New Safe Harbour*, 22 AUSTL. J. CORP. L. 255 (2008).

87. In contrast to its U.S. counterpart, the courts have interpreted the Australian statutory business judgment rule in such a way as to place the onus of proof on the defendant directors, rather than on the plaintiff. *See, e.g.*, *ASIC v Rich* (2009) 236 FLR 1; *ASIC v Fortescue Metals Grp Ltd* (2011) 190 FCR 364; *ASIC v Mariner Corp Ltd* [2015] FCA 589.

88. *See* Companies Act 2006, c. 46 § 232(1) (UK); *Corporations Act 2001* ss 199A–199C (Austl.).

Finally, enforcement mechanisms for breach of directors' duties differ across these three common law jurisdictions. Delaware and the United Kingdom both rely primarily on private enforcement of directors' duties.[89] Although a high percentage of civil actions filed in the Delaware Court of Chancery involve questions of fiduciary duty,[90] only those involving breach of the duty of loyalty tend to succeed, given the legal safe harbors available for negligence. In the United Kingdom, on the other hand, very little private litigation for breach of directors' duties is ever commenced due to procedural obstacles.[91]

Australia diverges radically from both Delaware and the United Kingdom in the area of enforcement of directors' duties because it adopts a primarily public enforcement model for breach of the statutory duties of directors and officers.[92] This regime enables the business regulator, the Australian Securities and Investments Commission (ASIC), to bring legal actions for contravention of the statutory duties. It appears that this mode of enforcement has affected the substance of directors' duties in Australia, shifting them away from the private to the public realm.[93] ASIC and the courts have, for example, stated that these statutory duties are closely interlinked with the "public interest"[94] and that breach of the duties constitutes, not only a private, but also a public wrong.[95] In the wake of a recent high profile Banking Royal Commission[96] in Australia, ASIC has indicated that it intends to use its enforcement powers in this area more aggressively in the future.[97]

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89. In Delaware, for example, actions for breach of fiduciary duty can be brought by the company, or by shareholders in direct suits, derivative litigation or, most commonly, by means of class actions. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167–69 (2004). In the U.K. context, there are, however, some aspects of public enforcement. *See* John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J EMP. LEGAL STUD. 687, 716–17 (2009).

90. Thompson & Thomas, *supra* note 89, at 165 et seq.

91. A number of procedural differences make the United Kingdom a less hospitable jurisdiction for corporate litigation than Delaware. For example, class actions and contingency fees are available in Delaware, but not the United Kingdom, which moreover operates on a "loser pays" basis. *See* Armour et. al., *supra* note 89, at 692–93.

92. Although historically, Australia had a U.K.-style private enforcement model, this changed in 1993, when it introduced the statutory "civil penalty regime." This is a distinctive public enforcement regime for certain contraventions of the Corporations Act 2001, including the statutory directors' duties. For the full list of civil penalty provisions, including the statutory directors' duties, see *Corporations Act 2001* s 1317E (Austl.).

93. *See* Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 223–28 (2014); Harris et al., *supra* note 75.

94. *See* AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION, ASIC'S APPROACH TO ENFORCEMENT, Information Sheet 151 (Sept. 2013), 6.

95. *See, e.g.*, *ASIC v Cassimatis [No. 8]* (2016) FCA 1023, [455], [461], [496] *ff*, [503] (Aug. 26, 2016).

96. COMMONWEALTH OF AUSTRALIA ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY, *Final Report*, Vol. 1 (2019).

97. In the Financial Services Royal Commission's Final Report, Commissioner Hayne stated that the regulator's first question, upon becoming aware of any entity's breach of the law, should be "Why not litigate?" *Id.* at 427. It is anticipated that this will result in a far greater volume of litigation, including for breach of statutory directors' duties, in the future. *See, e.g.*, Michael Pelly, *ASIC Set for Hayne Court Blitz*, AUSTL. FIN. REV. (Aug. 19, 2019); *see also* AUSTRALIAN SECURITIES AND

IV. CODES, NORMS AND FIDUCIARY DUTIES

The behavior of corporate actors is not only shaped by enforceable laws. It is also shaped by social norms and governance practices, which may indeed be more important in this respect than formal legal rules.[98] Norms can interact in complex ways with fiduciary law[99] to drive greater convergence or divergence across jurisdictions. Furthermore, the lines between formal legal rules and norms can sometimes be blurred and hard to define,[100] and there can be movement in either direction between so-called "hard law", comprising enforceable legal rules, and "soft law", encompassing norms.[101]

Corporate governance codes have proliferated around the world in recent decades.[102] They have focused greater attention on norms and governance practices, many of which intersect with the dictates of fiduciary duties. These codes operate in a parallel universe to corporate law. They can, nonetheless, affect the scope of directors' discretion, the nature of their fiduciary obligations and enforcement practices. Codes epitomize the shift from corporate law to corporate governance, a shift from "from legal rules standing alone to legal rules interacting with non-legal processes and institutions." [103]

Corporate governance codes are by no means uniform across jurisdictions and, in some countries, have been subject to almost continuous amendment.[104] The

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INVESTMENTS COMMISSION, *ASIC Enforcement Update: January to June 2019*, Report No, 625 (Aug. 19, 2019), 3.

98. Another criticism sometimes made of La Porta et al.'s *law matters* hypothesis is that it focused solely on legal rules and failed to recognise the important role played by social norms and governance practices. *See generally* John C. Coffee, *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2154 et seq. (2001).

99. *See generally* Matthew Harding, *Fiduciary Law and Social Norms*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 797, 797–99 (Evan J. Criddle et al. eds., 2019).

100. *See* Coffee, *supra* note 98. *Cf.* however, a recent U.K. corporate governance dispute, which relied on a clear distinction between legal rules and norms. In 2019, Daejan Holdings ("Daejan") constituted the only listed U.K. company without any women on its board of directors. It was reported that, Sir Philip Hampton, leader of a government review to increase the number of women in United Kingdom listed company boardrooms, wrote to Daejan calling on it to alter its all-male board policy, in accordance with prevailing corporate governance norms. According to the report, Daejan's response stated, "Whilst we appreciate the views of your review body they are not enshrined in law or any formal regulation and we are not obliged to comply with them." *See* Helen Cahill, *Inside the VERY Secret Boardroom that's Firmly CLOSED to Women*, DAILY MAIL (June 3, 2019), https://www.thisismoney.co.uk/money/markets/article-7095981/Inside-secret-Daejan-Holdings -boardroom-thats-firmly-CLOSED-women.html.

101. *E.g.*, although the appointment of independent directors listed public company boards was a prevalent practice in the United States, there was no specific rule requiring this practice prior to the introduction of the New York Exchange Stock Exchange corporate governance rules following the Enron and WorldCom scandals. *See* NYSE, Inc., Listed Company Manual, § 303A (2003).

102. *See* Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 U.N.S.W. L.J. 715 (2016) (noting that in 1999, 24 countries were reported to have a code of corporate governance in place, compared to 64 countries in 2008, and 93 countries in 2015). The full list of current international codes is available on the European Corporate Governance Institute (ECGI) website at https://ecgi.global/content/codes.

103. Gilson, *supra* note 8.

104. *See, e.g.*, Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 10 (2011) (criticizing the "fast-paced, code changes" in Germany).

provisions of these codes sometimes complement and bolster key directors' duties.[105] For example, corporate governance codes typically stress the need for independent directors[106] as a means of providing procedural protection against managerial conflicts of interest. However, in other instances, code provisions may create tension with established principles of fiduciary law. Nowhere is this more apparent than in the context of shareholder versus stakeholder rights and interests.

The blueprint for the international corporate governance codes is the U.K. Corporate Governance Code, which can be traced back to the 1992 Cadbury Committee.[107] These codes are typically non-binding, yet they can create powerful norms. They emanate from a variety of sources, including government agencies, stock exchanges and business organizations,[108] and this can itself affect the norms they create. The content of these codes differs considerably as does their enforcement and administration.[109]

The corporate governance codes of the United States, the United Kingdom and Australia reflect interesting differences in their approach to several key issues related to fiduciary duties, including the thorny question, which has underpinned corporate law since the time of the famous Berle-Dodd debate, as to whom directors owe their duties.[110] This debate has been described as a "clash between the different visions of corporatism",[111] exemplifying the tension between a public and private image of the corporation.[112]

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105. *See, e.g.*, ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 15 n.39 (2019), https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf (explicitly referencing a leading Australian case on the duty of care, *ASIC v Healey* [2011] FCA 717 (June 27, 2011), in its discussion of induction of new directors).

106. *See* ASX CORP. GOVERNANCE COUNCIL, *supra* note 105, at 13–15 (Recommendations 2.3 and 2.4). Note, however, that there are many differences in the interpretation of "independence" across jurisdictions. *See generally* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017).

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

108. Hopt, *supra* note 104, at 12.

109. *Id.* at 13–15.

110. Professors Berle and Dodd both considered that directors were "trustees"; however, they strongly disagreed on two other matters closely tied to directors' duties: (i) the theoretical nature of the corporation and (ii) the identity of the beneficiaries of directors' fiduciary duties. Berle adopted a private aggregate theory of the corporation, which supported his claim that directors held their powers in trust for shareholders. Dodd, on the other hand, regarded the corporation as a public institution, arguing that directors owed their duties to a diverse group of stakeholders, including employees, creditors, and consumers. *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers*]; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *Note*]. *See generally* Jennifer G. Hill, *Then and Now: Professor Berle and the Unpredictable Shareholder*, 33 SEATTLE U. L. REV. 1005, 1009–10 (2010).

111. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 124 (2008).

112. *See generally* William T. Allen, *Our Schizophrenic Concept of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992). The Berle-Dodd debate laid the groundwork for the persistent debate concerning shareholder primacy versus stakeholder theory. *See, e.g.*, Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003 (2013).

This public-private tension continues in corporate law and corporate governance today. Under traditional Anglo-Australian case law, directors have owed their duties to "the company as a whole," which has generally been interpreted to mean the shareholders as a general body, rather than the corporation as a commercial entity.[113]

Corporate governance codes, on the other hand, often display greater variation and emphasis concerning their "visions of corporatism."[114] There are several different categories of code, which can affect content. Codes are sometimes: (i) purely voluntary and self-regulatory; (ii) linked to public authorities; or (iii) promulgated by stock exchanges to provide listed companies with a blueprint for "good corporate governance."[115]

These diverse origins can result in major differences concerning the stringency and enforceability of these corporate governance codes.[116] They can also affect the emphasis given to shareholder or stakeholder interests. Variations can often be traced to the identity of the actors behind the relevant code. For example, the U.S. Corporate Governance Principles,[117] which were issued in January 2017, are an example of the first category of code. The U.S. Corporate Governance Principles are a set of six voluntary principles adopted by the Investor Stewardship Group ("ISG").[118] The ISG is a collective of some of the largest U.S.-based and international asset owners and managers. Signatories to the principles include, not only "the Big Three" fund managers (BlackRock, Vanguard, and State Street Global Advisers),[119] but also some activist hedge funds (ValueAct Capital and Trian Partners).[120] Not surprisingly, given the origins and identity of the actors behind the code, the U.S. Corporate Governance Principles assert that directors are directly

113. *See, e.g.*, *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438 (Austl.) (citing the decision of Evershed M.R. in Greenhalgh v. Arderne Cinemas Ltd [1951] Ch 286, 291 (UK)). *See generally* J.D. Heydon, *Directors' Duties and the Company's Interests*, i*n* EQUITY AND COMMERCIAL RELATIONSHIPS 120 (P.D. Finn ed., 1987). However, the courts have at times stated that there will be exceptions to this basic principle. For example, in *The Bell Grp Ltd (in liq) v Westpac Banking Corp [No. 9]* (2008) WASC 239, para 4393 (Austl.), Owen J. stated: "This does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole.' It will depend on the context, including the type of company and the nature of the impugned activity or decision. . . In my view the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders *are* the company but, rather, because the interests of the company and the interests of the shareholders intersect."

114. *See* Bratton & Wachter, *supra* note 111.

115. *See* Eddy Wymeersch, *Corporate Governance Codes and Their Implementation* 2–3 (Fin. Law Inst., Working Paper 2006–10, Sept. 2006).

116. *See* Hopt, *supra* note 104, at 13–15.

117. Inv'r Stewardship Grp., *Corporate Governance Principles for U.S. Listed Companies*, https://www.isgframework.org/corporate-governance-principles/ [hereinafter ISG corporate Governance Principles].

118. *See* Inv'r Stewardship Grp., *About the Investor Stewardship Group and the Framework for U.S. Stewardship and Governance*, https://isgframework.org/.

119. *See* Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLITICS 298 (2017); Bebchuk & Hirst, *supra* note 23.

120. For the full list of signatories to the *ISG Corporate Governance Principles* and *ISG Stewardship Principles*, *see* https://isgframework.org/signatories-and-endorsers/.

accountable to shareholders.[121] Furthermore, they state that shareholders should have participatory rights in corporate governance, and boards should be responsive to shareholders' viewpoints.[122] These principles reflect a strongly private, shareholder-focused conception of directors' duties.[123]

The origins of the U.K. and Australian corporate governance codes differ from the U.S. Corporate Governance Principles. The U.K. Corporate Governance Code falls within the second category of corporate governance code described above. It is administered by the U.K. Financial Reporting Council (FRC), an independent regulator, which, with the backing of the British government,[124] seeks to "promote transparency and integrity in business."[125] Australia's corporate governance principles represent the third category of code. They are drafted and promulgated by the Australian Securities Exchange (ASX) Corporate Governance Council, which comprises a group of industry stakeholders.[126]

Recent amendments to the U.K. and Australian corporate governance codes represent a far more public conception of the corporation, and correspondingly, directors' responsibilities than the U.S. Corporate Governance Principles.[127] The U.K. and Australian corporate governance codes also clearly recognize that financial under-performance is not the only problem in modern corporate law, and that issues relating to organizational integrity are also critical. The 2018 U.K. Corporate Governance Code notes, for example, that the role of a successful company is not only to create value for shareholders, but also to contribute to "wider society."[128] It states that that directors must lead by example to establish a culture of integrity[129] that is aligned with the organization's "purpose, values and strategy."[130]

The 2018 U.K. Corporate Governance Code also pays heightened attention to stakeholder interests, particularly those of employees. The code bolsters the statutory directors' duty in section 172(1) of the U.K. Companies Act 2006, but also

121. *See ISG Corporate Governance Principles, supra* note 117 ("Principle 1: Boards are accountable to shareholders.").

122. *See id.* ("Principle 2: Shareholders should be entitled to voting rights in proportion to their economic interest. Principle 3: Boards should be responsive to shareholders and be proactive in order to understand their perspectives."); *see also* Inv'r Stewardship Grp., *The Principles: Stewardship Framework for Institutional Investors*, https://isgframework.org/stewardship-principles/.

123. *See* Berle, *Corporate Powers*, *supra* note 110; Berle, *Note*, *supra* note 110.

124. *See* Fin. Reporting Council, *About the FRC*, https://www.frc.org.uk/about-the-frc.

125. The FRC's Board of Directors is appointed by the U.K. Secretary of State for Business, Energy & Industrial Strategy. Fin. Reporting Council, *FRC Board*, https://www.frc.org.uk/about- the-frc/structure-of-the-frc/frc-board.

126. *See* ASX CORP. GOVERNANCE COUNCIL, *supra* note 105, at 1 (About the Council).

127. *See* Bratton & Wachter, *supra* note 111.

128. The UK Corporate Governance Code 4 (2018), *available at* https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK Corporate-Governance-Code-FINAL.pdf (Principle A).

129. *Id.* at 1, 4 (Principle B).

130. *Id.* at 4 (Principle B). The British Academy's influential research project on the "Future of the Corporation" also focuses on the importance of corporate culture and "societal purpose." *See* THE BRITISH ACADEMY, FUTURE OF THE CORPORATION: RESEARCH SUMMARIES 26–27, 32–33, 48–49 (2018), https://www.thebritishacademy.ac.uk/sites/default/files/Future%20of%20the%20Corporation%20Research%20Summaries%20-%20British%20Academy.pdf.

goes further than legislation in the norms it creates. First, the code states that the board should describe in the company's annual report how the interests of stakeholders have been considered in board decision-making[131] and should "understand the views" of non-shareholder stakeholders.[132] Secondly, whereas section 172(1) involves protection of stakeholder interests,[133] the 2018 amendments to the code promote use of structural features to ensure actual participation in corporate governance by employees.[134] The U.K. code now outlines three alternative methods for ensuring workforce engagement in corporate governance: the appointment of an employee director, establishment of a formal workforce advisory panel, or designation of a non-executive director with responsibility for workforce related issues.[135]

Australia's 2019 Corporate Governance Principles and Recommendations ("ASX corporate governance code"),[136] replicates this U.K. trend towards more emphasis on organizational integrity and corporate responsibilities to the public. A 2018 Consultation Draft[137] of proposed changes to the code included a specific reference to a listed entity's "social licence to operate."[138] The Consultation Draft also stated that directors and managers were expected to consider the views and interests of, and engage with, a wide variety of stakeholders.[139] These proposed revisions were the subject of widespread backlash in the business community. Critics argued that these changes would directly conflict with existing Australian law regarding directors' and officers' duties,[140] emphasizing that Australia lacks any

131. The UK Corporate Governance Code (2018), *supra* note 128, at 1, 5.

132. *Id.*

133. It is also noteworthy that this protection is limited under section 172(1), in the sense that the directors are only required to consider the interests of stakeholders to the extent that such consideration is likely to promote the success of the company for the benefit of its members as a whole. *See* GOWER, *supra* note 71, at 501–02.

134. *See* the UK Corporate Governance Code (2018), *supra* note 128, at 1, 5.

135. The UK Corporate Governance Code states that, "[i]f the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective." *Id.* at 5.

136. ASX CORP. GOVERNANCE COUNCIL, *supra* note 105.

137. ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 4TH EDITION CONSULTATION DRAFT (2018), https://www.asx.com.au/documents/asx-compliance/consultation-draft-cgc-4th-edition.pdf.

138. *Id.*; *see also* Bryan Horrigan, *Does Corporate Performance Now Include a Social Licence to Operate?*, AUSTL. INST. OF COMPANY DIRECTORS (Dec. 20, 2018), https://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/governance-driving-performance/does-corporate-perfor mance- now-include-a-social-licence-to-operate.

139. *See* ASX CORP. GOVERNANCE COUNCIL, *supra* note 137, at 25.

140. In addition to the argument that the expression "social licence to operate" was contrary to Australian law concerning directors' duties, critics stated that the phrase was vague, uncertain, subjective, a product of political correctness, and potentially unfair to companies in certain industries, such as gaming, alcohol, tobacco and mining. *See, e.g.*, Patrick Durkin, *Board Outrage Over Push to Have a Social Licence*, AUSTL. FIN. REV. (Aug. 1, 2018); AUSTL. INST. OF CO. DIRS., SUBMISSION TO THE REVIEW OF THE ASX CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (2018); Janet Albrechtsen, *There's a Corporate Rebellion Brewing Over Fanatical Social Justice Movements*, THE AUSTL. (Aug. 4, 2018); Anne Davies, *Corporate Australia is Locked in a Culture War, But It's Not About Left and Right*, THE GUARDIAN (Aug. 9, 2018).

statutory directors' duty relating to stakeholder interests analogous to section 172(1) of the U.K. Companies Act.[141]

The final version of the 2019 ASX corporate governance code, which was released in February 2019, wound back several of the more controversial features of the draft code. In particular, it jettisoned the references to a listed company's "social licence to operate." Nonetheless, in launching the new code, the Chair of the ASX Corporate Governance Council noted that the controversial expression had been replaced by "essentially synonymous"[142] terms, such as "reputation" and "standing in the community."[143] She also noted that, in the wake of the Australian Banking Royal Commission Final Report, the ASX Corporate Governance Council considered it "imperative that listed entities align their culture and values with community expectations to help arrest the loss of trust in business."[144]

Shareholder stewardship codes ("stewardship codes") are another more recent variety of corporate governance code. Stewardship codes originated in the United Kingdom in the aftermath of the global financial crisis.[145] They exemplify the important link between problem framing and regulatory outcomes.[146] For example, a common view in the United States was that shareholders contributed to the global financial crisis, by placing pressure on corporate managers to engage in excessive risk-taking to increase profitability.[147] But, the reverse view prevailed in the United Kingdom, where the real problem during the crisis was perceived to be the failure of institutional investors to provide a counterweight to managerial risk-taking, by

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141. *See* Will Heath & Lauren Beasley, *Proposed Fourth Edition of ASX Corporate Governance Principles*, KING & WOOD MALLESONS (Jun. 6, 2018); *cf.* AUSTL. INST. OF CO. DIRS., FORWARD GOVERNANCE AGENDA: LIFTING STANDARDS AND PRACTICE 17 (2019).

142. Elizabeth Johnstone, Chair, ASX Corp. Governance Council, Address at the ASX Corporate Governance Council: Launch of the 4th Edition of the Corporate Governance Principles & Recommendations (Feb. 27, 2019) at 4.

143. *Id.*

144. *Id.* at 5.

145. The first stewardship code was adopted in the United Kingdom in 2010 in response to the global financial crisis. *See* The U.K. Stewardship Code, (2010). A revised version of the Code, which operates on a voluntary basis, was released in 2012. *See* The U.K. Stewardship Code, (2012). In January 2019, the Financial Reporting Council published a draft of proposed revisions to the Stewardship Code, designed to strengthen the code. *See* FIN. REPORTING COUNCIL, PROPOSED REVISION TO THE U.K. STEWARDSHIP CODE (2019). In October 2019, the Financial Reporting Council published the 2020 Stewardship Code, taking effect from January 1, 2020. *See* Baker McKenzie, *The Stewardship Code 2020: Is This an Opportunity for Listed Companies to Increase Meaningful Stakeholder Engagement?* (Nov. 11, 2019).

146. *See generally* Hill, *supra* note 6; Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action: The Australian Experience, in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press) (forthcoming 2020), *available at* https://corpgov.law.harvard.edu/2020/02/18/stewardship-and-collective-action-the-australian-experience/.

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

participating in corporate governance.[148] The U.K. Stewardship Code[149] was designed to address this problem, on the basis that "[e]ffective stewardship benefits companies, investors and the economy as a whole."[150]

Since the time of the global financial crisis, more than twenty countries have followed the United Kingdom's lead by adopting stewardship codes, and that number is growing.[151] Asian jurisdictions, in particular, have been eager to embrace the shareholder stewardship concept.[152] This is in spite of the fact that the capital market structure in many Asian countries is fundamentally different from U.K. capital market structure. Whereas in the United Kingdom the vast majority of shares of publicly listed companies are held by institutional investors,[153] in Asia, the opposite is true. Asian listed companies typically have concentrated ownership structures, with family members or the state as controlling blockholders.[154]

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148. According to the Walker Review, a lack of institutional investor engagement with UK banks was a key governance problem in relation to the global financial crisis. WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 72 (2009) (stating that "[w]ith hindsight it seems clear that the board and director shortcomings. . .would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners.").

149. *See* U.K. Stewardship Code (2012); U.K. Stewardship Code (2020).

150. U.K. Stewardship Code (2012), 1, ¶ 1. *Cf* the 2020 version of the code, stating that stewardship leads to "sustainable benefits for the economy, the environment and society": U.K. Stewardship Code 2020, 4. Although the U.K. Stewardship Code originally operated on a voluntary, "comply or explain" basis, the U.K. Stewardship Code 2020 now comprises a set of "apply and explain" Principles. *See supra*.

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

152. Jurisdictions in Asia which have adopted a form of stewardship code to date include: Japan, Malaysia, Hong Kong, Taiwan, Singapore, South Korea and Thailand. *Id.* A stewardship code has also been proposed for India. *See* Securities and Exchange Board of India (SEBI), *Report of the Committee on Corporate Governance*, at 93–94 (Oct. 5, 2017); *see also* Amarjeet Singh, Executive Director of SEBI, Keynote Speech and Panel Discussion at the NSE-IGIDR Conference on Corporate Governance, *Edited Transcript of Keynote Speech and Panel Discussion*, at 21–24 (June 21, 2018). In December 2019, SEBI adopted a stewardship code for mutual funds and alternative investment funds (AIFs), which is due to come into effect on April 1, 2020. *See SEBI Puts in Place Stewardship Code for Mutual Funds, AIFs*, THE ECONOMIC TIMES (India) (Dec. 24, 2019).

153. In the United Kingdom, around 90% of shares are held by financial institutions and approximately half of these are non-UK-based. *See, e.g.*, Paul L. Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); HOUSE OF COMMONS BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, CORPORATE GOVERNANCE: FOURTH REPORT OF SESSION 2016–17, at §§ 13–16.

154. In a controlling blockholder context, which is the main paradigm for Asian listed companies, increasing shareholder rights or responsibilities may be irrelevant as an accountability device. *See* Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 572 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Dan W. Puchniak & Samantha Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, VANDERBILT J. TRANSNAT'L L. (forthcoming); Kon Sik Kim, *Dynamics of Shareholder Power in Korea*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 535 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

Like corporate governance codes, stewardship codes emanate from different issuing bodies.[155] In some jurisdictions, such as the United Kingdom and Japan, stewardship codes are issued by regulators or quasi-regulators.[156] In others, such as South Korea and South Africa, stewardship codes are promulgated by industry players.[157] Finally, some countries, including Australia, Canada and the United States, have stewardship codes initiated by investors themselves.[158] These differences in origin can influence the effectiveness of a particular code.[159] It can also affect the extent to which a stewardship code tolerates or encourages shareholder activism, including collective activism.[160] Also, the regulatory goals for introducing stewardship codes vary across jurisdictions. Whereas the U.K. stewardship code was designed to address the need for effective risk control following the global financial crisis, Japan's stewardship code was designed to reverse declining profitability and increase investor returns by creating a "warmer climate" for foreign investors and shareholder activists.[161] The Japanese example also shows how political friction can affect the content of stewardship codes. It appears that the Japanese code adopted a "relatively gentle stance"[162] on shareholder engagement and activism as a way to appease critics of the more shareholder-oriented focus of the Japanese reforms.[163]

Some scholars have viewed the idea of granting stronger rights to shareholders, or encouraging them to become more engaged in corporate governance, as akin to letting the fox guard the henhouse.[164] However, Larry Fink, CEO of BlackRock, one of the world's largest institutional investors, has declared that companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[165] There is an increasing number of examples of this trend, whereby institutional investors have pursued broad social or stakeholder-related goals. In 2017, for instance, BlackRock, which is estimated to be one of the top three shareholders in every company listed

155. *See generally* Hill, *supra* note 6, at 507–13.

156. *Id.* at 507–08.

157. *Id.* at 508–09.

158. *Id.* at 509–13.

159. Ernest Lim & Luh Luh Lan, The Role of Institutional Investors in Singapore and Hong Kong: Stewardship Codes and Ownership Engagement (Aug. 17–18, 2017) (unpublished manuscript) (presented at the Corporate Governance and Regulation: East Meets West Conference at the Univ. of Sydney).

160. *See* Bowley & Hill, *supra* note 146.

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

162. *See* Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, *Berkeley*, BUS. L. J., 40 n.152 (forthcoming) (*available at* https://papers.ssrn. com/sol3/papers.cfm?abstract_id= 3311279).

163. *Id.*

164. Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L 311 (2011); *see also* Alan Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639 (2013).

165. *See* BlackRock, Larry Fink's Annual Letter to CEOs, *A Sense of Purpose* (Jan. 12, 2018); Peter Horst, *BlackRock CEO Tells Companies to Contribute to Society. Here's Where to Start*, FORBES (Jan. 16, 2018).

on the FTSE index, wrote to the chairs of over 300 U.K. companies, announcing that it would vote against executive pay increases, unless they were linked to strong and sustainable long-term corporate performance and were also matched by pay increases to rank-and-file employees.[166] Also, a list of the top ten corporate governance issues in the United States, released by Institutional Shareholder Services (ISS) in 2019, goes well beyond financial performance of corporations and includes topics such as board and C-suite diversity, climate change, executive misconduct, sexual harassment, and gun violence.[167] Environmental and social issues now account for the majority of all shareholder proposals filed in the United States and companies are showing greater willingness to reach agreements with proponents of such resolutions as a result of the increasing interest in these issues demonstrated by the largest institutional investors.[168]

V. CONCLUSION

It is often assumed that there is a unified and cohesive approach to the law of fiduciary duties across common law jurisdictions. This Article examines three common law jurisdictions: the United States, the United Kingdom and Australia, and shows that, in spite of their common legal heritage, there are nonetheless sufficiently significant differences to challenge any notion of homogeneity of directors' and officers' duties in these jurisdictions.[169]

This Article also discusses a new and important transnational regulatory development: the rise of corporate governance codes in both common law and civil law jurisdictions. These codes, which are usually non-binding, represent an interesting overlay to the law of directors' and officers' duties. Although corporate governance codes often complement and bolster these duties, they can also create tensions with them. The tension between shareholder versus stakeholder rights and interests is a clear example of this situation. Also, the focus on corporate culture, purpose, values and trust in some modern corporate governance codes shows that there are multiple problems in corporate law. Corporate underperformance is one important issue, but organizational integrity is equally critical.

While corporate governance codes could potentially increase convergence regarding directors' and officers' duties across jurisdictions, in fact, these codes are issued by different bodies, with different purposes and goals. They also vary in their content and are constantly evolving. Corporate governance codes are therefore likely to increase, rather than reduce, jurisdictional differences relating to directors' and officers' duties.

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166. *See* Angela Monaghan, *World's Largest Fund Manager Demands Cuts to Executive Pay and Bonuses,* GUARDIAN (Jan. 16, 2017).

167. *See* Kosmas Papadopoulos, *ISS Lists Top 10 Corporate Governance Topics to Watch in 2019*, THE CLS BLUE SKY BLOG (Jan. 11, 2019), http://clsbluesky.law.columbia.edu/2019/01/11/iss- lists-top-10-corporate-governance-topics-to-watch-in-2019/.

168. *See* Shirley Westcott, *2019 Proxy Season Preview*, THE ADVISOR (Alliance Advisors, Bloomfield, N.J.) (April 2019) at 1, 4.

169. *See generally* Hill & Conaglen, *supra* note 12.