THE TRANSNATIONALIZATION OF CORPORATE GOVERNANCE: LAW, INSTITUTIONAL ARRANGEMENTS, & CORPORATE POWER

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I. INTRODUCTION

One of the most puzzling questions facing corporate law today concerns its ability to adequately address, accompany, and shape the continuing globalization of business transactions and commercial relations. While the intensification of world-wide flows of products, services, money, and data is unimaginable without the business "firm" or "enterprise"[1] functioning as nodal point of planetary inter-

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[1] For a clear distinction between the economic phenomenon of the business "firm" or "enterprise" and the legal concept of "corporation," see, e.g., Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, 350-55 (2012); *see also* MASAHIKO AOKI, CORPORATIONS IN EVOLVING DIVERSITY: COGNITION, GOVERNANCE AND INSTITUTIONS 4 (2010) (defining corporations from an economic perspective as "voluntary, permanent

connectivity, the regulatory scope of corporate law itself—geographically speaking—is astonishingly limited. The obvious demarcations of legal rules' inherently local nature and, by consequence, their confinement to the domestic arena, find its counterpart in the belief that law's embeddedness in a territorially and politically circumscribed context is the necessary condition for a guarantee of law's legitimacy and enforceability.[2] Once law is meant to cross its home country's border, its fate is uncertain.[3] Corporate law rules pertaining to, for example, incorporation, the board of directors, types of shares and voting rights, minority protection rights, or control transactions are generally a matter of domestic, i.e. either national or, as in the case of the U.S., mostly state law.[4] For some time now, however, the subfield of "corporate governance" has become a very active field of rule-making and policy discourse in its own right.

Corporate governance has become a shorthand for the regulatory framework that governs the relationships between investors and managers and how a company is being run. Its significance results from the signaling effect that the specific form of corporate governance has on domestic and global investors, on the

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associations of natural persons engaged in some purposeful associative activities, having unique identity, and embodied in rule-based, self-governing organizations"); ISABELLE FERRERAS, FIRMS AS POLITICAL ENTITIES: SAVING DEMOCRACY THROUGH ECONOMIC BICAMELARISM (2017) (laying out a "political theory" which distinguishes the "corporation" from the "firm." The former is a legal construct, while the latter is a social organization, a locus of productive activity, that embeds the corporation in a network of relationships with workers, suppliers and other stakeholders.).

[2] Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 850-52 (1999) ("The boundaries that define territorial jurisdictions are a legal paradox because they are both absolutely compelling and hopelessly arbitrary. In one sense, all jurisdictional boundaries are arbitrary . . . . Yet, at the same time, an unwavering faith in the necessity and legitimacy of those boundaries would seem to be not only a foundation of our government, but a precondition of any government. Our reaction to the formality of jurisdictional arrangements is not that snide condescension or righteous outrage that we direct at malleable human institutions (the IRS for example, or the United Nations) but rather something akin to the reverence and awe we reserve for natural phenomena beyond our control or comprehension.").

[3] For the case of US anti-trust law, see, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004); Megan L. Masingill, *Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in* RJR Nabisco *to Foreign Competent Cartels*, 68 AM. U. L. REV. 621, 627 (2018) ("The general rule reflected in the FTAIA is that the Sherman Act will not govern conduct in foreign trade or commerce, or when the anticompetitive conduct at issue is foreign.").

[4] John Armour et al., *The Essential Elements of Corporate Law: What is Corporate Law?* (Harv. John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 643, 2009), http://www.law.harvard.edu/ programs/olin_center/papers/pdf/Kraakman_643.pdf ("The consequence of choice across jurisdictions is not just to enlarge the range of governance rules from which a given firm can choose, but also to create the opportunity and the incentive for a jurisdiction to induce firms to incorporate under its law—and thereby bring revenue to the state directly (through franchise fees) and indirectly (through increased demand for local services) by making the jurisdictions' corporate law unusually attractive.").

one hand,[5] and from the correlation between the governance structures internal to the corporation and the political economy in which the corporation is situated, on the other. Because of these inevitably varied correlations on the national, regional, and even industry levels, there is no single model of corporate governance. We can, instead, speak of *varieties of corporate governance* which may exist side by side between different countries and which can be differentiated along distinctive architectural features within their respective political economies. The larger methodological framework for this type of comparison is part of the so-called "Varieties of Capitalism" (VoC) school within political economy centered in the work of Hall and Soskice, whereby broad distinctions are drawn between coordinated market economies (CMEs) and liberal market economies (LMEs).[6] This dualism between CMEs and LMEs provided an institutional context within which the traditional diptych of shareholder versus stakeholder models of corporate governance has been analyzed.[7] But while the work of Hall and Soskice is often singled out for their VoC analysis, there is a much broader and less rigid neo-institutionalist approach to the comparative study of capitalism which stands in a longer tradition in political economy research that had been investigating and emphasizing the crucial role that organizations and institutions play in the operation of markets, something which is of particular interest to us for the purpose of this

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[5] Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 750 (1997) (citations omitted) ("The principal reason that investors provide external financing to firms is that they receive control rights in exchange. External financing is a contract between the firm as a legal entity and the financiers, which gives the financiers certain rights vis a vis the assets of the firm . . . ."); Mohammad Iftekhar Khan & Amit Banerji, *Corporate Governance and Foreign Investment in India*, 9 IND. J. CORP. GOV. 19, 27 (2016) ("From the government/regulator's perspective, implementation of CG norms has given them an unwitting way of increasing FI.").

[6] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM. THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 8 (Peter A. Hall & David Soskice eds., 2001).

[7] *See, e.g.*, Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, *in* VARIETIES OF CAPITALISM. THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); María Consuelo Pucheta-Martínez et al., *Varieties of Capitalism, Corporate Governance Mechanisms, and Stakeholder Engagement: An Overview of Coordinated and Liberal Market Economies*, 27 CORP. SOC. RESP. & ENV. MGT. 731, 733 (2020) (citations omitted) ("Varieties of capitalism theory assumes that companies are the economy's main players, with their performance going hand-in-hand with the country's overall economic performance. In order to prosper, companies need to engage with other players in multiple spheres of economic policies . . . . The varieties of capitalism perspective were developed at the end of the 1990s within the field of political economics to compare economies of different countries, while simultaneously placing companies at the heart of the analysis. This perspective is mainly concerned with analyzing how companies behave and interact within a particular institutional structure . . . .").

article.[8] Economic sociology became complicit to political economy in the analysis of the diversity of the market and the economy.[9] As Geoffrey Hodgson argued in 1996:

> In contemporary economies much more daily activity is internal to organizations and outside the market. True, the extensive growth of capitalism is characterized by the development and extension of markets on a global scale. Yet, in comparison to all earlier economic systems, the growth in organizational diversity, complexity and size is also a vital feature of the capitalist order.[10]

But while the nation-state has a central position in most neo-institutional studies of capitalist diversity,[11] studying the growing transnationalization of economic activity and its institutions within the bounds of a nation-state presents us with considerable challenges.[12] As we are confronted with an increasing *disembedding*

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[8] *See, e.g.*, Wolfgang Streeck, *E Pluribus Unum? Varieties and Commonalities of Capitalism, in* THE SOCIOLOGY OF ECONOMIC LIFE (Mark Granovetter ed., 2011) (critiquing Hall and Sockice's VoC approach on several accounts including its bipolarity and favoring 'dynamic commonalities' rather than 'static' varieties of capitalism); *see also* COLIN CROUCH, CAPITALIST DIVERSITY AND CHANGE: RECOMBINANT GOVERNANCE AND INSTITUTIONAL ENTERPRENEURS (2005) (pointing out the weaknesses of the dualistic VoC approach and favoring the 'governance approach' to institutional analysis); and more recently Mira Wilkins, *Multinational Enterprises and the Varieties of Capitalism*, 84 BUS. HIST. REV. 638, 640 (2010) ("While the notion of capitalism or capitalist systems generally has dealt with the role of firms and markets, so, too, variations in capitalism involve different legal systems and different approaches by states toward establishing "the rules of the game" –including attitudes toward (and the actual amount and nature of) state ownership and regulations. The state as owner can be an active or a passive player in the decisions made by firms. Regulations that constrain and/or enhance markets (domestic and/or international) can include everything from protection of national industry (general or by sector), antitrust or competition rules, financial-sector strictures, corporate governance rules, tax policies, national-security concerns, labor laws, immigration rules, consumer protection regulations, environmental protection rulings, and so on . . . .").

[9] *See, e.g.*, Mark Granovetter, *The Old and the New Economic Sociology*, *in* BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY (Roger Freedland & A. F. Robertson eds., 1990); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul DiMaggio eds.,1991).

[10] Geoffrey M. Hodgson, *Varieties of capitalism and varieties of economic theory*, 3 REV. INT'L. POL. ECON. 380, 394 (1996).

[11] *See, e.g.*, Hall & Soskice, *supra* note 6; Bruno Amable, *Institutional complementarity and diversity of social systems of innovation and production*, 7 REV. INT'L POL. ECON. 645 (2000); VIVIEN SCHMIDT, THE FUTURES OF EUROPEAN CAPITALISM (2002).

[12] Gregory Jackson & Richard Deeg, *How Many Varieties of Capitalism? Comparing the Comparative Institutional Analyses of Capitalist Diversity* 38 (Max Planck Inst. for Soc. Res.MPIfG Discussion Paper, No. 06/2), http://hdl.handle.net/10419/19930 ("The CC [comparative capitalism] literature has heretofore rested on the assumption that capitalism is most usefully segmented for analytical purposes into distinct economies bounded by the

of global economic activity from state-based democratic control, we need to turn our attention to the uncertain prospects of developing complementary institutional arrangements which might play a comparable role to the political institutions as well as courts, on the level of the nation-state.[13] What is crucial at this point is to remember that already "at home," that is, on the level of the nation-state *before* the advent of globalization and its many corrosive effects, the relationship between democracy and markets was anything but straightforward, given capitalism's distributional consequences and the perennial struggle for socio-economic rights and redistributionist policy intervention.[14] This point serves as an important reminder that an analysis of governance structures on the global level must be closely connected with a close scrutiny of the conditions that formed on the level of the nation state, and without which we cannot understand the democracy gaps allegedly "caused" by globalization.[15] It is for that reason that we place a particular emphasis on the interplay between "local," i.e. domestic forms of market governance, and the evolving contours of a transnational regulatory landscape. The corporation, its "creation" by law as a separate legal entity and its governance through an intricate combination of law and norms will be at the heart of our analysis. Like few other fields, say, for example, contract, commercial, or constitutional law,[16] corporate law reflects the significance of *norms* as a key

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borders of nation-states. The global economy consisted of various linkages (principally trade and capital flows) among these national units . . . The future analytical utility of the CC literature will rest on how well it meets these challenges of institutional change and the growing transnationalization of capitalist activity and its institutions.").

[13] Wayne Hope, *Conflicting Temporalities: State, Nation, Economy and Democracy under Global Capitalism*, 18 TIME & SOC'Y 62, 63 (2009) ("With the arrival of contemporary global capitalism, the interconnections between state, nation, economy and democracy are contingent, diverse and radically unstable. When these interconnections take the historically recognizable form of a nation-state, a national economy and/or a nationally constituted democratic polity, internal cohesion cannot be guaranteed; globalizing capital in given circumstances fractures nation states, national economies and democratic polities.").

[14] Bob Jessop, *Elective affinity or comprehensive contradiction? Reflections on capitalism and democracy in the time of finance-dominated accumulation and austerity states*, 28 BERLINER J. SOZIOLOGIE 9, 12 (2018) ("The mutual relation between capitalism and democracy has so far been studied and rendered plausible mostly in terms of a synchronic formal isomorphism. Defenders of this claim have shown less interest in the historical trajectories of economic and political institutions and practices. Yet these trajectories show the contingency of that relation between capitalism and democracy and, where they co-exist, reveal its manifold structural contradictions, strategic dilemmas, and discursive paradoxes.").

[15] For a compelling application of this approach to the development of human rights regimes, see Austen L. Parrish, *Rehabilitating Territory in Human Rights*, 32 CARD. L. REV. 1099 (2011) (arguing for the maintenance of investment in state-driven, multilateral treaty making to advance human rights protection).

[16] *See, e.g.*, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 63 (1963) ("Moreover, contract and contract law are often thought unnecessary because there are many effective non-legal sanctions. Two norms are widely accepted: (1) Commitments are to be honored in almost all situations; one

element of its regulatory infrastructure.[17] This correlation between law and norms is the centrally defining character of transnational regulatory governance in the absence of a centralized global regulatory authority. Insisting on this correlation not being unique or even having arrived along with the emergence of transnational governance forms under the auspices of globalization, however, promises to shed light on the continuities between domestic and transnational law. These continuities urge us to study the connections between law and norm creation on both the nation-state and the global level; rather than treating transnational law as the "exception." The co-existence of law and norms has always been a feature of domestic legal orders. Rather than studying this coexistence only through the lens of the sociology of law and legal pluralism, the analysis from a political economy perspective reveals the shifting institutional and power arrangements that shape the relationships between law and norms. By studying the regulatory frameworks of corporate governance and its attending discourses within and beyond the nation-state through a political economy lens, we see neither a neat demarcation between these two spheres nor the promise of a 'new' land of globalizing corporate governance law. Instead, we see the amplification and intensification of trends towards the privatization and depoliticization of corporate law that have their roots in the transformation of political economy arrangements between state and market which

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does not welsh on a deal; & (2) One ought to produce a good product and stand behind it. Then, too, business units are organized to perform commitments, and internal sanctions will induce performance."); Alessandro Arrighetti & Reinhard Bachmann, *Contract Law, Social Norms and Inter-Firm Cooperation*, 21 CAMB. J. ECON. 171 (1997); Sonia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854 (1961) ("[T]he particular norms or standards by which such disputes are judged are frequently spelled out by special committees with a degree of particularity that is rarely matched by our statutes and only occasionally by regulations of administrative agencies."); Bruce L. Benson, *Customary law as a social contract: International commercial law*, 3 CON. POL. ECON. 1 (1992) (arguing that the lex mercatoria–law merchant incorporated a host of accepted customary law principles as part of the commercial norms governing trans-border transactions); Chris Thornhill, *The Sociology of Constitutions*, 13 ANN. REV. L. & SOC. SC. 493, 495 (2017) ("[T]he sociological analysis of constitutions is defined by the fact that it perceives constitutions not solely as aggregates of norms reflecting rational or collective decisions about the overall organization of a governance system but also as the products of deeply embedded societal processes."). See also the thoughtful discussion of a 'breakdown' of constitutional norms by Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 U.C.L.A. L. REV. 1430 (2018).

[17] Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1254 (1999) ("The neglect of the operation of social norms in the field of corporate law parallels the neglect of the operation of social norms in the law generally."); s*ee also* E. Norman Veasey, *The Role of the Judiciary in Corporate Law, Corporate Governance and Economic Goals*, *in* COMPANY LAW REFORM IN OECD COUNTRIES: A COMPARATIVE OUTLOOK ON CURRENT TRENDS 1 (2000), ("[I]n a well-developed jurisprudential system of corporate governance—like that of Delaware—the dynamics of the daily functions of the board are governed by norms. That is, non-legal rules and standards. These norms have been built up in a culture shaped by a history of fiduciary duty litigation in the environment of an enabling regime, as distinct from a mandatory or regulatory regime.").

has been under way for at least thirty years institutionally as well as epistemologically.[18]

Our analysis is structured as follows. In Part II (A), we first present the governing definition of corporate governance and place it in dialogue with alternative approaches of conceptualizing the corporation. Our argument is that corporate governance is less a mere subfield of corporate law, but rather a distinct and important site of regulatory conflict. It is here that we seek to engage corporate governance as part of a larger critique of law's troubled relationship with the business corporation as an entity that exists not only in legal doctrine but in a wealth of actual socio-economic relationships. By thus *contextualizing* corporate governance, we hope to be able to render visible the parallels between the characterization of corporate governance as a field of market self-regulation through the use of contract and other forms of transnational governance which we see as being equally motivated by the idea of "keeping the state out." Underlying this insulation of the corporation from law is, in our view, a more fundamental inability of legal doctrine to address and grasp *power*. Part II(B) allows us to focus on this hidden dynamic between law and power in the recurring narrative of corporate governance's self-regulatory constitution. Echoing the heated debate over the alleged existence and value of *lex mercatoria* this narrative becomes particularly problematic as it, almost seamlessly, moves from a domestic policy discourse into the transnational realm. Namely, while the former still seems to offer access points for a political critique of the corporation and its place in society, these appear to become more elusive once we try to engage multinational corporations on the transnational plane.

Because we believe that the challenge here is foremost a methodological one, we return, in Part III, to our argument that the black/white view of pitting the domestic against the global fails to capture the myriad relations between these two universes of governance and politics, and posit that in order to understand the evolving transnational field of corporate governance, it is necessary and, indeed, crucial, to adopt both a historical *and* sociological perspective. Historically, then, it becomes apparent how the current state of globalization, privatization, and outsourcing has important domestic forerunners or, "past futures," which have to be acknowledged. Importantly, these futures, which we now revisit in retrospect can be found not in the "wild west" frontier of a global capitalism which we deem to exist "somewhere out there," but instead, at the heart of domestic political economy changes which have been taking place in countries around the world for more than thirty years. By focusing on the domestic dimensions of corporate law's

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[18] Bryan Evans & Marcel Goguen, *Policy Paradigms and the Structure of the State Apparatus: Embedding Neoliberalism*, 30 ALT. ROUTES. J. CRIT. RES. 13, 24 (2019) (citations omitted) ("Despite initial rumblings that the 2007-8 Global Financial Crisis (GFC) would lead to a decline in the authority of economics and potential shift away from neoliberalism (Collignon, 2008), outside of relatively minor changes to prudential financial regulation, the longstanding prestige and influence of neoclassical economics within the policy making process has not significantly diminished since the GFC.").

political economy in countries like the United States or the United Kingdom, we are able to carve out in more detail how exactly it could come to pass that corporate governance rose to become a key regulatory laboratory for economic power. Corporate governance, in other words, has become a central site of conflict between competing values associated with the corporation as a legal *and* economic entity of greatest political significance. As corporate governance joined the family of regulatory regimes that took transnational flight, it, too, became a semi-autonomous regulatory area, hovering between the state and the (global) market.

We are complementing our study with an analysis of the particular sociology and of the emerging political economies of regulatory governance that mark corporate governance today (Part IV). Our research sheds light on the evolving regulatory frameworks for corporate governance, as we are able to show that despite the untiring claims with regard to the state's most limited regulatory role in this area, the connections between public and "private ordering" are much more complex than the cliché of the "end of history for corporate law" wants us to believe. It is against this background, that we think the need for a more differentiated political theory of the corporation today becomes ever more obvious. This perspective productively transforms the corporate governance debate into a wider investigation into the future of political and democratic authority as held by both public and private actors. In light of the growing power of transnational corporations and large institutional investors, our analysis seeks to contribute to a better understanding of the political nature of private law-making; building on, but expanding, the insights from the VoC school and its refinements.

Meanwhile, the political economy lens on corporate governance reveals a breath-taking proliferation of actors and institutions that are involved in creating corporate governance norms, which is at the center of our analysis in Part V where we provide a telling example of what we see as a sustainable-oriented transformation of corporate governance norm creation. We focus on the transnational shift from voluntary codes of conducts and international initiatives towards mandatory disclosure and more recently regulatory governance in the form of due diligence and expansive directors' duties to address issues of environmental and social corporate sustainability. The case study illustrates, as under a magnifying glass, the increasing pressure on corporate actors to effectively embrace normative policies that are geared at a more sustainable and equitable organization of business going forward.[19]

In the final Part of the Article we peer into the post-Covid-19 future and precipitate a discussion of what we see as a critical methodological laboratory in which to study stakeholder capitalism's relation to transnational corporate

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[19] *See, e.g.*, Carmen Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*, 110 BUS. & SOC'Y REV. 191 (2005). The origins of such efforts, of course, go back much farther. *See* Rosamaria C. Moura-Leite & Robert C. Padgett, *Historical background of corporate social responsibility*, 7 SOC. RESP. J. 528 (2011).

governance, its sources and norms, its actors and processes, its regulatory aspirations, and its infrastructures.

II. THE PUBLIC-PRIVATE INTERFACE OF LAW & POWER: PARALLELS BETWEEN CORPORATE GOVERNANCE, LEX MERCATORIA, & TRANSNATIONAL CORPORATIONS

A. Corporate Governance as Site of Political Conflict & Normative Diversity

While corporate governance first emerged in—and still appears to remain confined largely to—discussions among economists and law-and-economics scholars seeking to conceptualize the contractual relationships between the firm and its various constituencies including shareholders, customers, suppliers and the community,[20] over the past two-three decades, it needs to be emphatically pointed out that the field has grown into a policy field of global significance.[21] Today, "corporate governance" is no longer a quasi-technical term internal to corporate law as a distinct legal area, but figures as a reference point for wide-ranging debates around the structure of the board, gender parity, executive compensation ("equal

[20] Oliver Williamson, *Corporate Governance*, 93 YALE L. J. 1197, 1200 (1984) (analyzing the relationship between the firm and its various constituencies through the lens of "transaction cost economics"). For a recent account of the economic analysis of corporate law and corporate governance, *see* David Gindis & Martin Petrin, *Economic Analysis of Corporate Law* (Apr. 10, 2020), *prepared for* ENCYCLOPEDIA OF LAW AND ECONOMICS (Alain Marciano & Giovanni B. Ramello eds, 2020), https://ssrn.com/abstract=3576513 (presenting an altogether favorable account of the significance of microeconomics and "comparative institutional analysis" [*id*. at 14-15] while failing to even mention the interventions made in this regard by the *Varieties of Capitalism* school. Comparative institutional analysis, for these authors, focuses predominantly on the "institutions" in the sense that Oliver Williamson [Econonomic Institutions of Capitalism, 1985] framed them).

[21] Ruth V. Aguilera & Rafel Crespi-Cladera, *Global corporate governance: On the relevance of firms' ownership structure*, J. WORLD BUS. 50, 50 (2016) ("Only in the 1990s, with the advent of accounting and financial fraud by globally present firms, and concurrently, when corporate governance became consolidated as a scholarly field, did scholarship expand to incorporate cross-national comparisons within the triad (mostly US, Japan and Europe). It was not until quite recently that the study of corporate governance embraced first Asian nations (i.e, Japanese keiretsu and South Korean chaebols) and ultimately emerging markets, especially China."); s*ee also* Simon Deakin, *Corporate Governance and the Financial Crisis in the Long Run*, *in* THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR AND FINANCE CAPITALISM (C. Williams & P. Zumbansen eds., 2011); Igor Filatotchev et al., *Corporate governance of a multinational enterprise: Firm, industry and institutional perspectives*, 57(C) J. CORP. FIN. 1, 1 (2019) ("There is an urgent need for a comprehensive analysis of MNE governance with a focus on the complex interface between firm-level governance mechanisms and these diverse institutional contexts.").

pay / "say on pay"[22]) as well as issues touching on the corporation's wider social as well as environmental "responsibilities."[23] This expansion of corporate governance to become a matter of larger social debate occurred in the context of a growing public concern over the lack of effective governmental oversight of corporate conduct before the notorious Enron collapse in 2001[24] and the Global Financial Crisis of 2008-2009.[25] But, while these previous examples of crisis and the current Pandemic moment may serve as powerful illustrations of the inseparability of business corporations from a globally integrated market place, the law has hardly kept pace with that level of connectivity. As a result, corporate law has been and largely continues to be thought of as domestic, something that almost every casebook exclusively demonstrates.[26] By contrast, corporate law and in particular corporate governance, both as fields of hybrid, public-private norm creation, and policy making, have long "grown" beyond the borders of the nation state to become fields of transnational regulatory politics in which domestic and international, public and private actors together create a newly spatialized regime constituted by law and norms.[27] As the deregulation of financial controls starting in the 1980s

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[22] Fabrizio Ferri & Robert F. Göx, *Executive Compensation, Corporate Governance, and Say on Pay*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Feb. 5, 2019), https://corpgov.law.harvard.edu/2019/02/05/executive-compensation-corporate-governance-and-say-on-pay/.

[23] Jean-Michal Sahut et al., *Corporate social responsibility and governance*, J. MGT. & GOV. 3 ("Responsiveness to pressures from stakeholders depends on the environmental and social risks companies take. The power, legitimacy and urgency of stakeholder demands shape managerial decisions with regards environmental and social concerns."); s*ee also* Samuel L. Brown & P. Scott Burton, *Trends in Social and Environmental Responsibility*, NAT. RESOURC. & ENV. 1 (2019) (discussing the need for corporations to incorporate social and environmental concerns into their strategic planning).

[24] William W. Bratton Jr., *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1278 (2002) ("The claims of regulatory failure have a sharp edge due to Enron's profile as one of corporate America's most aggressive political players. Deregulatory politics lay at the core of the company's business plan.").

[25] Martin Conyon et al., *Corporate Governance and the 2008-09 Financial Crisis*, 19 CORP. GOVERNANCE. 399, 403 (2011) ("[T]he directors who had hired and supervised those bankers had an indirect hand in creating a culture of short-term greed and narrow self-interest that became toxic when it became systemic and no longer limited to a few aberrant players.").

[26] Illustrative examples of this exclusively domestic focus include: WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS (10th ed., 2018); SARAH WORTHINGTON, SEALY & WORTHINGTON'S TEXT, CASES AND MATERIALS IN COMPANY LAW (11th ed., 2016).

[27] Peer Zumbansen, *Neither Public Nor Private, Neither National Nor International: Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. L. & SOC'Y 50 (2011); Gralf-Peter Callies & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 RATIO JURIS 260, 265 (2009) ("The very distinction between public and private ordering, however, has long become questionable not only in law . . . but also in its neighbouring disciplines . . . . In the ambit of transnational governance it is even more difficult to be upheld—even from a purely analytical point of view. For without

gave rise to a significant surge in the global movement of capital and cross-border investment,[28] governments felt a growing need to improve the "attractiveness" of their corporate law and corporate governance orders for a global community of investors in search for profitable placements;[29] it is the immense growth in global capital mobility which forms the crucial backdrop for the transformation of corporate governance from a sub-field of corporate law into the focal point of comparative and transnational policy discourse it has since become.

This specific constellation forms the "other side of the coin" of the corporation and its politics in which we are interested here. While connected, even inseparable, they present their distinct features to a particular audience, who too seldom flips the coin to acknowledge what's on the other side. As a result, the debate internal to corporate law around corporate governance, about the trajectories of corporate law over time and space,[30] and about the "convergence" or

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the nation-state as an Archimedean point of reference, the public or private status of regulators becomes fundamentally ambiguous. In the transnational arena, States, industry, and civil society often compete, intermingle, and work together in their regulatory efforts.").

[28] Saktinil Roya & David M. Kemme, *The run-up to the Global Financial Crisis: A longer historical view of financial liberalization, capital inflows, and asset bubbles*, 69 REV. INT'L. FIN. ANAL. 1, 6-7 (2020) ("Notably, in the decade of 1980s financial sector deregulation was initiated in the United States. Alongside liberalizing the domestic financial sector on multiple fronts, intervention in the foreign exchange market was discontinued, and there was increasing liberalization of the capital account."); s*ee also* John B. Goodman & Louis W. Pauly, *The Obsolescence of Capital Controls? Economic Management in an Age of Global Markets*, 46 WORLD POL. 50, 50 (1993) ("In country after country, governments have abolished controls and dismantled the bureaucratic machinery used to administer [capital controls]. And in the rare instances where governments have fallen back on controls, their temporary nature has usually been emphasized. This general trend toward liberalization has stimulated a growing body of research on the political and economic consequences of capital mobility.").

[29] OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 10 (2015) https://www.oecd.org/corporate/ca/Corporate-Governance-Principles-ENG.pdf) ("[C]orporate governance policies have an important role to play in achieving broader economic objectives with respect to investor confidence, capital formation and allocation. The quality of corporate governance affects the cost for corporations to access capital for growth and the confidence with which those that provide capital – directly or indirectly – can participate and share in their value-creation on fair and equitable terms."). In turn, a comparable competition exists with regards to incorporation *see* Peter Witt, *The Competition of International Corporate Governance Systems – A German Perspective*, 44 MIR MGT. INT'L. REV. 309, 311 (2004) ("A competition among different legal systems is impossible without mobile production factors. In the case of corporate governance, systems competition re- quires that companies are able to freely choose their location and thus the (politically determined part of their) governance system. The core assumption behind the theory of systems competition is that corporate governance has direct and indirect effects on the competitiveness of firms because it influences the prices of production factors and their productivities.").

[30] See, e.g., the provocative observation by Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L. J. 223, 245 no. 37 (1962) (". . .

"divergence" of corporate governance principles and rules towards an assumingly unified Anglo-American model of corporate governance[31] often enough takes place in a discursive universe and within an epistemic community quite distant from one another, whose participants seem to focus primarily on the political economy of corporate governance norm creation, the different, public and private actors involved, and the power dynamics at play.[32] Our emphasis on the problem that these "two sides" pose, however, risks becoming an overstatement of how agonistic each "audience" actually is of the respective other. In truth, numerous scholars give

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corporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the "corporation" seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes -towering skyscrapers of rusted girders, internally welded together and containing nothing but wind. But that is a broader thesis best saved for another day. Those of us in academic life who have specialized in corporation law face technological unemployment, or at least substantial retooling. There is still a good bit of work to be done to persuade someone to give a decent burial to the shivering skeletons. And there will be plenty of work overseas for a long time to come, for in, Latin America, and to a lesser extent on the Continent, the "corporation" yet thrives and breeds as it did in this country eighty years ago.").

[31] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001) (famously arguing that corporate law's history has come to an end with there no longer being a "serious competitor" to the shareholder value maximization principle); *but see* Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013*, 15 J. Corp. L Stud. 127, 153-56 (2015) (providing quantitative evidence based on an original leximetric dataset that measures the development of shareholder protection rules across 30 countries between 1990 and 2013 that shareholder protection rules have not formally converged to the US model of corporate law); *see also* Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance* in: THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 30, 33 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (emphasizing the role of "global governance" in promoting convergence and noting that the terms of the debate have now shifted: "[i]t's not shareholders versus stakeholder in a straightforward sense. We may all be shareholder value proponents now. The current question is, *which* shareholders: the ones who will pursue 'efficiency only' or other who may include 'stability' within their maximizing function?").

[32] *See generally* Antoine Rebérioux, *European Style of Corporate Governance at the Crossroads: the Role of Worker Involvement*, 40 J. COMM. MKT. STUD. 111 (2002); Ruth V. Aguilera & Gregory Jackson, *Comparative and International Corporate Governance*, 4 ACAD. MGT. ANNALS 485, 511 (2010) ("In effect, one of the profound shifts in global regulation and regulatory theory in recent decades is from conceptualizing international law as primarily an enterprise initiated by the state and instantiated in international treaties to an understanding of global regulation as a transnational framework composed of evolving hybrids, created by both public and private entities. The global regulation of multinational business entities' economic and social responsibilities is one area occupied by such regulatory hybrids, composed of networks of treaties, domestic law, voluntary standards and codes of conduct, certification procedures, best practices, and norms.").

an impressive testimony of successfully navigating and engaging the two sides.[33] And yet, the specialization in each of these discourses presents considerable "access" challenges for a more open and public political debate. The seemingly technical intricacies of corporate governance, whether they concern the number and the occupants of seats on the board of directors[34] or the board's authority to shape shareholder power through bylaw amendment, are inherently political,[35] and yet, related debates unfold in considerable distance from the public eye.

Our contention is that *both* sides matter because the conceptual/doctrinal issues which are at the heart of the debates internal to corporate law are intricately interwoven *with* and inseparable *from* the engagement with the institutional and normative transformations in the political economy in which corporations operate. Our aim is to draw these debates closer together, especially as the regulatory environment is becoming more fragmented due to the rising significance of private actors—such as stock exchanges, multinational enterprises, hedge funds, or institutional investors—acting as norm creators. As this privatization of corporate governance continues to increase in intensity on the transnational plane, questions about the pursued policy goals will be posed with greater urgency. And, the more that the object of such debates, namely the business corporation, seems able to insulate itself from regulatory intervention on both the domestic level—despite the key roles it has begun to play in assuming formerly public functions—and on the global level, as regards the staggering importance of multinational enterprises in the

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[33] *See, e.g.*, Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1722 (1989) (calling into question the assumption of free contractual choice in corporate norm making); Janis Sarra, *Convergence versus Divergence, Global Corporate Governance at the Crossroads: Governance Norms, Capital Markets and OECD Principles for Corporate Governance*, 33 OTTAWA L. REV. 177, 179 (2001) ("Effective corporate governance has become a key consideration with the growth of global capital markets. Corporations must enhance their governance systems if international capital is to invest in their enterprises, particularly corporations in those jurisdictions with developing or transitional economies.").

[34] David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Prioritizing Board Diversity*, HARV. L. SCHOOL FORUM ON CORPORATE GOVERNANCE (2017), https://corpgov.law.harvard.edu/2017/01/30/corporate-governance-update-prioritizing-board-diversity/; Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 214 (2019) ("Groups without diversity consistently make weaker decisions than those made by groups with experiential diversity. Diverse boards may also more effectively avoid or manage scandalous governance failures. The lack of diversity on boards has not gone unnoticed. Firms increasingly allocate substantial resources to diversify their leadership as they face pressure from investors and governments.").

[35] James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 258 (2015) ("[A]re there limits on the power of the board of directors to act through the bylaws to alter the rights shareholders customarily enjoy? Stated differently, can the board of directors' authority to amend the bylaws extend to changing both the procedural and substantive relationship that shareholders have with the corporation and the board of directors?").

global economy, the more pressing will demands become to reassert some kind of political, democratic control over it.

Such demands in themselves have a long history and seem to tie seamlessly into the types of concerns that are at the center of today's debates around "corporate social responsibility" or "corporate (social) purpose."[36] As Philip Blumberg wrote in 1972:

> One of the striking developments on the corporate scene has been the increasing attention devoted to a re-examination of the traditional role and objectives of business and a recognition of its changing responsibilities in a changing society. The nature and extent of corporate response to public expectations and demands for business participation in the solution of the urgent social and environmental problems of our times has become an issue of high priority for business leadership. In business activity, management structure, and in its dealings with shareholders and the public, corporate responsibility has assumed a significant position in corporate affairs.[37]

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[36] *See generally* Allen Ferrell et al., *Socially Responsible Firms*, 122 J. FIN. ECON. 585 (2016); Leo E. Strine, *Toward a Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* (Univ. of Pa. Inst. for Law. & Econ., Research Paper No. 19-39, 2019), https://ssrn.com/abstract=3461924; Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* (European Corp. Governance Inst., Law Working Paper No. 515/2020, N.Y.U. Pub. Law, Research Paper No. 20-16, 2020), https://ssrn.com/abstract=3589951; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, __ CORNELL L. REV. __ (forthcoming Dec. 2020); Colin Mayer, *Shareholderism Versus Stakeholderism—a Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* (European Corp. Governance Inst., Working Paper No 522/2020, 2020), https://ssrn.com/abstract=3617847; Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations have a Purpose?* (Univ. of Pa., Inst for Law & Econ., Research Paper No. 20-22, European Corp. Governance Inst., Law Working Paper No. 510/2020, 2020), https://ssrn.com/abstract=3561164; Amir N. Licht, *Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral*, European Corp. Governance Inst., Law Working Paper No 547/2020, 2020), https://ssrn.com/abstract=3718670. S*ee also* Martin Lipton et al., *On the Purpose and Objective of the Corporation*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Aug. 5, 2020), https://corpgov.law.harvard.edu/2020/08/05/on-the-purpose-and-objective-of-the-corporation/.

[37] Philip I. Blumberg, *Selected Materials on Corporate Social Responsibility*, 27 BUS. L. 1275, 1275 (1972).

Important landmarks in the dispute over the corporation's social responsibility or purpose, of course, date back even further.[38] But the significance of more recent complaints about the corporation lies in the resonance of such critique with a wider, even global, public. In fact, corporations, their activities, and how they are or can be regulated have become a topic of an ongoing worldwide discussion, especially as news regarding egregious labor and human rights abuses by Western multinationals and their foreign subsidiaries continue to reach a wider public.[39] It is this larger, "big picture" dimension of the corporation that we want to put at the center of our analysis. Rather than going down well-trodden paths along which we could revisit and re-engage old—and important—debates about the primacy of shareholder value maximization to explain the key role of the corporation, we want to approach the corporation and its governing rules from a *sociological* and *political economy* perspective. By focusing on the actual operation and the place of the corporation in its different domestic and transnational environments, it will be possible to better understand the regulatory landscape in which the corporation is not only embedded but which it continues to shape and direct.[40]

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[38] *See, e.g.*, Dodge v. Ford Motor Company, 170 N.W. 668, 684 (Mich. 1919) (stating the Court's famous assertion that "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."). *Compare* Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931), *with* E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). *See also* Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75. S. CALIF. L. REV. 1189, 1189-190 (2002) ("[T]he debate over the social role of the corporation remains unresolved.").

[39] *Pakistan Factory Fire Kills 125*, THE GUARDIAN, (Sept. 12, 2012), https://www.theguardian.com/world/2012/sep/12/pakistan-factory-fires-karachi; *see also* Juliane Kippenberg & Komala Ramachandra, *Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties*, WORLD REPORT 2020, HUMAN RIGHTS WATCH (2020), https://www.hrw.org/world-report/2020/momentum-builds-for-corporate-human-rights-duties ("Multinational corporations, some of the wealthiest and most powerful entities in the world— 69 of the richest 100 entities in the world are corporations, not countries—have often escaped accountability when their operations have hurt workers, the surrounding communities, or the environment."); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446 (2001) ("The last decade has witnessed a striking new phenomenon in strategies to protect human rights: a shift by global actors concerned about human rights from nearly exclusive attention on the abuses committed by governments to close scrutiny of the activities of business enterprises, in particular multinational corporations.").

[40] *See, e.g.*, Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 231 (2015) ("I am arguing that corporations 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. Like all international legal rules, they trump domestic law as a matter of international law. This does not necessarily mean that internationalized contracts automatically invalidate conflicting domestic statutes or regulations as a matter of the state's internal law."); *see also* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as*

For that kind of analysis to be successful it is crucial to approach a country's— or, as in the case of the United States, a state's—corporate law system as only one of the corporation's regulatory frameworks. As we will see, the corporation is not only *governed by* but is in fact *governing through* an intricate mixture of hard and soft law rules, which includes a fast-growing cohort of codes of conduct and standards. A sociologist of corporate governance is interested in the interplay between different bodies of norms that address corporate behavior.[41] As we will see, an important component of these norms today are rules, recommendations, guidelines and other "soft law" standards that, in contrast to state-originating mandatory corporate law rules, are mostly created by the corporations themselves.[42]

Another crucial component of the corporation's regulatory universe beyond the domestic sphere are norms promulgated by international organizations such as the United Nations or the Organization of Economic Cooperation and Development (OECD), which are, however, only of a voluntary and ultimately non-binding character. The definition of corporate governance, given by the OECD, is noteworthy:

> Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. . . . International flows of capital enable companies to access financing from a much larger pool of investors. If companies and countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principles. . . . *The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them. The Principles aim to provide a robust but flexible reference for*

Global Legislator, 39 CONN. L. REV. 1, 4 (2007) ("Wal-Mart has become an important actor in the transformation of law making. That transformation challenges the regulatory monopoly of states and may contribute to the construction of a global system of customary law as powerful as the English common law was in its day.").

[41] *See, e.g.*, Aleš Kubíček et al., *Cross-Country Analysis of Corporate Governance Codes in the European Union*, 9 ECON. & SOCIO. 319 (2016); *see also* Edward E. Williams & M. Chapman Findlay III, *Corporate Governance: A Problem of Hierarchies and Self Interest*, 43 AM. J. ECON. & SOCIO. 19 (1984) (arguing that the neo-classical theory of the corporation fails to capture the actual governance structures and power dynamics within the firm); Ivan Light, *Economic Sociology and Political Economy* (2020), https://economicsociology.org/.

[42] *See infra* Part III.

> *policy makers and market participants to develop their own frameworks for corporate governance. To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities.*[43]

What shines through the OECD's framing of the *Principles* is an awareness of corporate governance as a set of norms that is itself deeply immersed into the constant changes in the political economy in which corporations are operating. The OECD thus addresses both public and private actors, legislators, policy makers, and "market participants" as key players in the continuing shaping of relevant rules. Importantly, then, the last sentence captures the role that corporations must play themselves in innovating and adapting these norms. Effectively, this gives ample testimony to the role of corporations as drivers and co-creators of the regulatory regime, rather than merely being the object of governmental intervention. And, in turn, this further underlines the governing, "contractarian" model of the corporation.[44]

The normative universe of the corporation is, of course, constituted to a large degree by case law, but a case law that in fact embraces the just-described idea of the corporation *not* being governed by law. As the former Chief Justice of the Delaware Supreme Court, the Honorable E. Norman Veasey, stated in 2000:

> A word of caution is that the judge-made law that is at the heart of the Delaware model must not be of a free-wheeling or ad hoc quality. It must involve a disciplined and stable stare decisis analysis based on precedent and a coherent economic rationale. The *private ordering aspect* of it must be important to provide ex ante the contractual stockholder protections deemed important, as distinct from ex post judicial rewriting of the contractual construct. The *self-governance aspect* of this model is based on good faith development of, and adherence to, good corporate practices not mandated by law.[45]

But when we look at the corporation from the perspective of human rights, the picture presents itself again differently.[46] From that vantage point, there is still a

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[43] OECD, *supra* note 29, at 10-11 (emphasis added).

[44] Shleifer & Vishny, *supra* note 5, at 741 ("In most general terms, the financiers and the manager sign a contract that specifies what the manager does with the funds, and how the returns are divided between him and the financiers.").

[45] E. Norman Veasey, C.J. of Delaware, *The Role of the Judiciary in Corporate Law, Corporate Governance and Economic Goals, at* the Company Law Reform in OECD Countries: A Comparative Outlook of Current Trends (Swed., Dec. 7-8, 2000).

[46] Douglas L. Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 5 (2007) ("[T]he international system has generally failed to check

striking absence of effective regulation or case law. This is especially true with regards to overall frustrating litigation that has and is being brought against multinational corporations for human rights violations.[47] These have to be seen against the background of the limited role that both private and international law have been playing with regard to the corporation. As far as the corporation's border crossing activities are concerned, the arguable limitations of domestic corporate law were sought to be remedied historically through the employment of private international law and, more recently, through public international law,[48] albeit with varying success.[49] Noteworthy, of course, is the human rights litigation under the Alien Torts Act, a provision which dates back to 1789[50] and which, after a relatively brief but important resuscitation prompted by the Second Circuit in 1980,[51] appears

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the abuse of repressive governments and meaningfully deliver the promise of human rights to those most in need of protection. In essence, the international system's approach to enforcement and implementation of human rights has proven unrealistic in a world characterized by oppression, autocratic governments, poverty, and armed conflict.").

[47] Courtelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDH. L. REV. 1053, 1057 (2015) (citations omitted) ("While no court has upheld a jury verdict against a corporate defendant, expensive settlements combined with even more expensive attorneys' fees exert pressure on defendants to modify their behavior to avoid payouts or the potential publicity nightmare that might ensue. Yet even the most ardent supporters of transnational human rights suits concede that 'the direct economic benefit to individual plaintiffs has been limited[] [and] [f]ew ATS plaintiffs have received monetary compensation from their perpetrators.'"); s*ee also* Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, U.C. LEGAL F. 279 (2003) (arguing for the use of human rights class actions against corporate defendants).

[48] José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 19 (2011) ("A nation that permits itself and its laws to be subject to supranational adjudicative review when it comes to how it treats foreign investors but does not permit such independent judicial review with respect to its laws that may harm the human rights of others appears to say to the world that it values foreign investors' property rights more than it does any other civil, political, economic or social rights.") (discussing the symbolic significance of the Supreme Court's *Citizen United* decision for the treatment of corporations in international law); Jan Wouters & Anna-Luise Chané, *Multinational Corporations in International Law*, (KU Leuven, Working Paper No. 129, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216 ("The perceived inadequacy of domestic legislation to effectively regulate the activities of MNCs has moved the focus to the level of international law.").

[49] Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 896 (1994) ("Of perhaps greater concern is the fact that those injured at the hands of a TNC may rely on upon no more than a fragile and contingent chain of responsibility between the TNC and a state to enable them to resort to international law.").

[50] In only 33 words, 28 U.S.C. §1350 (2012), contains the following: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[51] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) ("In *Filartiga*, transnational public law litigants finally found their *Brown v. Board of Education.*"); s*ee also*

to have been put to rest in the Supreme Court's 2013 and 2018 decisions in *Kiobel*[52] and *Jesner*.[53]

Where else, then, is the law to be found, which governs the behavior of corporations? If corporate law is understood as being largely "enabling" rather than mandatory[54] and if the just noted ATA litigation illustrates to what degree the corporation is insulated from being held accountable, we need to shift our attention away from focusing directly on the corporation as the object and author of regulation. Instead, we ought to take a closer look at the larger regulatory universe in which corporations operate. Arguably, according to an even older tradition, many commercial economic exchanges were regulated under the auspices of the so-called "*lex mercatoria,*" or "law merchant," the exact status and legitimation basis of which remains a matter of lively dispute.[55] The particular position of *lex*

Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 N.D. L. Rev. 1645, 1647 (2014) ("This second incarnation of the ATS, baptized by the 1980 decision of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, was still halfway faithful to the aims of the original enactment insofar as it emphasized the First Congress's commitment to affording a private damages remedy for violations of international law. However, it importantly left out the specific concern with such violations that might subject the United States to trade sanctions or military retaliation by other more powerful states.").

[52] Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111 (2d Cir. Sept. 17, 2010); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013); s*ee also* Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119, 121 (2010) ("*Kiobel* is out of step with the historical tradition of the international legal system to fill governance gaps, including by holding actors operating in conflict zones accountable for egregious violations of human rights when domestic systems fail to do so. This tradition dates back at least to the World War II era and the case of I.G. Farben, the largest industrial entity supporting Nazi Germany, which was sanctioned with the corporate death penalty—dissolution—for its participation in violations of international law.").

[53] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Gerlinde Berger-Walliser, *Reforming International Human Rights Litigation Against Corporate Defendants after Jesner v. Arab Bank*, 21 U. PA. J. BUS. L. 757, 760 (2019) ("[T]he decision is far from serendipitous. It seems consistent with not only *Kiobel*, but the Supreme Court's reasoning in other recent decisions.").

[54] Elvin R. Latty, *Why Are Business Corporation Laws Largely Enabling?*, 50 CORNELL L. REV. 599, 601-02 (1965) (listing four enabling characteristics, including, first, contract as governing structure of the corporation, second, corporate law's providing but a "blue print" for the corporation's organization, third, that the power structure within the corporation should be free from outside intervention and, fourth, that corporate law is "not very interested with reform or with preventing or minimizing abuse of power.").

[55] Nikitas E. Hatzimihail, *The Many Lives—and Faces—of* Lex Mercatoria*: History as Genealogy in International Business Law*, L. & CONT. PROB. 169, 171 (2008) ("The divergence of opinion is noticeable even at the level of definition. There is disagreement as to the legal nature of *lex mercatoria* (is it a 'legal system' complete with its metanorms, a 'body of law' less systematic but rather coherent, or a 'phenomenon'?), as to the process of its creation (spontaneous or evolutionary), and as to the lawmaking role of business actors

mercatoria "in between" private (international) and public (international) law has raised intriguing debates about its nature, normativity, and effectivity which have been likened to a "religious war" and "trench warfare."[56] But, it is not *lex mercatoria*'s desired disconnection from the state in itself that is the cause for deeper concern. As we will show in Part II(B), it is this dimension of *lex mercatoria* as a representative of a self-reliant, spontaneous legal system that continues to attract critical attention and moves *lex mercatoria* into the vicinity of long-standing critiques of "private power."[57] It is here that the *lex mercatoria* seems to evoke the slippery slope between a rise in private power on the level of the transforming nation-state and the increasing public authority that is being vested in private (corporate) actors. Additionally, because the *lex mercatoria* is such a unique setting for the often invisible operation of corporate power, we need to examine it more closely.

B. The Hidden Side of Law: Negotiating Power in the Transnational Corporation

Like Castor and Pollux, *law* and *power* cannot appear separately.[58] But in Foucauldian terms, law is not the only power: "Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other-non-juridical mechanisms."[59] And elsewhere: "I don't want to say that the State isn't important: what I want to say is that relations of power, and hence the

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themselves."); s*ee also* Emanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. 208, 209 (1995) (citations omitted) ("*Lex mercatoria* is sometime attacked on ideological, theoretical as well as practical grounds. On the ideological front, *lex mercatoria* has been presented as a 'less than candid pseudo-legal caprice,' or, in more moderate terms, 'essentially . . . a doctrine of laissez-faire.' On the theoretical level, some reproach *lex mercatoria* for not having the characteristics of a complete legal system, leading to the conclusion that *lex mercatoria* does not exist.").

[56] See Helen E. Hartnell, *Living La Vida Lex Mercatoria*, 12 UNIF. L. REV. 733 (2007), for a good overview of the academic debates about lex mercatoria.

[57] *See infra* Part II(B); *see, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 39 POL. SCI. Q. 470(1923).

[58] Paul Sayre, *Law and Power*, 17 LA. L. REV. 756, 757 (1957) ("We also speak of law and power rather than law with power, because a considerable area of our activity is covered by power uncontrolled by the state; in a way there is a correspondence in law and morals, since morals may apply where you don't have legal regulations. We prefer, however, to speak of law with morals where the law operates, and power with morals where these are separate from legal regulations. We also speak of law and power, since this covers the area outside the reasonable restraints of law (power) in a fairly separate sense from the area covered by legal regulation.").

[59] MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 141 (Colin Gordon ed., 1980).

analysis that must be made of them, necessarily extends beyond the limits of the state."[60]

This approach to law and power, which insists on an analysis of power beyond the limits of sovereignty and state-driven law,[61] brings home to scholars of commercial and corporate law the heated debate over the alleged existence and value of the law merchant (*lex mercatoria*). Arguably, the key character of the *lex mercatoria* is that it is predominantly made up of private norms, enacted by contracting business partners, "merchants," with the aim of creating a cost- and time-effective, self-regulatory framework that governs the drafting, as well as the enforcement, of the agreements in case of a dispute. As a renowned scholar of the *lex mercatoria* observed:

> While formalizing and rationalizing commercial law for the domestic market through the production of legal unity in the substantive dimension and through the provision of reliable legal services in the procedural dimension, at the same time commercial law became territorially fragmented. Although this did not result in a complete denial of justice for international commerce, in a cross border situation additional uncertainties arose with regard to the questions of which court has jurisdiction, which national commercial law this court shall apply, and whether a resulting judgment will be recognized and enforced as well in another nation state.[62]

Questions of jurisdiction have remained central to any discussion of the *lex mercatoria*, especially as regards the differentiation between the *lex mercatoria* and the larger field of transnational commercial law and arbitration.[63] Crucially, the perceived advantage of the former would be that contracting parties could agree on

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60 *Id.* at 122.

61 *See, e.g.*, Nickolas John James, *Law and Power: Ten Lessons from Foucault*, 30 BOND L. REV. 31 (2018). *But see* Gary Wickham, *Foucault, Law, and Power: A Reassessment*, 33 J.L. & SOC'Y 596, 596 (2006) (arguing that "in attempting to separate law from what he sees as the positive power of modern governmentality, Foucault never understands law's role as a part of a crucial balance—between political power, military power, the social, the cultural, the legal, and the economic—a balance that tries to achieve both individual freedom and the security to enjoy that freedom.").

62 Gralf-Peter Calliess, *Lex Mercatoria* 8 (ZenTra Ctr. for Transnat. Studies, Working Paper No. 52/2015), https://ssrn.com/abstract=2597583.

63 Ole Lando, *The* Lex Mercatoria *in International Commercial Arbitration*, 34 INT'L & COMP. L. Q. 747 (1985); Alec Stone Sweet, *The New* Lex Mercatoria *and Transnational Governance*, J. EUR. PUB. POL'Y 627, 634 (2006) ("[T]he Lex Mercatoria is increasingly being selected as the controlling law in contracts by traders and arbitrators. The reason is straightforward: a national contract law can lower the bargaining and transaction costs of doing transnational business, including bargaining stalemates wherein neither party will agree to assign the contract to the specific national jurisdiction preferred by the other party.").

the applicable law and the forum for eventual dispute resolution beforehand, which effectively allows them to keep their contractual arrangement to a large degree out of the jurisdiction of a particular state. As Alec Stone Sweet pointed out:

> [Transnational business partners] easily access contractual instruments in the virtual space of the Lex Mercatoria. The International Chamber of Commerce (ICC), for example, has long sold inexpensive model contracts in the form of a booklet and floppy disk; the contracts are easily customized for specific needs. The introductory remarks to the ICC's model international sale contract . . . states bluntly: "parties are encouraged *not* to choose a domestic law of sale to govern the contract."[64]

But it is not *lex mercatoria*'s desired disconnection from the state in itself that is the cause for deeper concern. Arguably, many private lawyers would draw an analogy to contract law, where we can also find strong contentions regarding the relative autonomy of contractual governance from the state.[65] What continues to attract critical attention is *lex mercatoria*'s more ambitious claim to be representative, if not an embodiment, of a self-reliant legal system, which—because it is believed to be acting outside the purview and democratic control of the state— is bound to become a dangerous weapon in the hand of the powerful.[66] It is that dimension of the *lex mercatoria* that moves it into the vicinity of long-standing concerns with "private power" and the challenges it creates for public oversight, let alone democratic governance.[67] What the *lex mercatoria* seems to evoke in this context is the slippery slope between a rise in private power on the level of the nation-state, where in the course of privatization and market-oriented state

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[64] Sweet, *supra* note 63, at 634 (emphasis added).

[65] *Id.* at 562. See the astute depiction of this view by Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933): "Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least." And, later, he observes: "A contract, therefore, between two or more individuals cannot be said to be generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy."

[66] John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REG. & GOV. 317, 323 (2018) ("[T]he juridification of private international commercial relations has expanded immensely through the so-called new lex mercatoria or merchant law, which has the effect of 'delocalizing' not only commercial transactions but also related lawmaking and enforceable dispute settlement.").

[67] *See generally* Roscoe Pound, *The New Feudalism*, 16 AM. BAR ASS. J. 553 (1930); Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36 (1944); Heinrich Kronstein, *Arbitration is Powe*r, 38 N.Y.U. L. REV. 661 (1963).

transformation private actors have become increasingly vested with public authority.[68] While such processes are allegedly still within the regulatory prerogative and subject to the sovereignty of the state, *lex mercatoria*'s claim of autonomy sounds dangerously similar to the way in which transnational corporations continue to consolidate their seemingly infinite and unmoored power beyond the reach of the state and its law.[69] As globalization has by now become the short formula for the global integration of human, economic, cultural, technological, and digital integration, and for the erosion of public safety nets, the rise of inequality, and the prevarication of human life, the idea of witnessing the rise of a realm of unfettered market power outside the nation-state remains deeply troubling. As the law's control of global affairs—both as its architect through state agency and as a victim of global market pressure on the state 'to deliver'—remains contentious, a quasi-legal order, such as the *lex mercatoria.* seems to only further illustrate the state's weakening. As Kat Wall wrote already almost ten years ago:

> More explicitly, economic globalization, in its most recent form, has been limiting the capacity of states to determine their own policy outcomes in three main ways: through trade and economic integration; financial markets; and the competition for employment. Due to the increasing pressure of international competition in trade markets as well as the increased mobility of capital and multi-national corporations, states are incentivized to cut labour costs, to reduce the price of goods and services, reduce taxation to make their domestic market more competitive, and to decrease the size and scope of the welfare state.[70]

Of greater interest for us is a more differentiated view of contract law's place within a liberal legal order, which, on the one hand, prioritizes autonomy but, on the other, resists the libertarian projection of a space of human interaction and freedom that is somehow placeless and ahistorical. As Hanoch Dagan characterizes contract law, it echoes Jürgen Habermas's compelling account of the co-

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[68] Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, N.C. L. REV. 397, 300 (2006) ("The number of private contractors doing the work of government has accelerated, while the number of federal employees needed to supervise them has eroded.").

[69] Ruggie, *supra*, note 66, at 327; Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970)*; see also* Jonathan L. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 765 (1983) ("It is well-documented that there are a number of TNCs that are economically more powerful than all but the largest nation-states.").

[70] Kat Wall, *The End of the Welfare state? How globalization is Affecting State Sovereignty*, GLOBAL POL'Y (Aug. 17, 2012), https://www.globalpolicyjournal.com/blog/17/08/2012/end-welfare-state-how-globalization-affecting-state-sovereign.

evolutionary character of public and private autonomy.[71] For Habermas, the key lies in making sure that one is not sacrificed (or, reified) on the cost of the other:

> [P]rivate and public autonomy require each other. The two concepts are interdependent; they are related to each other by material implication. Citizens can make an appropriate use of their public autonomy, as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct. But members of society actually enjoy their equal private autonomy to an equal extent—that is, equally distributed individual liberties have "equal value" for them—only if as citizens they make an appropriate use of their political autonomy.[72]

But this is also the Achilles heel of the *lex mercatoria*: its "private" nature raises recurring concerns regarding its legitimacy and its nature as "law." Yet, when it comes to "corporate governance," once seen as a sub-field of corporate law, the reliance on contract as an important, perhaps even, the decisive regulatory foundation, is not altogether alien.[73] The idea that corporate law should do no more than provide a framework for the self-organization of entrepreneurs through contractual arrangements between investors and management resonates with the emphasis on "private ordering" we already find in the *lex mercatoria*. But, while the former is understood to be concerned with the legal organization of the corporation, the latter encompasses commercial relationships in a distinctly spatial

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[71] Stefan Rummens, *The Co-Originality of Private and Public Autonomy in Deliberative Democracy*, 14 J. POL. PHIL. 469, 475 (2006) ("In *Between Facts and Norms* Habermas reconstructs the practice of democratic self-legislation by free and equal citizens in a constitutional state. This practice is characterized by a system of basic rights, which contains as most important categories the rights providing the greatest possible measure of equal individual liberties (private autonomy) and rights providing equal opportunities of participation in the law-making processes (public autonomy).").

[72] Jürgen Habermas & William Rehg, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 767 (2001).

[73] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) ("Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc. . . . " and that " . . . most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals."). *But see* the critique by William W. Bratton Jr., *Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409 (1989) ("The new economic theory's core notion describes the firm as a legal fiction that serves as a nexus for a set of contracting relations among individual factors of production. This notion has achieved wide currency, showing up even in contexts in which the rest of the theory has little or no influence. Some have accorded this notion the weight of scientific truth. It has been received in the legal literature as an ontological discovery with immediate and significant implications for corporate law discourse.").

sense. Corporate law's private ordering paradigm, then, is focused on the corporation as an entity seen as being in need of protection from too much state intervention. By comparison, *lex mercatoria*'s playground is the universe of border-crossing commercial relations, believed to be largely autonomous from the nation-state's regulatory reach. However, both fields have a remarkably ambivalent stance on the co-existence of hard and soft law. But, while both corporate law and the *lex mercatoria* depend on prioritizing freedom of contract as their governing principle, both crucially depend on state law, with which they are intimately interwoven. Corporate law cannot get away from the fact that the corporation is "the mere creature of law,"[74] and the *lex mercatoria* has numerous connections to the state and domestic judicial systems when it comes to enforcing, for example, arbitral awards.

The problematic combination of economic and political power of the multinational corporation brings the challenge of law in the global context into sharp relief. Fifty years ago, Professor Detlef Vagts, in a landmark analysis of the Multinational Corporation (MNC) observed the following:

> A review of "the law of the MNC" reveals several serious defects: (1) it is divided along lines, perhaps useful in breaking down other problems, that fragment the MNC situation in an unhelpful way; (2) it is basically obsolete, coping with problems presented in reported cases of past decades, while MNC managers and attorneys assiduously strive to keep new issues from exploding into litigation (a proposition rather less true of tax law than other branches); (3) the cases that do arise are so rare and idiosyncratic that they do not provide the regularity and comparability needed for the growth of a normal body of law; and (4) the understanding of lawyers as to the characteristics of the MNC is often unsophisticated and erroneous, for there has been no merger between law and economics.[75]

If the key challenge posed by the MNC is its ability to escape legal regulation, it seems advisable to approach it within its own transnational context. It is there that we are likely to find that it is defined both by corporate law as we know it but also by its membership in the club of hybrid transnational actors whose regulatory foundation is spread out between the claims made domestically and those it asserts as an "independent" organization on the global plane. As such, it is characterized by a combination of law and norms, the bridging of which we have

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[74] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (famously holding that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

[75] Vagts, *supra* note 69, at 743-44.

already discovered to be a key problem in the context of the corporation in the domestic context. As the MNC is not only a creature of domestic corporate law but is constituted through cascades of interlocking transnational contractual regimes, it is an example of the law/norm combination of almost overwhelming force. Our argument, however, is that the mere fact that an organization (such as the MNC) brings together an intricate mix and interpenetration of hard and soft law, official and unofficial norms, need not mean that it cannot be subjected to sound legal critique. As Fleur Johns has shown in her work, it is by reifying the MNC as something that lives in a distinct space and is thus removed from and incomparable to the corporation we "know" in the domestic context, that we risk letting the MNC "get away." Drawing on the legal realist critique of law's affirmation of the corporation's actual power by treating it as a contractual arrangement of a private nature, Johns is able to pull the MNC back into the realm of critical accessibility.[76]

But it is of course not only in the realm of corporate law and the MNC that this co-existence of law and norms is operating. Already in the 1950s, Philip Jessup, professor of international law at Columbia and later judge at the International Court of Justice in The Hague, maintained that there were numerous border-crossing interactions which were the regulatory object of private norms and public international law but also of different types of norms, the entirety of which he referred to as "transnational law."[77] An important dimension of what Jessup considered as existing outside and beyond the confines of public and private international law were business norms, but also rules and standards drafted and disseminated by both public and private entities.[78] The more recent umbrella term for the legal pluralist, public-private, formal-informal, mix of laws, standards, rules, codes, and guidelines is *transnational private regulatory governance*, or *transnational private regulation*. The OECD describes the latter thus:

> As markets and regulatory tasks become increasingly global, forms of private international regulatory cooperation are emerging along with—or sometimes as a replacement for—inter- governmental cooperation. In a number of settings, traditional forms of public intervention are facing enormous difficulties in coping with certain policy problems. The weaknesses of public regulation emerge more specifically at the transnational level where difficulties to coordinate, inconsistencies between standard setting and enforcement, divergences between administrative and judicial enforcement and

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[76] Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 31 OXFORD. J. LEG. STUD. 391 (2011).

[77] Philip C. Jessup, TRANSNATIONAL LAW 2 (1956) ("Nevertheless, I shall use . . . the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules, which do not wholly fit into such categories.").

[78] *Id.* at 8-9.

> within the latter among domestic courts make inter-state regulatory co-operation an insufficient response.[79]

In view of numerous areas of regulation which exist today, and which are populated by private or "quasi-public" actors engaged in the production of norms, it is not surprising that that there are considerable concerns regarding the democratic legitimacy of these processes.[80] Some sociologists describe this type of governance against the background of privatization processes within the nation-state and characterize it as "a de-territorialized form of authority . . . which emerged . . . as governments offloaded regulation to the private sector to promote a neoliberal model of governance . . . [that] generally accepts rather than challenges the power of northern transnational corporations and NGOs."[81] Other scholars remain skeptical with regard to the alleged detachedness and autonomy of such regulatory regimes from the state.[82] Such concerns are important, not least with view to the lack of effective rights protection especially for those who are most vulnerable. As Patricia Pittman observed:

> As globalization advances, so too do the governance challenges that accompany expanded cross-border business activity and labor mobility. Transnational companies have, over time, diminished the effectiveness of regulation by single states, leading in some instances to a power imbalance between the transnational corporations and the individuals and communities

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[79] ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, *Transnational Private Regulation*, https://www.oecd.org/gov/regulatory-policy/transnational privateregulation.htm.

[80] *See, e.g.*, Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J. L. & SOC'Y 1 (2011) ("Transnational private regulation (TPR) is a key aspect of contemporary governance. . . TPR regimes raise significant problems of legitimacy because of a degree of detachment from traditional government mechanisms. A variety of models have emerged engaging businesses, associations of firms, and NGOs, sometimes in hybrid form and often including governmental actors. Whilst the linkage to electoral politics is a central mechanism of legitimating governance activity, . . . there are also other mechanisms including proceduralization and potentially also judicial accountability.").

[81] Tim Bartley, RULES WITHOUT RIGHTS. LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY 4 (2018).

[82] Guilherme Vasconcelos Vilaça, *Transnational Law, Functional Differentiation and Evolution*, 2 E-PÚBLICA 41, 43 (2015) ("The label 'transnational law' is deployed to address an urgent and current problem in international and domestic lives: in a different number of arenas, citizens have to abide by standards and rules which they have neither voted for, contributed to nor can easily change or dispute. Furthermore, despite the fact that such rules do guide behavior and thus are sociologically relevant, they can hardly be called proper law according to the canonical list of sources of international law either because they lack the appropriate form of law (they are soft) or because they are produced by bodies who are not recognized law-makers.").

> with whom they negotiate their transactions. Reduced government oversight and asymmetrical business arrangements have led to human rights violations and unfair labor practices.[83]

The "elephant in the room" is the "corporation," the legal mechanism which is used to structure the business firm,[84] which functions as linchpin and nodal point in various locations and different levels of the transnational production regimes and which poses significant regulatory challenges to an understanding of law based in and confined to the nation-state.[85] Attempts to more effectively bring the globally operating corporation within the reach of law have focused on different forms of responsibility based either on tort or on a more general conception of business, social,[86] environmental,[87] or human rights obligations.[88] The problem of

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[83] Patricia Pittman, *Alternative Approaches to the Governance of Transnational Labor Recruitment. A Framework for Discussion*, MACARTHUR FOUNDATION (2013), https://www.macfound.org/media/files/Alternative_Approaches_to_the_Governance_of_Transnational_Labor.pdf.

[84] Deakin, *supra* note 1, at 352.

[85] H. W. Arthurs, *Labour Law Without the State?*, U. TOR. L.J. 1, 1 (1996) ("A working definition of law is that it is a set of norms authoritatively pronounced by state institutions – the legislature and higher courts – and enforced by state officials mandated to employ the state's powers of coercion – bureaucrats, policemen, and lower-court judges.").

[86] Valentin Jentsch, *Corporate Social Responsibility and the Law: International Standards, Regulatory Theory and the Swiss Responsible Business Initiative* (Euro. Univ. Inst. MWP, Working Paper No. 2018/05, 2018), https://cadmus.eui.eu/bitstream/handle/1814/59084/MWP_WP_Jentsch_2018_05.pdf?sequence=1&isAllowed=y ; *see also* Ryan Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It?*, 15 AZ. J. INT'L & COMP. L. 905 (1998).

[87] Myria W. Allen & Christopher A. Craig, *Rethinking corporate social responsibility in the age of climate change: a communication perspective*, 1 INT'L J. CORP. SOC. RESP. 1 (2016); Neil Gunningham, *Shaping corporate environmental performance: A review*, 19 ENV. POL'Y & GOV. 215 (2009); *see also* David M. Ong, *The impact of environmental law on corporate governance: international and comparative perspectives*, 12 EUR. J. INT'L L. 685 (2001); Denis G. Arnold, *Corporate Responsibility, Democracy, and Climate Change*, 40 MIDW. STUD. PHIL. 252, 257 (2016) (discussing corporate misinformation efforts regarding climate change from the perspective of business ethics); Kerrie L. Unsworth, Sally V. Russell, & Matthew C. Davis, *Is Dealing with Climate Change a Corporation's Responsibility? A Social Contract Perspective*, 7 FRONT. PSYCH. 1, 6-7 (2016) (from the perspective of social contract theory, finding a widely shared view that corporations had a responsibility to mitigate anthropocentric (human-caused) climate change).

[88] Surya Deva, *Business and Human Rights: Time to Move beyond the "Present"?*, *in* BUSINESS AND HUMAN RIGHTS. BEYOND THE END OF THE BEGINNING 46, 67 (César Rodríguez-Garavito ed., 2017) ("Scholars have pointed out that corporate law has a critical role to play in promoting corporate compliance with human rights."); *see also* Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, 12 AM. SOC'Y INT'L L. INSIGHTS (2008), http://www.repository.law.indiana.edu/facpub/11; Rebecca M. Bratspies, *"Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. J. INT'L L. 9 (2005).

corporations "hiding" behind the veil of their subsidiaries' separate legal person or distancing themselves from their supply chain-related contractual partners was, at a time, addressed through the concept of "sphere of influence," according to which it could be argued that a MNC may be held accountable if the human rights violation occurred within a zone that the MNC's directors would have been able to exercise influence over. As Kate Macdonald argued, however, its shortcomings eventually prompted the development of the 2011 Guiding Principles on Business and Human Rights, developed by the then U.N. Special Representative for Business and Human Rights, John Ruggie:

> The "spheres of influence" concept was perceived by some observers as offering a promising means of capturing the diverse and widely varying channels through which business affect human rights, both directly and indirectly. However, whilst this concept's elasticity may have bolstered its virtues as a flexible guiding metaphor, its analytical bluntness has made it difficult to operationalize for use in defining operational standards to govern transnational business conduct.[89]

Meanwhile, it remains unclear where exactly the power lies between a local government's responsibility for creating a regulatory framework of (corporate) law and the emerging transnational corporate governance regime. But to ask, in effect, "who is calling the shots" also asks, "in whose name?" This combined inquiry has become a staple in contemporary global governance research[90] and the transnationalization of corporate governance can serve as a suitable exhibit. What requires deeper analysis is not only the exact origin and "authorship" of these norms, but also its legal quality as such. In other words, because the proliferation of corporate governance standards, best practice guidelines, "codes of conduct," and more recently, stewardship codes and principles does not in itself contain a satisfying answer to these questions, it is important to acknowledge the context in which the surge in private governance regulation is taking place. As Issachar Rosen-Zvi observed:

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[89] Kate Macdonald, *Re-thinking 'Spheres of Responsibility': Business Responsibility for Indirect Harm*, 99 J. BUS. ETH. 549, 550 (2011).

[90] *See* Callies & Renner, *supra* note 27, at 265 ("The difference between social norms and legal rules is attributed to the fact that the latter are made by public authorities, while the former are generated by private actors. Consequently, much like classical legal positivism, they argue that there can only be law where individual/corporate behaviour is regulated by the nation-state."); *see also* Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, *in* THE POLITICS OF GLOBAL REGULATION 1, 1-2 (Walter Mattli & Ngaire Woods eds., 2009) ("What institutional forums are selected for regulatory activities and what explains these choices? How is compliance monitored and enforced? Who are the winners and losers of global regulation and why?").

> The perceived crisis of the centrist state set in motion a major shift, characterized as a transition from regulation to governance. This shift—informed and morally legitimized by neo-liberal ideology—is a response to the challenges of globalization, which has undermined states' sovereignty by transforming them (both normatively and practically) into one among many norm-setting agents. It is also a product of the perceived failure of command-and-control regulation to cope with the complex, heterogeneous, and rapidly changing world.[91]

It is this paradox of a purportedly *private* regulatory regime with widely regarded *public* relevance that the next Part seeks to unpack.

III. REGULATING SELF-REGULATION: CORPORATE GOVERNANCE, POLITICS OF PRIVATE ORDERING, & THE TENSION BETWEEN NORMS & LAW

It is well known that within the discipline of corporate law itself, the particular theme of "corporate governance" emerged as a field of study in the mid-1970s, a period when economic theories prevailed.[92] Getting prominence within the context of what has variously been termed as the "contractarian," "nexus of contracts," or "private ordering" theory of the firm, corporate governance was mainly studied through the neoclassical economic lens of agency theory.[93] And, throughout the 20th century corporate governance scholarship and debate have stayed relatively close to the general understanding of the corporation as a private, profit-making, vehicle whose relations are fully a matter of private ordering by market actors. Discussions among corporate law scholars and practitioners have been largely occupied by the assumptions of neoclassical economics and the agency problems that arise from the separation of ownership and control in the Anglo-American corporation. As a result, scholars and practitioners have focused on a handful of key themes and issues—including the operation, duties and composition of the board of directors; executive remuneration; leadership; ownership structure; shareholder rights; the interests of corporate non-shareholder constituents (especially employees); and differences among national systems of corporate

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[91] Issachar Rosen-Zvi, *You Are Too Soft!: What Can Corporate Social Responsibility Do For Climate Change?*, 12 MINN. J. L. SCI. & TECH. 527, 529-30 (2011).

[92] Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Jensen & Meckling, *supra* note 73.

[93] Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); *see also* Dionysia Katelouzou & Peer Zumbansen, *Transnational Corporate Governance: The State of the Art and Twenty-First Century Challenges*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW (Mark Tunshet & Peter Cane eds., 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536488 (critically discussing the rise of the contractualist concept of the corporation).

governance.[94] Corporate governance, therefore, has long been studied as a *neutral* and *apolitical* private field reasserting—somehow contradictory—the primacy of a single contractual party, the shareholder, over the nexus.[95] But such an approach is now becoming unattainable.

The sheer explosion of corporate governance related scholarship since the 1980s and well into our present day cannot be understood without considering the larger institutional and geopolitical transformation that took place since the 1974 Oil Crisis, the end of the Bretton Woods system, and the unfolding of global financial markets.[96] The dramatic shifts in international trade from the GATT in 1948, over eight rounds of negotiations up to its abolishment, to the creation of the WTO in 1995 and the emergence of increasingly liquid and effective markets for capital transfers form an important backdrop for the rise in significance of corporate governance.[97] As the Keynesian Welfare State found itself under intense pressure to adapt its institutional and normative foundations to the reality of globally integrated financial markets and the demands to cut public funding, while becoming and staying internationally competitive,[98] the emerging law and economics paradigm, which had begun manifesting itself in creating efficiency benchmarks for just about every public service,[99] would settle deeply in the "theory of the firm"[100]

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[94] Meanwhile having become a classic: REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW. A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

[95] *But see* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 54-56 (2003) (dismissing the "myth" of "the neutral and apolitical nature of the private sphere").

[96] REINVENTING BRETTON WOODS COMMITTEE ET AL., BRETTON WOODS: THE NEXT 70 YEARS (Joseph Stiglitz et al. eds., 2019); David Hammas & Douglas Wills, *Black Gold: The End of Bretton Woods and the Oil Shocks of the 1970s*, IX IND. REV. 501 (2005).

[97] Ronald Dore, *Financialization of the Global Economy*, 17 IND. & CORP. CHANGE 1097, 1099-1100 (2008) (highlighting the crucial role of securitization); CHRISTIE FORD, INNOVATION AND THE STATE: FINANCE, REGULATION AND JUSTICE 60-61 (2017) (recapping the (innovative) emergence of currency swaps and collateral debt obligations).

[98] FORD, *supra* note 97, at 67; Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, FOREIGN POL'Y IN FOCUS (May 5, 2004), https://fpif.org/from_keynesianism_to_neoliberalism_shifting_paradigms_in_economics/ (arguing that "[t]he ultimate spark of neoliberal dynamism is to be found in the intellectual divisions of Keynesianism and its failure to develop public understandings of the economy that could compete with the neoliberal rhetoric of 'free markets.'"); Mimi Abramovitz, *Economic crises, Neoliberalism, and the US Welfare State: Trends, Outcomes and Political Struggle*, *in* GLOBAL SOCIAL WORK: CROSSING ORDER AND BLURRING BOUNDARIES (Carolyn Noble et al.eds., 2014).

[99] FORD, *supra* note 97, at 67-68.

[100] Jensen & Meckling, *supra* note 73, 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

and the proliferating understanding of corporate governance as the decisive framework for the administration of agency costs, control of management, and the firm's access to financial markets.[101] The emergence of "corporate governance" as a subfield of corporate law is thus directly related to the transformation that domestic Welfare State regimes in the West were undergoing in light of the geopolitical shifts towards competitive markets and the transition from Keynesian welfare state regimes to a large scale delegation of public services and responsibilities to private actors. By the 1980s and 1990s, the redistributive functions of the state, established during the New Deal and expanded during the Great Society, has been steadily shrunk, particularly in the US and the UK.[102] The corporation represented a key institution in this context, which further explains that a growing number of corporate law and corporate finance scholars actively endorsed and embraced the idea of the firm as an investment vehicle in need of an effective and facilitative legal support system.

This perspective is important as it allows for a more comprehensive contextualization of the fast-moving changes in corporate law doctrine and policy. Especially, as corporate governance became a key laboratory in further testing and perfecting the theory of the firm under these changing domestic and international institutional circumstances, the historical context for the rise to dominance of the neoclassical agency theory,[103] the contractual model of the corporation, and transaction cost economics[104] matters.[105] The shift to "free markets" and the receding critique of Keynesian aspirations to effectively administer or direct economic exchanges in a "borderless world"[106] amplified the long standing view of the corporation as a business that is, above all, a profit-making vehicle.[107] In this climate, much of the ensuing corporate governance scholarship and debate from the second half of the twentieth century well into our time has remained loyal to this understanding of the corporation, resulting in a predominant engagement with issues around agency and the separation of ownership and control.[108]

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cash flows of the organization which can generally be sold without permission of the other contracting individuals.").

101 Williamson, *supra* note 20.

102 *See* Linda Lobao et al., *The shrinking state? Understanding the assault on the public sector*, 11 CAMBRIDGE J. OF REGIONS, ECON. & SOC'Y 389 (2018), for a good summary of the central bodies of literature that grapple with the "shrinking state."

103 Fama & Jensen, *supra* note 93.

104 Williamson, *supra* note 20.

105 Bratton, *supra* note 73; Simon Deakin et al., *Legal institutionalism: Capitalism and the constitutive role of law*, 45 J. COMP. ECON. 188, 194-98 (2017).

106 G. John Ikenberry, *The Myth of Cold War Chaos, Foreign Affairs* (1996), *in* WHAT WAS THE LIBERAL ORDER? 50 (2017) ("The forces of business and financial integration are moving the globe inexorably toward a more tightly interconnected system that ignores regional as well as national borders.").

107 Dodge v. Ford Motor Company, 170 N.W. 668 (1919).

108 The key reference is often taken to be ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (1932). *Compare* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and 'The*

This law-and-economics approach to corporate governance rests on the foundation of seeing the firm as a "nexus of contracts" and on understanding corporate law as "enabling,"[109] rather than mandatory, thereby providing 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 "private ordering" is the treatment of corporate governance regulation as contractually determinable and market facilitative private law, rather than public regulatory law.[110] The proliferation of national as well as company-specific corporate governance codes,[111] codes of conduct,[112] statements of "good" or "recommended" practices by international organizations,[113] and, more recently, stewardship codes for institutional investors[114] 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.

Corporate governance production, from the introduction of independent directors to board committees and from greater transparency and disclosure to performance-based remuneration, was therefore introduced as a *nudge* to change the corporate actors' behavior on economically efficient attributes.[115] Over the 1980s and 1990s, policymakers have remained reluctant to introduce wholly

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Modern Corporation', 34 J. CORP. L. 99 (2008) (highlighting the crucial difference between the pluralism that, today, is often purported to underlie Berle's and Means' allegedly contractualist approach to the separation of ownership and control, and the actual corporatism characteristic of that time), *with* Herbert J. Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 375 (2009) (highlighting the importance of this issue even before the famous study by Berle and Means).

109 An insightful analysis is provided by John C. Coffee Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989). *See also* Edwin R. Latty, *Why Are Business Corporation Laws Largely Enabling*, 50 CORNELL L. REV. 599 (1965).

110 *See* Bratton, *supra* note 73 (offering a famous and biting critique); MARC MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE (2013) (presenting the debate in the UK).

111 Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, 25 ORG. STUD. 415 (2004).

112 *See*, *e.g.*, Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEG. STUD. 617 (2011).

113 *See*, *e.g.*, OECD, *supra* note 29.

114 *See, e.g.*, Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3616798.

115 RICHARD H. THALER & CASS R SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

mandatory provisions in the field of corporate governance, preferring instead softer regulatory strategies that "nudge" different corporate actors, including managers, shareholders, and to some extent, other stakeholders. Default rules in the United States, and "comply-or-explain" rules in the European Union, but also in Asia, have had extensive nudging effects.[116] The Code of Best Practice drafted by the Cadbury Report in 1992, for instance, has been an instrumental mode of corporate governance regulation in this regard. Corporate governance codes have developed out of the interactions of governmental or quasi-governmental entities, stock exchanges, the business, academic and industry communities, and investor-related groups as a response to corporate catastrophes[117] and have proliferated across more than sixty countries—with the notorious exception of the US[118]—recommending detailed governance frameworks mostly for publicly listed companies.[119] A distinctive feature of these codes is their extensive resort to non-statist, non-binding "soft-law" techniques, which incorporate a set of principles (rather than exhaustive rules) and provide scope for flexibility and opt-out. But what is important from our perspective with the Cadbury Code and all its subsequent revisions,[120] is that it was the "market" rather than the "state" that was regulating businesses.

While some of these codes are associated with a form of "corporate communication" about a company's ethical commitment to social or environmental standards,[121] they continue to raise significant concerns as regards their legitimacy,

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[116] *See*, *e.g.*, Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. REV. 542, 543 (1990) (expressing importance of mandatory/waivable debate); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989) ("Much of corporate law is certainly flexible, in the sense that the parties can opt out of many statutory default positions."); Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599 (1989) (explaining that "corporation codes are highly functional and adaptive").

[117] Holly J. Gregory & Robert T. Simmelkjaer, II, *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States* (2002), https://ecgi.global/code/comparative-study-corporate-governance-codes-relevant-european-union-and-its-member-states.

[118] *See, e.g.*, Jonas V. Anderson, *Regulating Corporations the American Way: Why Exhaustive Rules and Just Deserts are the Mainstay of U.S. Corporate Governance*, 57 DUKE L.J. 1081 (2008) (discussing the American predilection for rules-based (but default) regulation).

[119] The European Corporate Governance Institute maintains a list of most of the corporate governance codes that have been released worldwide. *Codes,* ECGI (Aug. 26, 2019), https://ecgi.global/content/codes-0.

[120] *See UK Corporate Governance Code*, FINANCIAL REPORTING COUNCIL (2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (current version).

[121] *Compare* Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535 (2011), *with* Ellis Jones, *Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism*, 62 SOCIOL. PERSP. 728 (2019).

permanence, and enforceability.[122] This growing realm of corporate self-regulation forms the mirror image of corporate law's preferred image as a contractual regime that is to a large degree self-regulatory. As the corporation generally manages to lead a life which remains largely protected from and uninhibited by overly zealous legal intervention, it is only in times of crisis— *real,* as during the current pandemic economic downturn or *discursive,* as brought on by a public backlash against "fat cats" and other instantiations of corporate "excess" or "scandal"—that it moves into the cross-eye of regulation. By contrast, during "normal" times the corporation is a fact of life, which is ubiquitous, omnipresent, and just part of the way things are. In other words, we only rarely think of the "law" that governs corporations. Too impressive and all-too-powerful are those at the helm of a "successful business," who allegedly build empires, innovate, and, advance the interests of all of society. And as we are all, for better or worse, bound up in the success or the failure of these corporations, whether as voluntary investors, as workers depending on the firm which ties our pension plan to the stock market for our livelihood during and after employment, as customers of safe, affordable products, or as citizens who are concerned with the privacy of our most intimate data, the corporation assumes in many ways a very central and powerful role in our lives.

As such, it is important to maintain a critical distance to an overly self-fulfilling, law-and-economics argument according to which the rise of purportedly global and apolitical, but efficient corporate governance standards are not only inevitable but also comprehensive and allegedly "without alternatives." Riding on the coat tails of the globalization of finance, this understanding of the corporate governance norm-generation was expressive of the legal-economic imagination of the 1990s, steeped in overtly triumphant endorsements of "end of history" shareholder value victories on the back of a widely shared belief that the state's role should be limited to providing an enabling and facilitating regulatory framework.[123] In retrospect, there can be no doubt that, along with its rhetorically universalizing impact on national, international, and comparative debates about the purpose of the financialized corporation and related corporate governance reforms, the law-and-economics narrative 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. The explicitly anti-regulatory bias fit the

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[122] Harry W. Arthurs, *Corporate Codes of Conduct: Profit, Power and Law in the Global Economy*, *in* ETHICS CODES, CORPORATIONS AND THE CHALLENGES OF GLOBALIZATION (Wesley Cragg ed., 2005); Anna Beckers, *Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct*, 22 (European Univ. Inst., Working Paper MWP 2016/12), https://cadmus.eui.eu/bitstream/handle/1814/41485/MWP_2016_12.pdf?sequence=4 ("It is this lack of public legitimacy and their firm-centered character that are a reason for the reluctance to accept standards developed autonomously by companies on a similar footing to mandatory rules in contract law.").

[123] *Compare* Hansmann & Kraakmann, *supra* note 31, *with* Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOV. 11 (2005).

time and had not 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. In a recent assessment of this development, Andreas Jansson and his co-authors observed that:

> It has thereby come to influence political, legal, and economic decision-making worldwide through a normativity—a set of norms and prescriptions derived from questionable conceptual assumptions and empirical observations—programmed into law and policy by means such as: strong common law-inspired formal investor protection and limited influence of blockholding shareholders . . . ; fair value accounting and extensive disclosure . . . ; high-powered equity-based executive compensation . . . ; and elements of corporate board and control structures such as independent or non-executive directors . . . .[124]

But precisely because this direction of corporate governance reform was so tightly interwoven into the state transformation of post-industrial states in their efforts to develop attractive destinations for global investment, it is impossible to study the continuing evolution of the business corporation separated from this bigger picture of the political economy through which it is shaped and in which it is embedded. The foregoing paints a rather gloomy picture of the purportedly diminishing role that the democratic state plays in the governance of globalizing economic affairs. But, while our analysis of the institutional arrangements of corporate governance norm creation unfolds against this background, we argue that the black/white view of pitting the domestic against the global fails to capture the myriad of relations between these two universes of governance and politics.

Economists have long known that social order depends on the interaction between formal and informal rules. New institutional economists refer to the former as shorthand for "law," while displaying greater interest in the latter, through which they depict the wealth of social customs, routines, business practices, and industry standards[125] and effectively open up the study of norms for a host of different

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[124] Andreas Jansson, Ulf Larsson-Olaison, Jeroen Veldman & Armin Beverungen, *The political economy of corporate governance,* 16 EPHEMERA: THEORY & POL. ORG. 1 (2016) (references omitted).

[125] Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 109 (1991) ("[T]he institutional evolution entailed not only voluntary organizations that expanded trade and made exchange more productive, but also the development of the state to take over protection and enforcement of property rights as impersonal exchange made contract enforcement increasingly costly for voluntary organizations which lacked effective coercive power. Another essential part of the institutional evolution entails a shackling of the arbitrary behavior of the state over economic activity."); Philip Keefer & Stephen Knack, *Social Capital, Social Norms and the New Institutional Economics*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS (Claude Ménard & Mary M. Shirley eds., 2008).

disciplines.[126] The significance of the formal-informal distinction is, however, less descriptive than it is—arguably—prescriptive. This becomes particularly clear when the economist is pressed for a view regarding the role (or, even the *need*) for law for the market. As two leading economic sociologists observed in 2015: "[s]lowly . . . it has been realized by economic sociologists that law constitutes a central part of the modern economy . . . ."[127] "How else are markets organized, if not with some involvement of law?" one might ask. As it turns out, the continuing discussion around the distinction between *law* and *norms* is not simply about the differences between, say, "hard" or "soft" law[128] or about the separation of law and morality.[129] On both sides of the divide, we find the assertion of an argument, effectively either for or against regulation, which is wrapped up in a stance for or against "the state," respectively based on how the relationship between state and market is being framed. Where some lawyers—rightly, we would argue—insist on the market being constituted and sustained by legal rules and principles, including property rights,[130] some economists want to see the market as a form of naturally

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[126] Thráinn Eggertsson, *A note on the economics of institutions*, *in* EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 6, 11 (Lee J. Alston et al.eds., 1996) ("As the institutional framework consists of formal and informal rules and their enforcement, research at this level intrudes into the domain of political science, sociology, and anthropology, along with law and history.").

[127] Victor Nee & Richard Swedberg, *Economic Sociology and New Institutional Economics*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 789, 795 (Claude Ménard & Mary M. Shirley eds., 2005); *see also* Daniel Luban, *What Is Spontaneous Order?*, 114 AM. POL. SC. REV. 68, 71 (2020) ("A market order, however, is not fully anarchic: its transactions are typically governed by the laws of at least one sovereign state, and to that extent it is indeed subject to formal hierarchy."); Friedrich August von Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) ("The problem is precisely how to extend the span of out utilization of resources beyond the span of the control of any one mind; and therefore, how to dispense with the need of conscious control, and how to provide inducements which will make the individuals do the desirable things without anyone having to tell them what to do.").

[128] Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006) ("In its broadest scope, the formula 'soft law' labels those regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions.").

[129] Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1052 (2008) ("Morality is relevant to adjudication because law involves matters of moral substance and because judges' allocative decisions can make these matters go better or worse—not because morality is a persuasive source of law.").

[130] Hale, *supra* note 57, at 470 ("Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any Spencerian formula. Since coercive restrictions are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the economic interests of persons living in foreign parts, statesmen cannot avoid interfering with economic matters, both in domestic and in foreign affairs. There is accordingly a need for the development of economic and legal theory to guide them in the process.").

evolving order. Representative of this view are the Austrian economist Friedrich Hayek and the concept of spontaneous order.[131]

Surely, this is but the tip of a much more voluminous iceberg, reaching as deep back in history as the Eighteenth Century.[132] Indeed, as Daniel Luban recently observed:

> Spontaneous order theory grew out of twentieth-century anticommunism, and the fight against state encroachment upon economic life more broadly. The dichotomy of state and market underlies the entire theory in ways that are far-reaching yet rarely made explicit—the market as bearer of spontaneity, the state as bearer of constructivist rationalism; the market as realm of peaceful competition, the state as realm of coercive force; the market as grown, the state as making and made. . . . .
> Spontaneous order theory, in other words, presupposes differentiation: a political sphere, in which a centralized sovereign state wields a monopoly of coercive force, and an

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[131] FRIEDRICH AUGUST VON HAYEK, LAW, LEGISLATION AND LIBERTY 17-39 (1973) (arguing that spontaneous order, rather than central planning, enables individuals, acting upon the signals of price and cultural rules, to cooperate most effectively). *See* Geoffrey M. Hodgson, *Hayek, evolution, and spontaneous order*, *in* NATURAL IMAGES IN ECONOMIC THOUGHT: MARKETS READ IN TOOTH AND CLAW 408 (Philip Mirowski ed., 1994) (for a critical discussion); Crouch, *supra* note 8, at 6 (citations omitted) ("Contrary to the assumptions of philosophers like Hayek, the market is not how human beings 'naturally' conduct themselves if only the state does not prevent them from so doing. The word 'natural' is deeply problematic when applied to human beings, as strictly speaking it relates only to those behavioural characteristics that we share with other animals. Those all-important characteristics that distinguish humans from other animals are not 'natural', but social, produced by interaction and the imposition of various kinds of rules, including the internalization of rules by the individual, intended to suppress the frequently disruptive, violent and antisocial exercise of natural impulses."); Luban, *supra* note 125, at 75 ("Lawmaking might be considered the central counterexample to his view of cultural evolution, the moment when humans cannot simply follow an inherited rule but must make the rules themselves.").

[132] *See* ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 182-83 (1767) (making the seminal statement: "Men, in general, are sufficiently disposed to occupy themselves in forming projects and schemes: but he who would scheme and project for others, will find an opponent in every person who is disposed to scheme for himself. Like the winds, that come we know not whence, and blow whithersoever they list, the forms of society are derived from an obscure and distant origin; they arise, long before the date of philosophy, from the instincts, not from the speculation, of men. The crowd of mankind, are directed in their establishments and measures, by the circumstances in which they are placed; and seldom are turned from their way, to follow the plan of any single projector. Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.").

> economic sphere, a decentralized market whose participants must rely on non-coercive means.[133]

As the state is associated with the creation and imposition of formal rules on the allegedly self-regulatory and thus naturalized natural order of the market, the universe of informal rules, as such, is treated as synonymous *with* the market and with free-market exchanges. As a result, the formal order, depicted as "law," is to be feared and kept in check, while the informal nature of market self-governance is seen to be the bedrock and foundation of societal freedom.

This tension between law and norms has always been an integral part of corporate governance. Shaped by competing views with regards to corporate law being "enabling" or "mandatory," the dominant strand in corporate governance sides with the enabling argument, from which it was able to posit contractual freedom at the heart of corporate law. In turn, the acknowledgement that "the corporation" is a *creation by law* and should therefore be the object of policy debates over its desired regulation, must appear outright hostile. The depiction of the corporation as a "nexus of contracts" continues to hold sway even in the context of the post 2008 government "bail-outs" of corporate collapse and during the 2020 Covid-19 driven economic downturn, with numerous companies claiming governmental rescue.[134] According to the nexus of contracts model, the legal-regulatory core of the business corporation is contractual, rather than organizational. But, despite the reference to a "nexus," which could encompass a greater number of contractual relations in and around the firm, the contractual relation at the heart of the concept is the principal-agent arrangement between investors and managers,[135] which itself is supported by the idea that risk taking by the latter on behalf of the former must be 'enabled' rather than constrained or 'mandated.'[136]

The fusion of a legal framework that *enables* rather than *mandates* an organization which allegedly emerges through and continues to be governed by contractual arrangements has an overwhelming persuasive force. But similar to a still, silken lake at dawn or the heaven of pure legal concepts, as it was critically

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[133] Luban, *supra* note 127, at 78-79.

[134] *See, e.g.*, Joe Miller, *German government agrees €9bn bailout for Lufthansa*, FIN. TIM., May 25, 2020.

[135] Jensen & Meckling, *supra* note 73, at 308 ("We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.").

[136] Jonathan R. Macey, *Corporate Law and Corporate Governance. A Contractual Perspective*, 18 J. CORP. L. 185, 189 (1993) ("In a regime of corporate law that is characterized by permissive rather than mandatory rules, investors, issuing firms, lawyers, and investment bankers all have incentives to develop new governance structures which enable firms to raise capital more cheaply by providing potential investors with the protection and assurances needed to induce them to invest at lower cost. By contrast, in a regime of corporate law characterized by mandatory rules, there are no incentives to innovate.").

depicted by the late Nineteenth Century jurist, Rudolf Ihering,[137] the dominant corporate law theory is based on make-believe and invisibilities. It takes but a random pebble to burst through the shiny surface. If, then, the law pertaining to arguably the most powerful societal actors of our time serves to reify these actors in Ihering's heaven by removing them from the actual social context, in which they are situated and in which they engage with their vastly differentiated environment—not just with their "investors"—through conceptual apotheosis, we must continue to ask "why?" *Why* would corporate law be so manifestly disinterested in the corporation's actual life in and impact on society, except for when an effort is made to grasp the "economics" of a merger[138] or when judges reassert their role of deference with regards to the directors' business judgment?[139] The explanation that corporate law is concerned with providing a backdrop for the contractual self-regulation of the corporation, while other fields of law—for example labor, tax, commercial, or even criminal law—are meant to address the corporation's relations with its non-shareholder stakeholders, is less compelling once we have seen how the *actual* corporation and its directors remain to a large degree unaccountable in law. How can we resolve this dilemma of being able to see the corporation living both in the world of largely abstract jurisprudence, which is occasionally influenced by crude, rudimentary economics, and in the actual, real world of society while not being able to reconcile and integrate these two worlds more?

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[137] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) ("Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, laches, and rights in rem. Here were all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems. Here one found a dialectic- hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.").

[138] Paramount Comms. Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994) ("Because of the intended sale of control, the Paramount-Viacom transaction has economic consequences of considerable significance to the Paramount stockholders.").

[139] Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors of a corporation 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 also* Andrew Keay &Joan Loughrey, *The concept of business judgment*, 39 LEG. STUD. 36, 38, 51 (for the United Kingdom, identifying material business judgments in England and Wales and explaining that section 172 of the Companies Act 2006 imposes "a positive duty requiring directors to take decisions that are informed by the company's interests").

Our approach is a practical, not a philosophical, one. It is based on the idea that a better understanding of how corporations work and operate can be enhanced in part by a closer scrutiny of how theories, doctrines, and policies of corporate law and corporate governance depict the corporation. It is this approach that we have adopted in our analysis so far, and it allowed us to see much more clearly how our image of what the corporation is, what it could, or even should be, is powerfully shaped by the legal rhetoric that is used. But, it has also forced us to acknowledge the limitations of leaving the corporation to corporate lawyers and judges. Precisely because the corporation occupies such a pivotal place in contemporary society, it is important that we move the analysis of the corporation and society closer together. This approximation of the corporation, and the society in which it sits, lies at the heart of the political economy approach we have been arguing for in this Article. This approach strikes us, indeed, as obvious, given the fundamental changes that contemporary societies are going through under the auspices of privatization and globalization,[140] rising inequality, precarization, and austerity,[141] and given the central role that corporations play in these developments. Especially because, under these conditions of state transformation, the corporation has become a key actor,[142] and an analysis of corporate governance must not remain confined to the argumentative logics and conceptual framework internal to corporate law doctrine. It is against this background that we posit that in order to

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[140] Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1477-78 (2001) ("This shift in perspective and the fundamental ways in which government conceives of and then carries out its responsibilities is closely tied to how decision makers at all levels of the public and private sec-tors conceptualize globalization. The privatization of governmental services resonates with primarily an economic conception of globalization based on markets and the competition they engender. These markets differ and often can be seen as more metaphorical than real. They are more often an alternative form of regulation than a substitution of something 'wholly private' for what once was 'wholly public.'").

[141] Evans & Goguen, *supra* note 18; *see also* Magnus Granberg & Katarina Giritli Nygren, *Paradoxes of Anti-austerity Protest: Matters of Neoliberalism, Gender, and Subjectivity in a Case of Collective Resignation*, 24 GENDER, WORK & ORG. 56, 58 (2017) ("As a predominantly female profession increasingly involved in labour conflict in advanced capitalism since the 1980s, nursing epitomizes a trend Briskin . . . calls the feminization strike activity—a trend related to the 'tertiarization' . . . or migration of strikes from manufacturing to the service industries in recent decades. Briskin . . . argues that not only are strikers increasingly likely to be women but the issues raised in labour conflict are increasingly likely to concern gender equality.").

[142] Judith Resnick, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162, 163-64 (2013) ("Private firms, crossing national borders, undertake some services (such as running prisons, policing, arbitrating, administering ports, supplying combatants, educating, providing housing or health services) that have been identified as activities of the state but are now sold to states by global enterprises advertising their services as more flexible and competent than those of governments.").

understand the evolving transnational field of corporate governance, it is necessary, and indeed crucial, to adopt a critical sociological perspective that sheds light on the governance challenges around the corporation in the context of a post-Welfare State and an increasingly transnational political economy of public and private actors. And it is in this context that we understand transnational corporate governance as an integral part of the changing political economy of "state"-"market" relations today. As we will describe in more detail in the following Part, this political-economy perspective on corporate governance in fact has a long pedigree that, well predates the thundering "end of history" clamor, which did a disservice to a better understanding of how corporate actors as "subjects"[143] (and not mere "objects") of corporate law evolve over time.

IV. A POLITICAL ECONOMY PERSPECTIVE ON CORPORATE GOVERNANCE: MOVING BEYOND THE VARIETIES OF CAPITALISM

The political economy perspective on the business corporation we are interested in here predates the global interest in corporate governance, which has set the tone for the last three decades, starting in the late 1980s. It aims at a different contextual approach and studies corporate governance from within historically evolved political economies and, more specifically, against the background of existing and evolving frameworks of company regulation, industrial relations, social protection, and employment law.[144] On that basis, then, scholars of history, economics, sociology, politics, and socio-legal change, have argued for an analysis of corporate governance as part of studying the transformation of public and, increasingly, private governance regimes in domestic political economies.[145] This

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[143] CUTLER, *supra* note 95, at 247 (finding that"[i]n international law, the problem of the subject appears in the designation of states as 'subjects' of the law, while individuals and corporations are regarded as 'objects' of the law. As such, whatever rights or duties individuals and corporations have are derivative of and enforceable only by states who as subjects conferred these rights and duties upon them.").

[144] FRANZ KLEIN, DIE NEUEREN ENTWICKLUNGEN IN VERFASSUNG UND RECHT DER AKTIENGESELLSCHAFT (1904); Vom Aktienwesen, *Eine Geschaftliche Betrachtung*, *in* 5 WALTHER RATHENAU GESAMMELTE SCHRIFTEN 121 (1918); RUDOLF WIETHÖLTER, INTERESSEN UND ORGANISATION DER AKTIENGESELLSCHAFT IM AMERIKANISCHEN UND DEUTSCHEN RECHT (1961); WILLIAM LAZONICK, BUSINESS ORGANIZATION AND THE MYTH OF MARKET ECONOMY (1991); PEER ZUMBANSEN, INNOVATION UND PFADABHÄNGIGKEIT. DAS RECHT DER UNTERNEHMENSVERFASSUNG IN DER WISSENSGESELLSCHAFT (Postdoctoral Thesis, Frankfurt 2004) (unpublished). More recently, Mark Roe and his collaborators have taken important steps in that direction. *See* Mark J. Roe & Massimiliano Vatiero, *Corporate Governance and Its Political Economy*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, 56 (Jeffrey Gordon & Wolf-Georg Ringe eds., 2018); MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE POLITICAL CONTEXT, CORPORATE IMPACT (2003).

[145] See, for example, the contributions to CONTEMPORARY CAPITALISM. THE EMBEDDEDNESS OF INSTITUTIONS (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

political-economy approach challenges the main assumptions of the law-and-economics narrative of corporate governance by exploring more deeply the political structures that constitute institutional corporate governance contexts.

In that regard, the work done by political economists and management scholars, such as William Lazonick and Mary O'Sullivan, provides a rich and differentiated canvas of the many relations between corporate governance rules and the larger framework of "business," labor, industrial relations, and taxation, as well as anti-trust law in an intensely globalizing market place.[146] Lucian Bebchuk and Mark Roe have similarly taken aim at dismantling the convergence argument supported by the law-and-economics narrative by positing 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 behind a global corporate governance convergence.[147] Extending this line of thought, Reinhard Schmidt and Gerald Spindler added the concept of complementarity to the analytical mix of path dependence by relating it to the internal "fit" of the institutional components of a governance system.[148] Because of the complementarity found in both insider/control-oriented and outsider/market-oriented corporate governance systems, Schmidt and Spindler rule out a rapid convergence towards a universally best corporate governance system.[149] While these scholars focused on the aspect of complementarity within a (national) corporate governance system, the former, already alluded to work by leading "Varieties of Capitalism" (VoC) scholars Peter Hall and David Soskice that highlighted the path-dependent, institutional complementarities between different sub-systems of a country's or a region's political economy.[150] By distinguishing the political economies of developed Western countries as Liberal Market Economies (LMEs) and Coordinated Market Economies (CMEs), respectively, VoC painted a considerably more differentiated picture of what *actually* makes up the landscape of corporate governance and its attending trials and tribulations. Importantly, Hall and Soskice inquire into 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

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146 LAZONICK, *supra* note 144; William Lazonick & Mary O'Sullivan, *Maximizing shareholder value: a new ideology for corporate governance*, 29 ECON. & SOC'Y. 13 (2000); PETER A. GOUREVITCH & JAMES SHINN, POLITICAL POWER & CORPORATE CONTROL. THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005).

147 Lucien Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

148 Reinhard H. Schmidt & Gerald Spindler, *Path Dependence, Corporate Governance and Complementarity*, 5 INT'L FIN. 311 (2002).

149 *Id.* at 325.

150 Hall & Soskice, *supra* note 6. For an important, earlier contribution to this field was J. Rogers Hollingsworth & Robert Boyer, see *Coordination of Economic Actors and Social Systems of Production, in* CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS, 1 (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

between the different sub-systems would make national corporate governance systems (especially CMEs) resilient to convergence.[151] While typologies of capitalism, such as the dichotomy between LMEs and CMEs or Schmidt's three models of European capitalism ("market," "managed," and "state"), should not be taken for granted,[152] the development of VoC or "comparative capitalism"[153] literature has 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*."[154] With a focus on institutional diversity, VoC and neo-institutionalist 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. Based on these comprehensive findings, which were the result of extensive empirical and quantitative work, they argued against a one-way convergence towards the Anglo-American, market-oriented corporate governance system.

The difference in perspective between the law-and-economics narrative and the political-economy narrative of corporate governance is crucial, but it also has its limitations. In response to corporate law's efforts to rethink the modern corporation in the context of a financialized and globalized economy, the political-economy narrative was driven by the belief that business enterprises and their regulation had to be diagnosed as part of the larger regulatory shift that nation-state governments were part of since the late 1970s. From this perspective, it was hoped that the study of changes in corporate governance would not become insulated from a critical engagement with questions regarding the legitimacy as well as the scope of regulating corporations through law.[155]

The ground-shifting changes in the challenges with which state governments were confronted when trying to adapt to the pressures of a fast, globalizing economy[156] touched deep at the roots of a legal and political theory, which placed the state at the pinnacle of a regulatory order. In some ways, then, the

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[151] *See also* Andreas Nölke & Simone Claar, *Varieties of capitalism in emerging economies*, 81/82 TRANSFORMATION: CRITICAL PERSPECTIVES S. AFR. 33 (2013); Michael A. Witt & Gregory Jackson, *Varieties of capitalism and institutional comparative advantage: A test and reinterpretation*, 47 J. INT'L BUS. STUD. 778 (2016).

[152] *See, e.g.*, Crouch, *supra* note 8, at 27-38.

[153] This is the term adopted by Jackson and Deeg, *supra* note 12.

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

[155] LAZONICK, *supra* note 144; John W. Cioffi, *Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany*, 7 GERM. L.J. 533 (2006); Peer Zumbansen, *Corporate governance, capital market regulation and the challenge of disembedded markets*, *in* CORPORATE GOVERNANCE AND THE GLOBAL FINANCIAL CRISIS 248 (William Sun et al.eds., 2011).

[156] Jürgen Hoffmann, *Co-ordinated Continental European Market Economies Under Pressure From Globalisation: Germany's 'Rhine-land capitalism,'* 5 GERM. L.J. 985 (2004); Kathleen Thelen & Ikuo Kume, *Coordination as a Political Problem in Coordinated Market Economies*, 19 GOVERNANCE 11 (2006).

VoC approach, put forward by political economists and socio-legal scholars, can in part be read as an attempt to reignite a discussion not merely around the "modes" of governance, but about the long-term goals and values, echoing earlier "progressive" scholars who have placed the social development of large corporations in the context of political theories of liberalism advancing an understanding of the social issues of corporate power.[157]

But, arguably, herein lie some of the problems of an analytical framework which proposes a contextualized approach to the comparative study of capitalism through the parochial, dualist distinction of CMEs and LMEs when the very survival of the institutional CME framework is at stake in a globalizing economy and a seemingly unstoppable fragmentation of regulatory authorities.[158] Arguably, then, there is a continuing need to further adapt existing political economy frameworks and methods in order to more effectively capture the complex and layered regulatory dynamics unfolding in today's transnational context.[159] What we see emerging here is a differentiated and layered landscape of norm production, which cannot adequately be depicted on the basis of uni-directional normative assessments and requires an ongoing engagement with the intricate ethnographies of post-national political economies.[160]

A central contention in our here developed approach is the observation of a *multiplication* of political economies in which corporations operate today. One dimension of this multiplication is spatial and manifests itself in a geopolitical diversification of corporate governance rules, which in turn unfolds through jurisdictional aggregations of rules originating in and being disseminated by competing systems. But, at the same time, this multiplication is institutional and procedural, as it is driven by the growing number of institutional actors, banks, institutional investors, stock exchanges, and related expertocracies who intervene into the norm generation and implementation process of corporate governance rules.

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[157] These include, among others, Herbert Croly, Walter Weyl, Thorstein Veblen, Peter Drucker and John Kenneth Galbraith. For a discussion of these significant American critics of the business corporation, see SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER AND IDEOLOGY (1996).

[158] Nicola Phillips, *Power and Inequality in the Global Political Economy*, 93 INT'L AFF. 429 (2017); Stijn Claessens, *Fragmentation in Global Financial Markets: Good or Bad for Financial Stability?* (Bank for International Settlements, Working Paper No. 815, 2019).

[159] *See, e.g.*, BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES (Wolfgang Streeck & Kathleen Ann Thelen eds., 2005); BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTIONS, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY (Bob Hancké et al.eds., 2007).

[160] Ruth V. Aguilera & Cynthia A. Williams, *Law and Finance: Inaccurate, Incomplete, and Important*, BYU L. REV. 1413 (2009); *see also* Ronald Gilson, *From Corporate Law to Corporate Governance*, *in* HANDBOOK OF CORPORATE LAW AND GOVERNANCE 18 (Jeffrey Gordon & Georg-Wolf Ringe eds., 2018) (arguing that such "one-factor corporate governance models are too simple to explain the real-world dynamics we observe"); Peer Zumbansen, *Law and the Transnational Political Economies of Global (Value Chain) Capitalism*, 1 J. POL. ECON. (forthcoming 2020).

In light of this spatial, institutional, and procedural multiplication of political economies, corporate governance emerges as an essentially transnational regulatory concern, which both cuts across and amplifies existing dynamics of harmonization versus competition, convergence versus divergence.[161]

Expanding on the analytically extremely helpful distinction made by the VoC scholars some twenty years ago between LMEs and CMEs, we want to underscore the need for a further differentiation of the VoC's register of comparative advantage. Through a more focused engagement with the multiplicity of societal stakeholders that today claim an interest in "the corporation" as an embedded actor, what we see emerging is an increasingly complex landscape of "actors, norms[,] and processes" that shape the corporation, while also being shaped by it.[162] In that regard, we argue for an investigation of the corporation in closer affinity and parallel situatedness with global value chains, which have come under heightened scrutiny as transnational regulatory regimes become increasingly integrated and, in turn, more efficient in insulating themselves from regulatory demands.[163] Approaching the corporation in connection to present-day value chain capitalism sheds new light on corporate efforts to adopt and protect potentially very far-reaching sustainable business practices. These might encompass the treatment of a corporation's workforce but may also extend to efforts of scrutinizing labor practices throughout a corporation's and its affiliates' value chain.[164] Meanwhile, other corporate responsibility strategies today can be seen to be, albeit with varying intensity and success, aiming at designing and implementing a wider program of sustainability, which can span from self-imposed transparency norms regarding environmental protection, socially responsible investment (SRI), or community development.[165]

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[161] *See also* Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Governance*, U. PA. J. INT'L. L. (forthcoming 2020).

[162] See Peer Zumbansen, *Transnational Law, With and Beyond Jessup*, *in* THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL 1, 33 (Peer Zumbansen ed., 2020), for an elaboration of the actors-norms-processes triad. With regard to corporate governance, specifically *see* Peer Zumbansen, *New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism*, 15 EUR. L.J. 246 (2009).

[163] *See, e.g.*, Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT'L L.J. 1557 (2013).

[164] Genevieve LeBaron et al., *Governing Global Supply Chain Sustainability through the Ethical Audit Regime*, 14 GLOBALIZATIONS 1 (2017); Margaret Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Diligence in Global Supply Chains*, 40 QUEENS L.J. 741 (2015); Julia Hartmann & Sabine Moeller, *Chain liability in multiplier supply chains? Responsibility attributions for unsustainable supplier behavior*, 32 J. OP. MGMT. 281 (2014).

[165] *See, e.g.*, Paul Rose, *Certifying the 'Climate' in Climate Bonds* 1 (Ctr. for Interdisc. L. & Pol'y Stud. Moritz Coll. of Law, Working Paper No. 458, 2018), https://ssrn.com/abstract=3243867_(summarizing the development of climate bonds and examining the intermediary role played by international organizations, such as the Climate Bond Initiative and climate verifiers); Charlotte Streck, *Filling in for Governments? The Role*

V. THE TWENTY-FIRST CENTURY TRANSFORMATION OF CORPORATE GOVERNANCE NORM CREATION: A TENTATIVE BUT AMBITIOUS REGULATORY SHIFT

Despite a continuously growing public interest in the corporation and in "alternatives" to the long-prevailing form of economic globalization, it is with surprise that a large part of the corporate law community still perceives the corporation predominantly as a private actor, governed for the most part by contract, and thereby according priority to shareholder value.[166] It is too early to say whether and to which degree the discourse will change in the long run. In the post-global financial crisis (2008-2009) world, and more importantly in the midst of the Covid-19 crisis, there is an increasing emphasis on what might (again) be called the "public" dimension of the corporation, its purpose, and the law relating to it.[167] Today, there is unprecedented support for a model of corporate governance, which is often referred to as "stakeholder capitalism" or "stakeholderism."[168] While the support for a stakeholder approach in corporate governance is not new,[169] the current demands for a reconceptualization of the corporation and of corporate law have come a long way from the CSR stand-offs in the early 1930s but also since the convergence/divergence discussion in the 1990s and early 2000s.[170] Today, what was previously thought of as an exclusively shareholder-driven regulatory area, is

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of the Private Actors in the International Climate Regime, 17 J. EUR. ENV'T & PLAN. L. 5, 6 (2020) ("In December 2019, the UNFCCC-hosted "Non-State Actor Zone for Climate Action (NAZCA)" recorded 22,470 climate-commitments by 9,465 cities, 278 regions, 2,688 companies, 955 investors, 977 civil-society organizations and 121 cooperative initiatives, making the non-state venues of international climate meetings decisively more exciting than the formal negotiation space").

166 Bebchuk & Tallarita, *supra* note 36 (arguing that "corporate leaders who have discretion to do so should still not be expected to benefit stakeholders beyond what would be necessary for shareholder value maximization").

167 *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).

168 *See supra* text accompanying note 36; ALEX EDMANS, GROW THE PIE: CREATING PROFIT FOR INVESTORS AND VALUE FOR SOCIETY 27 (2020) (using the term "pieconomics" to describe "an approach to business that seeks to create profits only through creating value for society"). *But see* Bebcuk & Tallarita, *supra* note 36, at- (arguing that "[s]takeholderim does not benefit stakeholders, shareholders, or society. If stakeholder interests are to be taken seriously, stakeholderism should be rejected").

169 For notable earlier supporters of "stakeholderism," see R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 53 (1984); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. Rev. 247 (1999); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339 (2011-2012).

170 *See* Katelouzou & Zumbansen, *supra* note 161, at 54-60 (critically dismantling the "scholarly bind" of convergence versus divergence).

being reshaped by a comprehensive and far-reaching critique by legal, management, and economic studies of what the corporation *is*, *does*, and *for whom*. Colin Mayer, for instance, forcefully argues that "[w]e need *diversity* rather than uniformity in corporate governance, and we need it in all its various manifestations—ownership, board structure, and incentives—to be focused on promoting the *full breadth of corporate purposes* and not the single goal of shareholder value."[171]

A telling example of what can be described as a sustainable-oriented transformation of corporate governance norm creation includes what we see as a transnational shift from voluntary codes of conducts and international voluntary initiatives towards mandatory disclosure and more recently regulatory governance in the form of due diligence and expansive directors' duties to address issues of environmental and social corporate sustainability.

With the rise of MNCs and global production networks, a plethora of voluntary codes of conduct relating to sustainability matters, such as the environment, human rights, and bribery, emerged.[172] Such codes serve as internal, voluntary value-setting and disciplining mechanisms and establish the minimum framework for promoting good citizenship and achieving long-term societal value. While academic opinions on the enforcement of such codes are currently divided,[173] prescriptively and normatively, international initiatives have largely turned such codes into "instruments of co-regulation."[174] Among the most influential initiatives at the international level are the already alluded-to OECD Guidelines for Multinational Enterprises,[175] the 2011 UN Guiding Principles on Business and Human Rights (UNPGs),[176] and more recently the UN Global Compact Principles.[177] They all differ in their scope, coverage, enforcement modalities, and

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[171] COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 155 (2018) (emphasis in original).

[172] Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011); *see also* RESEARCH HANDBOOK ON TRANSNATIONAL CORPORATIONS (Alice de Jonge & Roman Tomasic eds., 2017).

[173] *See, e.g.*, ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL AND SELF-REGULATION AND NATIONAL PRIVATE LAW (2015).

[174] Jan Eijsbouts, *Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement*, 24 IND. J. GLOBAL LEGAL STUD. 181 (2017).

[175] The Guidelines were most recently revised in 2011 but several due diligence guidance on the implementation of the Guidelines have published since then. *See* OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001), http://mneguidelines.oecd.org/guidelines/.

[176] U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf&action=default&DefaultItemOpen=1.

[177] *See generally* UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org.

practical impact,[178] but share a number of the well-known enforcement challenges raised by company- or industry-wide codes of conduct.

It is perhaps not surprising, then, that a prolonged period of market-based norm experimentation be followed by a distinct return to state-led rule creation.[179] A notable example is the EU Non-Financial Reporting Directive 2014, which imposes transparency on large companies (public-interest entities) in relation to the impact of their activities on environment, social and employment issues, human rights compliance, anti-corruption, and bribery matters.[180] In the UK, these reporting obligations were transposed in the directors' Strategic Report, which also includes disclosure requirements relating to gender diversity and greenhouse gas emissions,[181] while France and Denmark have mandated non-financial reporting long before the EU Directive.[182] In the US, despite the general trend towards voluntary CSR, corporations are required to disclose in relation to climate change.[183] This regulatory transformation from voluntary to mandatory sustainability regimes is also observed in developing countries. For instance, both China and India have adopted mandatory sustainability reporting regimes, with the latter also having imposed a mandatory spend provision.[184] While no uniformity in scope and content exists among national mandatory reporting requirements, a general problem plaguing such disclosure-based regulation is the lack of mandatory reporting standards that would allow for benchmarking and comparative analysis between companies. Surprisingly perhaps, state-imposed regulation currently refrains from adopting such standards. Rather, this gap is filled by transnational,

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[178] On the role of the OECD's National Contact Points as a hybrid enforcement mechanism in the field of business and human rights, see, for example, John Ruggie & Nelson Tamaryn, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (Harv. Kennedy Sch., Working Paper No. 66, 2015).

[179] According to a report by the Initiative for Responsible Investment of the Hauser Institute for Civil Society at the Kennedy School of Harvard University forty-one countries have adopted corporate environmental and social reporting initiatives. *See* Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges* (2015), http://iri.hks.harvard.edu/files/iri/files/corporate_social_responsibility_disclosure_3-27-15.pdf.

[180] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330).

[181] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, c. 4A, § 414A (Eng.); *See also* § 414C (Eng.).

[182] *See, e.g.*, Constance Z. Wagner, *Evolving Norms of Corporate Social Responsibility: Lessons Learned from the European Union Directive on Non-Financial Reporting*, 19 TENN. J. BUS. L. 619 (2018).

[183] SECURITIES AND EXCHANGE COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, RELEASE NO. 33-9106 (Feb. 8, 2010) [75 FR 6290].

[184] Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175 (2014).

voluntary disclosure regimes such as the Global Reporting Initiative, which has become the global benchmark for multi-stakeholder sustainability-related reporting.[185]

The effectiveness of disclosure-based regulation to induce behavioral change in companies and to achieve positive social ends is, however, debatable.[186] This is why regulators, stakeholders, and businesses themselves are now placing more emphasis on due diligence processes. In the specific area of social sustainability (respect and promotion of human rights and other basic social rights), for instance, the California Transparency in Supply Chains Act 2010 on human trafficking and the UK's Modern Slavery Act 2015 have introduced reporting and due diligence requirements to address the risk of modern slavery in businesses and supply chains.[187] But commentators were quick to point out the weaknesses of both in enforcing risk-based assessment processes as they are mainly permissive and only require disclosure of due diligence, not due diligence per se.[188] In the area of conflict minerals, § 1502 of the U.S. Dodd Frank Act—even though currently suspended[189]—requires public companies to report annually on whether their products contain certain Congolese minerals,[190] while the EU Conflict Minerals Regulation 2017 imposes prescribed due diligence procedures to importers of

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[185] According to data by KPMG, 75% of the world's largest 250 companies are using the GRI framework for sustainability reporting. José Luis Blasco & Adrian King, The Road Ahead, *The KPMG Survey of Corporate Responsibility Reporting* 2017, KPMG SURVEY OF CORP. RESP. REPORTING 28 (2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf. For the role of GRI in transnational corporate responsibility regimes, see Cynthia Williams, *The Global Reporting Initiative, Transnational Corporate Accountability and Global Regulatory Counter-Currents*, 1 UC IRVINE J. INT'L TRANSNAT'L COMP. L. 67 (2016).

[186] *See, e.g.*, Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Responsibility Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?*, 15 BRAZ. J. INT'L L. 65 (2018).

[187] Australia has also introduced a Modern Slavery Act in 2019. *See.*Justine Nolan & Jolyon Ford, *Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains* (UNSW, Law Research Paper NO. 19-57), https://ssrn.com/abstract=3434209.

[188] *See, e.g.*, Charlotte Villiers, *Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 551 (Beate Sjåfjell & Cristopher M. Bruner eds., 2019).

[189] Ed Pilkington, *Proposed Trump Executive Order Would Allow US Firms to Sell 'Conflict Minerals,'* THE GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations.

[190] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.4173, 111th Cong. § 1520 (2010). For an empirically based assessment of the effectiveness of this regime, see Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129 (2016); Nik Stoop et al., *More legislation, more violence? The impact of Dodd-Frank in the DRC*, 13 PLOS ONE (2018).

specific precious minerals and third party auditing.[191] Interestingly, the US and EU conflict minerals regulations rely on the same five-step due diligence framework laid out by the OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High Risk Areas.[192] This is another example of co-regulation in the emerging sustainability-oriented corporate governance terrain and is indicative of the increasing linkages between industry self-regulation, NGOs, multi-stakeholder collaborative processes, international and supranational organizations, and states, which we recognize as illustrative of the transnational legal pluralist nature of corporate governance normativity today.[193]

The regulatory complexities of limiting negative externalities associated with corporate behavior by seeking ways of internalizing them into corporate governance rules become more accentuated in the context of transnational corporate groups or global supply and value chains.[194] From a corporate law perspective,[195] the issue arises from the generally territorial reach of the parent company's law[196] and the doctrines of separate legal personality and limited liability despite the use of interlocking corporate structures.[197] The protection of environmental, social, and economic sustainability is significantly undermined because of the limited extraterritorial application of relevant company law in that regard.[198] Commentators in the company law field have pointed to the salience of directors'

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[191] Regulation (EU) 2017/821, Laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, 2017, O.J. (L 130/1).

[192] OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH RISK AREAS (3d ed. 2016).

[193] *See infra* Part VI.

[194] *See, e.g.*, Jennifer Bair & Florence Palpacuer, *CSR beyond the corporation: contested governance in global value chains*, GLOBAL NETWORKS 15 (Supp. 2015).

[195] Note that the relevant literature has mainly focused on the extra-territoriality of tort and criminal law (rather than company law) for sustainability abuses by transnational corporations or in global supply chains. *See, e.g.*, Andreas Rühmkorf, *Global sourcing through foreign subsidiaries and suppliers: challenges for Corporate Social Responsibility*, *in* RESEARCH HANDBOOK ON TRANSNATIONAL CORPORATIONS 194 (Alice de Jonge & Roman Tomasic eds., 2017); Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty and the Alien Tort Statute*, BERKELEY J. INT'L L. 259 (2012).

[196] *But see* Bribery Act 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[197] For a critique, see Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 CHI. J. INT'L L. 403 (2017).

[198] For a recent account of the potential of company law to address corporate sustainability challenges extraterritorially, see Jingchen Zhao, *Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 29 (Beate Sjåfjell & Cristopher M. Bruner eds., 2019).

duties and the corporate purpose in integrating sustainability issues into the business of the company.[199]

But national attempts to widen the directors' duties to account for non-shareholder interests (outside of social enterprises), such as § 172 of the UK Companies Act 2006 or §166 of the Indian Companies Act, do not have any extraterritorial reach, and even at the domestic level they lag behind in protecting non-shareholders due to their elusive enforcement.[200] A regulatory breakthrough is therefore needed to encompass the liability of the parent or lead company for its subsidiaries or its global value chain, respectively. Sjåfjell, for instance, proposes the introduction of a duty to create sustainable value within planetary boundaries with the same remedies as for other comparable duties.[201] While effective extraterritorial directors' duties have yet to be imposed, there have been some tentative steps at different policy levels.[202] For instance, the EU High Level Expert Group specifically recommended that the EU Commission should strengthen director (and investor) duties by explicitly incorporating sustainability concerns, while the European Commission explores ways of harmonizing minimum standards for sustainable corporate groups.[203]

Some national legislators have also started to experiment with widening directors' liability for sustainability risks. France, for instance, has expanded the duty of care (*devoir de vigilance*) for parent and subcontracting companies and requires certain large companies to establish and implement a public due diligence plan to identify and mitigate risks of human rights violations in their operations, supply chains, and business relationships.[204] The Netherlands has adopted a duty

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[199] Beate Sjåfjell & Linn Anker-Sørensen, *The Duties of the Board and Corporate Social Responsibility (CSR)*, *in* BOARDS OF DIRECTORS IN EUROPEAN COMPANIES: RESHAPING AND HARMONISING THEIR ORGANIZATION AND DUTIES (Hanne Birkmose, Mette Neville & Karsten Sørensen eds., 2013); Beate Sjåfjel et al., *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).

[200] *See, e.g.*, Georgina Tsagas, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures, in* SHAPING THE CORPORATE LANDSCAPE (Nina Böerger & Charlotte Villiers eds., 2017); Deva M. Prasad, *Companies Act, 2013: Incorporating Stakeholder Theory Approach into the Indian Company Law*, 39 STATUTE L. REV. 292 (2018).

[201] Beate Sjåfjell, *Realising the Potential of the Board for Corporate Sustainability, in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY (Beate Sjåfjell & Cristopher M. Bruner eds., 2019).

[202] Andrew Johnson, *Reforming English Company Law to Promote Sustainable Companies*, 11 EUR. COMP'Y. L. 63 (2014).

[203] EU HIGH-LEVEL EXPERT GRP. ON SUSTAINABLE FIN., FINANCING A SUSTAINABLE EUROPEAN ECONOMY, FINAL REPORT 2018; Blanaid Clarke & Linn Anker-Sørensen, *The EU as a Potential Norm Creator for Sustainable Corporate Groups*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 190 (Beate Sjåfjell & Cristopher M. Bruner eds., 2019).

[204] Loi 2017-399 du 27 Mars. 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of

of care to prevent child labor,[205] while the Swiss Parliament is currently discussing the introduction of a human rights due diligence law.[206] While directors' liability for sustainability risks in transnational corporate groups, or across the supply chains, remains embryonic, we are witnessing an emergence of transnational regulatory initiatives that move away from soft law or indirect disclosure-based regulation to the use of domestic legislative models in the form of mandatory due diligence and extraterritorial duties to address socially negative externalities of corporate activities.

This movement is deeply entwined with the globalization of business interactions, on the one hand, and increasingly shaped by a fundamentally financialized world economy, on the other. While there may still be a very long way to go to realize a "legal paradigm for supply chain liability"[207] or impose a unified regime of criminal liability for negligence,[208] the gradually regulatory hardening of socially facing matters by corporations and the expansion of multi-stakeholder norm-making processes is a powerful illustration of transnational corporate governance regulation. This regulation is being assumed on both the national and international levels and through the intervention and contribution of both public (state) and private (market, civil society, and environmental groups) actors. Exhibiting a growing importance of private actors such as multinational corporations, stakeholders, and wider civil society as powerful drivers of corporate governance norms, it seems that the field is shaped today, above all, by a cross-jurisdictional search for optimal regulatory conditions for a firm's financial, governance, and managerial infrastructure, while at the same time promoting and enforcing social responsibility standards. We understand this changing face of sustainability-related regulation as illustrative of the multi-stakeholder, but still fragmented, norm-making processes and as indicative of the changing condominium of market- and state-driven corporate governance regulation. It is within this context that transnational corporate governance can be a methodological laboratory for the advancement of stakeholder capitalism. But finding the right

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Vigilance of Parent Companies and Ordering Companies], http://www.assemblee-nationale.fr/14/ta/ta0843.asp.

[205] Child Labour Due Diligence Law [*Wet zorgplicht kinderarbeid*], https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vkbklq11jgyy/f=y.pdf; *see* Anneloes Hoff, *Dutch child labour due diligence law: a step towards mandatory human rights due diligence*, OxHRH Blog (June 10, 2019), http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence.

[206] *Swiss Due Diligence Initiative Set for Public Referendum as Parliament Only opts for Reporting-Centred Proposal,* BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative (last visited Sept. 20, 2020).

[207] Benedikt Reinke & Peer Zumbansen, *Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability,' in* LE DEVOIR DE LA VIGILANCE 157 (Sophie Schiller ed., 2019).

[208] Carsten Momsen & Mathis Schwarze, *The Changing Face of Corporate Liability – New Hard Law and The Increasing Influence of Soft Law*, 29 CRIM. L. F. 576 (2019).

balance between these different (and partially) contradicting aims is an ongoing challenge.

It is also important to remember that the persisting ideological conflict continues to be informed by the tension between the focus on shareholder value maximization of the dominant corporate governance approach and seeing the firm through the lenses of its organizational infrastructure, on the one hand, and of its relations with a wide range of stakeholders, on the other. Unsurprisingly, this conflict has long been the subject of a lively debate because the stakes are high and business corporations are deeply interwoven into the fabric of countries' political economy arrangements.[209] But it is at a moment like the present that the foundations of this political economy are called into question because the relationship between public and private actors is being scrutinized under the brightest lights. Precisely because the current discussion around "rescuing the economy" focuses on the role of *both* the state and business,[210] we need to take a closer look at how this relationship has been understood before the crisis hit. In that vein, even a cursory glance at the evolution of corporate governance, both as a scholarly subject and matter of policy making, reveals the crucial intersection of economic and legal ideas, which have and continue to unfold in close relation to the socio-economic environment in which corporations operate. From its emergence as a distinct concept in the late 1970s onwards, corporate governance debates seem to have consistently straddled an odd divide between theory and practice. While, on the one hand, referencing the conceptualization of governance relations between different actors *within* the corporation,[211] we have shown in this Article that there was never any doubt with regard to corporate governance's very real, political dimension.

While this correlation between trying to identify the most suitable theoretical model for corporate infrastructure and engaging in a larger debate around the beneficiaries and potential "losers" of such arrangements should seem obvious, in reality, the opposite is true. Most of the time, corporate governance debates have unfolded in a largely abstract universe of economic modelling next to which the role of law and regulation was at best secondary. This is a remarkable insight, which requires more explanation. Throughout this Article, we have argued that the roots for the collapse of practice into theory that occurs under the semantic umbrella of corporate governance lie in the prevailing theory of insulating the corporation from being understood as a legally governed entity.

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209 Lazonick & O'Sullivan, *supra* note 144.

210 *See, e.g.*, Nomi Prins, *Wall Street Wins, Again: Bailouts in the Time of Coronavirus*, COMMON DREAMS (Apr. 6, 2020), https://www.commondreams.org/views/2020/04/06/wall-street-wins-again-bailouts-time-coronavirus.

211 Williamson, *supra* note 20.

VI. LAW & POLITICAL ECONOMY OF CAPITALISM: TRANSNATIONAL CORPORATE GOVERNANCE AS A CRITICAL LABORATORY

Seen in the light of the continuing and expanding shift of public to private governance responsibilities across numerous sectors,[212] which we described above, the observed transformation of sustainability-oriented corporate governance regulation amidst the changing market-state condominium raises important questions as to the longer-term trajectories of corporate governance regulation. Such questions connect the governance challenges as they pertain to business organizations in today's financialized and globalized markets with those arising from newly emerging relationships between public and private actors in transnational political economies. The Covid-19 crisis emphatically urges us to revisit the pivotal moments of "crisis" and "reform" (or, the lack thereof,) in leading up to the more necessary enunciations of "stakeholderism" and concepts of "sustainable corporate governance." Indeed, we need to see corporate governance norm creation against the background which we sketched at the start of this Article: rather than testifying to a wholesale "retreat" or even "end" of the state, contemporary governance dynamics unfold in a transnational realm in which states, private actors, civil society groups, and a myriad of interest groups are competing with one another for knowledge, participation, and, certainly, power. As a result, traditional national, comparative, or international approaches might not offer the best of insights into the complex regulatory landscape which has been forming before our eyes.

Looking back at the changes in the general political economy after the height of the redistributive Welfare State of the 1970s, on the one hand, and the transformation that corporations themselves and the legal and regulatory environment surrounding them have undergone since that time under the influence of globalizing capital markets, on the other, "corporate governance" is today a true laboratory of opposing views on market regulation, corporate responsibility, and, even, capitalism itself. The end of "embedded liberalism"[213] and the emergence of regulatory frameworks, which have long been sitting uncomfortably beside and in between traditional categories of "public authority" and "private power,"[214] have long blurred the borders between differently legitimated regulatory authorities, posing lasting challenges for the assessment and evaluation of corporations' power, the legitimacy of their actual functions in society, and with regard to their accountability to a wide range of societal stakeholders.[215] This "big picture" understanding of the corporate governance is complemented by a continuing and

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[212] *See, e.g.*, Catherine E. Rudder, *Private Governance as Public Policy: A Paradigmatic Shift*, 70 J. POL. 899 (2008).

[213] John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

[214] CUTLER, *supra* note 95.

[215] *See, e.g.*, MAYER, *supra* note 171.

today-only, intensifying examination of the role of the key corporate actors (shareholders, managers, directors, and stakeholders) and civil society in curbing short-term value-maximizing practices and not just a particular company's ability to foster sustainability but with regard to the underlying system of capitalist market organization itself.[216]

A serious attempt to address the steep differences in socio-economic equality around the world and between regions, countries, and markets today has to adopt a sociologically informed perspective on the transnational competition between different approaches to political intervention on national and supranational levels and their ability to respond to the comprehensively disruptive role that both financialization and digitization plays with regard to governmental aspirations to effectively regulate economic activities.[217] Its fundamentally *spatialized* proliferation and its anti-political functionalization make corporate governance a transnational regulatory concern that requires a methodologically different response than those which have been at the forefront of debates around "convergence" and "divergence" until now. While these regularly revert to the nation-state as a reference point for authoritative political "intervention,"[218] the transnational nature of corporate governance in a globally interconnected economy has to address the "footloose" and "timeless" status of multinational corporations and their purpose.[219] Building on this, what we call *transnational corporate governance* aims at opening a research agenda for the 21st century corporate governance scholarship which is based on a deeply contextual approach and on the development of a critique of a predominantly law-and-economics narrative of corporate governance and corporate purpose. This agenda can have a powerful impact on the already intellectually collapsing shareholder primacy thinking and pave the way for the re-orientation of firms (not only corporations) away from the sole maximization of shareholder value to social targets.

Effectively, the undertaken suggestion to revisit, to retell and to *reimagine* the trajectory of corporate governance *as* a transnational regulatory terrain shows the field as part of a bigger picture of political-economy transformation. The

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[216] Strine, *supra* note 36; THE SUSTAINABLE COMPANY: A NEW APPROACH TO CORPORATE GOVERNANCE (Sigurt Vitols & Norbert Kluge eds., 2011); THOMAS PIKETTY, CAPITAL IN THE TWENTY FIRST CENTURY (2014).

[217] Till van Treeck, *The Political Economy Debate on 'Financialization' – A Macroeconomic Perspective*, 16 REV. INT'L POL. ECON. 907 (2009); Paddy Ireland, *Financialization and Corporate Governance*, 60 N. IR. LEGAL Q. 1 (2009); Paddy Ireland, *Efficiency or Power? The Rise of the Shareholder-oriented Joint Stock Corporation*, 25 IND. J. GLOBAL LEGAL STUD. 291 (2018).

[218] ROBERTO MANGABEIRA UNGER, THE KNOWLEDGE ECONOMY 82 (2019) (arguing that "[t]he conception of an institutional and legal reshaping of the market order contradicts a history of modern ideological controversy that is built around the contrast, or the balance to be struck, between market and state.").

[219] MAYER, *supra* note 171, at 33.

globalization of capital in the absence of a "global-state" or a "global law"[220] is part of the new political economies of corporate governance. But so are the newly emerging disembedded, financialized, and algorithmitized[221] governance regimes that mark today's transnational institutional assemblages. Our telling example of what can be described as a sustainable-oriented transformation of corporate governance norm creation illustrates the expansion and, at the same time, the deepening of national and regional policy spaces in a global economy. It also illustrates a next stage in the continuing transformation of public/private corporate-law-making processes. The increasing digitization of global financial capitalism itself suggests, at the same time, that the described variety of regulatory instruments and evolving "hard" and "soft" law instruments is likely to become even more volatile. In that sense, while we depict more recent efforts to revitalize and to give stronger effect to domestic corporate governance reforms aimed at sustainability or corporate citizenship in a growing number of countries, we must ask how the transnational legal pluralism of global capitalism will continue to unfold and what role states can continue to play in that regard. While domestic regulation evokes different normative legacies and the institutional and processual path-dependencies of distinct, local political economies, it is not entirely clear how these shape the functional pluralization of transnational corporate governance going forward. That said, a legal pluralist reading of corporate governance in a global context is already a significant step forward, as it helps render visible the co-existence, the interpenetration, and the interaction of different regulatory actors, forms, and objectives.

It is in that light that the analysis offered in this Article should be seen in the context of the broader transformative trends in transnational law, global law, and legal pluralism. Especially, the global financial crisis of 2008-2009 opened the door towards a more differentiated engagement with mainstream economic thinking and its underlying premises regarding efficiency and growth[222] as well as economic's and economists' approach to climate change and sustainability.[223] The

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[220] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

[221] Zumbansen, *Law and the Transnational Political Economies of Global (Value Chain) Capitalism, supra* note 160; ALAIN SUPIOT, GOVERNANCE BY NUMBERS: THE MAKING OF A LEGAL MODEL OF ALLEGIANCE (Saskia Brown trans., 2017).

[222] DANI RODRIK, ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE (2015); Joseph E. Stiglitz, *Lessons from the Financial Crisis and their Implications for Global Economic Policy*, *in* 10 YEARS AFTER: THE END OF THE FAMILIAR… REFLECTIONS ON THE GREAT FINANCIAL ECONOMIC CRISIS 1 (2019), 227; Victor A. Beker, *On the Economic Crisis and the Crisis of Economics* 1 (Kiel Inst. for the World Econ, Discussion Paper No. 2010-18, 2010), http://www.economics-ejournal.org/economics/discussionpapers/2010-18/file.

[223] John Chung-En Liu et al., *Climate Change and Economics 101: Teaching the Greatest Market Failure*, 11 SUSTAINABILITY 1 (2019); Caroline Anstey, *We need an economic model that works for people and the planet*, WORLD ECONOMIC FORUM, SUSTAINABLE DEVELOPMENT IMPACT SUMMIT (Sept. 23, 2019),

Covid-19 crisis reinforces this absolute need for transformative initiatives that will enable today's and future's corporate governance system and capitalism to "work for all."[224] Our analysis seeks to make sense of the distinct layers of comparative corporate law and institutional analysis and tries to shed a new light on the far-reaching reform processes in domestic corporate governance systems worldwide. At the same time, we sought to shed some light at least on the dynamics and 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 constantly being created. In this vein, transnational corporate governance can be seen 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. The here-envisioned, *critical* project of transnational corporate governance prompts a reconceptualization of the transnationally embedded corporation and its key actors as part of a comprehensive, inter-disciplinary strategy to study the place, function, and the responsibilities of the firm in today's financialized, globally networked economy, which exhibits continuities of exploitation and discrimination and is, at the same time, engulfed in newly emerging geopolitical realities and further shaped by the revolutionary forces of a technologically driven and determined digital economy.

This Article addresses these problems at a time when it is not just the legitimacy of transnational corporate law norm-making that is being disputed, but when the dramatic collapse of world-wide economic activity in the shadow of the global Covid-19 pandemic renders the alleged "normality" of the existing regulatory arrangements between the state and private business into sharp relief. Where now some of the market's most successful firms in history turn to the state for the receipt of rescue packages to guarantee survival, this raises far-reaching questions about both the nature of the relationship between the state and the market and the nature of the "firm" itself. Because many of these firms were for the last 30 or 40 years pushing back government "intervention" and regulatory impositions on the basis of contractarian arguments, it is crucial to retrace the historical trajectories of domestic privatization and deregulation politics. Over time, when the state was arguably "in retreat," when social services and public guarantees were driven back, and when the burden was shifted onto the shoulders of the individual to take on new "responsibilities," corporate governance emerged as a crucial experimentation site for self-regulating markets. As we have shown in this Article, corporate governance was able to develop into a distinct field, marked by a low degree of public intervention and oversight while simultaneously conceived of as having significant policy importance. But corporate governance as a distinct and important site of regulatory conflict, distinguishable from corporate law due to its

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https://www.weforum.org/agenda/2019/09/how-to-make-markets-more-sustainable/; NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE (2014).

[224] Strine, *supra* note 36.

continuing and inevitable tension between law and norms, needs to be studied both within and beyond the nation state through a political-economy lens. This Article contributes to this aim by contextualizing corporate governance as a site of political conflict and normative diversity, seeking for the "hidden" dynamic between law and power in transnational spaces, moving beyond the VoC approach, and unpacking the paradox of a purportedly *private* regulatory regime with widely regarded *public* relevance through the use of a case study on the transnational shift from voluntary codes of conducts and international voluntary initiatives towards mandatory disclosure, and more recently, regulatory governance in the form of due diligence and expansive directors' duties to address issues of environmental and social corporate sustainability.

Future research needs to engage with corporate governance as a transnational field that spans across legal-territorial borders in that its multi-dimensional nature mirrors the various functions that corporations play today in an era of continuing privatization of public functions, on the one hand, and corporate rescue demands to be bailed out in times of crisis, on the other. In addition, given the economies of scale of a great number of multinational companies, discussions around corporate governance need to take a more expanded view of the firm and its socio-economic, political, and natural environment. As such, corporate governance *as* laboratory helps us understand and transform not only the rules for the internal operation and administration of large organizations but also see the correlations between corporate and *societal* governance. With this tall order in mind, corporate governance rules must still meet the demand for effective governance strategies geared towards an ideally frictionless interaction between the company, its shareholders, and its differentiated local and global stakeholders. Part policy arena, part timekeeper of economic and financial transformation, corporate governance is a battle ground and conflict site for competing views of "the corporation." Those competing views negotiated between the poles of representing the firm as a private business actor, exclusively beholden to its owner-investors and a slowly, more widely accepted understanding of the firm as a market and societal actor with specific responsibilities towards its employees, the local communities in which it and its many subsidiaries are located and operating, but also the global communities of those affected by corporate action and the environment. This tension shapes both very local and embedded and transnational public debates around the firm.