Preface

This was originally supposed to be a book about the global financial crisis. I first thought up the basic idea for the book in late 2008, in the wake of the major banking collapses that occurred in the United States and United Kingdom around this time, and the extensive government action that they entailed. My initial aim was to provide a critical analysis of corporate governance law and theory in these countries in light of the issues that recent events had exposed, especially concerning the essential role of the state in the private sector of the economy. In the intervening four years, though, much ink has been spilt on this general topic, and many people – myself included – have grown tired of reading and talking about the ubiquitous 'c' word ('crisis', that is!). Accordingly, while the experience of the crisis remains highly pertinent for the discussion that follows, this has in fact turned out to be a book about Anglo-American corporate governance more generally. Specifically, it is a book that is concerned principally with how we, as academics and scholars, *think* about the respective bodies of laws relating to corporate governance in the United States and United Kingdom. This is in distinction from, but by no means entirely detached from, the practical questions about how those laws operate within the relevant jurisdictions.

Above all, this book aims to make sense of, and also challenge, the underlying assumptions that we commonly bring to bear on our studies of Anglo-American corporate governance – particularly with respect to the supposedly 'private' nature of the phenomenon, and the limited involvement of the state therein. In approaching this task, I have tried – as best as possible – to adopt a 'neutral' point of view, by analysing the relevant laws and their underpinning theoretical rationales at face value and on their own terms – that is to say, without any particular normative predisposition or bias. Of course, the fallibility of the human condition is such that no scholarly account of any social-scientific phenomenon can ever be truly 'colourless' in this regard, although I hope that my standpoint is sufficiently impartial to elicit the attention of readers from across the political spectrum.

As will become clear fairly early in the following discussion, it has long been my belief that the dominant way of thinking about corporate governance laws in the United States and United Kingdom – namely, the 'contractarian' or 'nexus of contracts' paradigm of the subject – is in many respects not entirely satisfactory. In particular, I feel that the particular ideological 'picture' that contractarian theorists seek to present in their

work – emphasising the primacy of (market-determined) private ordering over (state-determined) public policy in propelling the law's evolution – is, to a significant extent, out of keeping with the 'real' nature and content of its subject-matter. At the same time, I am cognisant of the immense value of this particular school of thought in aiding the teaching and learning of both corporate governance and corporate law more generally. Indeed, few would deny that the contractarian paradigm, for all its arguable faults and limitations, is largely creditable for the status that corporate governance enjoys today as a respectable and intellectually rigorous field of academic enquiry. With this consideration in mind, I am wary about engaging in the practice of 'contractarianism-bashing' that has become popular within progressive varieties of corporate law scholarship over the past two decades. At the same time, though, I believe that there remain some fundamental – and, as yet, unresolved – issues concerning the empirical and logical validity of the contractarian approach, which risk either obstructing – or, at worst, *derailing* – the continuing constructive development of legal scholarship in this field.

Although the actual writing of this book took place exclusively over the last two years, the ideas and thinking behind it have been many years in the making. Since I began teaching my graduate course in Anglo-American corporate governance some seven years ago, it has been my intention to present the subject to students as a subject of distinctly *legal* enquiry. To this end, I have consistently encouraged students to understand and evaluate the key laws and institutions in this field in accordance with what are, at root, characteristically legal criteria. I have always believed that corporate governance – viewed from a law (as opposed to economics or business) student's perspective – should be concerned at least as much with the legalistic concepts of power, accountability and legitimacy, as it should be with the economistic criteria of efficiency, profitability, and regulatory cost-effectiveness. I hope that, in the discussion that follows, I am – at the very least – able to impart this method of thinking about corporate governance to some students and scholars outside the walls of my seminar rooms, regardless of whether they agree with everything that I have to say about the subject.

In researching and writing this book, I have been fortunate to have benefitted from the assistance of a number of people who were kind enough to share their valuable time and expertise with me over recent months and years. I am especially indebted to Iris Chiu, David Kershaw, Harry McVea and Edward Walker-Arnott, for their insightful comments on some earlier draft chapters. I have presented parts of this book at various conferences and workshops over the past few years in both the United Kingdom and United States. I am thankful for invitations, comments, criticisms and words of encouragement received from participants at all of these events. Special thanks in this regard are due to John Armour, Brian

Cheffins, Blanaid Clarke, Paul Davies, Simon Deakin, Alan Dignam, Paddy Ireland, Ciaran O'Kelly, Andreas Kokkinis, Chris Riley and Sally Wheeler. I am also thankful for conversations with Roger Barker, Carrie Bradshaw, Pat Capps, Anna Donovan, Nick Gould, Claire Moore, Antoine Reberioux, Arad Reisberg and William Wright, which have likewise helped to shape my thinking in many important respects. Of course, in acknowledging the above individuals, I am in no way suggesting that they would personally endorse any of the views expressed in this book – on the contrary, I suspect that one or two may strongly disagree with certain aspects of what I have to say!

Thanks also to Panos Koutrakos, for initially encouraging me to get my idea for this book off the ground. I am furthermore grateful to all of the excellent company law and corporate governance students at both UCL and Bristol with whom I have had the privilege of discussing the ideas in this book over the course of my teaching career. And I must make special mention of my JD Business Entities class at Seattle University in spring term 2011, for their willingness to be taught the finer points of US corporate law by a rambling and somewhat idiosyncratic Scotsman!

I wrote a significant part of this book during a four-month spell in early 2011 at the Adolf A Berle, Jr Center on Corporations, Law & Society, based in the Seattle University School of Law. I am grateful to Chuck O'Kelley for inviting me to work at the Center, and also for the many informative and inspiring conversations that we've had about corporate governance, law and political economy both during and since then. My understanding of the complexities of US corporate law would not be what it is without the benefit of Chuck's superb knowledge, insights and time-generosity. I am further indebted to Bob Menanteaux from the Seattle University Law Library, for his generosity in securing for me various pieces of obscure literature from across the US northwest on inter-library loan. These sources turned out to be central to the research that I conducted whilst at the Berle Center. I am also thankful to Randall Thomas, for inviting me to present my work to the corporate law students at Vanderbilt University in spring 2011 – an experience from which I benefited greatly.

Fortunately, a recurrent theme in my career has been the inexplicable willingness of many important people to put their faith in me, despite having little-to-no tangible evidence to justify those beliefs! This list includes John Lowry, my former head of department and current company law teaching colleague at UCL, and also Richard Hart, who as a publisher has consistently been enthusiastic, encouraging and understanding about this project, despite my running over our initially agreed deadline for the book. In this regard, I must also mention the late John Parkinson, who agreed to accept me as his PhD supervisee at the University of Bristol in 2001 on the basis of a five-minute telephone conversation, and with no more than an undergraduate law degree to my

name! I am indebted to John for being such a patient, open-minded and inspirational supervisor to me, up until his tragic and untimely death in early 2004. In my opinion, John's classic 1993 work *Corporate Power and Responsibility* remains one of the most pioneering and conceptually sophisticated works in the history of corporate law academia. I only hope that I have done justice to John's legacy by producing a work that in some way comes close to meeting his high standards, although whether he would have agreed personally with my approach and arguments herein is quite another matter! I must also pay my thanks to Charlotte Villiers, for being a constant source of support and inspiration in her multi-faceted role as my LLB dissertation supervisor at the University of Glasgow, my 'stand-in' PhD supervisor at Bristol after John's death, and – latterly – a valued academic colleague and friend more generally.

Finally, I must thank the two people in the world who have done the most to make this work a reality. First, I am eternally thankful to my mother and friend Catherine McGee, who has contributed in more ways than could be imagined to enabling me to follow my chosen career. Without her persistent self-sacrifices throughout the most testing of circumstances, I would no doubt be in a very different place. Secondly, I am forever grateful to my wife Emily, who has been a constant source of love and support throughout the past 13 years, despite having to deal with some tremendous personal and professional challenges of her own during these times. More recently, Emily has very patiently put up with my many solitary hours over the past months spent in the study, while acting as the best (and worst paid!) research assistant that an author could possibly wish for. I can say in all sincerity that without Emily, this book (like so many other things in our life) would not have existed.

Last but certainly not least, thanks to George – for keeping me sane over the past year in his own unique little way!

Marc Moore
27 July 2012, London

1

Introduction

I. WHAT IS THIS BOOK ABOUT?

IN THIS BOOK, I will attempt to answer the following question: *what is the fundamental nature of the laws relating to the governance of public corporations in the United States and United Kingdom?*

Above all, I will examine whether so-called 'Anglo-American' corporate governance is more appropriately characterised as an area of *private* or facilitative law, or else as an aspect of *public* or regulatory law. This question is not just an academic one in the pejorative sense. On the contrary, it is arguably the most important issue confronting those who study or teach the subject of corporate governance in any level of depth or analytical rigour.

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 don't 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 governance – and indeed corporate law generally – is as an aspect of private or facilitative law. As such, corporate (or company[1]) law is conventionally bracketed alongside other traditional

[1] Whereas the term 'corporate law' is ordinarily used in the US, in the UK it is still customary to refer to the law of incorporated business entities as 'company law'. On the historical origins of this semantic distinction, see below ch 5 of this volume, fn 11 and accompanying text. For purposes of authorial convenience, I will tend to use the former of these terms in this book.

private law subjects such as contract, property,[2] equity, agency and trusts law. Accordingly, the efficacy of the various laws and regulations concerning corporate governance in the United States and United Kingdom 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 – in the last place – the common or ordinary shareholders who supply the corporation's equity or risk capital; and, by necessary implication, 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 governance laws should be to reflect or 'mimic' the governance 'terms' that shareholders and managers would be inclined to agree upon with one another privately, in the hypothetical scenario where no antecedent laws exist and therefore all norms stand to be determined by private negotiation alone.[3] This is what is commonly known as the 'contractarian' or 'nexus of contracts' theory of corporate law.

Correspondingly, corporate law is ordinarily *not* characterised as an aspect of 'public'[4] or regulatory law, in the way that subjects like tort,[5] or

[2] Although property law is unquestionably part of private law, whether it is a 'facilitative' area of law in the sense of the other topics in this list is open to question. Arguably, property law is more correctly understood as a *market-constitutive* (and thus *pre-facilitative*) area of law insofar as it delineates the set of social relations that are conventionally understood to constitute ownership, on which basis productive exchange becomes possible. However, for purposes of argumentative convenience, I will regard this function of property as being facilitative in itself, thereby justifying property law being viewed on the same plane as these other, notionally private law subjects. In any event, one may make a similar claim about contract law, on the basis that modern social exchange relations are arguably not innate or pre-ordained in a proverbial state of nature, but rather are artificially constituted by judicial doctrines that define the essential features of an enforceable promise. As important as these concerns are for lawyers, though, they lie outside of the scope of the present study. For an authoritative exposition of the concept of property as an artificial and juridically constituted 'bundle of rights', see WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710. For an excellent critical perspective on these issues, drawing on the work of the American legal realist Robert Lee Hale, see P Ireland, *Property and Contract in Contemporary Corporate Theory* (2003) 23 *Legal Studies* 453, 486–91.

[3] The most comprehensive and influential statement of this conception of corporate law is provided by Easterbrook and Fischel's now classic work, *The Economic Structure of Corporate Law* (Cambridge MA, Harvard University Press, 1991).

[4] To clear up any potential confusion amongst readers, I am not using the term 'public law' here in its conventional doctrinal sense, which tends to denote areas of law that govern the relationship between individual citizens and the state, including constitutional and administrative law. Rather, I use the term here essentially to refer to 'non-private' or regulatory areas of the law that affect the activities of business corporations, and for want of a better word for this purpose.

[5] No doubt many English private lawyers will dispute my inclusion of tort law within the 'non-private' category of legal topics. However, insofar as tort law is designed to regulate the ex post facto risk-distributive outcomes of economic activity, and thus only indirectly affects the ex ante prudential motivations therefor, it is in my opinion more appropriately situated within this latter list. In view of the fact that the vast majority of tort claims (espe-

criminal, environmental, antitrust (or competition) and securities law[6] are. That is to say, unlike the above areas of law, corporate law – including corporate governance law[7] – 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 governance 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.

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 physical 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

cially concerning large businesses) are settled on a negotiated 'out of court' basis, there is an argument to say that tort law is best understood as a market-*facilitative* area of law designed to provide a framework for the retrospective 'purchase' by a tortfeasor of the victim's right not to be wrongfully harmed. On this, see PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979) 750. Accordingly, in categorising tort law in the above way, I do not deny being guilty of a degree of deliberate conceptual over-simplification.

[6] On the (somewhat arbitrary) substantive distinction that is customarily drawn between corporate law and securities (or, in Europe, capital markets) law, see below ch 6 of this volume, pt II.C–E.

[7] On the distinction between corporate *governance* law and corporate law more generally, see my introduction to ch 3 of this volume below.

order to establish (or change) the points of reference 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 in elsewhere – '*ought*' judgements are ultimately dependent to a large extent on '*is*' judgements, because in order to be able to critically evaluate a subject we must first of all understand its key attributes and qualities.[8] 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.

In the field of corporate governance, the main 'is' dispute concerns the alleged 'private' v 'public' nature of the laws in this field – that is, to what extent can corporate governance laws 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 governance 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 governance law, one is 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 such.[9]

Conversely, proponents of the latter (synthetic) view of corporate governance 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.[10]

[8] At the same time, it may conversely be said that 'is' judgements are to a large extent dependent on preceding 'ought' judgements, insofar as it is impossible to make sense of any social phenomenon without first having a preordained sense of its perceived purpose or objective. On the 'is–ought' distinction in legal discourse generally, and also the distinction between (i) sheer physical facts and (ii) institutional facts as interpreted – and thus given meaning – through the lens of a given normative order, see N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, Oxford University Press, 2007) chs 1 and 2; N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) ch 1.

[9] On this, see JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford, Oxford University Press, 1993) 25–32.

[10] On the distinction between socially-determinative and non-socially-determinative conceptions of the purpose of corporate law, see D Millon, 'New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law' (1993) 50 *Washington and Lee Law Review* 1373.

As will be demonstrated in later chapters, to a significant extent the contractarian characterisation is supported – albeit it in different ways – by the actual form and substance of corporate governance law as it exists in both the United States and United Kingdom.[11] However, a comparatively significant body of existing Anglo-American corporate governance rules and principles would – at first sight anyhow – appear to undermine or at least challenge the dominant contractarian portrayal of the law in this area as being purely facilitative, by suggesting that corporate governance law is in fact imbued with a heavily 'public' or regulatory impetus.[12] In particular, the fact that many fundamental norms of Anglo-American corporate governance are determined on a mandatory (and thus contractually irreversible) basis – either directly or indirectly at the behest of the regulatory state – sits uneasily alongside the dominant contractarian portrayal of corporate laws as being the flexible, instrumental and *non*-socially-determinative outcome of private selection methods based on rational (shareholder and managerial) choice.

The most problematic feature of mandatory rules from a contractarian perspective is the fact that they are necessarily subject to universalistic or 'across the board' application, and hence by definition *cannot* be responsive to individual preferences or firm-specific circumstances that might merit the occasional exception from the regulatory norm. Accordingly, consideration for collective conformity on a macro (ie system-wide) basis effectively trumps any conflicting concern for respecting private ordering at the micro (ie individual firm) level. Insofar as the permissible ambit of private ordering in corporate governance is in this way restricted by externally-imposed regulatory boundaries, it can consequently be said that the process of legal-institutional evolution in corporate governance is one which – although in many respects organic and quasi-contractual in nature – nonetheless operates substantially *in the shadow of* the interventionist regulatory state.

Against this background, if the contractarian position is to retain its normative argumentative force, it must be capable of providing a convincing explanation for the significant presence of prima facie regulatory laws within the corporate governance field. In fairness, defenders of the contractarian paradigm of corporate governance have been acutely cognisant of the conceptual difficulties which mandatory rules pose for the continuing validity of their empirical and, in turn, normative claims. In my view, though, the principal arguments that have been advanced by contractarians in response to these difficulties have – with limited exception – been at

[11] On the principal manifestations of the contractarian paradigm within the doctrinal frameworks of US and UK corporate governance law, see below chs 4 and 5 of this volume respectively.

[12] On the principal 'public' or regulatory dimensions of Anglo-American corporate governance law, see below ch 6 of this volume.

best unconvincing, and at worst fundamentally *paradoxical* (and thus self-defeating).[13]

However, whilst identifying the weaknesses in the contractarian rationalisation of mandatory rules is one thing, providing an alternative positive explanation for the widespread regulatory features of Anglo-American corporate governance law is quite another. To this end, I will attempt towards the end of the book to develop what I believe to be a more convincing explanation for the somewhat peculiar combination of facilitative and regulatory rules that together constitute the key laws of corporate governance as they apply in the United States and United Kingdom respectively.[14] The counter-explanation that I will offer for the prevailing structure of the law in this field is, I believe, at root consistent with the basic impetus of the contractarian position. However, in contrast to contractarianism, it involves recognising the inherent limitations to effective private ordering of corporate governance at the individual firm level, and the consequent inevitability of regulatory state interventionism as a necessary means of achieving the core objectives of the law in this area.

Finally, I will outline the normative consequences that acceptance of this position tends towards. Essentially, it entails accepting a significantly wider ambit of regulatory state involvement in the development of governance norms at the macro level, as a logically necessary precondition to the effective functioning of Anglo-American corporate governance as a whole.

II. THE PLAN FOR THE BOOK

Accordingly, the 'road map' for the discussion in this book is as follows. In chapter two, I will attempt to define corporate governance as a subject of legal-academic enquiry, which is a necessary preliminary to the subsequent analysis of its fundamental nature as an area of law. Here I will argue that, whatever one's specific view as to the fundamental (facilitative or regulatory) nature of corporate governance law, there are certain core aspects of the subject that are constant and, moreover, intrinsic to the subject by virtue of its very nature.

Thus any corporate governance system is, ultimately, designed to ensure that those who possess and exercise *power* within the corporate structure (namely managers) are perceived by those who are directly subject to such power (principally shareholders) as being effectively held *accountable* for their exercise of that power, so as to *legitimate* the former group's continuing possession and exercise of such power in the eyes of

[13] On this, see below ch 7 of this volume.
[14] See below ch 7 of this volume, pt V.

the latter. The three core and irreducible elements of any framework of corporate governance law, accordingly, are: (i) power, (ii) accountability, and – ultimately – (iii) legitimacy.

Essentially, *power* represents the initial corporate governance problem, with *accountability* being the solution, and *legitimacy* the consequence which follows from successful resolution of the corporate power problem. I will submit that the answer to the question of how effectively managerial accountability is achieved inevitably differs depending on how one perceives the fundamental nature of corporate governance law. However, regardless of one's particular theoretical perspective, the above trichotomy of factors is – in my opinion – a necessary constant of *any* meaningful corporate governance debate.

In chapter three, I will examine the dominant contractarian characterisation of corporate governance law in detail. Above all, I will seek to demonstrate how the contractarian paradigm is dependent on a peculiarly passive-instrumentalist understanding of corporate law as a phenomenon that is in the last place *determined by*, rather than determinative of, the private preferences and bargains of individual corporate participants (principally shareholders and managers).

In seeking to (empirically) demonstrate and (normatively) defend the purported 'privity' of corporate law – including corporate governance law – in the sense of its inherently private or transactional nature, contractarianism implicitly denies any effective role for regulatory state interventionism in determining the legal ordering of internal corporate affairs. Rather, effective managerial accountability, and – in turn – the legitimacy of managers' continuing possession and exercise of power, is believed to be most appropriately determined on a decentralised, micro level in accordance with firm-specific governance norms and institutions.

Corporate governance is thus presented as a contractual rather than regulatory creation. The purpose of the 'regulatory' state within this model, meanwhile, is merely to supply the most popular governance 'terms' to corporate participants on an 'off-the-shelf' basis, so as to save participants (principally shareholders) the extensive transaction costs that would otherwise be involved in devising such norms from scratch. Over and above this base facilitative level of involvement, however, the state is perceived as having no further material role to play in engendering effective managerial accountability within public corporations.

In chapters four and five, I will demonstrate the main respects in which the contractarian paradigm of corporate governance law is actually manifested within the US and UK frameworks of corporate governance law respectively. I will explain how the prima facie contractual nature of both systems has (empirically) reinforced – and in turn been (normatively) reinforced by – the popular contractarian understanding of corporate law.

The principal doctrinal embodiments of the contractarian tradition within US corporate governance are the commodified 'opt-out' and 'choice' traditions of corporate law design that persist at State (especially Delaware) level, and also the long tradition of judicial deference to the internal contractual autonomy of corporations as manifested in the business judgment rule at common law. Both of these phenomena will be explored in chapter four.

In the United Kingdom, by comparison, the influence of contractarian logic is demonstrated most conspicuously in the significant degree of regulatory deference apparently afforded to so-called 'soft law' norms that are promulgated outside of government and which depend mainly on market pressures, rather than the binding force of state sanction, for their effectiveness in eliciting managerial behavioural change. Meanwhile, judicial deference to internal corporate autonomy likewise persists in the English common law environment under the doctrinal label of the 'internal management' doctrine. This rule, together with the comparably longstanding contractual principle that underpins the juridical character of the corporate constitution, has operated so as to affirm the characteristic 'privity' of UK corporate law in the sense of its inherently *facilitative* and *non*-regulatory nature. These issues will be analysed in chapter five.

A key theme that I will seek to draw out from these two chapters' doctrinal analyses is the extent to which – and variety of ways in which – the regulatory state has taken a proverbial 'back seat' when it comes to establishing effective managerial accountability mechanisms at the micro level. In many respects, both legislators and courts have restricted their respective law-making functions to the provision of broad procedural standards and mechanisms, which provide a facilitative framework for private ordering within individual companies. This has ultimately left corporate participants with a material degree of self-regulatory 'space' in which to determine directly, and on an individual firm basis, which substantive accountability norms will govern their ongoing governance relationships with one another. Such a finding has the effect of affirming – to a considerable extent – the empirical validity (and, in turn, normative persuasiveness) of the contractarian characterisation of corporate governance law.

As against this, however, in chapter six I will seek to demonstrate that the contractarian paradigm – in spite of its substantial descriptive accuracy in the above ways – is nonetheless significantly limited empirically in a number of other comparably important respects. For a start, the growing compliance costs encountered by Anglo-American (and especially US) public corporations in adapting to a continuously expanding corporate governance regulatory agenda over the past decade have put into question the contractarian claim that legal rules in this area are primarily the result of flexible private ordering rather than coercive state

sanction.[15] On a more fundamental level, meanwhile, the extent to which both US and UK corporate governance law is – and has for a long time been – pervaded by significant mandatory elements would appear, at least on first inspection, to undermine seriously the forcefulness of the theory's normative claims about the rightful form and content of the law in this field. Therefore, insofar as many core managerial accountability norms are determined not at the individual firm level, but rather on a centralised and universalistic basis, some further explanation is required in order to demonstrate that such outcomes are driven principally by private-contractual – rather than public-regulatory – pressures.

Accordingly, in chapter seven, I will critically evaluate the main contractarian rationalisations of mandatory corporate governance rules. In other words, how have defenders of the contractarian paradigm sought to justify their 'private ordering' conception of corporate governance in spite of the fact that, in many crucial respects, the basic (mandatory) structure of the relevant legal rules prima facie lends credence to a public-regulatory understanding of this area of law? Here I will attempt to demonstrate that all of the main contractarian explanations for mandatory rules in corporate governance, in spite of their undeniable intellectual sophistication, are nonetheless highly problematic on either an empirical or logical level.

I will therefore attempt in the final part of chapter seven to provide a more convincing and defensible rationalisation of the prevailing (dual facilitative and regulatory) structure of Anglo-American corporate governance law today. In essence, I will seek to highlight the impossibility of engendering an effective – and thus legitimate – framework for formal managerial account-giving within widely-held public corporations on a decentralised, micro basis. I will argue, rather, that effective accountability in corporate governance, and the resultant sustainability of the Anglo-American governance system as a whole, are necessarily dependent on the interventionist regulatory state as an active and ever-present corporate governance participant at the macro level. Additionally, I will explore the most notable normative consequences that tend to follow from acceptance of my re-characterisation of corporate governance law. Essentially, I will argue that scholars and students of Anglo-American corporate governance law must in general be considerably more willing than they have been in the past to embrace the (essential) regulatory dynamics of their subject.

[15] On this issue generally (viewed from a US perspective), see L Ribstein, 'International Implications of Sarbanes-Oxley: Raising the Rent on US Law' (2003) 3 *Journal of Corporate Law Studies* 299; A Barden, 'US Corporate Law Reform Post-Enron: A Significant Imposition on Private Ordering of Corporate Governance?' (2005) 5 *Journal of Corporate Law Studies* 167; R Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance' (2005) 114 *Yale Law Journal* 1521; S Bainbridge, 'Dodd-Frank: Quack Federal Corporate Governance Round II' (2010) UCLA School of Law, Law-Econ Research Paper No 10-12, available at: ssrn.com/abstract=1673575.

Finally, in chapter eight I will summarise the conclusions of the book as a whole, and also make some suggestions for future avenues of enquiry that that would be constructive either in developing or testing the hypotheses advanced herein.

III. PROVISOS TO THE FOLLOWING DISCUSSION

Before continuing, two important substantive provisos should be noted at this point. First, given the extraordinary significance of the managerial power phenomenon as it operates within widely-held corporate ownership environments, the following study – in contrast to standard accounts or analyses of company law – will be concentrated exclusively on *public* corporations: that is, companies whose shares are traded on a public equity market and which consequently exhibit the characteristic known popularly as the separation of ownership and control.[16]

Although I acknowledge the potential (albeit limited) applicability of some of this book's insights concerning power, accountability and legitimacy to larger-scale private or closely-held companies, I can only say by way of defence that concern for the length and thematic consistency of the book have necessitated the imposition of a substantive 'cut-off point' in this regard; and the public/private company divide – while admittedly imperfect – appeared to be the most logical and, correspondingly, least arbitrary such threshold to adopt.

Secondly, the scope of the discussion that follows is, for pragmatic reasons, restricted exclusively to the so-called 'Anglo-American' environment: in other words, to the corporate governance systems of the United States and United Kingdom. Insofar as both these systems share basically similar institutional features[17] and also a broadly comparable – albeit by no means equivalent – politico-economic climate,[18] their common analysis is in my opinion both appropriate and mutually reinforcing. That said, it is imperative to be aware of the significant differences between these two countries' respective legal, market and political environments, and throughout this book it is my intention to avoid the common trap of obfuscating these distinctions via blunt and inconsiderate usage of the 'Anglo-American' label.[19]

[16] On this notion generally, see AA Berle and G Means, *The Modern Corporation and Private Property*, 4th edn (New York, Harcourt, Brace & World, 1968) (first published 1932).

[17] Most notable amongst these are widely-held and liquid equity ownership, a unitary and non-pluralist board model, and a mutual common law heritage.

[18] Common politico-economic characteristics of the two systems include liberal democracy, financial capitalism, and a relatively non-interventionist approach to national industrial policy.

[19] For an excellent account of the key differences between the US and UK corporate governance systems, including relevant distinctions between the two countries' respective

In an increasingly globalised and interlocking industrial, financial and regulatory environment, it is understandable that such a western-centric focus as that adopted in this book might be regarded by some readers as rather antiquated and parochial. Undoubtedly the recent (US-originated) financial crisis and ongoing shift in the global balance of politico-economic influence towards the rapidly industrialising BRIC nations[20] have together called into question the purported comparative advantage of western corporate and financial norms. As against this, however, it remains the case that – for all its alleged systemic flaws and social injustices – the Anglo-American system of financial capitalism, with its underpinning framework of corporate governance, remains highly influential on an international level.[21] For this reason, its exclusive treatment within an academic work of this nature is in my view justified.

Furthermore, if the general theoretical themes developed in this work prove to have some (albeit limited) relevance in other corporate ownership environments and legal cultures beyond the particular geographic scope of the present study, this can hardly be regarded as a weakness of the book. On the contrary, such a finding would indicate the wider international applicability of the ideas and arguments developed herein.

Before getting ahead of oneself, though, there remains the small matter of tackling the initial job at hand: that is, convincing readers to accept my claims as valid and sustainable within their immediate Anglo-American context. It is to this task that I will now turn.

political cultures, see C Bruner, 'Power and Purpose in the "Anglo-American" Corporation' (2010) 50 *Virginia Journal of International Law* 579.

[20] Brazil, Russia, India and China. The BRIC thesis posits that of these four emerging economies, China and India will by the middle of the 21st century become the world's dominant suppliers of manufactured goods and services, respectively, while Brazil and Russia will become similarly dominant as suppliers of raw materials.

[21] For a comprehensive comparative analysis of the Anglo-American system of corporate governance set within its broader global and macro-economic context, see A Dignam and M Galanis, *The Globalization of Corporate Governance* (Farnham, Ashgate, 2009).