The de-privatisation of Anglo–American corporate law?

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Introduction

The way in which scholars and students characterise a phenomenon academically is of enormous – and often underappreciated – significance, especially when it comes to aspects of the law. How we characterise an area of law – or, in other words, what the dominant academic paradigm of that subject is – affects how we customarily think about it, write about it and teach it. Crucially, it also affects our normative perspective on that subject. That is to say, it determines what we regard to be its strengths and weaknesses, its ‘rights’ and ‘wrongs’, and the appropriate course of its future development. The opinions and attitudes that are shaped in legal monographs, law review articles and law school classrooms do not just echo around the proverbial ivory towers of elite academic institutions. Ultimately – albeit often very gradually – they trickle down into the so-called ‘real world’, either when former students of the law later become influential practitioners of it or when leading academic texts are used by judicial or policy-making figures to help shape their critical understanding of challenging legal issues.

Within the Anglo–American environment, the dominant academic characterisation of corporate law is as an aspect of ‘private’ or facilitative law. As such, corporate (or – to use English parlance – ‘company’) law is conventionally bracketed alongside other traditional private law subjects such as contract, property, equity, agency and trusts law. Accordingly, the efficacy of corporate law in the US and UK is ordinarily judged by reference to how responsive those rules are to the supposed private preferences of key corporate participants or ‘contractors’. For the most part, this category is normally restricted to include the common or ordinary shareholders who supply the corporation’s equity or risk capital, and the managerial officers (including directors) who are appointed to make executive policy decisions on shareholders’ collective behalf.

It follows from this premise that the core and motivating purpose of corporate law should be to reflect or ‘mimic’ the notional ‘terms’ that shareholders and managers would be inclined to agree upon with one another privately, in the hypothetical situation where no antecedent laws exist and therefore all norms stand to be determined by private negotiation alone. This is what is commonly known as the ‘contractarian’ or ‘nexus of contracts’ paradigm
of corporate law (see, e.g. Black 1990; Easterbrook and Fischel 1991; Hansmann and Kraakman 2000).

Correspondingly, corporate law is ordinarily not characterised as an aspect of ‘public’ or regulatory law, in the way that subjects such as tort, criminal, environmental, antitrust (or competition) and securities law are. That is to say, unlike the above areas of law, corporate law is typically not perceived as being designed to coerce social-behavioural change, or to bring about direct distributional outcomes within society whether in terms of risk, power or wealth. Therefore, academic characterisations of corporate law normally do not seek to portray the laws and norms in this field as exhibiting such characteristics, which would run counter to their purportedly facilitative – and thus fundamentally non-socially-determinative – nature (on the private/public divide in corporate law generally, see Bottomley in this volume; Hadfield and Talley 2006).

Just as the purpose of an artistic caricature is to accentuate the most distinctive or noteworthy features of a person rather than portray her every literal detail, the objective of an academic characterisation is to emphasise and draw on the key distinguishing features of a subject rather than to document that phenomenon in all of its complexity. Inevitably, therefore, the process of academic characterisation – in law as elsewhere – involves some marginal degree of papering over the empirical cracks. That is to say, the occasional outlying or idiosyncratic feature is conveniently (and quite acceptably) elided so as not to detract from the essential qualities of the subject that the writer is seeking to accentuate.

Therefore an academic characterisation of an area of law, like an artistic caricature, need not be 100 per cent comprehensive in documenting a subject, nor sensitive to its every empirical nuance. As a minimum requirement, however, the characterisation must be capable of incorporating all materially significant features of its subject matter, or else the ensuing model will lose its essential representational quality.

Moreover, the process of academically characterising a subject – and especially an area of law – involves not just an empirical but also a normative dimension. These two elements necessarily overlap and reinforce one other. Inevitably, the answer to the empirical question – that is, what essentially is a given phenomenon – affects our answer to the ensuing normative question – that is, what essential form or qualities should that phenomenon embody? Thus, in any field of social science, constructive academic debate involves scholars providing competing characterisations of the essential (empirical) nature of a thing on a definitional level, in order to establish (or change) the points of references in accordance with which the efficacy or desirability of that phenomenon can subsequently be judged from a more critical perspective.

In short – in law, as elsewhere – ought judgments are ultimately dependent to a large extent on is judgments because, in order to be able critically to evaluate a subject, we must first of all understand its key attributes and qualities.1 It follows that, where a particular characterisation of an area of law lacks adequate empirical foundations (in the sense of failing to represent any materially significant features of the relevant subject matter), any normative conclusions that are drawn on that basis are either void – or, at the very least – become subject to further questioning as a precondition to their continuing acceptance by others.

1 On the ‘is–ought’ distinction in legal discourse generally, see MacCormick 2007: chs 1–2; MacCormick 1999: ch 1.
In the field of corporate law, the main ‘is’ dispute concerns the alleged ‘private’ versus ‘public’ nature of the laws in this field – that is, to what extent can corporate law properly be regarded as the outcome of decentralised market or civil society bargaining, in contrast to centralised regulatory state imposition? Or, to put the issue another way: is corporate law at its core an organic (‘bottom-up’) or synthetic (‘top-down’) creation? Where one adopts the former view as regards the fundamental nature of corporate law, they are ordinarily led to the ensuing normative position that the relevant laws in future should rightfully be developed along the same basic path: that is, law-making in this field should be responsive to private preferences, rather than determinative of them.

Vice versa, proponents of the latter (synthetic) view of corporate law tend consequently to arrive at the contrary normative position. That is, that the laws in this field should be coercive and socially-determinative, aimed at eliciting direct change in the behavioural patterns and relative resources of key corporate participants in line with general democratic opinion in society; and irrespective of whether or not such regulatory outcomes are consistent with the affected participants’ (especially shareholders’) private preferences.

Against the above background, this chapter accordingly examines and challenges the dominant academic portrayal of Anglo–American corporate law as an aspect of private law, and argues for a recharacterisation of the subject that reflects the centrality of public regulation to its core dynamics. It first explores the purported ‘privacy’ (or privateness) of corporate law as it is most commonly understood and taught within the Anglo–American environment. In doing so, it makes reference to some of the most notable quasi-contractual aspects of US and UK corporate law, which would appear to provide empirical support for the dominant contractarian paradigm of the subject. The chapter then highlights an apparent ‘de-privatisation’ trend in Anglo–American corporate law over recent years, including the impact of increasing federalisation of corporate law in the United States under the Sarbanes–Oxley and Dodd–Frank reforms, and also the effect of increasing juridification of corporate law in the United Kingdom at both domestic and EU level.

The chapter subsequently examines the normative implications of this de-privatisation trend. It demonstrates that the developments in question – on closer inspection – are in fact considerably less material than might first appear to the overall character of Anglo–American corporate law, which has for a long time exhibited significant public-regulatory features. However, insofar as these more publicly oriented aspects of corporate law have tended to be rationalised under the separate head of securities (or capital markets) law reforms, their existence has generally not been seen as threatening the continuing private dynamic of ‘corporate’ law as a distinct system in itself. As against this, however, the chapter argues that once the inherent artificiality of the conventional corporate/securities law divide is recognised, the prevailing academic characterisation of Anglo–American corporate law as an inherently private phenomenon is rendered unsustainable, both descriptively and normatively.

The purported ‘privacy’ of Anglo–American corporate law

For much of the past century, corporate law scholars in the United States and United Kingdom have sought to develop the academic contours of their subject as an essentially private, functional and politically colourless field of enquiry. The precise jurisprudential trajectories along which these developments have occurred on each side of the Atlantic bear their own unique characteristics. Nonetheless, a common and fundamental feature of the so-called ‘Anglo–American’ corporate law systems is the dominant scholarly perception of the subject as a dynamic and self-determinative aspect of private law lying beyond the
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The meddling reach of the ‘public’ or interventionist regulatory state. As such, corporate law arguably is – and, moreover, should be – focused more or less exclusively on giving legal effect to the terms and essential substance of arrangements constituted by decentralised persons acting on their own behalf, whether in an individual or private–organisational capacity.

The perceived ‘privity’ (or privateness) of Anglo–American corporate law is attributable in large part to the pervasive influence of what has variously been termed the ‘contractarian’, ‘nexus of contracts’ or ‘private ordering’ theory of the firm. Originally an invention of US-based financial economists in the 1970s, contractarianism has expanded in depth and influence over recent decades to become the dominant conceptual and normative lens through which the corporation and its constituent laws are conventionally studied across the English-speaking world.

On a jurisprudential level, contractarianism in effect instils the logic of private law into the internal structure and functioning of modern business corporations, by asserting that ‘public’ or widely held corporate entities – in spite of their typically enormous organisational scale, extensive social impact and peculiar ownership/control dynamic (including the lack of any distinct proprietary or entrepreneurial presence) – should nonetheless be regarded as essentially private and quasi-contractual institutions, which are subject to qualitatively similar market dynamics and pressures to those affecting orthodox (i.e. closely held) business entities (Ireland 2003). In particular, contractarian scholars emphatically refuse to afford any conceptual significance to the corporation’s formal legal autonomy or ‘personhood’, instead regarding the incorporated firm as a mere structural convenience that serves the collective, contractually communicated interests of its various human participants at any given point in time (see e.g. Cheffins 1997: 31–41; Easterbrook and Fischel 1985). It is therefore unsurprising that the contractarian theory of the firm has tended in general to exhibit a strong anti-regulatory hue.

To a significant extent the contractarian characterisation is empirically validated – albeit in different ways – by the actual form and substance of corporate law as it exists in both the United States and the United Kingdom. In the United States, the pervasive influence of the contractarian paradigm inheres at least as much in the peculiar form that many core corporate law rules take, as in the inherent substance of those doctrines themselves. Consistent with the general ideological impetus of the contractarian position, corporate law scholars in the United States tend in general to show a preference for legal rules that are flexible and adaptable in their application.

From the contractarian assertion that there is no universally determinable ‘right’ way to structure a corporation’s internal governance arrangements, there derives a commonly held view in the United States that corporate law rules should be designed so as to allow ample space for deviation and diversity by contractors from the regulatory norm. Therefore, in contrast to the orthodox ‘command’ conception of laws as a coercive means of engendering conformity by citizens with universally applicable sovereign decrees, US business entities law by contrast is commonly depicted in terms of an essentially facilitative, transaction–cost saving device or ‘tool’ that contracting parties are free to adopt or reject at their personal whim (see e.g. Easterbrook and Fischel 1989).

Furthermore, since in the absence of state-promulgated corporate laws, shareholders and managers would be inclined to work out their own ad hoc contractual solutions to corporate governance problems in any event, the law in this context should – it is argued – rightfully be viewed as having no socially determinative value in its own right. Rather, the purpose of corporate law within the contractarian paradigm is simply to ‘mimic’ ex ante those contractual outcomes that hypothetical corporate participants would in general be inclined to favour if
given the opportunity to bargain free of charge over the internal division of power, rights and entitlements in respect of their mutual venture (Black 1990: 552–5).

From this understanding of law there derives a legislative preference (at least at state level) for providing generally – but not universally – accepted ‘default’ legal rules that are freely ‘reversible’ at the behest of key corporate participants (Bainbridge 2008: 35–7). Such reversibility is achieved by granting directors and/or shareholders an ad hoc licence to ‘opt out’ of any rule or doctrine that appears ill-suited to their firm’s peculiar characteristics or environment, by including a provision to this effect within a corporation’s internal constitutional documents (Bechuk 1989: 1396–7).

The long-standing trailblazer of the opting-out (and, vice versa, opting-in) tradition in US corporate law is the State of Delaware, which has over the past century developed a highly flexible corporate law statute permitting individual firms significant leeway in their application of core governance norms (Bowman 1996: 60). This includes the freedom to limit or negate in respect of any one firm the effect of important statutory and common law rules concerning the balance of power, influence and accountability between shareholders and directors. Largely for this reason, Delaware has become the state domicile of choice for a majority of publicly listed corporations in the United States.

Moreover, the tradition of adaptability and opting-out in US corporate law is reinforced by the country’s unique competitive-federalist law-making system. Ingrained into the jurisprudential fabric of US corporate law is the long-standing ‘internal affairs’ doctrine, which dictates that the state of incorporation – as the formal source of a corporation’s legal existence – has exclusively regulatory prerogative over intra-firm affairs involving the rights and powers of shareholders, directors and managers (DeMott 1985; Tung 2006).

Thus incorporators – both ‘start-up’ first-time incorporators and ‘midstream’ reincorporating firms – enjoy a legally uninhibited choice of 51 intra-national jurisdictions2 as the formal legal domicile for their company. Moreover, applicable rules of US corporate law – in contrast to other aspects of civil or criminal law – are determined purely by a corporation’s state of registration, irrespective of whereabouts in the country (or world) its physical activities and transactions are subsequently carried out (Romano 1993: 1). This means that, with respect to corporate law at least, the choice of state of incorporation in effect amounts to a choice of law, thereby creating a quasi-consumerist tendency to view each individual state’s corporate law system as an effective ‘menu’ of choices that can be weighed up against those competing regulatory ‘products’ offered by other states (Easterbrook and Fischel 1991: 5).

Accordingly, just as corporations compete with each other to offer the securities and governance systems that appeal to investors, at a higher level states can also be seen as competing with one another to offer the legal ‘terms’ that corporations themselves are likely to find attractive (Bainbridge 2006: 1742). Whereas the imputed motivating force for a corporation in offering attractive terms to investors is reduction of its cost of capital and, ultimately, profit maximisation, for states, the corresponding imperative is perceived to be maximisation of incorporation revenues and attendant benefits (Bechuk 1992: 1451). In this way, the orthodox chain of regulatory cause and effect is reversed in the sense that regulatees, as notional ‘consumers’ of legal rules, dictate the decisions of regulators as notional ‘producers’ on the corporate law marketplace.

2 This figure includes all 50 US states plus the District of Columbia, which operates its own incorporations regime.
Such a portrayal of the rule-making process, moreover, aligns logically with the above-mentioned ‘opting out’ tradition in corporate law. On a private ordering analysis it could thus be said that an incorporator, having chosen to ‘purchase’ a particular set of rules by incorporating her firm within a chosen jurisdiction, should thereafter be free as the notional ‘owner’ of those rules to adapt them to her personal preference, just as one might wish to make perceived improvements to a house or car following its purchase.

In contrast to the US model of corporate law-making outlined above, the corresponding British system is for most practical intents and purposes unitary in nature. Furthermore, in respect of the majority of significant corporate governance matters the UK’s principal corporate law statute, the Companies Act 2006, operates on a mandatory and thus irreversible basis. More generally, the use of mandatory and irreversible statutory rules to afford protection to shareholders of UK corporations has been widely accepted and thus seldom questioned, either academically or judicially.

Notwithstanding, the dual contractual qualities of flexibility and reversibility of laws are maintained within the British company law framework in other important respects. Insofar as publicly listed companies are concerned, a particularly distinctive dimension of UK corporate law’s rich private ordering heritage is its extensive resort to non-statist ‘soft law’ techniques that lie beyond the orthodox realm of statutory and common law, and which (theoretically at least) provide scope for flexibility, diversity or opt-out at the point of firm-specific norm application. This comparatively peculiar aspect of UK corporate law can be attributed to the cultural path dependencies underlying the so-called ‘London approach’ to financial market regulation (FRC 2006), a central characteristic of which is the implicit devolution – by government – of far-reaching regulatory responsibilities to individuals or groups directly affected by the ensuing rules (Cheffins 1997: 366).

In the field of corporate governance, meanwhile, the so-called ‘soft law’ phenomenon has manifested itself in two main forms. The first of these is the system for regulation of listed company board structures and risk oversight practices under the UK Corporate Governance Code: an informal body of norms promulgated by the non-governmental Financial Reporting Council (FRC), and whose enforcement is characterised by the dynamic and (theoretically) investor-driven practice of ‘comply or explain’ (FRC 2014: 4; Moore 2009: 104–7). The second of such forms is the UK’s so-called ‘privatised’ system of corporate takeover regulation under the remit of the Panel on Takeovers and Mergers: a non-statist rule-making and executive body comprised mainly of appointees from financial institutions that are broadly representative of the City of London’s institutional shareholder (and associated professional) community. The Panel administers and adjudicates on the application of its influential Takeover Code, and also publishes regular updates to the Code in response to developing market practices.

Successive UK governments from both sides of the political spectrum have consistently resisted the populist temptation to displace the perceived prerogatives of the FRC and Takeover Panel in determining the substantive content of the codes, or to transplant any core code provisions onto a legally binding statutory basis. An important political consequence of this is that the codes’ respective rule frameworks – in spite of bringing about significant

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3 This is notwithstanding the effects of (internal) devolution and legal pluralism, and (external) European Union membership, on the UK’s national law-making dynamics. On the latter of these factors, see below.

and far-reaching innovations to UK corporate governance practices over recent decades – have nevertheless slipped under the proverbial public policy radar by largely eluding formal democratic scrutiny. As such, the codes have tended to derive their general social acceptability from two alternative – albeit overlapping – normative sources.

The first of these is the codes’ reputed quasi-contractual status as relatively flexible and investor-determinable norms, which purport only to consolidate pre-existing ‘best practice’ rather than having any socially determinative effect in their own right (Cheffins 1997: 370; Amour and Skeel 2007: 1729). Second, there is the apparently neutral-technocratic system by which the respective codes are formulated, whereby leading financial and legal intermediaries devise rules in an apparently practical and politically colourless forum, guided by a prevailing professional sense of what regulatory outcomes are functionally ‘correct’ – in the sense of optimally efficient – from the perspective of industry and financial market participants generally. According to this view, the purported ‘neutrality’ – and, by implication, public defensibility – of the codes inheres in the fact that the members of the relevant rule-making bodies (that is, the FRC and Takeover Panel) are elected exclusively on the basis of their perceived practical expertise in the relevant fields, and correspondingly not on account of any particular political or ideological predisposition that they seek to bring to bear on their respective regulatory and supervisory tasks.5

Therefore, the continuing normative acceptability of the codes is based principally on private (prudential and professional) rather than public (democratic or policy-based) criteria. Substantively, this important institutional characteristic of the codes is exemplified in their common investor-protectionist ethos, and corresponding general disregard for public policy concerns extraneous to considerations of shareholder welfare.6

The recent ‘de-privatisation’ trend in Anglo–American corporate law

Developments in the United States

Academic concern about a perceived ‘de-privatisation’ trend in Anglo–American corporate law has been expressed most vehemently in the United States, which over recent years has witnessed increasing federal government involvement in the traditionally state-dominated realm of internal corporate governance affairs. Regulatory limitations on the permissible scope for private ordering in US corporate law have tended to derive from the expanding involvement of federal government in corporate governance, a process that has been described (in somewhat pejorative terms) as one of federal regulatory ‘creep’ (Bainbridge 2009: 44).

A major consequence of the long-standing internal affairs doctrine in US corporate law – which regards the regulation of intra-firm decision-making processes as being the exclusive preserve of individual states – is that federal interventions in this area have historically tended to take the form of securities market measures aimed principally at enhancing the public transparency of corporate performance and dealings.7 With limited exceptions (such as the

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5 On technocratic approaches to establishing economic-regulatory legitimacy generally, see Prosser (1999).
6 In this regard see in particular the pivotal ‘no-frustration/board neutrality’ doctrine established by General Principle 3 and Rule 21 of the Takeover Code.
7 The dual legislative basis of the federal government’s securities law-making function in the US is the Securities Act of 1933 and the Securities Exchange Act of 1934, together with regulations promulgated
federally prescribed system of proxy solicitation under SEC Rule 14), these interventions have tended to affect US corporate governance practices only in an indirect and largely uncontroversial way, insofar as informationally efficient securities markets are widely regarded as an institutional prerequisite of effective managerial monitoring and discipline within widely held corporations (Moore and Reberioux 2011: 88–90).

In a notable break from this trend, however, the corporate governance components of the 2002 Sarbanes-Oxley and 2010 Dodd-Frank Acts sought – respectively – to increase directly the formal accountability of listed company boards to shareholders, and to empower shareholders to influence matters formerly subject to the exclusive prerogative of the board under state law. Both Acts take the form of wide-reaching legislative or regulatory measures that, whilst formally billed as extra-corporate financial reforms, have nevertheless had a considerable ‘overspill’ impact on intra-corporate governance norms and practices. From an orthodox contractarian point of view, these developments are doubly controversial insofar as they represent a limited erosion of the traditional division of law-making functions between federal and state level, and also a regulatory concretisation of formerly flexible corporate governance practices (Bainbridge 2012; Barden 2005).

The first such prima facie financial reform measure with a corporate law ‘sting in the tail’ was the Sarbanes-Oxley (or ‘SOX’) Act of 2002, which was enacted in the immediate wake of the Enron and WorldCom scandals at the turn of the century. SOX was presented as a comprehensive regulatory response to the extensive accounting fraud and financial audit failures exposed in the aftermath of these and other high-profile corporate collapses of the time.

From a private ordering perspective, arguably the most controversial implication of SOX for US corporate law was its ‘top-down’ implementation of compulsory intra-firm accountability processes that, in terms of procedural rigour, went significantly above and beyond previously accepted norms of self-regulatory best practice. Most notable in this regard are the oft-criticised internal control requirements laid down by sections 302 and 404 of SOX. Taken together, these provisions have the effect of vesting a corporation’s senior managerial officers – and, in particular the chief executive officer (CEO) and chief finance officer (CFO) – with responsibility to act as ultimate guardians of the firm’s internal system of financial information flows by formally certifying the reliability and integrity thereof.

Prior to 2002, the offices of CEO and especially CFO had been regarded as contractually contingent organisational functions. Accordingly, the existence and contours of these offices were determinable privately by boards in exercise of their inherent right to delegate and sub-divide executive powers on a flexible and discretionary basis, and to structure a firm’s managerial hierarchy accordingly. However, a largely unwelcome by-product of SOX has been its effect in affording express statutory recognition to the formerly endogenous CEO and CFO positions, thereby establishing these phenomena as formal legal role definitions.

Other post-Enron regulatory measures in the United States took the (comparably less controversial) approach of concretising previously informal and self-regulatory norms of best practice on a mandatory and legally prescribed basis. The most notable such reforms were the introduction in US stock exchange listing rules of express requirements for majority-independent boards and fully independent sub-board nominating and compensation committees, together with a detailed supporting definition of directorial ‘independence’ for these
purposes.\(^8\) Also noteworthy in this regard was the more demanding definition of independence established under section 301 of SOX for application to audit committees. Whilst these latter types of reform – unlike the former – did not in general seek to elicit fundamental change in established practices, they were nevertheless problematic from a contractarian perspective in that they both universalised and formalised certain corporate governance norms that had previously been susceptible to inter-firm variation or occasional exception.

More recently, the Obama administration’s principal legislative response to the financial crisis of 2007 and 2008, namely the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, continued in the trend of SOX by introducing significant federal amendments to US corporate governance under the apparent head of financial regulatory reform. However, in contrast to SOX’s focus on reforming the internal monitoring function of corporate boards, the corporate governance aspect of Dodd-Frank was concerned primarily with increasing the direct external influence of shareholders within the corporate decision-making process.

In particular, Dodd-Frank sought (inter alia) to recalibrate the traditional state law division of power between boards and shareholders in the latter group’s favour with a view to ensuring greater managerial accountability and improved standards of shareholder risk oversight. The two principal regulatory innovations that Dodd-Frank sought to introduce in purported fulfilment of this objective were: (i) shareholder access to the corporate election ballot, and (ii) the introduction of precatory ‘say on pay’ procedures within US-listed firms, including (inter alia) on corporate disclosures relating to the highly controversial issue of CEO–worker pay ratios.

Under the first of these reforms, the Securities and Exchange Commission was vested with delegated statutory authority (under \(§\) 971 of Dodd-Frank) to formulate rules permitting shareholders of US-listed corporations to nominate their own candidates for election to the board of directors. This so-called ‘proxy access’ provision was designed so as to permit significant change to be made to the long-established traditional process for electing directors in US corporations, whereby the board of directors (and, indirectly, management) itself is vested with the exclusive right to determine the particular ‘slate’ of candidates that will be proposed to shareholders for election or re-election to the board each year (Bebchuk 2003).

In exercise of its rule-making authority in this regard, the SEC in 2010 promulgated the highly controversial Exchange Act Rule 14a-11 (see SEC 2010). Proposed SEC Rule 14a-11 purported to allow any ‘significant, long-term’ shareholder satisfying certain minimum ownership and holding requirements\(^9\) to have his or her directorial nominee or nominees\(^10\) included in the proxy voting card that is circulated by the corporation in advance of its annual shareholders’ meeting, alongside and in opposition to those candidates nominated by the board.

By virtue of the second of the above reforms, shareholders of US listed corporations were statutorily vested (under \(§\) 951 of Dodd-Frank) with the collective right to pass a periodic precatory (i.e. advisory) vote on the compensation arrangements for executive officers. This

\(^8\) See \(§\) 303A.02.

\(^9\) Specifically, the rule would have required a shareholder to have held at least three per cent of the company’s voting equity capital on a continuous basis for at least three years, before being entitled to invoke the directorial nomination procedure.

\(^10\) Under the proposed rule, a qualifying shareholder would have been entitled to nominate one director, or a number of directors together constituting no more than 25 per cent of the seats on the company’s board of directors (whichever is the greater).
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is an amended version of the so-called ‘say on pay’ procedures that have been a fixture of UK public company annual general meetings since 2002 (Gordon 2009). In a clear rejection of the contractarian paradigm, the SEC resolutely adopted the position that the proposed 14a-11 proxy access requirement should supersede any conflicting rules of state law, and also that its effect should be incapable of reversal or reduction by means of any corporate constitutional ‘opt-out’ provision (SEC 2010: 17–19).

Likewise, whilst the legislation granted a degree of leeway to firms in respect of the frequency of ‘say on pay’ resolutions,11 its basic position was nevertheless that such votes must be held at least once every three years, regardless of whether there is material investor demand to this effect (Gordon 2009). Moreover, in addition to mandating disclosure on orthodox compensation-related concerns relating to the correlation between executive pay and firm performance, Dodd-Frank (specifically, § 953(b) thereof) imposed a further requirement on US-listed corporations to disclose annually the ratio between: (i) the total amount of pay received by the firm’s CEO over the most recent year, and (ii) the median level of pay received by the rest of the firm’s employees (the so-called ‘pay ratio disclosure’).

In spite of the considerable procedural and substantive limitations on the above regulatory provisions, both the proxy access and ‘say on pay’ (including pay ratio disclosure) reforms attracted widespread criticism within the business and academic communities for a number of reasons (see e.g. Bainbridge 2012; Fisch 2012; Sharfman 2012; Kahan and Rock 2011; Bratton and Wachter 2010; Gordon 2009). A prominent cause of concern was the common perception of these rules as a further sharp lurch in the direction of widespread federalisation of ‘core’ US corporate law, and the concomitant threat that this posed to corporate law’s traditional private ordering dynamic (Bainbridge 2012).

A further source of unease was the fact that, since the relevant rules’ mandatory status renders them unsusceptible to bargaining and market ‘pricing’ by those persons whose interests are directly affected by them (i.e. investors and managers), they would be more likely to exhibit inefficiencies and, consequently, to have an overall wealth-reducing effect on the US corporate sector as a whole (Sharfman 2012). As regards the CEO–worker pay ratio disclosure requirement in particular, there was widespread unease amongst the managerial and professional-advisory communities as to the arguably doubtful practical worth of such information to investors, which seemed to bear little obvious relevance to orthodox corporate financial-performance criteria (SEC 2013: 96; although for a counter-perspective on this, see Moore 2015).

In respect of the proxy access issue, the above debate was rendered largely academic (in the pejorative sense) by the July 2011 decision of the DC Circuit Court of Appeals in Business Roundtable v SEC,12 which struck down proposed SEC Rule 14a-11 on Administrative Procedure Act grounds (see Fisch 2013; Brown 2011). Notwithstanding the invalidation of Rule 14a-11, the SEC nevertheless proceeded with the introduction of proxy access on a non-mandatory ‘opt-in’ basis by removing the former restriction in Rule 14a-8 on the tabling of shareholder resolutions relating to the reform of directorial election procedures. The effect was to slant the private ordering process considerably more in shareholders’ favour, whilst leaving companies ultimately free to determine their own procedures for

11 Specifically, Dodd-Frank prescribes that ‘say on pay’ votes take place either on a yearly, two-yearly or three-yearly basis, as determined by shareholders via a separate resolution on ‘say on pay’ vote frequency, itself to be held at least once every six years. See Dodd-Frank § 951(b).

12 647 F.3d 1144 (DC Cir 2011).
nomination of directors, as opposed to supplanting private ordering altogether with a regulatorily determined election procedure.

In contrast, the equally controversial ‘say on pay’ requirement was successfully brought into effect in its entirety in 2011. However, the SEC’s additional rules including CEO–worker pay ratio disclosure as part of the mandatory ‘say on pay’ process were (following significant public and political challenge) not implemented until August 2015. Moreover, even though the proxy access issue is now apparently off the public policy agenda (at least for the foreseeable future) – the Rule 14a-11 experience as a whole at least evidences the federal government’s occasional political resolve to attempt to override US (state) corporate law’s traditional private ordering dynamic where political circumstances would seem to necessitate a more interventionist regulatory stance (on this tendency generally, see Coffee 2012).

**Developments in the United Kingdom**

In the markedly different legal culture and political climate of the United Kingdom, there are signs of a corresponding de-privatisation trend within corporate law over recent years. Just as the US reforms discussed above have proved controversial within that country’s peculiar federalist and market-liberal law-making environment, some recent developments in the UK have created challenges that are in large part specific to Britain’s own path-dependent corporate governance system.

In respect of internal matters of board structure and function, the UK regulatory response to Enron and other corporate failures at the turn of the century was similarly extensive compared to the above-mentioned US reforms in terms of its impact on established national corporate governance practices. Ensuing British reforms came in the form of the Financial Reporting Council’s significant revisions to the UK’s (then-called) Combined Code on Corporate Governance in 2003, following the influential recommendations in 2002 of the Higgs and Smith Committees. These changes included the introduction of a requirement for US-style majority-independent boards within UK FTSE 350 companies, which represented a significant change to the executive-dominated, ‘majority-insider’ board model that had previously been customary within the British listed company sector. Also affirmatively required for the first time by the 2003 version of the code were fully independent and financially skilled audit committees, independent non-executive chairmen and senior independent directors. These requirements were reinforced, moreover, by a rigorous regulatory definition of directorial independence that established an effective presumption against long periods of office holding.

The 2003 Code reforms were by no means free from controversy in the UK (see e.g. Alcock 2003). Nevertheless, they largely escaped many of the criticisms levelled against the contemporaneous regulatory reforms in the US on account of the code’s officially ‘soft’ presumptive status as a set of non-statutory ‘best practice’ norms, underpinned by the market-invoking principle of ‘comply or explain’, rather than the binding and absolute force of state sanction. This feature of the code makes it difficult for critics of corporate governance reforms in the UK to raise SOX-esque concerns of ‘ill-fit’ with pre-existing norms, given the continuing flexibility afforded to British boards (formally if not always practically) to opt for reasoned non-compliance in cases where maladaptation concerns apparently render full code compliance cost-ineffective at the individual firm level.

The UK Corporate Governance Code (as it is called today) has thus been able to maintain its self-claimed status as a fundamentally facilitative and non-coercive institution, in spite of
the typically limited degree of deviation from its core norms that tends to occur in practice (on this, see Moore 2009: 117–29). The code’s perceived quasi-contractual ‘neutrality’ in the above regard has been crucial for maintaining its continuing legitimacy as a private ordering mechanism, and also the legitimacy of its promulgar – the Financial Reporting Council – as a non-statist rule-making body. This is in spite of the deep and sweeping reforms to British boardroom norms and practices that the code is widely acknowledged to have brought about over the past two decades, within a national political climate generally favourable to the increased regulation of corporate activities in the public interest.

Notwithstanding the general resilience of UK corporate law’s underpinning normative fabric to the regulatory developments described above, the characteristic privity of the UK corporate governance system has by no means been immune from challenge over recent years. Most notably in this regard, the UK has witnessed a growing trend of statutory ‘spread’ in corporate law, which would appear to evoke fundamentally similar concerns to those that have arisen with respect to the above-mentioned US regulatory reforms.

Domestically, the principal factor in this trend was the Blair/Brown Governments’ promulgation and implementation of the Companies Act 2006 which, at over 1300 sections long, constitutes the longest piece of legislation in British legal history. The most controversial aspect of the new Act has been its perceived ‘juridifying’ effect. Accordingly, an increased number of core corporate governance concerns in the UK, the most notable of which being the formulation and content of directors’ general duties, were displaced from their traditional common law or equitable realm into the arguably more rigid and politically reactive territory of statute law.

Additional to this has been the significant influence of EU harmonisation measures as an extraneous juridifying constraint on the operation and development of UK corporate law. Indeed, the notion of inter-jurisdictional harmonisation in the European sense is arguably antithetical to the rationality of private ordering. Whereas US-style competitive federalism operates on an endogenous ‘bottom-up’ basis, with any inter-state ‘harmonising’ initiatives (e.g. the American Bar Association’s influential Model Business Corporation Act) merely reflective of pre-established regulatory best practice; EU-style harmonisation by contrast works in an exogenous ‘top-down’ manner, and for the express purpose of driving substantive convergence between different legal systems where it would not otherwise be inclined to exist.

Therefore, in spite of what may be connoted by the notion of ‘harmony’, harmonisation of laws is in reality a process that entails varying degrees of mandated regulatory conformity at the individual state level, at least insofar as the subject state wishes to remain part of the relevant inter-state order. These characteristics contradict the basic tenets of voluntariness and unanimity that underpin the contractarian concept of the ‘prudential state’ as an individually rational rule-selector. Furthermore, harmonisation measures require formal implementation within a member state’s legal system in order for the relevant state to be deemed compliant with its treaty obligations. The effect is that statutory entrenchment of practices and institutions becomes the regulatory norm, in some cases at the expense of institutional flexibility or diversity.

In UK corporate law, the most conspicuous and controversial example of EU-compelled juridification has occurred in the area of takeover regulation. As explained above, the regulation of public company takeovers in the UK is administered on a relatively informal basis by the non-governmental Panel on Takeovers and Mergers, which promulgates and enforces the non-statutory UK Takeover Code. In light of the Panel and Code’s widely acknowledged success in this regard, the EU Takeover Directive – which came into force
in 2004 – was designed with a view to extending long-established features of the UK’s flexible and market-liberal system of takeover regulation (including, inter alia, the mandatory bid requirement and ‘no-frustration’ doctrine) across EU Member States as a whole. The ultimate policy objective was to afford heightened protection to cross-border investors in respect of control-related issues and, in turn, facilitate the free movement of corporate capital on a Community-wide basis.\(^{13}\)

However, whilst the content of the directive has been heavily influenced by pre-existing UK takeover norms, the subsequent trans-European harmonisation of these rules has necessarily entailed that the UK itself formally implement the provisions of the directive, thereby reducing to an extent the previous informality of the relevant norms at domestic level. Thus, a curious side-effect of the directive has been to require the UK to give statutory authorisation to the Takeover Panel in formal support of its rule-making, executive and adjudicative functions, notwithstanding the fact that the Panel has been carrying out these functions for the past four decades. More fundamentally, Part 28 of the UK Companies Act 2006 – in addition to formally establishing the Panel’s powers and its new right of judicial recourse for enforcement of sanctions – also gives express statutory recognition to the Panel for the first time in its history. As a result, the Panel has – somewhat inadvertently – become entrenched as an indirect part of the British Government apparatus, thereby transforming it from a private sector institution into a quasi-public regulatory agency.

**Normative implications of the de-privatisation trend in Anglo–American corporate law**

The analysis above does not purport to provide a remotely comprehensive survey of the US and UK corporate governance systems by any means. Rather, the purpose of the foregoing discussion is simply to highlight an arguable trend towards greater mandatory regulatory intervention in core aspects of Anglo–American corporate governance, as manifested in some conspicuous key respects. From a contractarian perspective, it could be said that this trend – if it continues – potentially threatens the characteristic privity of Anglo–American corporate law, by undermining its traditionally perceived nature as a facilitative body of rules reflective of prudential contractual choices. However, on closer examination, these regulatory reforms and initiatives are not particularly unusual within the wider institutional framework of Anglo–American corporate law as a whole. In fact, both US and UK corporate law (understood in a broad and inclusive sense) have for a long time exhibited significant mandatory components that, prima facie at least, take the form of public-interventionist regulation rather than quasi-contractual norms.

In particular, it is largely beyond question today (even amongst adherents to the contractarian paradigm of corporate law) that the mandatory regulation of corporate securities markets – specifically, the regulatory compulsion of corporate information disclosure to the investing public – is a structurally necessary component of any effective corporate financing and governance system. Indeed, it is commonly accepted that in any market environment (but especially in complex financial securities markets) information has the special status of a ‘public good’: that is to say, it is both non-excludable and non-divisible. The former quality denotes that those who expend the costs involved in producing and verifying information

\(^{13}\) See Directive 2004/25/EC (preamble).
cannot exclude those who have not paid for it from benefiting from it, insofar as information is by its very nature capable of (and also prone to) being circulated beyond its immediate recipients. The latter quality indicates that information – unlike most other commodities – is not exhausted or diminished in utility by being used, with the effect that those who pay to receive information will continue to derive significant use value from it even in the presence of a number of ‘free-riders’ who also stand to benefit from it indirectly (Easterbrook and Fischel 1984: 681).

Against this background, where information is generated and verified by private actors alone, those paying for the information will – owing to the inevitability of free-riders – be incapable of appropriating all of the benefits of their search efforts (Coffee 1984: 726–7). As a result, such persons will be disinclined to invest in acquiring information to the optimal extent that they would if they could exclusively exploit the full economic benefits thereof. It follows that corporate information will be systematically under-produced; or, more likely, over-produced in certain isolated respects (that paying investors value most), whilst under-produced in others (Easterbrook and Fischel 1984: 681–2).

This is one of the classic economic situations where the pursuit (by investors) of individual rationality en masse leads not to overall allocative efficiency, but rather to the ‘collective folly’ of a socially sub-optimal outcome (specifically, informational incompleteness and imbalance in corporate securities markets). Accordingly, since private actors (i.e. investors) will not be inclined to generate individually the quantity and quality of company data that they would ideally wish for as a general group, a mandated universal system of disclosure is arguably necessary in order to ‘correct’ this innate disparity between individual and collective rationality, so as to produce an optimal level of information from the perspective of investors (and, in turn, society) as a whole.

On a normative level, the accommodation of mandatory disclosure regulation within an institutional paradigm otherwise hostile to regulatory interference in private ordering is achieved by drawing a (frequently grey) conceptual ‘dividing line’ between the purportedly distinct spheres of: (i) corporate/company law, and (ii) securities/capital markets law. The former is presented as an aspect of facilitative private law, and the latter – contrarily – as a subset of public-regulatory law. Accordingly, securities law is purportedly dedicated to the mandatory and pre-contractual ‘correction’ of structural market failures that would otherwise inhibit the efficient operation of private ordering processes within corporate law. On this basis, federal legislative and administrative control over corporate disclosure regulation has been widely accepted in the United States as both functionally necessary and politically legitimate, in spite of the internal affairs doctrine’s formal hostility to supra-state intervention in other areas of corporate governance.

Given the irrelevance of such intra-national federalist concerns to UK corporate governance, the importance of ensuring a distinct division between company and capital markets law has been of lesser normative importance within the British regulatory environment. Here the principal legal rules pertaining to the disclosure and verification of information in respect of UK-listed companies are situated in a somewhat disorderly and seemingly illogical domain, spanning parts of orthodox corporate law and financial markets legislation, as well as the listing requirements of the London Stock Exchange.

Irrespective of the specific national institutional environment, however, understanding corporate disclosure regulation as a non-corporate law field is – for a variety of reasons – highly convenient both doctrinally and politically. On a policy level, it legitimises federal interventions in the US (such as the SOX and Dodd-Frank reforms discussed above) that, whilst formerly billed as aspects of securities law, nevertheless carry a significant internal
corporate governance ‘sting in the tail’. In the UK and wider European context, meanwhile, the normative effect of branding a particular EU regulatory innovation in corporate governance (e.g. the Takeover Directive or Shareholder Rights Directive14) as an aspect of capital markets rather than company law is to legitimise it on common market grounds as a facilitator of cross-border free movement of financial capital. In such instance, the political impediments to successful trans-national importation of the provision in question are likely to be less severe (although by no means absent) than if the relevant innovation purported to be concerned exclusively with the so-called ‘social dimension’ of European integration as it applies to intra-company governance relations and the distribution of power and wealth between corporate participants.

Moreover, regarding corporate and securities law in distinction from one another matters a great deal on a conceptual level, insofar as it enables the validity of the contractarian paradigm in corporate law to be continually asserted notwithstanding the arguable incongruity between the theoretical ideal and empirical reality. This is because aspects of corporate governance – such as mandatory disclosure regulation – that fail to fit the facilitative, private ordering paradigm in corporate governance – such as mandatory disclosure regulation – that fail to fit the facilitative, private ordering blueprint can effectively be ‘carved out’ of the conceptual picture, leaving only those features of the law that support the prevailing theoretical characterisation of the subject-matter.

An outstanding definitional difficulty with this distinction, however, is that some commonly accepted elements of so-called securities or capital markets law – including proxy rules, anti-fraud legislation and significant/extraordinary transaction approval requirements – affect corporate governance in ways beyond merely mandating ongoing corporate transparency. However, even in ‘standard’ situations where compulsory corporate disclosure regulation does little more than render corporate affairs and performance more conspicuous to the investor community, it cannot be said that this outcome is either extraneous to, or formally separable from, so-called ‘core’ corporate governance processes and norms (as the US internal affairs doctrine would seem to imply). Mandated corporate transparency, even in the most basic form of requiring periodic disclosures on ongoing financial performance, entails the regulatory state going considerably above and beyond its limited neo-liberal remit of enforcing contracts, property rights and surrounding ‘rules-of-the-game’ (on this notion, see Friedman 1962: 27).

Rather, a publicly mandated disclosure regime for the benefit of investors constitutes direct governmental action aimed at mitigating the informational disparity between managers and shareholders, so as to recalibrate – by means of interventionist regulation – the prevailing balance of governance power in the latter constituency’s favour. This is arguably at least as much an aspect of direct investor protectionism inspired by political-distributional considerations, as it is a technical means of correcting failures in securities market pricing mechanisms.

Consequently, mandatory securities laws are not as readily susceptible to conceptual expulsion from the realm of ‘internal’ corporate to ‘external’ regulatory law as contractarian theorists have sought to infer. This important finding has the normative effect of blurring the conventionally perceived boundaries of corporate law as a subject and, in turn, undermining the purported privity of Anglo-American corporate law as asserted within the dominant contractarian frame of reference.

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14 Directive 2007/36/EC.
Conclusion

The long-standing presence of mandatory and irreversible corporate law rules, in whatever rhetorical guise, poses a difficult descriptive challenge for those who seek to present corporate law as a principally private-contractual, rather than public-regulatory, phenomenon. Moreover, once the inherent artificiality of the corporate/securities law divide is recognised, it becomes impossible to rationalise these features by reference to the orthodox conceptual reference points of private ordering and market failure analysis.

The unavoidable conclusion is that Anglo–American corporate law is an undeniably public phenomenon, whose innate regulatory dimensions cannot readily be explained away by recourse to contractarian logic. Only when scholars and students of the subject on both sides of the Atlantic are willing to accept this fundamental descriptive premise will it become possible to develop a new normative theory of corporate law that might displace the incumbent contractarian paradigm.

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