THE NEW CORPORATE LAW OF CORPORATE GROUPS

Mariana Pargendler*

How does corporate law treat legal entity boundaries in groups of companies? This is a critical question given that large corporations typically have hundreds of subsidiaries. Investigating the treatment of this question in key jurisdictions over time reveals a critical, but thus far overlooked, development in corporate law around the globe. Corporate law rules of internal governance increasingly overcome entity boundaries and apply on a pass-through basis, such as by allowing shareholders of a parent company to sue subsidiary directors, inspect subsidiary books and records, and approve major asset sales by subsidiaries. This phenomenon, which can be described as the rise of "entity transparency" in corporate law, reflects a gradual trend that has accelerated in the twenty-first century. Interestingly, there appears to be little direct correlation between a jurisdiction's willingness to disregard entity boundaries to enforce shareholder rights, on the one hand, and to impose liability on shareholders for the benefit of creditors, on the other. The Article then offers an economic account for the distinct treatment of corporate separateness vis-à-vis shareholders and creditors, and explores the broader theoretical and normative ramifications of its analysis. The rise of entity transparency in corporate law underscores the importance of unbundling different dimensions of corporate separateness, challenges the view that overcoming entity boundaries between parent companies and subsidiaries invariably requires extraordinary circumstances, and has implications for a wide array of legal issues across various areas of law.

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Introduction

There is continued debate about the proper role of corporate personality and legal-entity boundaries in groups of companies across different legal settings, such as the administration of bankruptcy, the imposition of liability for corporate torts, and the choice of tax and jurisdictional rules. Less discussed is the treatment of entity boundaries by corporate law itself for purposes of applying its regime of corporate governance and investor protection. Do corporate law rules "pass through" and reach corporate subsidiaries—e.g., by allowing shareholders of a parent company to sue subsidiary directors, inspect subsidiary books and records, and approve major asset sales by subsidiaries? Or does corporate law instead uphold corporate separateness strictly by circumscribing shareholder rights to the particular entity in which investors hold shares?

These are key questions for the operation of corporate law. Large firms today are not organized as a single legal person but as constellations of legal entities. A large public corporation typically has hundreds of significant subsidiaries with distinct legal personality.[1] In a *Harvard Law Review* article published half a century ago, Professor Melvin Eisenberg argued that the then-recent rise of large subsidiaries posed a significant threat to investor protection.[2] He saw the risk that shareholder rights could be "subverted merely by the insertion of an extra layer of entity between ownership and management."[3] To address this problem, Eisenberg advocated granting shareholders pass-through rights in corporate subsidiaries. While Eisenberg's

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[1] Throughout this article, I use legal entity status as a synonym for formal legal personality or corporate personhood. By 2020, the largest 100 U.S. public companies by revenue reported an average of 204 and a median of 116 major subsidiaries. Only six companies reported fewer than five major subsidiaries. These numbers are based on Exhibit 21.1 ("Subsidiaries of the Registrant") of the companies 2020 10-K Annual reports available on the EDGAR System and disclosed under U.S. Securities and Exchange Commission (SEC) Regulation S-K, 17 C.F.R. § 229.601(b)(21). The list includes only significant subsidiaries under SEC Regulation 17 C.F.R. § 270.8b-2. The list of companies is based on the first 110 companies in the Fortune 500 list for 2021, excluding Fannie Mae, State Farm Insurance, Freddie Mac, Phillips, NY Life Insurance, Liberty Mutual Insurance, Nationwide, TIAA, USAA and Northwestern Mutual, whose data is not available on Edgar. These figures are similar to those found by Richard Squire using 2010 data. *See* Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. Chi. L. Rev. 605, 606 (2011) (reporting an average of 245 and a median of 114 subsidiaries among the 100 largest U.S. public companies by revenue). Of the material subsidiaries reported to the SEC in 2020, 30.9% are constituted in Delaware, followed by Texas (approximately 4%), the United Kingdom (approximately 3%), the Netherlands, Florida, California, and China (over 2% each). These numbers are unlikely to be fully representative of the number and location of significant subsidiaries, as there is evidence of underreporting due to reputational costs of operations in tax havens. *See generally* Scott D. Dyreng et al., *Strategic Subsidiary Disclosure*, 58 J. Acct. Res. 643 (2020).

[2] Melvin Aron Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 Harv. L. Rev. 1577, 1587–89 (1971).

[3] *Id.* at 1597.

arguments made it to his influential book *The Structure of the Corporation*[4] and sparked academic debate in Germany and Japan,[5] the inquiry into corporate law's treatment of legal entity boundaries largely fell into oblivion.[6]

By mapping corporate law's treatment of entity boundaries within groups of companies in key jurisdictions over time, this Article offers several contributions about the development of corporate law around the world. The first is an evolutionary finding. Corporate laws have increasingly disregarded entity boundaries to reach corporate subsidiaries in applying rules of investor protection such as shareholder rights to bring a derivative suit, approve major asset sales, or inspect corporate books and records. This erasure of entity boundaries in the application of corporate law rules—which I term the rise of "entity transparency"[7]—has increased in the twenty-first century in jurisdictions as diverse as Brazil, Delaware, India, France, and Japan. While the problem identified by Eisenberg persisted in the United States well into the 1990s, by 2020 courts and legislatures had largely addressed it. Corporate laws now routinely disregard legal entity boundaries for purposes of investor protection—that is, without the need to prove exceptional circumstances or abuse.

The second finding is comparative in nature and concerns the existence of cross-country differences in this area. While we observe a general trend toward greater entity transparency in corporate law, jurisdictions have diverged in their pace of adoption, thus producing overlooked gaps in investor protection.[8] Although the United States and the United Kingdom lack a self-described law on corporate groups and are assumed to be entity centric, these countries have led the way in the rise of entity transparency in corporate law.[9]

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[4] Melvin Eisenberg, The Structure of the Corporation (1976). David Skeel described Eisenberg's volume as the most important corporate law book of the 1970s, having "set the terms of discussion in corporate law scholarship for the years that follow." David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 Yale L.J. 1519, 1519 (2004).

[5] *See infra* Parts II.D and C.

[6] Recent works reiterate the critique that U.S. corporate law lacks a differentiated legal regime for corporate groups and is plagued by dysfunctional "entity centrism." *See*, *e.g.*, Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. Irvine L. Rev. 1, 5 (2021) ("Corporate groups dominate the American economy. … Yet, corporate laws have failed to develop a statutory scheme that acknowledges these relationships among entities."); Anita K. Krug, *Constraining Corporate Law Principles in Affiliate World*, 72 Emory L.J. 855, 859 (arguing that "corporate law is defined by the entity, and its entity-centrism is the problem").

[7] Entity transparency in corporate law refers to the approach of disregarding entity boundaries in the application of corporate law rules of investor protection. Transparency here means a "look through" approach for rules of internal governance: it is not to be confused with transparency as disclosure of information nor with the imposition of shareholder liability.

[8] For works discussing convergence in shareholder rights without regard to entity transparency, see generally Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013*, 15 J. Corp. L. Stud. 127 (2015) (finding significant convergence in shareholder rights but acknowledging that there are substantial differences in enforcement); Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance, in* The Oxford Handbook of Corporate Law and Governance 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[9] *See infra* Parts II.A and B.

In fact, after accounting for pass-through shareholder rights, the United States and the United Kingdom emerge as having a robust and dedicated corporate law regime for groups of companies, a conclusion that runs counter to existing depictions in the literature.

Third, there is a noticeable decoupling of different exceptions to corporate separateness across jurisdictions. The rise of entity transparency in corporate law reveals a lack of direct correlation between a jurisdiction's willingness to overcome entity boundaries for purposes of imposing liability on shareholders (asset departitioning) and for purposes of extending the application of shareholder rights to controlled firms (an instance of regulatory departitioning or "pass-through"). The U.K. is a leader in entity transparency in corporate law but is comparatively reluctant to curtail shareholders' limited liability.[10] Brazil, by contrast, has aggressively weakened limited liability in corporate groups[11] but has been slower in embracing pass-through shareholder rights in various contexts.[12]

The erasure of entity boundaries in the application of corporate law rules hence produces an apparent puzzle. Shareholders appear to often have it both ways: the law is willing to uphold entity boundaries to benefit shareholders by shielding them from liability while simultaneously disregarding entity boundaries for purposes of applying corporate law rules of shareholder protection. Could such a double standard possibly be justified?

The Article then offers a novel account of how the distinct nature of shareholders' and creditors' interest in the corporation can justify the differential treatment of entity boundaries across diverse contexts. Creditor claims can be backed by the assets of a single legal entity. Upholding asset partitioning with respect to creditors can potentially reduce their monitoring costs and, in turn, the corporation's cost of capital. By contrast, shareholders are residual claimants in a corporation's subsidiaries. Upholding entity boundaries vis-à-vis shareholders does not reduce, but can effectively increase, monitoring costs and the cost of equity financing. This creates a strong case for entity transparency in shareholder rights, even if one embraces the view that asset partitioning vis-à-vis creditors (or only certain types of creditors) is efficient.

Recognizing the rise of entity transparency in corporate law also produces broader ramifications by offering new doctrinal and functional grounds to question the upholding of entity boundaries in other areas of law, such as the attribution of tort liability and jurisdiction in corporate groups. First, it challenges the dogma of complete corporate separateness and corroborates the view that the degree of legal insulation provided by corporate personality

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[10] *See infra* Part II.B.

[11] Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 Colum. J. Transnat'l L. 1, 19–30 (2019).

[12] *See infra* Part II.H.

is a matter of public policy, not a logical or doctrinal imperative. Second, and relatedly, the prevalence of entity transparency in corporate law helps debunk the oft-repeated notion that exceptions to corporate separateness invariably require extraordinary circumstances or express legislative authorization. Entity transparency in corporate law applies strictly and routinely; it does not require abuse. Third, insofar as the premise for the legal insulation of parent companies in the tort or jurisdictional realm is the subsidiary's purported legal "autonomy," entity transparency in corporate law shows that this premise is flawed. A subsidiary is not only subject to de facto economic control by the parent, but also to legal controls by the parent company's shareholders and directors.

Finally, this Article's findings highlight the limitations of the prevailing conceptual categorization of "enterprise" vs. "entity" approaches to the regulation of corporate groups as simply too coarse.[13] The enterprise vs. entity dichotomy does not distinguish between the treatment of *asset partitioning* (legal separation for purposes of monetary liability) and *regulatory partitioning* (legal separation for purposes of the imputation of other legal rights and duties), which are often subject to different regimes. Moreover, the entity vs. enterprise conundrum often considers multiple areas of law simultaneously, instead of focusing on specific legal fields and their functional requirements. By painting with too broad a brush—thereby conflating exceptions to the distinct phenomena of asset and regulatory partitioning, as well as different areas of law—this dominant framework has obfuscated the rise of entity transparency in corporate law and its significant repercussions.

The remainder of this Article is structured as follows. Part I presents the law and economics of entity transparency in corporate law. It distinguishes between asset and regulatory partitioning, analyzes the economic tradeoffs of entity boundaries vis-à-vis shareholders and creditors, and offers a taxonomy of entity transparency. Part II describes the general trend, and different reach, of entity transparency in corporate law by examining legal developments in the United States, the United Kingdom, Japan, Germany, France, India, and Brazil, among other jurisdictions. Part III considers the use of entity transparency in corporate law for purposes of stakeholder protection. Part IV addresses the meaning and limits of entity transparency in corporate law by identifying areas of apparent entity centrism. Part V explores the driving forces behind the global rise of entity transparency in corporate law, as well as observed divergences across jurisdictions. Part VI examines the implications for other areas of law. The conclusion reflects on the broader lessons derived from the rise of entity transparency in corporate law.

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[13] *See infra* Part I.A.

I. Law and Economics of Entity Boundaries in Corporate Law

A. *Defining Entity Transparency in Corporate Law*

Existing accounts of corporate separateness in corporate groups typically contrast "entity" and "enterprise" approaches.[14] Entity approaches treat each legal person as distinct and legally insulated from affiliates. Enterprise approaches recognize the economic significance of common control and disregard entity boundaries to treat the entire economic group or undertaking as the object of regulation. This influential dichotomy, however, has conflated two functionally distinct dimensions of corporate separateness afforded by legal personality: asset partitioning and regulatory partitioning. The entity vs. enterprise framework has also failed to distinguish between parent-subsidiary relationships, which are often subject to entity transparency, and relationships between sister companies under common control, for which pass-through treatment is rarer.

Asset partitioning refers to the separation of the assets of the entity from those of shareholders.[15] It has different dimensions, the most famous of which

[14] For an original framing of enterprise and entity approaches, *see* Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 354 (1947) ("In all these categories, the underlying principle seems plain. Whenever 'corporate entity' is challenged, the court looks at the enterprise."). For the influential treatises in this tradition by Phillip Blumberg, defending a shift from entity to enterprise approaches to corporate groups in a variety of legal settings, *see* Philip Blumberg, Procedural Problems in the Law of Parent and Subsidiary Corporations (1983); Phillip Blumberg, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality (1993); Phillip Blumberg, Blumberg on Corporate Groups (2005). While Blumberg's work does not distinguish between asset and regulatory partitioning, it focuses primarily on the former. P.I. Blumberg, *The Law of Corporate Groups. Substantive Law*, 40 Revue internationale de droit comparé 661, 661 (1988) (review by André Tunc).

[15] Since the foundational work by Henry Hansmann and Reinier Kraakman, scholars have identified the provision of asset partitioning—the separation between the assets of the corporation and those of shareholders—as "the essential economic role of organizational law." Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387, 394 (2000). Asset partitioning has three different dimensions: (i) *entity shielding*, by which creditors of shareholders cannot resort to corporation's assets, (ii) *limited liability*, by which corporate creditors cannot resort to shareholder assets, and (iii) *capital lock-in*, by which shareholders cannot resort to corporate assets prior to liquidation and the payment of creditors. *See generally*, defining the economic role of legal entity in terms of a demarcation of assets and related features, Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387 (2003); George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 Harv. L. Rev. 1102 (2004); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1335, 1338 (2006); Lynn Stout, *On the Nature of Corporations*, 2005 U. Ill. L. Rev. 253; Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 Va. L. Rev. 515, 520–21 (2007); Morgan Ricks, *Organizational Law as Commitment Device*, 70 Vand. L. Rev. 1303, 1306 (2017); Giuseppe Dari-Mattiacci, *The Theory of Business Organizations* 10, 23 (Amsterdam L. Sch. Legal Stud. Rsch. Paper, Paper No. 2018–32, 2018), https://ssrn.com/abstract=3296232.

is shareholders' limited liability for corporate obligations. The debate concerning entity boundaries in corporate groups—or entity vs. enterprise—has overwhelmingly focused on issues of asset partitioning, particularly on the attribution of monetary *liability* vis-à-vis corporate creditors to other entities within the group.[16] Because there is continued resistance to overcoming limited liability in corporate groups, and the law on veil piercing and related doctrines is particularly muddy, there appear to be no clear trends or widely accepted solutions in this area.[17] The literature's insistent focus on liability issues in debating entity vs. enterprise approaches has hindered the recognition of the rise of entity transparency in corporate law as a significant trend in the field.

Entity transparency as defined here does not concern asset partitioning and its exceptions, but rather *regulatory partitioning* and its exceptions, which I have broadly termed "veil peeking."[18] Regulatory partitioning denotes the legal insulation between shareholders and corporations for purposes of the imputation of rights and duties *other than* those relating to the demarcation of assets for purposes of monetary liability. Courts and legislatures engage in veil peeking (or regulatory departitioning) when they "look through" the corporate veil to attribute shareholders' legal rights, obligations, or characteristics to the corporation, or vice-versa.[19] In corporate law, this means, for instance, allowing parent-company shareholders to exercise the right to sue directors, inspect the books and records, and approve major asset sales of subsidiaries. It also means looking through entity boundaries in the application of various other rules, such as directors' fiduciary duties, the mandatory bid rule in the event of a change of control, and public disclosure requirements.

Throughout this Article, entity transparency designates the use of regulatory departitioning or veil peeking in the application of corporate law. Figure 1 below contrasts the traditional approach of regulatory partitioning (or "entity formalism") in corporate law to the approach of entity transparency, in which the law peeks behind the corporate veil to extend the application of corporate

[16] *See*, *e.g.*, José Engracia Antunes, *Estrutura e Responsabilidade da Empresa: O Moderno Paradoxo Regulatório* [Structure and Liability of Enterprise: The Modern Regulatory Paradox], 1 Revista Direito GV 29, 38 (2005) ("the regime of liability of polycorporate enterprise constitutes today the touchstone of legal regulation of this new form of business organization," but its current regulation is enmeshed in "failures and dead ends").

[17] *See*, *e.g.*, *id.*; Virginia Harper Ho et al., *Corporate Groups: Toward Corporate Group Accountability*, *in* Handbook of Corporate Liability 292, 304 (Martin Petrin & Christian Witting eds., 2022) ("[h]owever, even in the United States, Germany, and other jurisdictions where it has been more widely embraced, enterprise law remains the exception, not the rule.").

[18] *See generally* Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. Pa. L. Rev. 717 (2021) [hereinafter Pargendler, *Veil Peeking*]; Mariana Pargendler, *Regulatory Partitioning as a Key Element of Corporate Personality*, *in* Research Handbook on Corporate Purpose and Personhood 263 (Elizabeth Pollman & Robert Thompson eds., 2021).

[19] *Id.*

law rules across legal entity boundaries, such as by granting shareholders pass-through rights in corporate subsidiaries.

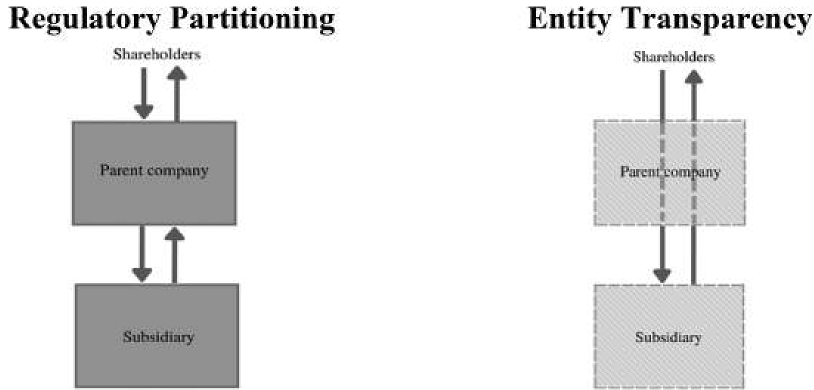

FIGURE 1: REGULATORY PARTITIONING VS. ENTITY TRANSPARENCY

Before proceeding, a few clarifications regarding terminology are in order. First, entity transparency for our purposes does not denote disclosure or access to information, but rather the *fading of entity boundaries*, understood as the adoption of a look-through approach in the application of corporate law rights and duties across affiliated legal entities. Second, entity transparency in corporate law does *not* concern asset partitioning or shareholder liability for corporate obligations, but rather the scope of shareholders' (and, occasionally, workers') *rights* in companies belonging to a corporate group. It is worth recalling that corporate law itself is not directly concerned with holding shareholders liable for corporate debts. Instead, it mainly deals with internal corporate governance and shareholder protection, as well as occasionally (and increasingly) also stakeholder protection.[20]

B. Economic Analysis

Prior to undertaking an economic analysis of pass-through corporate law, it is worth pausing to consider the existing literature on the economic role of entity boundaries, which has focused on asset partitioning. Asset partitioning

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[20] *See generally* Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 79 (Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hidekki Kanda, Mariana Pargendler, Wolf-Georg Ringe & Edward Rock eds., 3d ed., 2017) [hereinafter THE ANATOMY OF CORPORATE LAW].

provides numerous benefits, though it also entails costs.[21] For our purposes, suffice it to say that the benefits of asset partitioning are greater, and the costs are smaller, when applied to shareholders outside of the corporate group (external asset partitioning) than when applied to entities within the group (internal asset partitioning).[22]

The most prominent justification for asset partitioning within a corporate group is that it reduces the information costs of creditors and, consequently, the firm's cost of debt capital.[23] Recall that debt is a fixed claim backed up by the assets of the counterparty. Cabining certain assets and business activities of the firm into different legal entities—e.g., one subsidiary for a firm's hotel business, another subsidiary for the firm's oil business—can reduce creditors' information costs and facilitate their monitoring efforts.[24] At least in theory, the upholding of entity boundaries in the form of asset partitioning within the group can be beneficial to creditors, the corporation, and shareholders alike.[25]

The economic analysis of entity transparency in corporate law—as a form of regulatory departitioning or veil peeking between controlled entities—differs from that of asset (de)partitioning vis-à-vis creditors. This is due to the distinct legal and economic nature of shareholder and creditor rights, which makes them differentially sensitive to entity boundaries within the group. Creditors' economic interests and legal rights can be made to be entity-sensitive, that is, they can be limited to the business prospects and assets of the particular debtor entity, even if it is part of a broader group of companies.

By contrast, shareholders' economic interests are mostly "entity blind," that is, largely insensitive to entity boundaries vis-à-vis controlled firms. As residual claimants in a corporation, shareholders' economic rights in the company are limited to the collection of dividends—provided that the corporation is profitable and that dividends are duly approved by the relevant corporate body—and to a proportionate share of the assets in liquidation after all creditors are paid in full. Critically, shareholders are residual claimants not only of the corporation whose shares they hold directly but also of the corporation's subsidiaries.

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[21] *See* Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* The Oxford Handbook of Corporate Law and Governance 251, 252–67 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[22] *Id.*

[23] Richard Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 519–24 (1976); Hansmann & Kraakman, *supra* note 15, at 399–400; The Anatomy of Corporate Law, *supra* note 20, at 9.

[24] The example comes from Hansmann & Kraakman, *supra* note 15, at 399–400.

[25] *But see* Hansmann & Squire, *supra* note 21, at 260–61 (noting that "most firms do not maintain informationally relevant internal partitions" and that the real-world prevalence of intra-group guarantees further undermines the capacity of subsidiaries to reduce information costs); *see also* Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 Yale L.J. 2680 (2015) (positing that cross-guarantees create tailored partitions that reduce lenders' monitoring costs by permitting the choice between project-specific and firm-wide enforcement).

Entity transparency in corporate law primarily serves to align shareholders' economic rights with corresponding legal protection.[26] In other words, it ensures that shareholders' legal protection is not undermined by the creation of subsidiaries or controlling entities. Because shareholders are necessarily exposed to the economic performance of controlled companies, the upholding of entity boundaries vis-à-vis shareholder rights in wholly owned subsidiaries does not save monitoring or information costs for shareholders.[27] At the same time, upholding internal entity boundaries vis-à-vis shareholders can easily decrease their ability to monitor the business, thereby raising agency costs and the cost of equity capital.[28] Moreover, in helping reduce abuses by management and controlling shareholders, entity transparency in shareholder rights often operates to the benefit of creditors and other stakeholders as well.[29]

To be sure, one relevant consideration in the choice between entity transparency and regulatory partitioning concerns the costs of application, or line drawing. Regulatory partitioning has the benefits of a bright-line rule. Entity transparency, by contrast, will require a determination of the relevant trigger for pass-through treatment, which may be standard like (for example, a costly, fact-intensive inquiry about control *ex post*) or rule based and thus established *ex ante* (for example, 100% share ownership, more than 50% of voting rights).[30] Although regulatory partitioning is cheaper to apply, the difference decreases with the spread of entity transparency in other areas of corporate law. For instance, entity transparency is now the norm in consolidated accounting across jurisdictions. This can reduce the incremental cost of line drawing, since many rules on entity transparency can, and often do, piggyback on the legal definition of consolidated subsidiaries.

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[26] As discussed in Part III *infra*, entity transparency can also be harnessed for the benefit of workers, in which case the key objective is to give full effect to the worker protection regime.

[27] George Triantis has argued that the creation of subsidiaries may, in some instances, reduce agency costs by constraining managers' option to switch capital allocations among different projects. *See* Triantis, *supra* note 15, at 1125. Pass-through corporate law may in some cases compromise this function by facilitating related-party transactions between wholly owned subsidiaries.

[28] The creation of partially owned subsidiaries through an equity carve-out may enhance monitoring by recruiting the subsidiary's minority shareholders, compared to the level of monitoring available to a wholly owned subsidiary or division of the same corporation. *See* Triantis, *supra* note 15, at 1134. However, pass-through shareholder rights to the corporation's parent generally only adds, and does not subtract, from the monitoring efforts of the subsidiary's minority shareholders.

[29] *See* George Triantis & Ronald Daniels, *The Role of Debt in Interactive Corporate Governance*, 83 Calif. L. Rev. 1073, 1073 (1995) ("Yet, stakeholder interests do converge in the objective of controlling managerial slack and nonequity constituents have substantial influence over firm decisions.").

[30] On the economic tradeoffs between legal rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

C. Taxonomy of Entity Transparency

Entity transparency in corporate law is not a unitary phenomenon. This section offers a preliminary taxonomy of its different manifestations.

1. Downstream, Upstream, and Horizontal Entity Transparency

As a form of veil peeking, entity transparency in corporate law operates vertically in two different directions. It most frequently operates downstream to impute shareholders' legal status to direct or indirect controlled companies. Shareholder approval and inspection rights with respect to corporate subsidiaries constitute examples of downstream entity transparency.[31] Although rarer, entity transparency can occasionally also apply upstream, with corporate rights or qualities passing from the subsidiary to the parent company's shareholders, as in the case of double derivative suits. When seeking to determine "control" or conflicts of interest for purposes of applying various rules, corporate law similarly adopts an upstream look-through approach to determine beneficial ownership up the chain of controlled entities.

Conversely, entity transparency typically does not apply horizontally to impose corporate law rights or duties across sister companies—that is, companies under common control—within the same group.[32] The legal treatment here again follows the underlying economic interests: sister companies are not shareholders or residual claimants in one another. This difference in the scope of downstream, upstream, and horizontal entity transparency also underscores another problem of the entity-enterprise conceptual dichotomy, which fails to distinguish between the different treatment of parent-subsidiary and sister-company relationships within the same group.

2. Internal vs. External Entity Transparency

Entity transparency in corporate law can apply within a corporate group (internal entity transparency) or outside of the corporate group to reach individual shareholders (external entity transparency). While most dimensions of entity transparency operate internally, upstream pass-through is often used to identify individual controlling shareholders. Although entity transparency is particularly prevalent with respect to corporate groups, it can also be used to

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[31] Downstream entity transparency is a direct form of veil peeking, while upstream entity transparency is reverse veil peeking. *See* Pargendler, *Veil Peeking*, *supra* note 18, at 738–39.

[32] Various jurisdictions exempt transactions between sister companies that are wholly owned from different corporate law rules, though this can also be interpreted as vertical entity transparency flowing down from the common parent to both companies. *See*, *e.g., infra* notes 82, 136 and 222 and accompanying text.

impute rights, status, or obligations to individual controlling shareholders that are not formally members of the group of companies.

3. Entity Transparency by Statute, Judicial Decision, and Private Ordering

Entity transparency in corporate law can result from an explicit formulation by legislation or regulation, or from an interpretative exercise by courts when the statute or contract is silent with respect to the treatment of controlling shareholders or controlled entities. As we will see, the rise of pass-through corporate law around the world has taken place both through the expansion of explicit statutory provisions and regulation, and through judicial lawmaking and interpretation in the absence of statutory or regulatory change.[33]

Some aspects of entity transparency can also result from mechanisms of private ordering, such as stock exchange listing rules, charter provisions, and voluntary practices. Consolidated accounting famously emerged from private ordering in the United States and then found voluntary adopters in other jurisdictions before being legally mandated by statute or regulation. Institutionalized mechanisms of private ordering, such as stock exchange listing rules and self-regulatory bodies (such as the United Kingdom's Takeover Panel at its origin), have also played a role with respect to different dimensions of entity transparency.

Beyond the general critiques of contractarianism in corporate law,[34] the use of private ordering to overcome the perils of entity formalism faces additional limitations. Corporate charters could require shareholder approval for the creation of subsidiaries, but that would be overkill. Subsidiaries are routinely created for tax, regulatory, and debt-financing purposes. Subjecting subsidiary creation to shareholder approval—and the formalities associated with a shareholder meeting in public companies—would unduly hamper regular business operations. Perhaps a more promising alternative would be to include provisions in the parent-company charter requiring that subsidiary charters grant pass-through rights—such as double derivative suits and inspection rights—to parent company shareholders, though this strategy may be ineffective or unenforceable in jurisdictions where there are significant mandatory law constraints.[35]

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[33] This categorization tracks the distinction between "explicit veil peeking by lawmakers" vs. "judicial veil peeking as gap filling," observed in other areas of law. *See* Pargendler, *Veil Peeking*, *supra* note 18, at 744.

[34] For a review, see Michael Klausner, *The Corporate Contract Today*, *in* Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[35] For a critique of Panglossian claims in corporate law arguing that charter provisions may be unenforceable in a different context, see Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833, 888 (2005). Moreover, charters of controlled companies

4. The Scope and Criteria for Entity Transparency

Different criteria can be used to trigger entity transparency in corporate law. At one end of the spectrum is absolute regulatory partitioning (or entity formalism), by which legal entity boundaries would be always impenetrable and could not be disregarded for any reason. Next to absolute impenetrability, a slightly more flexible approach is to permit regulatory departitioning only in the presence of extraordinary circumstances authorizing asset departitioning, such as fraud, "alter ego" status, or abuse more generally. This Article's core claim is that such a restrictive, abuse-based approach to regulatory departitioning has progressively given way to strict entity transparency based on equity control alone. Given equity control, entity transparency now applies routinely and strictly, not exceptionally or subject to the demonstration of special circumstances suggestive of dysfunction.

Different criteria can trigger strict entity transparency across jurisdictions and legal contexts. At the most restrictive end of the control spectrum, entity transparency is limited to wholly owned subsidiaries. Given the potential for evasion and arbitrage, as well as the relevant economic interest of parent company shareholders in partial subsidiaries, corporate law has been gradually evolving to apply entity transparency based on equity control. One common solution is to tag entity transparency to consolidated subsidiaries (it also being the case that the criteria for accounting consolidation have gradually become more encompassing over time and across jurisdictions so as to counterweigh the risks of entity formalism). More generally, one may hypothesize that the greater the net benefits of the original corporate law rule, the more expansive the trigger for entity transparency.

5. The Goals of Entity Transparency in Corporate Law

This Article focuses on the use of entity transparency in corporate law to protect shareholders, which serves to equalize the rights they would have if the relevant business were conducted as a division of the same corporation and not as a separate legal entity. Entity transparency essentially neutralizes the creation of subsidiaries—typically driven by tax, regulatory, or debt financing

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are a poor mechanism of credible commitment, since they can easily be amended by the parent company, and many jurisdictions worldwide impose significant mandatory constraints on corporate law rules that could render such protective charter provisions unenforceable. *See* Jens Dammann, *The Mandatory Law Puzzle*, 65 Hastings L.J. 441, 466 (2014) (noting how "more concentrated ownership translates into a greater risk for opportunistic charter amendments," which, in turn, helps explain the greater prevalence of mandatory corporate law rules outside of the United States). Interestingly, Eisenberg defended pass-through rights with respect to subsidiary charter amendments. Eisenberg, *supra* note 2, at 1605 *et seq.* However, no jurisdiction has adopted this particular manifestation of entity transparency to date, likely because the costs outweigh potential benefits.

reasons—from a shareholder's perspective.[36] In constraining wrongdoing and abuse by corporate insiders, these rules also typically provide indirect protection to creditors and other stakeholders.[37]

Entity transparency can also specifically target the protection of nonshareholder interests, as exemplified by the regime of employee board representation in Germany and by the EU regulation of nonfinancial disclosure described in Part III *infra*. Finally, other manifestations of entity transparency aim not at enhancing investor or stakeholder protection, but at reducing administrative costs by creating exemptions to the application of corporate law rules between the parent and wholly owned subsidiaries or between wholly owned subsidiaries.

6. Regulatory Departitioning and Pass-Through in Different and Related Areas of Law

The analysis in this Article focuses on entity transparency—or veil peeking—in the application of corporate law to groups of companies. The emphasis lies on the choice between upholding regulatory partitioning or adopting a pass-through approach in the context of parent-subsidiary relationships. I leave to future work the analysis of other mechanisms and doctrines relating to the broader tension between form and substance in corporate law more generally, which includes the treatment afforded to mergers and the doctrine of independent legal significance.[38]

The Article will likewise not address veil peeking or pass-through treatment in other areas of law,[39] except in the final section on broader normative implications. It will also not examine the distinct question of pass-through

[36] For a discussion of organizational neutrality as a justification for pass-through treatment to reach individual shareholders in the different context of corporate constitutional rights, see Vincent Buccola, *Corporate Rights and Organizational Neutrality*, 101 Iowa L. Rev. 499 (2016).

[37] However, some manifestations of entity transparency might reduce creditor protection by augmenting shareholder control and facilitating related-party transactions between wholly owned corporations within the group. A small decrease in creditor protection does not necessarily cut against entity transparency in corporate law given that voluntary creditors can more easily protect themselves through contract than shareholders can. Indeed, credit agreements often provide for pass-through treatment by regulating conduct by subsidiaries. *See* Vincent S.J. Buccola & Greg Nini, *The Loan Market Response to Dropdown and Uptier Transactions,* J. Legal Stud. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143928 (describing the market practice of extending the credit agreements' covenants and liens to subsidiaries of the borrower).

[38] For a review of the evolution of the doctrine of independent legal significance in Delaware, see C. Stephen Bigler & Blake Rohrbacher, *Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance*, 63 Bus. Law. 1, 23 (2007) ("The boundaries of ILS [independent legal significance] as applied by the courts are much narrower than sometimes assumed by practitioners.").

[39] For the treatment of veil peeking across different areas of law, see Pargendler, *Veil Peeking*, *supra* note 18, at 757–80.

shareholder rights relating to shares held by investment vehicles,[40] given the existence of formal and functional differences between both contexts that demand dedicated analysis as distinct phenomena.[41]

II. Entity Boundaries in Comparative Corporate Law

This section surveys corporate law's treatment of entity boundaries in the application of shareholder rights within and across jurisdictions over time. It examines the presence and evolution of pass-through shareholder rights, as well as the source of legal change (such as statutory amendments, judicial decisions, securities regulations, or stock exchange listing rules). It also identifies the factors prompting reform in this area, such as scandals, the use of legal transplants and foreign ideas, or international pressure.

The exposition proceeds by offering dedicated vignettes of developments from the United States, the United Kingdom, Japan, Germany, France, India, and Brazil as the core jurisdictions examined,[42] as well as occasional examples from other countries, such as Israel and South Korea. The goal is to illustrate relevant developments across jurisdictions, not to exhaust all instances of entity transparency (or lack thereof) in any given legal system. Because the substance of corporate law varies across countries, so do the areas of entity

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[40] This is an old theme that attracted renewed attention when giant fund manager BlackRock decided to allow large clients to exercise votes with respect to the shares held by the fund. *See* Andrew Ross Sorkin et al., *BlackRock's Transfer of Power*, N.Y. Times Dealbook, Oct. 8, 2021; *see also* Jill Fisch, *The Uncertain Stewardship Potential of Index Funds, Global Shareholder Stewardship: Complexities, Challenges and Possibilities* (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) (describing how the SEC considered the issue of pass-through voting in the 1970s given the then recent rise of institutional investors). For proposals of pass-through voting, see Dorothy S. Lund, *The Case against Passive Shareholder Voting*, 43 J. Corp. L. 493 (2018); Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 Md. L. Rev. 954 (2020).

[41] From a disciplinary standpoint, pass-through voting in funds can be understood as part of investment fund regulation—or, alternatively, of private ordering—rather than of corporate law proper. From a substantive perspective, concentrating voting rights at the mutual fund level can help mitigate investors' collective action problems between shareholders, while entity formalism in corporate law reduces shareholder rights without a similar benefit. *See* Fisch, *supra* note 40 (arguing that "mutual fund investors are poorly positioned to direct the proxy voting of their proportionate interest in the fund's portfolio companies"). Moreover, pass-through shareholder voting in mutual funds is far more amenable to private ordering and tailoring than pass-through corporate law. *See* Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Authority*, 98 Tex. L. Rev. 983 (2020). Finally, investors in mutual funds are subject to stronger exit rights than corporate shareholders, including with respect to disagreement with voting decisions. *See* John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 Yale. L.J. 84 (2010).

[42] The choice of core jurisdictions for purposes of this Article follows the comparative corporate law textbook The Anatomy of Corporate Law, Enriques et al., *supra* note 20, except for replacing Italy with India with the aim of including a developing country of common law origin. The resulting core jurisdictions examined encompass the developed countries that have received the lion's share of attention in the comparative corporate law literature as well as Brazil and India as large emerging economies with fairly developed capital markets.

transparency. The analysis that follows focuses on issues that are particularly salient in each jurisdiction to highlight the direction of change and comparative differences.

To facilitate visualization and comparison, Table 1 in the Annex shows whether and when the core jurisdictions examined adopted entity transparency with respect to key dimensions of the corporate law regime: (i) derivative suits, (ii) inspection rights, (iii) approval rights for major asset sales, (iv) consolidated accounting, and (v) the mandatory bid rule. The result is a clear trend toward rising entity transparency in corporate law around the globe, including well into the twenty-first century, though pockets of entity formalism persist in some contexts.

A. United States

The rise of entity transparency constitutes a significant, but heretofore unnoticed, trend in the evolution of U.S. corporate law. In their seminal work, Adolf Berle and Gardiner Means noted that a parent company has, through controlled directors, "all the powers of directors" and "all the powers of shareholders" in subsidiaries.[43] They cited the fact that "a holding has a far wider latitude . . . than any other corporation" as one of the reasons why the form had attracted suspicion.[44]

Entity transparency in one particular area—the rise and expansion of consolidated accounting—is well documented and understood. The United States was a pioneer in accounting consolidation through private ordering before its embrace by regulation, from tax laws starting in 1918 to the reporting rules in the U.S. Securities and Exchange Commission's (SEC) Regulation S-X promulgated in 1940.[45] The scope of accounting consolidation has also expanded over time, including in the twenty-first century as a response to the Enron scandal.[46] Yet, accounting consolidation is viewed as an isolated development that has not otherwise affected the fabric of U.S. corporate law.

Scholars have continued to decry the "entity centrism" of U.S. corporate law and the absence of a dedicated corporate law regime for corporate groups.[47] One prevailing assumption is that U.S. state laws "generally do not have statutory provisions or judicial doctrines designed especially for

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[43] Adolf Berle & Gardiner Means, The Modern Corporation and Private Property 183 (Routledge 2017) (1932) (also observing that "[a] parent or holding corporation can, accordingly, perform all of the operations noted in the previous chapter and the present chapter, with respect to its subsidiaries and their assets and earnings").

[44] *Id.*

[45] For a detailed description of the history of consolidated statements in the United States, see generally Robert G. Walker, Consolidated Statements: A History and Analysis (2006).

[46] *See infra* note 118 and accompanying text.

[47] *See supra* note 6 and accompanying text.

corporate groups."[48] It turns out, however, that the paradigm of entity centrism in corporate law is largely obsolete. The rise of entity transparency means that parent company boards no longer hold all the powers of shareholders—which now pass through to the parent's own shareholders in a variety of contexts. Figure 2 in the Annex depicts the significant rise in the number of states adopting explicit entity transparency provisions in their corporation statutes in the last decades with respect to inspection of subsidiary books and records and approval of major asset sales by subsidiaries.

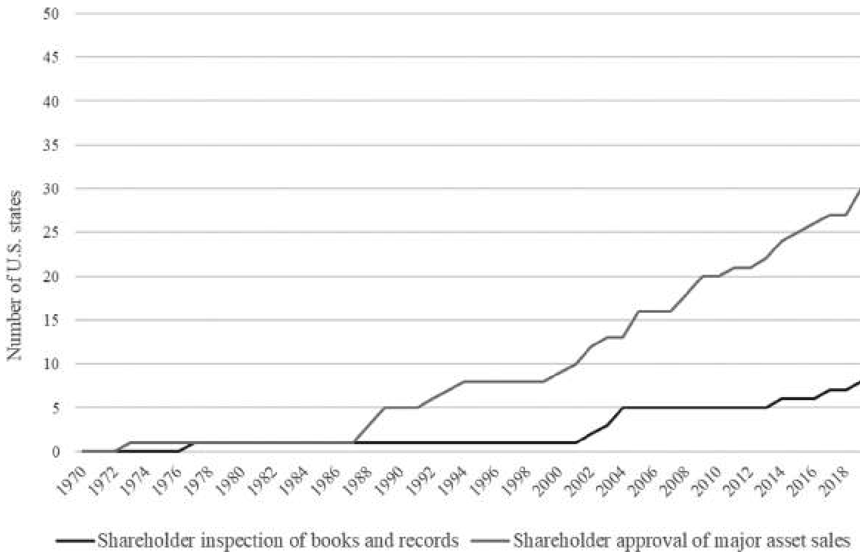

FIGURE 2: ENTITY TRANSPARENCY IN U.S. STATE STATUTES

1. Double Derivative Suits

The ability of shareholders to file suit against directors, officers, or controlling shareholders through derivative actions is one of the main mechanisms of private enforcement in corporate law.[49] Derivative suits themselves encapsulate a distinct form of veil peeking, with shareholders asserting corporate rights on behalf of the corporation. Scholars and international organizations

[48] Franklin A. Gevurtz, *Groups of Companies*, 66 AM. J. COMPAR. L. 181, 182–83 (2018) (adding that "[o]ne narrow exception exists to protect shareholders in parent corporations from director entrenchment through circular voting").

[49] Derivative suits themselves can be understood as a distinct form of regulatory departitioning or entity transparency, since shareholders are allowed to assert a corporate claim on behalf of the corporation in certain circumstances.

have identified numerous procedural hurdles that hamper the broad use of derivative suits in most countries beyond the United States and Japan,[50] such as minimum ownership requirements and the allocation of costs and litigation risk.[51] However, the role of entity formalism as a relevant obstacle to derivative suits in corporate groups has not yet received dedicated attention.

If regulatory partitioning is strictly upheld, one concern is that the creation of wholly owned subsidiaries would operate to insulate subsidiary managers from lawsuits by parent shareholders. The double derivative suit addresses this problem by embracing entity transparency. While a derivative suit permits a shareholder to bring action against directors, officers, or controlling shareholders on behalf of the corporation, the double derivative suit allows a shareholder of the parent company to bring such a suit on behalf of the subsidiary, even though she is not formally a shareholder of the subsidiary. The double derivative suit is also known internationally as the multiple derivative suit, in allusion to its application to multiple tiers of indirect subsidiaries.

Together with consolidated accounting, the double derivative suit is arguably the most paradigmatic and longstanding manifestation of entity transparency in U.S. corporate law,[52] and one that remains firmly grounded in the common law. U.S. courts have allowed not only double derivative suits, but also triple and even quadruple derivative suits when facing additional layers of separate entities.[53] In *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*,[54] the Delaware Court of Chancery agreed to process a quadruple derivative suit involving two separate levels of French wholly owned subsidiaries by treating the French assets as beneficially held by the Delaware holding company. By 2005, Phillip Blumberg's treatise on corporate groups noted that "the right of a shareholder of a parent corporation to institute a multiple derivative action on behalf of a subsidiary corporation became firmly established 35 to 45 years ago" and "has not been judicially challenged since."[55]

Simple derivative suits were first accepted by U.S. state courts in 1832 and by the U.S. Supreme Court in 1855.[56] The acceptance of double derivative suits in the United States did not take long to follow the proliferation of corporate subsidiaries. From the outset, U.S. courts refused to compromise

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[50] Enriques et al., *supra* note 20, at 164–65.

[51] *See, e.g.*, Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?,* 37 Brooklyn J. Int'l L. 843, 856–70 (2012); Organisation for Economic Co-operation and Development (OECD), Private Enforcement of Shareholder Rights: A Comparison of Selected Jurisdictions and Policy Alternatives for Brazil (2020).

[52] For a detailed discussion of double (and triple) derivative suits in current U.S. practice, see Deborah DeMott, Shareholder Derivative Actions: Law and Practice § 2:10 (2011).

[53] *Id.*

[54] No. CIV. A. 13950, 1996 WL 189435 at *8 (Del. Ch. Apr. 16, 1996).

[55] Phillip Blumberg, Blumberg on Corporate Groups § 44.02 (2005).

[56] Robinson v. Smith, 1832 WL 2663 (N.Y. Ch. Jan. 1, 1832); Hawes v. Oakland, 104 U.S. 450 (1881). *See* Maximilian Koessler, *The Stockholder's Suit: A Comparative View*, 46 Colum. L. Rev. 238, 239 (1946).

shareholders' right to sue by upholding regulatory partitioning vis-à-vis subsidiaries. In the influential 1917 case of *Holmes* v. *Camp*, which inspired a 2018 Hong Kong opinion,[57] a New York court reasoned that "[t]he free use of holding companies which has grown up in recent years would prevent the righting of many wrongs if an action like the present might not be maintained by a stockholder of a holding company."[58]

Doctrinal systematization and conceptualization helped the broad recognition of double derivative suits. The very term "double derivative suit" appears to have been coined by a 1937 *Harvard Law Review* note which collected precedents on the subject.[59] It argued that "[t]he theory of the 'double derivative suit' is very similar to the theory of the derivative suit"— an illustration of the notion that entity transparency begets more entity transparency.[60] Subsequent authors and judicial decisions then quickly took on both the terminology of double derivative suit and the note's conclusion that "the majority of courts which have been faced with this problem have logically made available to the [parent] stockholder the device of the derivative suit."[61]

By 1951, another *Harvard Law Review* note concluded that "[j]udicial acceptance of the double derivative suit is almost without exception."[62] Courts have since continued to embrace double derivative suits without applying the stringent criteria of abuse required for veil piercing, even if they did not settle on a single theory for their acceptance.[63] By the time Melvin Eisenberg came to challenge regulatory partitioning in corporate law, the double derivative suit served as his primary example that "the pass-through technique is no stranger to the corporate institution."[64]

2. Shareholder Approval of Major Asset Sales

The twenty-first century has witnessed a rapid advance of entity transparency with respect to dispositions of all or substantially all of a subsidiary's

[57] Almost one century later, a Hong Kong court quoted this passage to argue that "[i]f this was true of New York in 1917 it is certainly no less true of Hong Kong in 2008." *See* Waddington Ltd. v. Chan Chun Hoo Thomas et al. [2008] 11 H.K.C.F.A.R. 370 (C.F.A.). *See also* King Fung Tsang, *International Multiple Derivative Actions*, Vand. J. Transnat'l L. 75, 86 (2019) (noting that the Hong Kong statute was amended in 2014 to expressly allow multiple derivative actions).

[58] Holmes v. Camp, 167 N.Y.S. 840 (App. Div. 1917).

[59] Editorial Board Notes, *Remedies of Stockholder of Parent Corporation for Injuries to Subsidiaries*, 50 Harv. L. Rev. 963, 963–68 (1937).

[60] *Id.* at 963–64.

[61] *Id.* at 963.

[62] Editorial Board Notes, *Suits by a Shareholder in a Parent Corporation to Redress Injuries to the Subsidiary*, 64 Harv. L. Rev. 1312, 1314 (1951).

[63] William H. Painter, *Double Derivative Suits and Other Remedies with Regard to Damaged Subsidiaries*, 36 Ind. L.J. 143, 148–49 (1961); David W. Locascio, *Dilemma of the Double Derivative Suit*, 83 Nw. U. L. Rev. 729, 732 (1988–1989).

[64] Eisenberg, *supra* note 2, at 1596.

assets, a significant development that has gone unnoticed. Eisenberg's 1976 book reported only two states (Pennsylvania and New Jersey) as granting statutory pass-through voting rights to parent company shareholders for subsidiary asset sales.[65] By 2000, the corporate statutes of only five more states (Colorado, Michigan, Mississippi, Utah and Tennessee) had done so.[66] By 2020, by contrast, thirty states had explicit pass-through provisions in the statute. Figure 2 in the Annex illustrates this evolution.

Both the Model Business Corporation Act revision in 1999 and the Delaware Chancery Court decision in *Hollinger Inc. v. Hollinger International, Inc.* in 2004[67]—itself influenced by the Model Business Corporation Act (MBCA)[68]—played a role in this trend. A survey of state corporation statutes shows that four states enacted reforms to follow the new § 271 of the Delaware General Corporation Law (DGCL) after its adoption by Delaware,[69] while eleven states crafted their own language for entity transparency regarding shareholder approval of asset sales.[70] The MBCA was particularly influential, with fourteen states amending their statutes to incorporate the MBCA's language providing for an even broader scope of entity transparency in this area.[71]

The revised MBCA language for asset dispositions provides that "[t]he assets of a direct or indirect consolidated subsidiary shall be deemed the assets of the parent corporation for the purposes of this section."[72] The official comment cited the Florida decision in *Schwadel v. Uchitel* requiring shareholder approval for the sale of a restaurant held by a wholly owned subsidiary, which was the last of several restaurants owned by the parent corporation. Despite the silence of Florida's corporations statute, the *Schwadel* court noted that the purpose of a shareholder "consent" provision is "to protect the shareholders from fundamental change, or more specifically to protect the shareholders from the destruction of the means to accomplish the purposes or objects for

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[65] Eisenberg, *supra* note 4, at 290.

[66] Pa. Stat. Ann. tit. 15, § 1311(B) (1967); N.J. Stat. Ann. § 14A:10-11(3) (Supp. 1974); Tenn. Code Ann. § 48-22-102 (1989); Colo. Rev. Stat. Ann. § 7-112-102 (1993). North Carolina (1989), Georgia (1988), and Minnesota (1994) also had some degree of entity transparency in their statutes, but both Minnesota and North Carolina made subsequent reforms inspired by the Model Business Corporation Act (MBCA).

[67] Hollinger Inc. v. Hollinger Intern., Inc., 858 A.2d 342 (Del. Ch. 2004) (Strine, V.C.) (citing § 12.02(h), "which some states have adopted").

[68] Jeffrey M. Gorris et al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 J. L. & Contemp. Probs. 107, 118 (2011) ("Inspired by Hollinger (and ultimately by the MBCA's clarity on the point), Delaware amended section 271 to clarify that assets of a corporation for purposes of that statute include the assets of its wholly owned subsidiaries.").

[69] Alabama, Kansas, Ohio, and Oklahoma, as of 2021.

[70] Colorado, Michigan, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming, as of 2021.

[71] Connecticut, Florida, Idaho, Indiana, Iowa, Louisiana, Maine, Mississippi, Montana, Nebraska, New Hampshire, Virginia, Washington, and West Virginia, as of 2021.

[72] Model Business Corporation Act § 12.03(h) (Am. Bar Ass'n, 2d ed., 1999 rev.).

which the corporation was incorporated and actually performs."[73] This illustrates how both caselaw and statutory law have contributed to, and interacted in, the rise of entity transparency.

The 2004 Delaware Chancery Court decision in *Hollinger* examined whether the requirement of shareholder approval of a sale of substantially all of a company's assets under § 271 of the DGCL applied to a sale effected by a wholly owned subsidiary.[74] The defendant offered a "technical statutory defense" based on the subsidiary's separate legal personality, arguing that "§ 271 would have no application unless the selling subsidiary has no corporate dignity under the strict test for veil piercing."[75] The opinion by then-Vice Chancellor Leo Strine describes this formalistic stance as having "the virtues that accompany all bright-line tests, which are considerable, in that they provide clear guidance to transactional planners and limit litigation."[76] At the same time, Strine recognized that upholding regulatory partitioning meant that "§ 271's vote requirement will be rendered largely hortatory—reduced to an easily side-stepped gesture."[77]

The *Hollinger* Court did not ultimately decide if § 271 applied to a sale of assets by the subsidiary. It found that, even if one imputed the sale to the parent, the transaction in question did not qualify as a sale of substantially all corporate assets as a matter of "economic substance."[78] Interestingly, Strine expressed skepticism toward the defendant's all-or-nothing argument to the effect that "a wholly owned subsidiary is either without any legal dignity at all in the sense that it fails the severe test required to pierce the corporate veil or else its separate existence must be recognized in all contexts."[79] Instead, the decision noted that "[t]he utility of this stark, binary approach is not immediately clear and does not comport with the approach Delaware has taken in other areas of its corporate law."[80]

Prior to *Hollinger*, Delaware case law suggested, and most practitioners understood, that only record shareholders of the selling company were

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[73] Schwadel v. Uchitel, 455 So. 2d 401 (Fla. Dist. Ct. App. 1984) (citing 6A W. Fletcher, Cyclopedia of the Law of Private Corporations § 2949.2 (rev. perm. ed. 1981 Supp. 1983)).

[74] *Hollinger Inc.*, 858 A.2d at 346.

[75] *Id.* at 348.

[76] *Id.* at 374 (also noting that such an approach "also adheres to the director-centered nature of our law, which leaves directors with wide managerial freedom subject to the strictures of equity, including entire fairness review of interested transactions").

[77] *Id.*

[78] *See id.* at 371, 375–85.

[79] *Id.* at 374–75.

[80] *Id.* at 375. As examples of the Delaware approach in other scenarios, Strine cites the regime of holding parents to personal jurisdiction in the state based on transactional acts of the subsidiary, as well as the liability regime imposed on controlling shareholders for breach of fiduciary duty when they directly control the subsidiary affairs through representatives on the subsidiary board.

required to vote on major asset sales.[81] To avoid resulting uncertainty following the decision, Delaware amended § 271 to embrace entity transparency with respect to wholly owned subsidiaries, both to require parent shareholder approval for substantial asset transfers conducted by a subsidiary and to exempt from approval transfers to and from a subsidiary. In lieu of the bright-line rule offered by the MBCA, which piggybacked on the criteria for accounting consolidation, the new § 271 follows the characteristic Delaware stance of leaving the criteria as a question for courts to decide.[82]

3. Inspection Rights (Access to Books and Records)

Another manifestation of growing entity transparency in U.S. corporate law is the significant expansion of pass-through inspection rights in the 2000s. Prior to the turn of the twenty-first century, only California had a broad statutory provision granting shareholders access to the books and records of subsidiaries.[83] In the absence of specific statutory authorization, Phillip Blumberg criticized the prevailing case law in most states as adopting "the outdated analysis associated with piercing the corporate veil,"[84] though some courts had occasionally suggested that access to subsidiary records should be subject to "greater liberality" than veil piercing for purposes of imposing liability on corporate shareholders.[85] Starting in 2002, several states shifted to entity transparency in this area, either through statutory amendments or judicial decisions. The Enron debacle in 2001, a product of accounting fraud involving

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[81] *See, e.g.*, J.P. Griffin Holding Corp. v. Mediatrics, Inc., No. 4056, 1973 Del. Ch. LEXIS 153, at 5 (Jan. 30, 1973) (finding that approval requirements under § 271 were met by a vote of subsidiary shareholders); Leslie v. Telephonics Office Technologies, No. 13045, 1993 Del. Ch. LEXIS 272, at 26–27 (Dec. 30, 1993) (noting as dicta that "more often than not, Delaware courts have upheld the legal significance of corporate form, in a corporate-subsidiary complex"). *See also* Yaman Shukairy, *Megasubsidiaries and Asset Sales under Section 271: Which Shareholders Must Approve Subsidiary Asset Sales*, 104 Mich. L. Rev. 1809, 1811 (2006).

[82] According to the synopsis of the statute, "[t]he amendment is not intended to address the application of subsection (a) to a sale, lease or exchange of assets by, or to or with, a subsidiary that is not wholly owned and controlled, directly or indirectly, by the ultimate parent." H.R. 150, 143d Gen. Assembly (Del. 2005), https://corpfiles.delaware.gov/hb150.pdf; *see also* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1778 (2006) ("[i]t was felt that a clear resolution of the most common problem—transfers to or by wholly owned subsidiaries—would contribute much in the way of clarity, and that attempting to do more would prove unwieldy and confusing . . . Council members felt that the Delaware courts would be best suited to supply interpretations of the underlying statute to the extent that it remained unclear in its application.").

[83] *See* Cal. Corp. Code § 1601(a)(3) (West 2023) ("[t]he right of inspection created by this subdivision shall extend to the records of each subsidiary of a corporation subject to this subdivision.").

[84] Blumberg on Corporate Groups, *supra* note 14, § 46.02 (noting that "there is some indication that acceptance of enterprise principles is strengthening").

[85] *See* State *ex rel.* United Brick & Tile Co. v. Wright, 95 S.W.2d 804, 808 (Mo. 1936); 18 Am. Jur. 2d *Corporations* § 400 (1985); *see also* Editor's Note, *Suits by a Shareholder in a Parent Corporation to Redress Injuries to the Subsidiary*, 64 Harv. L. Rev. 1312 (1951).

the use of special-purpose entities, played a role in this development. As part of its reform package in response to Enron, Delaware amended § 220 of the Delaware General Corporation Law in 2003 to allow parent company shareholders to inspect books and records of subsidiaries without the need to show fraud or abuse.[86] The reform represented a clear shift from Delaware's previous jurisprudence, which conditioned regulatory departitioning on a showing of "a fraud or that a subsidiary is in fact the mere alter ego of the parent."[87]

Delaware's revised § 220 covers partially owned subsidiaries but stops short of providing an unconditional right to access subsidiary records as in the California statute. Instead, it restricts the right, among other things, to situations in which the corporation "has actual possession . . . of such records" or "could obtain such records through the exercise of control over [the] subsidiary."[88] Following Delaware, three other states amended their laws to extend inspection rights to subsidiaries: while Kansas (2004) and Oklahoma (2004) replicated Delaware's restrictive language, Florida (2019) adopted the broader approach of unconditionally extending the right of inspection to books and records of the corporation's subsidiaries.[89]

The increase of entity transparency in inspection rights also took place through judicial decisions in the absence of statutory reform. The 2004 decision by the Ohio Supreme Court in *Danziger*, which cited both the Enron scandal and Delaware's recent reform, is paradigmatic in this respect.[90] The

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[86] *See* Hamermesh, *supra* note 82, at 1769 n.90 ("In proposing this amendment, the drafters were sensitive to the fact that many of the accounting irregularities at Enron occurred at the level of direct or indirect subsidiaries."); Lewis S. Black, Jr. & Frederick H. Alexander, Analysis of the 2003 Amendments to the Delaware General Corporation Law 5 (2003) (linking the amendment to the "highly publicized events calling into question the quality of corporate governance"). This development appears to follow the pattern of Delaware law adopting stronger constraints on managers out of fear of federal intervention. *See generally* Mark J. Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588 (2003) (showing how the threat of federal intervention explains developments in Delaware law).

[87] Skouras v. Admiralty Enters., Inc., 386 A.2d 674, 681 (Del. Ch. 1978); *see also* George S. Geis, *Information Litigation in Corporate Law*, 71 Ala. L. Rev. 407, 422 (2019) (noting that "[h]istorically, shareholders were not allowed to examine a subsidiary unless they could prove fraud or demonstrate that the subsidiary was a mere 'alter ego' of the parent corporation," but the 2003 amendment "reversed the presumption").

[88] Del. Code Ann. tit. 8, § 220 (West 2003). In an early case under the new rule, the Delaware Supreme Court denied the claim for inspection of a 45% owned public corporation because the records requested were not in the controlling company's actual possession. *See* Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 511 (Del. 2005); *see also* Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1594 (2005) (suggesting that *Weinstein* exemplifies Delaware courts' "discomfort with" or "hostility to" the legislative intrusions). *But see* Hamermesh, *supra* note 82, at 1769 n.90 (arguing that *Weinstein* does not reflect hostility to the amendment on the part of Delaware courts but rather reflects a stance restricting the duty to "actual operational control" rather than "potential control through share ownership").

[89] *See* Kan. Stat. Ann. § 17-6510 (West 2004); Okla. Stat. tit. 18, § 1065 (2004); Fla. Stat. § 607.1602 (2019) ("The rights of a shareholder to obtain records under subsections (1) and (2) shall also apply to the records of subsidiaries of the corporation.").

[90] Danziger v. Luse, 815 N.E.2d 658 (Ohio 2004).

Ohio court decided to adopt what it described as "the majority rule," and hold that, "in Ohio, shareholders have a right at common law to inspect the records of a wholly owned subsidiary of the corporation in which they own stock when the parent corporation so controls and dominates the subsidiary that the separate corporate existence of the subsidiary should be disregarded."[91] It observed that "[t]his right, always important, takes on a new significance in light of recent high-profile corporate scandals involving financial misdeeds," given that "[t]hose charged with protecting shareholders, such as investment banks, accountants, and lawyers, have not always been up to the task."[92] The court also noted that "[w]hether inquisitive shareholders could have prevented the worst offenses of the Enron scandal and others will never be known," even if "that was the purpose behind the right from the very beginning."[93]

Twelve years later, a New York appellate court's decision in *In re Pokoik v. 575 Realties, Inc.* likewise granted shareholder access to the books and records relating to salaries and compensation of a wholly owned subsidiary, even though there was no evidence of deficiencies in corporate formalities.[94] In the court's view, upholding strict entity boundaries "would allow respondents to shield their alleged misdeeds from scrutiny" and "fails to give due consideration to the relationship between a parent and its wholly owned subsidiary," which includes the possibility of parent company shareholders filing a double derivative suit.[95] Noting that the common law right of inspection is broader than statutory rights,[96] the New York Court cited *Danziger* as well as a 2006 decision by the Court of Appeals of Missouri.[97] A 2017 decision by the Court of Appeals of Arkansas also cited *Danziger* but adopted an even broader rationale: "[b]ecause subsidiaries are assets of a corporation, their books and records are corporate records," so "[b]y the plain language of the statute, they are subject to inspection."[98]

4. Fiduciary Duties and Oversight Liability

A major development in U.S. corporate law has been the recognition and expansion of the board's oversight duties with respect to legal compliance

[91] *Id.* at 662.

[92] *Id.* (citing Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime after Sarbanes–Oxley*, 81 Wash. U. L.Q. 357 (2003) and Gary J. Aguirre, *The Enron Decision: Closing the Fraud–Free Zone on Errant Gatekeepers?*, 28 Del. J. Corp. L. 447 (2003)).

[93] *Id.*

[94] Pokoik v. 575 Realties, Inc., 38 N.Y.S.3d 553 (N.Y. App. Div. 2016).

[95] *Id.* at 555–56.

[96] *Id.* at 555.

[97] *Id.*; State *ex rel* Brown v. III Investments, Inc., 188 S.W.3d 1 (Mo. Ct. App. 2006).

[98] Ashley Bancstock Co. v. Meredith, 534 S.W.3d 762, 768 (Ark. Ct. App. 2017).

since the leading *Caremark* case in 1996.[99] Less noticed, but critical to this evolution, is the erasure of entity boundaries in determining the board's oversight duties. Delaware courts have found that directors' duty to act in the interest of the company entails an obligation to oversee liability-creating activities in subsidiaries in the same way as with respect to the parent company. In other words, they have taken the position that directors' duties to the parent company require an entity-blind approach with respect to the location of the liability-creating activity within the group.

The *Caremark* decision itself pays little attention to entity boundaries in describing the facts of the case. Chancellor Allen's opinion inaccurately conflates parent and subsidiary in stating that Caremark was required to pay the fines and civil penalties for mail fraud, which were technically imposed on a wholly owned subsidiary.[100] The apparent confusion stems from the irrelevance of internal entity boundaries to shareholders outside of insolvency—while it was technically the Caremark subsidiary that was required to pay the sanctions, that made no economic difference to the shareholders of the parent company. The subsequent Delaware Supreme Court 2006 decision in *Stone v. Ritter*, which confirmed and clarified the doctrinal grounds for directors' oversight liability under *Caremark*, specifically concerned the liability of parent company directors for lack of oversight of wrongdoing by a subsidiary that resulted in fines and civil penalties.[101]

Recent decisions are bolder in extending oversight obligations to corporate subsidiaries. In its 2019 decision in *Marchand v. Barnhill*, the Delaware Supreme Court reversed the Chancery Court's decision to dismiss a complaint against directors and officers for oversight failure in a food company that led to a disastrous Listeria outbreak.[102] Vice Chancellor Slights had taken notice of the fact that the operating company in the case was a limited partnership 69% owned by the holding company in which the plaintiffs held their shares,

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[99] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). For the recent strengthening of oversight duties, see Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. Corp. L. 119, 127–29 (2022).

[100] *See Caremark*, 698 A.2d at 965 n.10. ("The agreement, covering allegations since 1986, required a Caremark subsidiary to enter a guilty plea to two counts of mail fraud, and required Caremark to pay $29 million in criminal fines, $129.9 million relating to civil claims concerning payment practices, $3.5 million for alleged violations of the Controlled Substances Act, and $2 million, in the form of a donation, to a grant program set up by the Ryan White Comprehensive AIDS Resources Emergency Act."). In fact, as described by the Department of Justice, Caremark's subsidiary Caremark Inc. was the party to the agreement required to pay the criminal and civil sanctions. Press Release, U.S. Dep't of Just., Caremark to Pay $161 Million in Fraud and Kickback Cases (June 16, 1995) ("[T]he Department of Justice today announced a criminal and civil settlement with Caremark Inc., a subsidiary of Caremark International, the Illinois based health care corporation. Caremark Inc. will plead guilty and pay approximately $161 million in criminal fines, civil restitution and damages . . .").

[101] Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 365 (Del. 2006).

[102] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

and he requested special submissions by the parties on this issue.[103] The Supreme Court's decision by Chief Justice Leo Strine, however, embraced entity transparency and did not even bother with the issue of entity boundaries, except to observe in a footnote that, ultimately, "the Court of Chancery sensibly and properly collapsed the enterprise for purposes of analyzing the complaint."[104] In its 2020 decision in *Chou*, the Delaware Chancery Court again confirmed its approach of strict entity transparency in allowing a *Caremark* claim to proceed against the parent company's directors even though the violation in question occurred in only one of many subsidiaries of a giant drug company.[105]

B. United Kingdom

The United Kingdom is famous in the comparative literature for its alleged formalism and conceptualism in upholding "an 'extreme' entity view of corporate groups"[106] and providing "the starkest example of non-intervention" in refusing to legislate on company groups.[107] However, when it comes to the treatment of shareholder rights, such notions do not survive inspection. Far from following a "very strict approach to the separateness of companies within groups,"[108] U.K. company law is strongly, and increasingly, marked by entity transparency.

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[103] *See* Marchand v. Barnhill, No. 2017-0586-JRS, 2018 WL 4657159, at *1, *8 (Del. Ch. Sept. 27, 2018), *rev'd* 212 A.3d 805 (Del. 2019).

[104] *Marchand*, 212 A.3d at 809 n.14.

[105] *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020). For a discussion, see Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 Wash. U. L. Rev. 1857, 1866 (2021) (noting that "[t]he *Chou* court extends the application of such enhanced oversight duties to the context of a giant drug company, for violations that occur in one of its many subsidiaries, and involve only a tiny fraction of the company's overall revenues ($14 million)").

[106] Christian Witting, *The Corporate Group: System, Design and Responsibility*, 80 Cambridge L.J. 581, 581 (2021) ("UK courts uphold what has been described as an 'extreme' entity view of corporate groups, which emphasises the separate legal personality of each group company and the limited liability of shareholding companies."); *see also* Janet Dine, The Governance of Corporate Groups 43 (2004) ("Perhaps the most extreme example of separate units is the UK," to the effect that "much of the jurisprudence concerning groups has been developed on this basis."); Klaus J. Hopt, *Groups of Companies: A Comparative Study on the Economics, Law, and Regulation of Corporate Groups*, *in* The Oxford Handbook of Corporate Law and Governance 611 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (arguing that in the United Kingdom, the "corporate group law as such (apart from group accounting, for example) is non-existent"). *But see* D. D. Prentice, *Some Comments on the Law Relating to Corporate Groups*, *in* Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation 372 (Joseph McCahery et al. eds., 1993) (mentioning "laws relating to consolidation of accounts, disclosure, taxation, directors' dealings within the context of groups, minority shareholder oppression, and insolvency" as relevant areas of U.K. laws affecting corporate groups, but not addressing the scope of shareholders rights within corporate groups).

[107] Dine, *supra* note 106, at 65.

[108] *Id.* at 43.

The United Kingdom tracks closely, and possibly surpasses, the United States as a champion of entity transparency in corporate law, in a longstanding trend that became even more conspicuous in the Companies Act of 2006. Unbeknownst to commentators, the United Kingdom's apparent aversion to veil piercing for purposes of holding shareholders liable for corporate debts does not translate into entity formalism for purposes of shareholder rights under company law. In fact, U.K. law epitomizes the lack of correlation between a jurisdiction's willingness to disregard asset partitioning for the benefit of creditors, on the one hand, and to overcome regulatory partitioning for the benefit of shareholders, on the other.

To begin with, the United Kingdom was a pioneer in the adoption of consolidated accounting compared to civil law jurisdictions, even though it lagged behind the United States.[109] The obligation to publish group accounts in some form emerged from rules issued by the London Stock Exchange in 1939, the Institute of Chartered Accountants in England and Wales in 1942, and the government in 1947, though earlier experiences of voluntary provisions date to the 1910s.[110] Scholars have advanced various explanations for the later adoption of group statements in the United Kingdom relative to the United States, including the lower incidence of holding-company structures in nineteenth-century Britain,[111] the greater effort to attract scarce funding in U.S. capital markets,[112] legal concerns that the Companies Act required entity-based financial reporting,[113] and British managers' desire to continue to use secret reserves provided by subsidiaries to smooth earnings.[114]

The spread of consolidated accounting from the United States to the United Kingdom was assisted by audit firms, as their largest offices in New York and London have communicated for well over a century.[115] Local scandals enabled by entity centrism in accounting also played a part. The famous

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[109] *See* Christopher Nobes, *The Development of National and Transnational Regulation on the Scope of Consolidation*, 27 Acct. Auditing Accountability J. 995, 996 (2014) ("The USA and the UK pioneered the practice of consolidation in the first half of the twentieth century, and then Germany and France introduced some significantly different practices in the second half."); Hadden, *supra* note 106, at 362 (arguing that statutory requirements of consolidated accounting "[were] introduced much earlier in this respect in common-law than in civil-law jurisdictions").

[110] J. R. Edwards & K. M. Webb, *The Development of Group Accounting in the United Kingdom to 1933*, 11 Acct. Historians J. 31, 31 (1984).

[111] *See* Walker, *supra* note 45, at 113 ("Until the 1920s few British companies had used the holding-company form as a means of organizing their affairs and carrying out mergers."). The growing use of the holding company structures in the United States in part served to evade the protectionist provisions in state laws requiring local incorporation of utility companies—a problem absent in the U.K. system. *See* Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 Ind. L.J. 533, 566 (2020).

[112] *See* Edwards & Webb, *supra* note 110, at 43 (citing Nicholas A. H. Stacey, English Accountancy: A Study in Social and Economic History, 1800–1954 (1954)).

[113] *See id.* at 45.

[114] *Id.* at 44.

[115] Nobes, *supra* note 109, at 1016.

crisis involving Royal Mail in 1931, a company that inflated profits through intercompany transfers of dividends based on secret reserves, was a "major factor" prompting the publication of consolidated financial statements.[116]

The United States preceded the United Kingdom in the adoption of greater entity transparency relating to the scope of consolidation, expanding coverage from wholly owned to majority owned companies and shifting from majority of shares to a majority of voting shares.[117] By contrast, the United Kingdom pioneered the mandatory inclusion of foreign subsidiaries (likely more significant in British groups), noncorporate entities, and controlled-entities that are not majority owned. It was not until after the Enron debacle in 2001 that the United States caught up with the latter two requirements.[118] Yet the United Kingdom's vanguard role in group accounting is generally viewed as an isolated development bearing little relationship with the overall treatment of groups by corporate law.

By 1956, British company scholar L.C.B. Gower argued that "the [famous veil piercing] case of *Salomon v. A. Salomon and Co.,* which is its parent, laid down the corporate entity principle with such rigor that English judges have found much greater difficulty than their American colleagues in piercing the corporate veil when public policy so demands."[119] To be sure, there is reason to question the presumed hostility of United Kingdom courts to veil peeking as an exception to regulatory partitioning (as opposed to veil piercing as an exception to asset partitioning),[120] and Gower himself offers examples of how company law reacted to abuses enabled by regulatory partitioning.[121]

As he explains it, public companies in the early twentieth century took advantage of immunities afforded to private companies, including the prized advantage of avoiding the obligation to publish financial statements, by operating through subsidiaries.[122] The Companies Act of 1948 foreclosed this form of evasion through entity formalism by subdividing private companies into exempt and nonexempt—with immunities being limited to the former, which were not allowed to have legal persons as shareholders.[123] Interestingly, this encroachment to entity formalism did not immediately spread to the

[116] Walker, *supra* note 45, at 83; Edwards & Webb, *supra* note 110, at 48 ("revelations in the Royal Mail case awakened the accounting profession to the existence of a moral as opposed to a purely legal responsibility towards its clients"); Eri Kanamori, *The Development of Group Accounting in the United Kingdom to 1950*, 9 (2009) (Thesis Submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy of Cardiff University).

[117] Nobes, *supra* note 109, at 1016.

[118] *Id.*

[119] L.C.B. Gower, *Some Contrasts between British and American Corporation Law*, 69 Harv. L. Rev. 1369, 1379 (1956).

[120] Pargendler, *Veil Peeking*, *supra* note 18, at 731, 740, 764.

[121] Gower, *supra* note 119, at 1379.

[122] *Id.*

[123] *See id.*; Companies Act 1948, 11 & 12 Geo. 6 c. 38, § 129, sch. 7 (UK).

Commonwealth, as it was rejected by the South African Companies Act of 1952.[124]

Although forgotten by present-day commentators, the innovations in entity transparency introduced by the 1948 Companies Act did not go unnoticed by contemporaneous observers. Prominent comparativist Otto Kahn-Freund noted in 1946 how the report preceding the Act had "boldly ignored the fiction of corporate personality" and "may well be the starting point of a new branch of the law, the law of 'interlinked concerns', the discipline which, in Germany, used to be known as *Konzernrecht*."[125] The 1948 Companies Act indeed included several instances of entity transparency: the age limit for directorships applied to both public companies and their subsidiaries,[126] the power of inspectors appointed by the Board of Trade included investigation of related companies,[127] and disclosure requirements for director remuneration[128] and loans to officers[129] covered amounts paid by the company and its subsidiaries. Overall, the 1948 Companies Act provided several rules contemplating specific treatment to groups of companies, usually to ensure pass-through treatment. There are 193 mentions of "subsidiary(ies)," 54 mentions of "holding company," and 34 mentions of "group" (mostly in connection with the new rules for group accounting)—with the number of mentions of the same terms ballooning to 246, 106, and 221, respectively, in the Companies Act of 2006.[130]

The United Kingdom's signature mandatory bid rule in the takeover context has also gradually evolved toward ever greater entity transparency. In 1972, the City Code on Takeovers and Mergers introduced a mandatory bid rule, that is, the requirement that the acquirer of corporate control extend an offer to all shareholders at the highest price paid for the shares in the preceding year.[131] Just four years later, the Code introduced the so-called "chain principle" in connection with the mandatory bid rule, which aims to capture

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[124] Gower, *supra* note 119, at n.1379.

[125] Otto Kahn-Freund, *Company Law Reform: A Review of the Report of the Committee on Company Law Amendment*, 9 Mod. L. Rev. 235, 238, 240 (1946).

[126] Companies Act 1948, 11 & 12 Geo. 6 c. 38, § 185

[127] *Id.* § 166.

[128] *Id.* § 196.

[129] *Id.* § 197.

[130] Figures based on author's calculations based on original versions of each statute. The Companies Act of 2006 also contains eleven references to the new term "associated companies." The Companies Act of 1985 mentions "subsidiary(ies)," "holding company," and "group" 399, 193, and 193 times, respectively. However, the relative decline in the number of mentions of the terms "subsidiary" and "holding company" from 1985 to 2006 does not necessarily entail a decline in entity transparency in U.K. company law. Not only does the number of provisions explicitly providing for entity transparency appear to have increased, but courts have also filled perceived gaps in the statute to provide entity transparency. *See supra* notes 93–94 and accompanying text.

[131] Andrew Johnston, *Takeover Regulation: Historical and Theoretical Perspectives on the City Code*, 66 Cambridge L.J. 422, 445 (2007).

certain indirect acquisitions of control dates. In the original formulation of the chain principle, the mandatory bid rule covered not only the direct target of the takeover, but also any controlled company that (i) constituted a substantial part of the assets of the offeree company or (ii) was the main purpose of the acquisition of the offeree company.[132]

Subsequent amendments to the City Code in 1985 and 1988 enhanced the scope of entity transparency in the operation of the chain principle for purposes of the mandatory bid rule: this meant that the mandatory bid rule would also apply to subsidiaries that are (i) "significant" vis-à-vis the target company (defined as covering 50% or more of value) or (ii) a "significant" (rather than a "main" or "one of the main") purpose in the acquisition of the target.[133] In May 2022, the Takeover Panel amended the code to augment the scope of the chain principle even further by replacing "significant purpose" with "significant interest," which was reduced from 50% to 30% of target value.[134] In addition to increasing the reach of the mandatory bid rule, the shift from "purpose" to equity interest also reflects the broader tendency of tagging entity transparency to objective criteria rather than to more subjective tests aimed at capturing regulatory arbitrage.

Entity transparency is also a feature of U.K. listing rules. Premium listing rules embrace entity transparency in their requirements of shareholder approval for significant transactions, including sales of 25% of total assets, as well as in the regulation of related-party transactions.[135] The rules on significant transactions cover the listed company and subsidiaries, but exempt transactions between the listed company and a wholly owned subsidiary or between wholly owned subsidiaries.[136] A large number of other listing rules cover both listed companies and subsidiary undertakings or apply to the "group."[137]

Entity transparency in U.K. company law also results from case law. Despite the broad embrace of entity transparency by the 2006 Companies Act in

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[132] The City Code on Take-overs and Mergers 64, Practice Note 8 (item 12) (Revised April 1976). A substantial part of the assets was generally interpreted by the Executive as a threshold of approximately 80%. *See* Public Consultation by the Code Committee, Miscellaneous Code Amendments 21 (Dec. 2, 2021) [hereinafter 2021 Consultation].

[133] The Takeover Code, F8, Notes on Rule 9.1 (item 8) (Dec. 2016).

[134] The Takeover Panel Instrument 2022/2, 5 May 2022 (amending the Takeover Code with effect from 13 June 2022).

[135] FCA Listing Rules, The Fin. Conduct Auth., https://www.handbook.fca.org.uk/handbook/LR.pdf [hereinafter Listing Rules], LR 10: Significant transactions (Premium listing) (§§ 10.1.3, 10.2.2, 10.5.1); LR 11: Related party transactions (Premium listing) (§§ 11.1.3, 11.1.7).

[136] Listing Rules, § 10.1.3(1) and (5).

[137] *See*, *e.g.*, Listing Rules, § 6.7 ("An applicant must satisfy the FCA that it and its subsidiary undertakings (if any) have sufficient working capital available for the group's requirements."); § 6.14.3 ("For the purposes of LR 6.14.1R and LR 6.14.2R, shares are not held in public hands if they are: (1) held, directly or indirectly by: (a) a director of the applicant or of any of its subsidiary undertaking . . ."); 9.4.4 ("(1) This *rule* applies to the grant to a *director* or *employee* of a *listed company* or of any *subsidiary undertaking* of a *listed company* of an option to subscribe, warrant to subscribe or other similar right to subscribe for *shares* in the capital of the *listed company* or any of its *subsidiary undertakings*.").

other respects and the recommendation for the regulation of double derivative suits by the committee in charge of reviewing the Act,[138] the relevant statutory provisions on derivative actions do not contemplate double derivative suits.[139] Facing this "legislative oversight," U.K. courts have held that double derivative suits survived the Act and continue to apply under the common law requirements, which are however more burdensome than those applicable to derivative suits under the 2006 Act.[140] The only major example of entity transparency that the U.K. currently lacks is access to the books and records of subsidiaries, for the simple reason that shareholders do not have general inspection rights regarding books and records under U.K. company law.[141]

C. Japan

Among the jurisdictions examined, Japan stands out for having most deliberately embraced entity transparency through statutory reforms in the last decades. Four years before the Delaware reform granting pass-through inspection rights, a 1999 amendment to Japan's Commercial Code allowed shareholders of parent companies to request the books and records of subsidiaries, with the explicit aim of avoiding a "reduction of shareholder rights."[142] This reform followed a revision to the Antimonopoly Act two years earlier that permitted the use of holding companies in Japan for the first time since the Allies banned conglomerate (*zabaitsu*) structures in 1947.[143] Interestingly, scholarly attention to the problem of reduction of shareholder rights in Japan

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[138] A Consultation Document from The Co. L. Rev. Steering Grp, Modern Company Law for a Competitive Economy: Developing the Framework 172 (Mar. 2000). This contrasts with a previous recommendation by the U.K. Law Commission on Shareholder Remedies, which had argued that the issue of multiple derivative actions "is best left to the courts to resolve." U.K. Law Commission, Shareholder Remedies Report 103–104 (1997) (reasoning that despite support from a small majority of respondents during the consultation phase, "this situation is likely to be extremely rare" and "any rule attempting to deal with it would be complicated and unlikely to be able to cover every conceivable situation.").

[139] Paul Davies, Introduction to Company Law 277 (2020).

[140] *Id.*; Universal Project Management Services Ltd. v. Fort Gilkicker Ltd & ors, [2013] All ER (D).

[141] Dan W. Puchniak & Samantha Tang, *Limited Shareholder Inspection Rights in Singapore: Worrying Legal Gap or Unnecessary for Rankings?* 18 (Eur. Corp. Governance Inst. – L. Working Paper No. 608/2021, 2022), http://ssrn.com/abstract_id=3918900 (noting that the United Kingdom lacks a specific mechanism of shareholder inspection rights).

[142] Tomotaka Fujita, *National Report on Japan*, *in* Group of Companies: A Comparative Law Overview 182 (Rafael Mariano Manóvil ed., 2020) (noting that the terminology "reduction of shareholder's rights" used by Japanese commentators derives from the German academic literature).

[143] *Id.* at 181–82; Zenichi Shishido, *The Turnaround in 1997: Changes in Japanese Corporate Law and Governance*, *in* Corporate Governance in Japan: Institutional Change and Organizational Diversity 316 (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds., 2007) (observing that the Allies viewed the *zabaitsu* holding companies as "one of the biggest evils" in pre-war Japanese society).

drew explicitly on German scholarship, which was itself inspired by Melvin Eisenberg's work defending pass-through shareholder rights.[144]

A broader reform in 2014 increased entity transparency by allowing double or multiple derivative suits, following scholarly references to U.S. law.[145] Despite support by commentators, Japanese courts refused to allow double derivative suits prior to the 2014 amendments, finding that standing for a derivative suit required the continued holding of at least one share of the company at which a defendant served as a director or officer.[146] The new rules allowing double or multiple derivative suits are still more restrictive than their counterparts in other jurisdictions, only applying to wholly owned subsidiaries whose shares exceed 20% of the parent company's total asset value and to parent company shareholders holding 1% of voting rights (a requirement that does not exist for standard derivative suits in Japan).[147]

The change is likely consequential in Japan, the only jurisdiction outside the United States with significant levels of derivative litigation.[148] The same 2014 reform also increased entity transparency in requiring parent-company shareholder approval of transfers of substantial subsidiary shares, while maintaining entity formalism with respect to sales of subsidiary assets. Even prior to these reforms, there have long been pockets of entity transparency in Japanese corporate law. In contrast to the statutory laws of countries such as Brazil,[149] the Japanese Commercial Code explicitly grants statutory auditors the right to inspect corporate subsidiaries.[150]

Japan was a latecomer in the adoption of consolidated accounting. First introduced in 1977 as part of its securities laws, the new consolidation requirements responded both to the standardization pressures linked to Japan's growing integration into global capital markets and to its own experience with accounting manipulation under an entity view.[151] When Japanese firms began issuing equity in U.S. markets in the 1960s, they had to hire international accounting firms to produce consolidated financial statements for the first time

[144] Fujita, *supra* note 142, at 182. Curiously, German law itself followed a different path. *See infra* Part II.D.

[145] Fujita, *supra* note 142, at 184–85.

[146] *Id.*

[147] *Id.*

[148] Gelter, *supra* note 51, at 844 (noting that derivative suits are important mechanisms of corporate governance enforcement in Japan and the United States, but not in continental Europe); *see generally* Dan W. Puchniak & Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behaviour and Non-Economic Motives as Rational Explanations for Shareholder Litigation*, 45 Vand. J. Transnat'l L. 1 (2012) (exploring the factors leading to the explosion of derivative actions in Japan starting in the 1990s).

[149] *See infra* Part II.H.

[150] Shiro Kawashima & Susumu Sakurai, *Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms*, 33 Stan. J. Int'l L. 9, 25 (1997).

[151] Jill L. McKinnon, *Application of Anglo-American Principles of Consolidation to Corporate Financial Disclosure in Japan*, 20 Abacus 16, 20 (1984).

due to the lack of expertise among domestic accounting professionals.[152] In the 1970s, when U.S. companies began seeking listings on the Tokyo Stock Exchange, they negotiated with Japanese regulators regarding the possibility of using consolidated financials instead of the parent-only model that prevailed at the time.[153] Finally, Japan had major scandals of accounting manipulation in the 1960s due to fictitious intercompany sales at inflated prices designed to hide losses or inflate profits of parent companies, as illustrated by the high-profile fraudulent bankruptcy of Sanyo Special Steel Company in 1965.[154]

The new consolidation requirements were framed as convergence to the Anglo-American model, which was perceived as superior.[155] Japanese commentators, however, expressed concern that the imported model of consolidation based on equity ties was less suitable for Japan given its particular ownership patterns.[156] While Anglo-American firms often had a holding company and wholly owned subsidiaries, the Japanese group structure was based on "complex patterns of decentralized shareholdings."[157] Identifying these relationships became a significant operational problem for accounting professionals in Japan.[158]

Nevertheless, these early consolidated financial statements were deemed uninformative due to various exceptions.[159] Japanese financial analysts continued to focus exclusively on parent companies rather than on the group finances.[160] Scholars have posited that the lack of transparency operated as a hurdle to foreign acquisitions of Japanese firms,[161] enabling them to shift losses into the accounts of subsidiaries.

It was not until 1999 that corporate groups had to disclose consolidated accounts in earnest, following the growing consensus that improvements in accounting standards were necessary to keep Japan internationally competitive in the aftermath of its property bubble burst.[162] Reflecting a significant

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[152] *Id.* at 19. The use of parent-only financial statements had historically hindered the access of Japanese companies to U.S. capital markets.

[153] *Id.*

[154] *Id.* at 19–20. *See also* Shisuki Saito, *Japan, Part Two: Postwar to Present*, *in* A Global History of Accounting, Financial Reporting and Public Policy 189 (Gary John Previts ed., 2011) (arguing that the introduction of consolidated financial statements in Japan was "partly due to the public outcry over profit manipulation by parent companies through the transfer of losses to their subsidiaries (i.e., window-dressing)").

[155] Saito, *supra*, note 154, at 20.

[156] *Id.* at 22.

[157] *Id.* at 22.

[158] *Id.* at 23.

[159] *Id.* at 31; Kees Camfferman & Dominic Detzen, "*Forging Accounting Principles" in France, Germany, Japan, and China: A Comparative Review*, 23 Acct. Hist. 448, 466 (2018).

[160] Curtis Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals*, *in* Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals 305 (Curtis Milhaupt ed., 2003).

[161] *Id.*

[162] Camfferman & Detzen, *supra* note 159, at 467; Mathias Siems, Convergence in Shareholder Law 133 (2007).

move toward greater entity transparency, Japanese law today focuses on the corporate group not only for purposes of financial statements and business reports, but also for risk and internal control systems.[163]

D. Germany

German law stands out as the first legal system to have established an explicit statutory regime for corporate groups—a model subsequently adopted by other jurisdictions such as Brazil, Portugal, and Italy. The German law on corporate groups (*Konzernrecht*) was enacted in 1965 with the stated goal of protecting minority shareholders and creditors in corporate subsidiaries,[164] but it also increased flexibility in group management.[165]

The *Konzernrecht* regime increased entity transparency in German corporate law in some respects. It innovated by requiring consolidated financial statements for corporate groups for the first time in the country, even if originally limited to domestic subsidiaries. This early move to consolidated accounting made Germany a pioneer among its continental European peers.[166] It also recognized unidirectional entity transparency by allowing subsidiary shareholders to sue directors of parent companies.[167] Like other jurisdictions, the subsequent German statute on control transfers also adopts entity transparency in connection with the mandatory bid requirement triggered by a change of control.[168] Other provisions of German corporate law, however, continue

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[163] Fujita, *supra* note 142, at 172.

[164] Andreas Cahn & David C. Donald, Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA 834 (2018) (arguing that *Konzernrecht* rules found in §§ 15–19 and 291–38 of the *Aktiengesetz* "are designed for the protection of the subsidiary's minority shareholders and creditors").

[165] This is another goal of corporate group law in Australia and the European Union. *See* Klaus J. Hopt, *Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups*, *in* Oxford Handbook of Corporate Law and Governance (Jeffrey Gordon & Wolf-Georg Ringe eds., 2018). *See also* Alexander Scheuch, *Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, 13 Eur. Co. L.J. 191, 191 (2016) (describing how *Konzernrecht* "provides a controlling shareholder with management powers that significantly go beyond what would be possible according to the rules of regular stock corporation law").

[166] Peter Swoboda, *Comparison of Consolidated Financial Statements in the United States and West Germany*, 1966 Int'l J. Acct. 9, 9–10 (noting that the 1965 German Act contained "more rigorous regulations concerning consolidation practices than for any other European country").

[167] Harald Baum & Dan W. Puchniak, *The Derivative Action: An Economic, Historical and Practice-Oriented Approach*, *in* The Derivative Action in Asia: A Comparative and Functional Approach 8 (Dan W. Puchniak et al. eds., 2012) (hereinafter The Derivative Action in Asia).

[168] WpÜG (Securities Acquisition and Takeover Act), § 29 (definition of "control"), § 35 (mandatory bid). Defining control as 30% of voting rights, the German statute captures both direct and indirect control sales. Domingos Freire de Andrade, *The Chain Principle: Equilibrium Between a Regulatory Need and Its Effects*, 17 Eur. Co. L.J. 243 (2020). The statute also generally extends the mandatory bid rule to outside shareholders of corporate subsidiaries, although

to uphold regulatory partitioning.[169] German law still does not recognize the standard form of double derivative suit allowing parent company shareholders to sue subsidiary directors.[170]

Melvin Eisenberg's work on shareholder protection in corporate groups left a clear imprint on German corporate law. Eisenberg's writings impressed on German scholars the notion that corporate groups also posed a threat to minority shareholders in the parent company through the so-called "mediatisation" of shareholder rights,[171] a concern that differs from the well-known risks to shareholders and creditors of subsidiaries that were the focus of *Konzernrecht*.[172]

The landmark *Holzmüller* decision by Germany's highest civil court (*Bundesgerichtshof* [BGH]) in 1982 provides a prophylactic, if partial, response to the problem. It does not enhance entity transparency as envisioned by Eisenberg, but rather polices asset transfers *to* subsidiaries. This case concerned a challenge by substantial minority shareholders of the managing board's decision to transfer valuable corporate assets to a wholly owned subsidiary especially established for that purpose. Even though Germany's Stock Corporation Act required shareholder approval only in limited circumstances, the BGH found that the decision demanded shareholder approval given its potential to "weaken the legal position of the shareholders even if the parent company owns all of the shares of the subsidiary."[173]

Noting that the express statutory provisions were insufficient to protect parent-company shareholders, the court found "a real gap in the Stock Corporation Act that should be closed in accordance with the Act's systematic design and policy aims."[174] The decision shows a civil law jurisdiction's willingness to interpret a statute broadly, in lieu of waiting for legislative

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the supervisory board of the target may waive the obligation when the assets of the subsidiary represent less than 20% of the assets of the parent. Davies et al., *supra* note 20, at 233.

[169] Most of *Konzernrecht* provides distinct corporate law rules for groups of companies without impinging on entity formalism, such as the requirement that companies in a *de facto* group provide an audited version of a "dependence" report on intragroup transactions to their supervisory board, and the obligation of parent companies to indemnify subsidiaries for losses incurred by acting in the group's interest. *See* Armour et al., *supra* note 20, at 121, 133.

[170] Georgios Zouridakis, Shareholder Protection Reconsidered: Derivative Action in the UK, Germany and Greece 89 (2020) (describing the inadmissibility of multiple derivative suits in continental European jurisdictions, which "can be perceived to frustrate the sacrosanct principle of separate legal personality").

[171] Marc Löbbe, *Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection—The German Federal Court of Justice's Recent Gelatine and Macrotrom Cases Redefine the Holzmüller Doctrine*, 5 German L.J. 1057, 1059 (2004).

[172] Cahn & Donald, *supra* note 164, at 839 (noting how Eisenberg's work "was adopted and expanded by German scholars in numerous articles and books, some of which are cited in the Holzmüller decision"); Marcus Lutter, *Enterprise Corp. v. Entity Law Inc.—Phillip Blumberg's Book From the Point of View of an European Lawyer.*, 38 Am. J. Comp. L. 949, 958 (1990).

[173] Cahn & Donald, *supra* note 164, at 622.

[174] *Id.* at 624.

intervention.[175] Citing various German scholars who had built on Eisenberg's lessons and expressed concern that the transfer to the subsidiary "may hollow out the membership rights of the shareholders in the parent company," the opinion embraced the prophylactic policing of the intragroup transfer in the first place by requiring shareholder approval.[176] U.S. commentators at the time celebrated the decision as a model for American law, then viewed as plagued by formalism.[177]

Holzmüller is now famous in Germany as a decision on the balance of power within the corporation, given the system of strong insulation of the management board from shareholders under the Stock Corporation Act, but it is also criticized for the legal uncertainty it produced.[178] Subsequent judicial decisions in the *Gelatine* cases in the 2000s have restricted *Holzmüller* to decisions affecting a substantial part (around 80%) of corporate assets.[179] While *Holzmüller* sympathetically cites doctrinal authority for pass-through shareholder rights in corporate groups,[180] the strategy of *ex ante* shareholder approval has likely contributed to the continued grip of entity formalism in German law. In some respects, the German regime represents the opposite solution adopted by Delaware and U.K. law, which police shareholder approval of substantial asset sales *from* wholly owned subsidiaries but not *to* them.

E. France

Entity transparency has also gained ground in French law, although niches of formalism remain. Recommended by accounting authorities since 1968, consolidated accounting became broadly mandatory when France implemented the EU's Seventh Directive in 1985.[181] As is true in Japan, the inspection rights of French statutory auditors apply on a pass-through basis

[175] *Id.* ("[i]t would unduly restrict a necessary extension of the law through judicial precedent (*Rechtsfortbildung*) to ask the damaged shareholders to wait for a future legislative amendment or further clarification in the legal scholarship, as the Court of Appeals in effect found proper. This would above all contradict a tendency found in existing corporate law to protect minority shareholders in manifold ways against a debasement of their membership status through direct or indirect encroachments of the majority and against a management under their influence, particularly in corporate groups").

[176] The Anatomy of Corporate Law, *supra* note 20, at 200.

[177] Richard M. Buxbaum, *Extension of Parent Company Shareholders' Rights to Participate in the Governance of Subsidiaries*, 31 Am. J. Comp. L. 511, 519 (1983) ("Given the present unsatisfactory situation under the American law already criticized by Eisenberg, however, it is at the least clear that *Müller* [Holzmüller] is a significant improvement on that present situation, one which might well be used as a guide to American courts in the development of this aspect of corporate governance").

[178] Löbbe, *supra* note 171, at 1064.

[179] *Id.* at 1078.

[180] Cahn & Donald, *supra* note 164, at 624 (citing German scholars Lutter, Schneider and Timm).

[181] Nobes, *supra* note 109, at 998.

to reach controlled and controlling entities of the company in question.[182] Entity transparency also applies in France to exempt companies belonging to the same corporate group from various corporate governance rules, such as limitations on the number of directorships, the prohibition of serving as a managing director in more than one company, and the requirement of an audit committee beyond the parent level.[183] Moreover, a 2014 statute exempted transactions with wholly owned subsidiaries from regulations on related-party transactions.[184]

French corporate law allows for a "group view" defense against director criminal liability for abuse of corporate assets in groups of companies. The famous *Rozenblum* doctrine, as developed by the French Supreme Court, provides that a parent company may lawfully "divert value from one of its subsidiaries if three conditions are met: the structure of the group is stable, the parent is implementing a coherent group policy, and there is an overall equitable intra-group distribution of group costs and revenues."[185] While French courts are inclined to find the overall distribution equitable if there is no threat to the company's solvency,[186] the *Rozenblum* doctrine still falls short of recognizing full entity transparency, since it considers the individual company's benefits and costs of belonging to the group.

Other reforms in the twenty-first century have further increased entity transparency. A 2001 statute required consolidated accounts to be submitted for approval by the shareholder meeting, as well as extended shareholders' information rights to cover subsidiaries.[187] Shareholders holding at least 5% of shares can request information from the company's president regarding subsidiaries, and, if the request is not satisfactorily addressed, the shareholder can then request the judicial appointment of an expert to inspect the operations of the subsidiary.[188] Entity transparency for purposes of inspection rights operates unilaterally, applying downstream to cover subsidiaries, but not upstream to cover parent companies.[189]

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[182] Code de commerce [C. com.] [Commercial Code] arts. L823-13, L823-14 et L233-3 (Fr.); *see* Geneviève Helleringer, *Related Party Transactions in France: A Critical Assessment*, *in* The Law and Finance of Related Party Transactions 402, 411 (Luca Enriques & Tobias Tröger eds., 2019).

[183] Code de commerce [C. com.] [Commercial Code], arts. L225-21 al. 2 and L225-54-1 (Fr.). Organisation for Economic Co-operation and Development (OECD), Duties and Responsibilities of Boards in Company Groups 28 (2020) (hereinafter OECD Report).

[184] Code de commerce [C. com.] [Commercial Code] arts. L225-39 and L225-87 (Fr.).

[185] Enriques et al., *supra* note 50, at 164.

[186] *Id.*

[187] Code de commerce [C. com.] [Commercial Code] arts. L225-100 and L225-231 (Fr.).

[188] *Id.* at L225-231. Courts have assessed if the response is satisfactory and an expert should be appointed in view of the interest of the group, and not in the sole interest of the shareholder. *See*, *e.g.*, Cour d'appel [CA] [regional court of appeal] Versailles, 14e ch., Oct. 23, 2002, 02/05235 (Fr.).

[189] Cour de cassation [Cass.] [supreme court for judicial matters], com., Sept. 10, 2013, Bull. civ. IV, No. 12-16.509 (Fr.).

While France stands out among civil law jurisdictions for its longstanding recognition of derivative suits,[190] double derivative actions remain unavailable despite scholarly support. After citing the availability of double derivative suits in the United States and the advent of consolidated accounting in France, a 1986 law review argued that "in sneaking behind the opacity of legal personalities[, French law] went against the current of the recent evolution of company law, which recognizes various levels of transparency of companies belonging to a group."[191] More recently, scholars have argued that double derivative suits are consistent with the "judicial and legislative evolution of corporate law in France," given that the interest of the group under *Rozenblum* permits actions and transactions detrimental to an individual entity's interests and that the 2001 reform expands shareholders' information rights to subsidiaries.[192]

Nevertheless, French courts continue to hold that the right to file a derivative suit under article L225–252 of the Commercial Code is limited to the company in which the plaintiff is a shareholder.[193] At the same time, the minority shareholders' right to request the appointment of an administrator for all companies in the group serves as a way around the ban on double derivative suits, as the administrator is then able to take legal action against subsidiary directors.[194] There is also growing judicial support for entity transparency in related areas, as exemplified by a criminal court decision allowing a parent-company shareholder to file a lawsuit for abuse of corporate assets committed at the subsidiary level.[195]

F. EU Company Law

Directives at the EU level have also recognized and promoted the expansion of entity transparency in corporate law across Europe. The Seventh Directive of the European Economic Community of 1978, inspired by German

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[190] Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. Econ. Persps. 117, 128 (2007).

[191] Claude Armand & Alain Viandier, *Réflexions sur l'exercice de l'action sociale dans le groupe de sociétés : transparence des personnalités*, 104 Revue des Sociétés 557 (1986).

[192] Estelle Scholastique, *Détermination des personnes habilitées à exercer l'action sociale ut singuli dans un groupe de sociétés*, 18 Recueil Dalloz 1475, 1477 (2002) (citing Rozenblum); Jean Christophe Pagnucco, *Les pouvoirs des minoritaires dans les groupes de sociétés*, Droit des sociétés 26, 29 (juin 2017) (noting the contradiction between the ban on double derivative suits and shareholder rights to request information or inspection of subsidiaries). *See also* Le Lamy, Sociétés commerciales, § 2319 (2021) (also supporting double derivative suits, despite caselaw to the contrary).

[193] Cour de cassation [Cass.] [supreme court for judicial matters], com., Mar. 13, 2019, Bull. civ. IV, No. 17-22.128 (Fr.).

[194] Cour de cassation [Cass.] [supreme court for judicial matters], com., Feb. 5, 1985, Bull. civ. IV, No. 82-15.119 (Fr.).

[195] Cour de cassation [Cass.] [supreme court for judicial matters], crim., Apr. 4, 2001, Bull. crim. No. 00-80.406 (Fr.).

and especially U.K. practices, played a key role in the spread of consolidated accounting in Europe.[196] The Second EU Shareholder Rights Directive explicitly embraced entity transparency when requiring disclosure of director remuneration "not only from the company itself, but also from any undertaking belonging to the same group."[197] The Preamble articulates the risk of evasion associated with regulatory partitioning: "[i]f remuneration awarded or due to individual directors by undertakings belonging to the same group as the company were excluded from the remuneration report, there would be a risk that companies try to circumvent the requirements laid down by this Directive by providing directors with hidden remuneration via a controlled undertaking."[198]

EU Directives have adopted entity transparency not only to augment minority shareholder protection but also to ensure flexibility in subsidiary management and to further non-shareholder interests. Similarly to U.K. law, the Second EU Shareholder Rights Directive allows Member States to exempt transactions between the company and wholly owned subsidiaries from its reporting and approval requirement, thereby saving on administrative costs.[199]

G. India

There has been a concerted move towards entity transparency in Indian law, although the regime still exhibits some level of inconsistency. India follows international best practices by considering relationships with subsidiaries and associates in the determination of director and auditor independence[200] and, since 2002, by requiring consolidated financial statements of listed companies as part of its convergence to IFRS.[201] Although consolidated accounting came relatively late to Indian law, entity transparency previously operated

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[196] Graham Diggle & Christopher Nobes, *European Rule-making in Accounting: The Seventh Directive as a Case Study*, 24 Acct. Bus. & Rsch. 96, 328 (2012) (arguing that "the German 1965 Aktiengesetz [Stock Corporation Act] was an important model for the first published draft of the Seventh Directive," but "the final Directive was closer to UK rules or practice"). On this evolution, *see also* Martin Gelter & Zehra G. Kavame Eroglu, *Whose Trojan Horse? The Dynamics of Resistance Against IFRS*, 36 U. Penn. J. Int'l L. 89 (2014).

[197] Council Directive 2017/828, 2017 O.J. (L 132) 10 (EC) (amending Council Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement).

[198] *Id.*

[199] *Id.*, art. 9c(6), at 31. The 2006 changes to the EU Accounting Directive likewise included the possibility of states exempting reporting of related-party transactions between two or more members of a group provided that subsidiaries which are party to the transaction are wholly owned by such a member. Council Directive 2006/46, art. 1, 2006 O.J. (L 224) 9 (EC).

[200] OECD Report, *supra* note 183, at 67.

[201] Shalini E. Perumpral et al., *The Evolution of Indian Accounting Standards: Its History and Current Status with Regard to International Financial Reporting Standards*, 25 Advances Acct., incorporating Advances Int'l Acct. 106, 110 (2009); Padmini Srinivasan & M.S. Narasimhan, *The Value Relevance of Consolidated Financial Statements in an Emerging Market: The Case of India*, 20 Asian Rev. Acct. 58, 61 (2012) (noting that until 2001 Indian companies prepared parent-only financial statements and attached financial statements of every subsidiary along with the parent-only report).

through the requirementstill in existence[202]that listed parent companies publish separate financial statements for individual subsidiaries.[203] India goes beyond the international norm by requiring the presence of at least one independent director of the parent company on the board of material unlisted subsidiaries.[204] It also requires the board of directors of parent companies to review minutes of board meetings and major transactions by unlisted subsidiaries.[205]

At the same time, India still adheres to regulatory partitioning in other dimensions of corporate law, despite its common law tradition and its track record of legal innovation, including in corporate law.[206] In marked contrast to other common law jurisdictions, Indian courts have refused to allow double derivative suits.[207] In its 1993 *Janardan* decision, the Bombay High Court followed the old-fashioned approach of treating the issue of a double derivative suit as subject to exceptional criteria of veil piercing precedents applicable to asset departitioning.[208]

Citing the famous English precedent of *Salomon v. Salomon*,[209] the *Janardan* court found no authority for double derivative suits in the common law. It assumed that English law did not recognize multiple derivative suits and explicitly disallowed reliance on U.S. law.[210] The result is even more striking given that Indian commentators have argued that Indian courts have been more likely to disregard the corporate veil than their Western counterparts to augment the state's regulatory power.[211] Scholars have attributed the paucity of

[202] Organisation for Economic Cooperation and Development (OECD), Improving Corporate Governance in India: Related Party Transactions and Minority Shareholder Protection 42 (2014) [hereinafter OECD Report on Improving Corporate Governance in India] ("Noteworthy is the requirement for separate disclosure by both the subsidiary and the holding company").

[203] *Id.*

[204] OECD Report, *supra* note 183. To be sure, the effectiveness of independent directors in India's system remains questionable in view of domination by controlling shareholders. *See* Vikramaditya Khanna & Umakanth Varottil, *Board Independence in India From Form to Function?*, *in* Independent Directors in Asia: A Historical, Contextual and Comparative Approach (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017).

[205] Perumpral et al., *supra* note 201.

[206] For the bold and novel stances by Indian courts in constitutional adjudication, *see* Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia (Daniel Bonilla Maldonado ed., 2013). For a discussion of the innovative corporate social responsibility (CSR) provisions in India's Companies Act, *see* Afra Afsharipour, *Lessons from India's Struggle with Corporate Purpose*, *in* Research Handbook on Corporate Purpose and Personhood (Elizabeth Pollman & Robert Thompson eds., 2021).

[207] Mihir Naniwadekar, *Double Derivative Actions Revisited*, IndiaCorpLaw (Mar. 18, 2013), https://indiacorplaw.in/2013/03/double-derivative-actions-revisited.html.

[208] Bsn (Uk) Ltd. And Others v. Janardan Mohandas Rajan Pillai, 1993(3) BOMCR 228 at 8 (22 January 1993) (India) (hereinafter *Janardan*).

[209] Salomon v. A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22 (UK).

[210] *Janardan*, *supra* note 208 at 8 ("Under Indian Law, it is settled that only a member on the register of members can sue and, therefore, the American cases relied upon by the plaintiffs can have no application").

[211] Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 Am. U. Int'l L. Rev. 253, 295 (2016) (arguing that, compared to their

derivative suits in India—despite massive litigation in other areas—to a combination of substantive and procedural hurdles,[212] which, it turns out, include a lack of entity transparency in derivative suits. Following U.K. and Hong Kong decisions allowing for double derivative suits in the 2000s, there have been calls for Indian courts to reconsider the prohibition set in *Janardan*.[213]

The lack of entity transparency in Indian corporate law has historically enabled a series of abuses. The business media has described the use of unlisted subsidiaries as "the new cloaking device."[214] While regulators tout the Indian regime for related-party transactions as "one of the most stringent in the world,"[215] its effectiveness has been plagued by an unwillingness to fully implement entity transparency. For instance, the requirement of shareholder approval of material related-party transactions covers transactions between the listed company and a subsidiary, but not between two unlisted subsidiaries.[216] Indian companies have also avoided a shareholder vote on executive remuneration by having an overseas subsidiary make the payment.[217]

Entity transparency has since advanced to close many loopholes. While India's mandatory bid rule dates back to the listing agreements of the 1980s and regulations by the Securities and Exchange Board of India (SEBI) of 1994,[218] the original chain principle covering indirect acquisitions was introduced by the SEBI Takeover Regulations in 1997 and had its scope further expanded through amendments in 2002 and 2011.[219] Following a recommendation by

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counterparts in England, "courts in India tend to adopt a broader view taking into account the interests of all stakeholders whose interests are affected by the actions of companies"); Ritu Birla, *Maine (and Weber) against the Grain: Towards a Postcolonial Genealogy of the Corporate Person*, 40 J.L. & Soc'y 92, 106 (2013) ("In India, the doctrine of piercing the veil has been deployed more liberally than in the United States and United Kingdom"). The authors appear to refer to cases of veil peeking (regulatory departitioning) rather than veil piercing (asset departitioning).

[212] This includes the lack of a statutory derivative action in India. *See* Vikramaditya Khanna & Umakanth Varottil, *The Rarity of Derivative Actions in India: Reasons and Consequences*, *in* The Derivative Action in Asia, *supra* note 167, at 8.

[213] Naniwadekar, *supra* note 207.

[214] *Unlisted Subsidiaries: The New Cloaking Device*, BW Online Bureau, Nov. 8, 2014 [hereinafter *Unlisted Subsidiaries*]. *See also* OECD Report, *supra* note 183, at 36 ("instances of misuse of subsidiaries to carry out transactions, borrowings and other actions to the detriment of minority shareholders has been an issue of special concern in India").

[215] OECD Report, *supra* note 183, at 79.

[216] *Unlisted Subsidiaries*, *supra* note 214.

[217] *Id.*

[218] Umakanth Varottil, *The Nature of the Market for Corporate Control in India*, *in* Comparative Takeover Regulation, 347 (Umakanth Varottil & Wai Yee Wan eds., 2018).

[219] Cyril S. Shroff, *INDIAN UPDATE - New Takeover Regime Provides Clarity for Indirect Acquisitions in India and Overhauls Old Regime*, Int'l Inst. for the Study of Cross-Border Inv. & M&A, (Oct. 18, 2011), https://xbma.org/indian-update-new-takeover-regime-provides-clarity-for-indirect-acquisitions-in-india-and-overhauls-old-regime/. *See also* Technip Sa v. Sms Holding (Pvt.) Ltd. & Ors, 2 (2005) 5 SCC 465 (India) (finding that the laws of the parent company (French law) govern the determination of when a mandatory offer is due for an Indian subsidiary under the chain rule).

the OECD,[220] listing regulations came to prohibit Indian companies from divesting major subsidiaries without shareholder approval, which was previously a major avenue for abuse.[221] In 2021, SEBI further strengthened entity transparency in its regulation of related-party transactions, both by requiring parent shareholder and audit committee approval of significant transactions between foreign subsidiaries and by extending existing exemptions to cover transactions between wholly owned subsidiaries.[222]

The prevalence of partially owned subsidiaries in India may play a role in explaining its historical adherence to entity formalism. India's capital market is unique in boasting a large number of listed subsidiaries of multinationals on local stock exchanges, a remnant of foreign ownership restrictions imposed in the 1960s.[223] Another factor is the prevalence of powerful controlling shareholders, which—in India, as elsewhere—often deploy regulatory partitioning to extract private benefits of control.

H. Brazil

The evolution of Brazilian corporate law also reflects a general trend toward greater entity transparency, although formalism persists in some areas. Brazil's Corporations Law of 1976 adopted a version inspired by the German law on corporate groups from 1965.[224] It followed Germany in mandating consolidated financial accounting, allowing lawsuits against parent companies for abuses against subsidiaries, and not permitting double derivative suits, which remain unknown in Brazil to date.[225]

Brazil's Securities Commission (*Comissão de Valores Mobiliários* [CVM]) and courts have played an important role in the shift toward greater entity transparency, though the path was subject to detours. The original

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[220] OECD Report on Improving Corporate Governance in India, *supra* note 202, at 29. *See also* Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765, 1793 (2021) (describing the influence of international organizations on corporate law reforms worldwide).

[221] Reena Zachariah, *Companies may need shareholders' nod to divest stake in major subsidiaries*, The Econ. Times, (Dec. 6, 2013), https://economictimes.indiatimes.com/companies-may-need-shareholders-nod-to-divest-stake-in-major-subsidiaries/articleshow/26925160.cms?from=mdr.

[222] Sharon Pinto & Shaivi Bhamaria, *SEBI's Amended Related Party Transactions Framework – An Incisive Analysis*, LawStreetIndia, (Nov. 16, 2021), https://www.lawstreetindia.com/experts/column?sid=628.

[223] *See* Pargendler, *supra* note 111, at 540 ("[n]ationalist regulations in India during the 1960s required foreign companies to divest their stockholdings below forty percent," which had the "indirect effect of promoting the development of Indian capital markets by encouraging multinationals to sell their excess stakes through public offerings").

[224] *See* Viviane Muller Prado, *Grupos Societários: Análise do Modelo da Lei 6.404/1976*, 1 Revista Direito GV 5, 9 (2005).

[225] Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, Arts. 246 and 249. According to Art. 249 consolidation requirements were however limited to public companies whose subsidiaries accounted for more than 30% of net assets.

mandatory bid rule in the 1976 statute was silent with respect to indirect transfers of control. When faced with an indirect control sale structured through a holding company, CVM relied on the doctrine of "disregard of legal entity" to extend the mandatory bid rule to the case. Its decision quoted Italian scholar Tullio Ascarelli for the proposition that "the creation of a company and the theory of legal personality should not constitute a means to evade the normal operation of legal rules."[226] Nevertheless, the Commission reached the opposite result in a contemporaneous decision involving an indirect sale of control through an intermediate close corporation that was not a pure holding company.[227] It was not until 2001 that an amendment to the Corporations Law expressly endorsed entity transparency by mentioning "direct or indirect" transfers of control of public companies in its new mandatory bid rule.[228]

Courts have also gradually embraced entity transparency in granting access to the books and records of subsidiaries despite the absence of explicit statutory authorization. Article 105 of the Corporations Law allows shareholders with at least 5% of the company's equity capital to request access to books and records in case of unlawful acts or suspicion of grave irregularities but makes no mention of subsidiaries.[229] While earlier decisions found that parent company shareholders lacked standing to request books and records of corporate subsidiaries,[230] several recent precedents have recognized such a right.[231] A 2011 opinion by Brazil's Federal Superior Court (*Superior Tribunal de Justiça* [STJ]) embraced entity transparency in this area by reasoning that "the legal personality within a group of companies must be considered in view of the broader reality of junction between component firms, and not in its merely formal aspect."[232] Moreover, both courts and CVM have held that the members of the board of auditors (*conselho fiscal*) of a parent company can

[226] CVM, CVM/SJU Opinion [Parecer CVM/SJU] n. 86, 09.12.1982.

[227] CVM, CVM/SJU Opinion [Parecer CVM/SJU] n. 28, 25.06.1985. The public company in question was 84% owned by the intermediate company but accounted for only 5% of its assets—a fact that, for the Commission, showed the absence of fraud or intent to evade the law. *Id*.

[228] Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, Art. 254-A (as amended by Lei No. 10.303, de 31 de outubro de 2001, Diário Oficial da União [D.O.U.] de 01.11.2001).

[229] Lei 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, Art. 105.

[230] T.J.S.P., Apelação Cível 9176970-96.2000.8.26.0000, Sixth Private Law Chamber, Relator: Des. Waldemar Nogueira Filho, 15.02.2007, 77, Diário Oficial do Poder Judiciáro, [D.O.J.], 04.04.2007, 68 (concerning limited liability company).

[231] T.J.S.P., First Reserved Chamber for Business Law, Apelação 1005934-40.2015.8.26.0019, Relator: Des. Hamid Bdine, 18.05.2016, 2.128, Diário da Justiça [D.J.e.], 03.06.2016, 1779; T.J.R.J., Agravo de Instrumento 0003009-77.2014.8.19.0000, Twenty-Second Civil Chamber, Relator: Des. Rogério de Oliveira Souza, 18.03.2014, 132, Diário de Justiça [D.J.e.], 20.03.2014, 345.

[232] S.T.J., Fourth Chamber, Recurso Especial 1.223.733-RJ, Relator: Justice Luis Felipe Salomão, 07.04.2011, Superior Tribunal de Justiça Jurisprudência [S.T.J.J.], 04.05.2011, 2.

request access to the books and records of the company's subsidiaries, even though the Corporations Law is also silent on the matter.[233]

At the same time, Brazil continues to deviate from the emerging trend toward entity transparency with respect to shareholder approval of executive compensation. Article 152 of the Corporations Law provides that "the shareholder meeting will determine the global or individual amount of executive compensation,"[234] but makes no mention of amounts paid by subsidiaries. CVM's technical body took the position that, given its clear aim of deterring abuse, the rule should be interpreted as encompassing compensation paid by subsidiaries.[235] In a split decision, CVM's Board of Commissioners disagreed, holding that the statute recognizes regulatory partitioning in requiring that "each company must approve and pay each executive remuneration corresponding to the work performed in that company."[236] By contrast, U.S. law treats the parent and its subsidiaries as one unit and therefore its advisory say-on-pay votes cover the CEO, CFO, and three highest-paid executives from anywhere within the company.[237]

In sum, Brazil has moved in the direction of entity transparency even though doctrines grounded in entity formalism remain. Even where the entity transparency approach did not win out, as in the case of say-on-pay, the debate highlighted the advantages of such an approach over the traditional, formalist one.[238]

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[233] CVM, Processo CVM No. RJ2003/7703, Relator: Commissioner Luiz Antonio de Sampaio Campos, 18.11.2003; CVM, Processo CVM No. RJ 2005/2734, Relator: Commissioner Sérgio Weguelin, 30.08.2005; T.J.S.P., Second Reserved Chamber for Business Law, Apelação 0908996-31.2012.8.26.0037, Relator: Des. Ramon Matteo Junior, 13.06.2016, 2.142, Diário da Justiça [D.J.e.], 23.06.2016, 1.505.

[234] Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, Art. 152 (as amended by Lei No. 9.457, de 05 de maio de 1997, Diário Oficial da União [D.O.U.] de 17.12.1976).

[235] For wholly owned subsidiaries, it argued that "despite their own independent legal personalities, in economic terms, these companies are indistinct parts of the controlling companies, and equivalent to business segments of it," and that "the direct ownership of shareholders in the controlling company is identical to the indirect ownership of these same shareholders in the subsidiary." CVM, CVM/SEP Opinion [Relatório No 70/2018-CVM/SEP/GEA-2], Processo Administrativo 19957.007396/2017-00, Relator: Commissioner Henrique Machado, 27.08.2019, 13.

[236] CVM, Relatório No 70/2018-CVM/SEP/GEA-2 Processo Administrativo 19957.007396/2017-00, Commissioner Gustavo Gonzalez, 27.08.2019, 12.

[237] Dodd-Frank Act § 951, 15 U.S.C. § 78n-1 (adding Section 14-A to the Securities Exchange Act of 1934).

[238] New controversies regarding entity transparency are likely forthcoming. A 2021 reform introduced the requirement for shareholder approval for related-party transactions and asset sales exceeding 50% of total company assets, but neglected to mention if the rule applied to transactions entered into by corporate subsidiaries. *See* Lei 6.404, de 15 de dezembro de 1976, Art. 122, X (as amended by Lei 14.195, de 26 de agosto de 2021).

I. Other Jurisdictions

Other jurisdictions have similarly increased entity transparency in corporate law since the turn of the century. While its previous caselaw had recognized only double derivative actions, Israel broke new ground by recognizing multiple derivative actions in 2014.[239] The Israeli Supreme Court decision examined caselaw from U.S. states, the United Kingdom and Hong Kong to conclude that multiple derivative actions are commonplace in foreign law and should be recognized in Israel.[240]

Even jurisdictions that had previously considered and rejected greater entity transparency, such as South Korea, have come around recently. In 2003, the Seoul High Court first allowed shareholders of a parent company to file a derivative suit against directors of a subsidiary,[241] but the Korean Supreme Court ultimately reversed the decision on grounds of entity formalism.[242] Following the decision, the Ministry of Justice provided for double derivative suits in the 2006 bill to amend the Korean Commercial Code, but, following significant controversy, the change was ultimately omitted from the amendments passed in 2007.[243] A 2020 amendment to the Korean Commercial Code finally allowed parent company shareholders to file multiple derivative actions.[244]

III. Entity Transparency and Stakeholder Protection

Although the analysis so far has focused on corporate law rules targeting shareholder protection (even if they indirectly protect other stakeholders), entity transparency in corporate law is also used to directly promote the interests of other constituencies. The use of entity transparency for purposes of stakeholder protection is not only commonplace, but often stronger than with respect to investor protection. This can be explained

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[239] Yechiel Kasher, Ittai Paldor & Amir Scharf, *Israel*, *in* The Securities Litigation Review 144 (William Savitt ed., 2016).

[240] Justice Esther Hayut, President, Supreme Court of Israel, *Comparative Law in General and in Corporate Law, Remarks in the 12th Annual Columbia-Ono Conference Corporate Law and Governance* (July 17, 2018).

[241] Joo Hyun Lee, *Selected Case Reports on Korean Law*, 3 Kor. U.L. Rev. 29, 51 (2008).

[242] *Id.* at 54 ("it is because the holding company and the subsidiary are separate legal entities, and a shareholder must hold shares of the company of the directors being sued to qualify for filing a derivative suit").

[243] *Id.* at 52. For a discussion of the academic and political controversies following the Korean Supreme Court decision, *see* Kyung-Hoon Chun, *Multiple Derivative Actions: Debates in Korea and the Implications for a Comparative Study*, 15 Berkeley Bus. L.J. 306 (2018).

[244] Kim & Chang, *Recent Developments in Derivative Actions and Director's Obligations and Liabilities*, Kim & Chang Insights Blog (Apr. 13, 2022), https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=24739, (noting that the new Article of 406-2 of the Korean Civil Code limits multiple derivative actions to shareholders holding 1% of outstanding shares of the parent, and, in the case of a listed company, 0.5% for at least six months).

by the potential for entity formalism to enable regulatory arbitrage and by the greater importance of mandatory law to ensure the protection of stakeholder interests.

While Germany has adopted an intermittent stance toward entity transparency in shareholder rights, its signature system of worker participation in supervisory boards (known as "codetermination") relies strongly on entity transparency both in counting the number of employees triggering the codetermination regime and in providing representation of both parent and subsidiary workers on the parent company's supervisory board.[245] Interestingly, a recent proposal to extend the scope of codetermination requirements in Germany relies precisely on entity transparency. Although the Codetermination Act counts subsidiary employees toward the 2,000-person triggering threshold, the One-Third Participation Act[246] upholds regulatory partitioning by only counting workers of subsidiaries in the rare case of formal company groups subject to a "domination agreement."[247] A 2022 bill by a progressive coalition sought to broaden the reach of codetermination in Germany by counting all subsidiary workers for purposes of the One-Third Participation Act,[248] thereby converging on the broad look-through approach of the Codetermination Act.

France's limited system of worker representation, which provides for one or two labor representatives depending on board size, also adopts entity transparency by counting subsidiary employees to trigger the codetermination regime.[249] However, it retains elements of entity formalism by dispensing with worker representation at the parent company level if it has one or more subsidiaries subject to codetermination.[250] The EU Directive on work councils, which guarantees employee consultation and information rights, provides for

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[245] Marcus Lutter, *supra* note 172, at 951. While blind to entity boundaries, Germany's codetermination regime is highly sensitive to national boundaries: board representation rights are limited to workers and trade unions based in Germany—a feature that has withstood EU scrutiny. *See* Pargendler, *supra* note 111. A similar system providing by the appointment of employee representatives by workers from the entire group also applies in Austria. *See* Christine Windbichler, *The Many Facets of "Group Law,"* 3 Católica L. Rev. 11, 20 (2019). *See also* Ewan McGaughey, *Ending shareholder monopoly: why workers' votes promote good corporate governance*, LSE Policy and Politics Blog (Nov. 30, 2017), https://blogs.lse.ac.uk/politicsandpolicy/why-workers-votes-promote-good-corporate-governance/, (proposing the adoption of codetermination in the U.K. based on a model that "ensure[s] employees of the corporate group (readily defined for group accounts and tax) are included in ballots for the board").

[246] The One-Third Participation Act requires one-third employee representation in companies with more than 500 workers, Drittelbeteiligungsgesetz [DrittelbG] [One-Third Participation Act], § 4, para. 1, § 1, para. 1, https://www.gesetze-im-internet.de/drittelbg/BJNR097410004.html.

[247] Caspar Behme, *Venture More Co-determination?*, Oxford Bus. L. Blog (Feb. 11, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/venture-more-co-determination.

[248] *Id.*

[249] Code de Commerce [C. Com.] [Commercial Code] art. L225-27-1(I).

[250] *Id.* at L225-27-1(I)(2).

their establishment at the group level.[251] The EU Directive on Non-Financial Reporting likewise operates on a consolidated basis.[252]

IV. Threshold Areas

This section undertakes to examine two central areas in which corporate law resorts to entity transparency in distinct ways (fiduciary duties) or still does not operate on the basis of entity transparency (director elections). Because entity transparency in some aspects of corporate law can substitute for others, I suggest that the current treatment can be deemed consistent with, rather than opposed to, the broader trend of rising entity transparency.

A. Fiduciary Duties

The erasure of entity boundaries is visible in directors' and officers' fiduciary duties. This is a large and nuanced area of law, and its detailed analysis—including the particular regime applicable to related-party transactions—is outside the scope of this Article.[253] It is worth noting, however, a noticeable trend toward greater entity transparency in the application of fiduciary duties, be it to augment the scope of duties of parent companies' directors, as in the United States, or as a defense against liability in corporate groups, as in several European jurisdictions.

Entity transparency makes an appearance in two different forms. The first approach, adopted by Delaware, is the imposition of *downstream oversight obligations* to reach corporate subsidiaries, a strategy that augments the availability of director liability suits. This is a relevant qualification to the "well-established" notion, reiterated in a 2020 OECD Report, that in common law jurisdictions "the fiduciary duties of directors and boards relate solely to the company itself and not to its parent or the larger group."[254] As previously discussed, Delaware laws regarding directors' oversight duties cover corporate subsidiaries in ways that pay little heed to their separate legal personalities.

Delaware is not alone in embracing entity transparency to impose oversight obligations on parent company boards and committees. Under India's

[251] Art. 1 (5) Dir. 2009/38/EC superseding Dir. 94/45/EC. Art. 3 (2) Dir. 2001/86/EC; Windbichler, *supra* note 245, at 20.

[252] Pmbl. 14 Dir. 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU with respect to disclosure of non-financial and diversity information by certain large undertakings and groups.

[253] There is a large comparative literature on this issue. *See*, *e.g.*, Enriques et al., *supra* note 50, at 164; The Law and Finance of Related Party Transactions (Luca Enriques & Tobias Tröger eds., 2019).

[254] OECD, *Overview of the legal/regulatory framework with respect to the duties and responsibilities of boards in company groups*, *in* Duties and Responsibilities of Boards in Company Groups 9, 15 (2020).

Listing Obligations and Disclosure Requirements, the audit committee of a listed parent company has an affirmative obligation to review the financial statements and investments made by unlisted subsidiaries.[255] The national corporate governance codes of several jurisdictions, including Ireland and Colombia, implicitly or explicitly impose oversight responsibility on the parent company board for certain group-wide activities.[256]

A different approach, embraced by several European jurisdictions (such as France, Germany, Italy, and Belgium), recognizes the interest of the group as a defense against director liability. This approach allows directors to show that, even if a challenged transaction was harmful to a subsidiary, it was fair to the group as a whole and the benefits and costs to the subsidiary of belonging to the group roughly even out over a reasonable timeframe.[257] This approach relies on entity transparency to increase flexibility in group management at the expense of investor protection in partially owned subsidiaries. The European Commission has considered imposing the recognition of the "interest of the group" at the EU level, but the initiative has not moved forward to date. Nevertheless, there is continued movement in that direction. While Germany's statutory scheme on groups of companies traces back to 1965, other countries have followed its model well into the twenty-first century, as exemplified by Italy's adoption of group law in a 2003 reform.[258]

Be it to enhance shareholder protection or to ensure managerial flexibility, legal systems worldwide have increasingly recognized some form of entity transparency in fiduciary duties with or without legislative intervention. An important European study found that numerous civil law jurisdictions (including Belgium, France, and Spain) have recognized the interest of the group through judicial precedents rather than legislation.[259] This, in turn, demonstrates that civil law jurisdictions are not necessarily hostile to entity

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[255] *Id.* at 30.

[256] *Id.*

[257] In France, the famous *Rozenblum* doctrine exonerates directors for the crime of abuse of corporate assets (*abus de biens sociaux*) provided that the following conditions are met: "the structure of the group is stable, the parent is implementing a coherent group policy, and there is an overall equitable distribution of costs and benefits." Enriques et al., *supra* note 50, at 163–4. For Belgium, *see* Simon Johnson et al., *Tunneling*, 90 Am. Econ. Rev. 22, 25 (2000). The slightly different approach applicable to Germany *de facto* maintains entity-centric enforcement of duties, but evaluates the existence of harm to the subsidiary based on aggregate transactions in a year-long period, as opposed to a transaction-specific basis. For a study mapping reliance on the group interest in Europe, *see* The Informal Company Law Expert Group (ICLEG), *Report on the Recognition of the Interest of the Group* [hereinafter ICLEG Report], Oct. 2016.

[258] Luca Enriques, *Modernizing Italy's Corporate Governance Institutions: Mission Accomplished?* 31 (ECGI Law Working Paper No. 123,2009) ("the corporate law reform introduced a (broadly speaking German-inspired) law on corporate groups, that appears to have made it lawful for a parent company to impose harmful transactions upon the subsidiary, so long as there is a legitimate business purpose and the damage is compensated as a result of the overall business group policy, a standard quite similar to the French criminal case law on *abus de biens sociaux*").

[259] ICLEG Report, *supra* note 257, at 22.

transparency or resistant to flexible adaptations, a topic to which I will turn in Part V below.

Courts have also embraced entity transparency in fiduciary duties beyond the context of oversight obligations. A 2021 decision by the High Court of the Republic of Singapore found that a parent company's shareholder could sue a director for usurping a corporate opportunity from a subsidiary.[260] The Court refused to sanction the defendant's attempt to "use the form of separate legal personality to avoid the substance of his breach of fiduciary duty."[261] Adopting a look-through approach, it concluded "[t]hat a new business, for ordinary commercial reasons, will be housed under a new subsidiary does not make that business any less of an opportunity for the holding company."[262]

B. Appointment of Directors

Despite the adoption of entity transparency in various dimensions of corporate law, none of the jurisdictions examined have embraced Eisenberg's proposal of granting parent-company shareholders the right to elect subsidiary directors. Eisenberg reasoned that "legally as well as practically, the board of directors is an independent power center within the corporation."[263] Even the extension of board composition and qualification rules of listed companies to unlisted subsidiaries is rare, as in India's requirement that at least one independent director of the parent company serve on the board of material unlisted subsidiaries.[264] The requirements of gender quotas for company boards in various jurisdictions generally only apply to the board of directors of the parent listed company.[265]

One possible explanation for the absence of pass-through rights in subsidiary director elections is that her proposal is less consequential today than it was in the 1970s, precisely because of greater entity transparency in other

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[260] OOPA Pte Ltd v Bui Sy Phong [2021] SGHC 142.

[261] *Id.* at 22.

[262] *Id.* at 21.

[263] Eisenberg, *supra* note 2, at 1602.

[264] *See* note 204 *supra* and accompanying text.

[265] The gender quotas legislation of Norway, Germany, and Italy applies to public companies, as well as codetermined companies (in Germany) and state owned enterprises, in the case of Italy. California's statute as well as NASDAQ's diversity rules only cover public companies. France stands out for its gender quota system that applies on an entity basis given a minimum of 500 employees and 50 million euros in revenue. France's 2021 statute imposing quotas for senior executives also applies on an entity basis. Code de Commerce [C. Com.] [Commercial Code] art. L225-21 (Fr.); Norwegian Public Limited Liability Companies Act, Act of 13 June 1997 No. 45, § 6-11a; Gesetz zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst [FüPoG II] Law for the Supplementation and Amendment of the Regulations for the Equal Participation of Women in Leadership Positions in the Private Sector and Public Service], Bundesgesetzblatt, Teil I [BGBl I], at 642 Aug. 7, 2021 (Ger.); Legge 12 giugno 2011, n. 120, G.U. June 28, 2011, n. 174 (It.); Sen. Bill No. 826, 2017-2018 Reg. Sess., ch. 954.

areas of corporate law. The expansion of the pass-through approach has operated to reduce the role of subsidiary boards. One example is the recognition and expansion of the duties of parent company boards with respect to oversight of subsidiaries, as in *Caremark*'s progeny under Delaware law.[266] Another channel for the weakening of subsidiary boards is the dispensation of their approval in parent-subsidiary mergers, as provided by the MBCA since 1999.[267] The Official Comment to the MBCA revisions justifies the change by downplaying the subsidiary board as an independent power center: given 90% or more stock ownership by the parent, it notes, "the subsidiary's directors cannot be expected to be independent of the parent, so that the approval by the subsidiary's board of directors would also be a foregone conclusion."[268]

Perhaps more importantly, the conceptual case for pass-through rights for subsidiary director elections was never as strong as the case for other forms of entity transparency, such as approval of asset sales, access to books and records, or derivative suits. Upholding entity formalism with respect to the latter would substantially reduce shareholder rights and encourage regulatory arbitrage through the creation of subsidiaries. Denying parent company shareholders the right to elect board members in subsidiaries is far less consequential. It is less conducive to regulatory arbitrage and does not substantially alter the legal protection shareholders would have if certain business activities were conducted through divisions of the same entity under the delegated authority of corporate officers. Finally, one could posit that recognizing pass-through election rights in corporate subsidiaries, as Eisenberg wanted, would operate to reify entity formalism by taking the entity boundaries of subsidiaries too seriously from a shareholder's perspective.

V. Explaining and Evaluating Entity Transparency

A. *The Origins and Driving Forces of Entity Transparency*

The rise of entity transparency in corporate law essentially responds to the nature of shareholders' economic interests in parent companies and is generally as efficient as the underlying corporate law rule. But even if the rise of entity transparency reflects a beneficial evolution, we are still left with the question of which channels have brought it about. Future work can determine the specific mechanisms behind each of the various developments in different jurisdictions, which are likely to be diverse and context specific. The analysis

[266] *See infra* Part II.A(iv).

[267] *Changes in the Model Business Corporation Act - Fundamental Changes*, 54 Bus. Law. 685, 701–2 (1999).

[268] *Id.* at 742.

conducted thus far suggests general factors driving the rise of entity transparency in different jurisdictions.

1. Corporate Scandals and Hard Cases

Numerous reforms toward entity transparency followed corporate scandals enabled by dysfunctional entity formalism. For instance, the scandals involving Royal Mail in the U.K., Sanyo Steel in Japan, and Enron in the United States, have all contributed to the adoption or refinements in accounting consolidation. The Enron debacle has also contributed to the adoption of pass-through inspection rights in Delaware. Hard cases such as *Hollinger* in Delaware, early experiences with the mandatory bid rule in Brazil, and abuses in related party transactions in India all triggered statutory reforms to increase entity transparency.

2. Intellectual and Policy Entrepreneurship

New ideas, and intellectual entrepreneurship to diffuse them, have also played a part in the rise of entity transparency. The coining of the label "double derivative suit" in a *Harvard Law Review* note seems to have aided the diffusion of the doctrine, both in the United States and in other jurisdictions such as Israel and Japan. Melvin Eisenberg's argument for pass-through shareholder rights was highly influential in Germany and, through German scholarship, Japan—although, ironically, it had the effect of enhancing entity transparency in Japan but not in Germany. Conversely, the lack of conceptualization and study of entity transparency since Eisenberg's work has allowed this important trend to go unnoticed and likely hampered its further expansion.

3. The Role of Legal Transplants and Local Development

Legal transplants from other countries played a role in the expansion of consolidated accounting and in the adoption of double derivative suits in common-law jurisdictions. Various U.S. state decisions granting pass-through rights through asset sales and inspection rights cite similar developments in other states. However, transplants have been less relevant with respect to other dimensions of entity transparency. For instance, both Japan and Delaware enacted parallel statutory reforms for greater entity transparency in the late 1990s and early 2000s, but there appears to have been little cross-reference between these phenomena. Much of the rise of entity transparency worldwide appears to result from parallel local developments responding to similar economic problems and needs. Precisely because the rise of entity transparency had not been conceptualized and documented in the literature or in policy circles,

it did not trigger much foreign borrowing or academic debate. However, in the context of double derivative suits, knowledge of foreign practices has led to proposals for reform toward their adoption, which were successful in Japan and South Korea but unsuccessful in France.

4. Financial Globalization and Network Benefits of Standardization

The network benefits of standardization in global markets have also prompted convergence toward entity transparency, most conspicuously with respect to accounting standards. The interest of domestic firms in accessing the most developed U.K. and U.S. capital markets, and harmonization initiatives at the EU level, have played a major role in the adoption and refinement of consolidated accounting. The cross-border practice and interests of large accounting firms have arguably played a part as well, although local accountants have resisted convergence, fearing loss of market share.[269]

B. Explaining Comparative Differences

While there is an unambiguous global trend toward greater entity transparency, diffusion has proceeded at different paces across jurisdictions, and many still lag. The United Kingdom and the United States have moved faster than other countries, but even in the United States, many reforms did not take place until the twenty-first century. A common/civil law divide does not account for observed variation, as illustrated by Japan, a civil-law jurisdiction which stands out for passing the most deliberate statutory reforms in the area, and India, a common-law jurisdiction that has continued to struggle with entity formalism.[270] Moreover, any differential adoption across legal traditions does not appear to result from intrinsic characteristics of the common or civil law, but rather from patterns in legal borrowing[271] and from other correlated characteristics, such as the particular prevalence of wholly owned subsidiaries in both the United States and the United Kingdom.

At least three factors relating to ownership structures—a key characteristic influencing the development of corporate law through efficiency and political channels[272]—help explain the distinct pace in the rise of entity transparency across jurisdictions.

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[269] For recent work suggesting the interests of the accounting profession in explaining corporate governance convergence and divergence more, *see generally* Martin Gelter, *Accounting and Convergence in Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE (Afra Afsharipour & Martin Gelter eds., 2021).

[270] *See infra* note 283 and accompanying text.

[271] *See infra* note 283 and accompanying text.

[272] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 131 (1999) ("the set of rules that would

The first is the widespread use of subsidiaries. Entity formalism in corporate law becomes a significant problem only when corporate subsidiaries are widely employed. This happened earlier in the United States than in other jurisdictions because of both the dynamic of state regulatory competition and the use of the holding company as a device for regulatory arbitrage against state protectionism.[273]

A second factor relates to the ownership structure of subsidiaries, specifically the relative prevalence of wholly owned and partially-owned subsidiaries. Scholars have documented how tax rules and regulations hampered partial ownership of subsidiaries and pyramidal structures in the United States and the United Kingdom.[274] In the absence of such tax and regulatory constraints, corporate pyramids through partly owned subsidiaries persist elsewhere.

The different ownership structures of subsidiaries seem to affect the rise of entity transparency. As discussed below, the case for entity transparency is strongest and most intuitive as applied to wholly owned subsidiaries. The United States and the United Kingdom, where partial subsidiary ownership is rare, were pioneers in the adoption of ownership transparency.

A third factor appears to be the relative prevalence and importance of public investors or controlling shareholders.[275] As capital markets deepen, public investors emerge as a powerful and sympathetic constituency that stands to lose from dysfunctional entity formalism, which helps explain why the United States pioneered consolidated accounting through private ordering. Conversely, wealthy controlling shareholders may be particularly influential in avoiding greater legal constraints through entity transparency.[276]

Affiliation with common or civil law does not appear to play a significant role in prompting, or resisting, the adoption of entity transparency. There is a large, if controversial, body of literature suggesting that a common law origin

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be efficient. . . might depend on the country's existing pattern of corporate structures and institutions").

[273] Pargendler, *supra* note 111, at 566.

[274] Randall Morck & Bernard Yeung, *Dividend Taxation and Corporate Governance*, 19 J. Econ. Persps. 163, 174, 177 (2005) (describing the United States and the United Kingdom as the only jurisdictions bereft of pyramids, and attributing the absence of corporate pyramids in the United States to the rules on intercorporate taxation first introduced by the New Deal); Steven A. Bank & Brian R. Cheffins, *The Corporate Pyramid Fable*, 84 Bus. Hist. Rev. 435, 438, 442 (2010) (arguing that the Utility Holding Company Act of 1935 was largely responsible for the demise of corporate pyramids in the United States); Julian Franks, Colin Mayer & Stefano Rossi, *Spending Less Time with the Family: The Decline of Family Ownership in the United Kingdom*, *in* A History of Corporate Governance Around the World 604–06 (Randall K. Morck ed., 2007) (attributing the absence of corporate pyramids in the U.K. to the role of the institutional investors, as well as to the mandatory bid rule instituted by the Takeover Panel).

[275] Bebchuk & Roe, *supra* note 272 (describing how ownership structures affect interest group politics and, consequently, legal rules).

[276] *Id.* at 131 ("once a country has legal rules that enhance the private benefits to controlling shareholders and thus encourage the presence of such controllers, the controllers' political power will also increase the likelihood that the country would continue to have such rules").

is more conducive to investor protection and capital market development.[277] Scholars have posited that a key channel for the allegedly superior outcomes in common law systems is their greater capacity to adapt legal rules to changing needs through judicial decisions and discretion, as opposed to the supposedly greater focus on formalism, rigidity, and legal certainty in civil law systems.[278]

While adaptability is hard to measure and indeed has not been adequately measured by the main works on the subject,[279] the rise of entity transparency provides a glimpse into the operation of rigidity and adaptability in one discrete but important context. A few patterns stand out. The United States and the United Kingdom, which are common-law jurisdictions, have indeed moved more quickly toward entity transparency, through both case law and statutes. However, this does not appear to be associated with the judicial or legislative source of legal change. Judges in civil law jurisdictions have proved fully capable of embracing entity transparency on numerous occasions, even while common-law judges have failed to do the same.

There is also significant variation within legal traditions. By the turn of the twentieth century, Delaware courts did not yet generally recognize pass-through shareholder rights with respect to access to books and records and the approval of asset sales. Rather, entity transparency came through the legislature in the early 2000s.[280] Although Japanese law has been described as "much more formal and, therefore, inflexible than in its common-law

[277] For the main original work in this literature, *see generally* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. Pol. Econ. 1113 (1998). The initial finding was successfully challenged due to coding errors, though rehabilitated through subsequent research. Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 Rev. Fin. Stud. 467, 483 (2009) (finding that the results no longer held after correcting for coding errors); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. Fin Econ. 430 (2008) (confirming the initial association between legal origin and investor protection through a revised coding and index). *See also* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. Econ. Literature 285 (2008) (for a review of the legal origins literature by its key proponents).

[278] Thorsten Beck et al., *Law and Finance: Why Does Legal Origin Matter*? 31 J. Comp. Econ. 653, 655 (2003) ("[t]he adaptability channel stresses that legal traditions differ in their ability to evolve with changing conditions"); Simon Johnson et al., *Tunneling*, 90 Am. Econ. Rev. 22, 23 (2000) ("[c]ivil-law countries emphasize the predictability of the law and rely on statutory rules to govern self-dealing behavior. They do so even though the formal statutory rules that are consistent with legal certainty may invite insiders to structure unfair transactions creatively so as to conform to the letter of the law"). *But see* Andreas Engert & D. Gordon Smith, *Unpacking Adaptability*, 2009 BYU L. Rev. 1553, 1554 (noting that "the chief methodological challenge confronting the empirical study of adaptability is that researchers cannot measure adaptability directly"); Holger Spamann et al., *Judges in the Lab: No Precedent Effects, No Common-Civil Law Differences*, 13 J. Legal Analysis 110, 121–22 (2021) (for a laboratory experiment with judges of seven jurisdictions finding no differences between legal traditions and no significant influence of horizontal precedents).

[279] Engert & Smith, *supra* note 278, at 1554.

[280] *See supra* Part II.A.

counterparts,"[281] Japan led the way in statutory reforms designed to enhance entity transparency. At the same time, courts and the securities commission in Brazil, a civil law jurisdiction, have gradually embraced entity transparency in various contexts without accompanying statutory reform, whereas Indian law, of common law origin, has been highly formalistic in several respects.

An observed preference for borrowing from within the same tradition may play a role in explaining some differences across common and civil law traditions.[282] This appears to be particularly relevant with respect to reliance on U.K. law by Hong Kong and jurisdictions from the Commonwealth.[283] At the same time, Germany's approach to group law and France's judge-made *Rozenblum* doctrine have influenced other civil law jurisdictions. Yet there is also cross-fertilization of legal ideas across legal traditions. German scholarship inspired by U.S. literature influenced Japan, leading it to embrace some aspects of entity transparency before U.S. jurisdictions did.

C. Evaluating Entity Transparency in Corporate Law

This Article does not take a position on the optimal content of corporate law and shareholder rights, a determination that is likely to vary across firms and jurisdictions, as well as over time. The argument, instead, is that the chosen level of shareholder protection should not be thwarted by the use of intermediate wholly owned (and, in some cases, partially owned) subsidiaries. To the extent that a given rule is inefficient, it is preferable to eliminate the rule in its entirety rather than to limit its scope through entity formalism.

Even if entity transparency can be efficient in a broad set of circumstances, it also produces costs and challenges of its own, which (i) vary depending on the rule in question, (ii) are greater with respect to partially owned subsidiaries, and (iii) give rise to new problems of conflict of laws.

1. The Scope of Entity Transparency

The normative case for entity transparency is stronger and more intuitive with respect to wholly owned subsidiaries. First, failing to grant pass-through rights in wholly owned subsidiaries would often leave minority shareholders as a class without any remedy. Partially owned subsidiaries, by contrast, have shareholders of their own who could in theory exercise their rights directly

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[281] Johnson et al., *supra* note 278, at 24 (citing Chizu Nakajima, Conflicts of Interest and Duty: A Comparative Analysis in Anglo-Japanese Law 51 (1999).

[282] For the original articulation of this point, see Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. Rev. 1813, 1816 (2009).

[283] *Id.* at 1813.

and thereby curb agency costs to the benefit of all shareholders, thus indirectly protecting the interests of parent company shareholders. Second, covering partially owned subsidiaries involves difficulties of line drawing, which, however, are not insurmountable. Third, the presence of minority shareholders exacerbates the challenges associated with conflicts of laws and regulatory differentiation, an issue to which I now turn.

2. Conflicts of Laws

A troubling aspect of entity transparency concerns its implication for conflict of laws. The general conflict of law rule for corporate law is that the laws of the state of incorporation—be it determined by the principal place of business (real seat doctrine) or subject to free choice—govern the internal affairs of the company. While the contours of the internal affairs doctrine can be contested with respect to matters involving external interests,[284] entity transparency significantly complicates the conflicts of law analysis because of its potential for extraterritorial application. By definition, entity transparency means that a company's governing laws will apply to other related entities, which may be, and often are, constituted under the laws of a different jurisdiction.

For instance, Delaware law has applied extraterritorially to allow parent company shareholders to sue directors of foreign subsidiaries, to obtain access to books and records of foreign subsidiaries, and to approve sales of assets of foreign subsidiaries. In these cases, the parent corporation's law applies to the subsidiary's internal affairs.[285] The *Hollinger* decision concerned a lawsuit by a shareholder of the Delaware holding company to enjoin a sale by a sixth-tier U.K. subsidiary.[286] In other cases, such as the operation of the mandatory bid rule, the requirements of a subsidiary corporation can bind the acquirer and effectively influence the terms of a control sale at the parent level.[287]

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[284] Jill E. Fisch & Steven Davidoff Solomon, *Centros, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019) (arguing that the internal affairs doctrine should be defined in terms of shareholders' economic interests).

[285] This result differs from Delaware precedent holding that it is the law of the company's state of incorporation, not the state of incorporation of shareholders, which governs the approval process. The Delaware Supreme Court allowed the Delaware subsidiary of a Panamanian corporation to vote its shares in its parent, something which is permitted under Panamanian law but not under the entity transparent approach of Delaware law. *See* McDermott Inc. v. Lewis, 531 A.2d 206, 219 (Del. 1987)

[286] *See Hollinger Inc.*, 858 A.2d at 342.

[287] At the same time, the application of a mandatory bid requirement for a subsidiary's shares may depend on the governing law of the parent company. The Indian Supreme Court's decision in *Technip* ruled that the laws of France, where the parent target company was incorporated, governed the determination of the control transfer for purposes of triggering a mandatory bid requirement for the Indian subsidiary's shares under the Indian chain rule. *See supra* note 219 and accompanying text.

Such extraterritorial application of corporate law can pose challenges when the legal regimes of parent and subsidiary differ substantially. This could result in disparate legal treatment of parent and subsidiary shareholders when the parent's jurisdiction recognizes broader rights than the subsidiary's jurisdiction. Paradoxically, non-shareholders could enjoy greater rights than direct shareholders. Still another complicator is that corporations subject to distinct ownership structures may be best served by a different set of shareholder rights. As a result, the application of the parent company's law on subsidiary legal matters could be dysfunctional.[288]

These problems can easily be overstated, however. The most paradigmatic pass-through shareholder rights—shareholder approval of subsidiary asset sales, access to subsidiary books and records, and double derivative suits—are unlikely in most instances to confer private benefits on parent-company shareholders at the expense of subsidiary shareholders. Instead, the benefits of reducing agency costs can also revert to subsidiary shareholders, as well as to other stakeholders.

VI. Implications for Asset Partitioning and Regulatory Partitioning in other areas of law

The prevalence of entity transparency in corporate law also adds to previous research showing that the degree of legal insulation from controlling shareholders offered by corporate personality is not absolute or subject to a strong presumption that requires extraordinary circumstances to be overcome. In prior work, I have shown that academics, judges, and practitioners have often committed a fallacy of equivocation when defending complete corporate separateness, which stems from the different meanings of the term "separate."[289] While the corporation undoubtedly provides a separate (in the sense of *distinct*) nexus of imputation of rights and duties, this does not necessarily mean—as often argued—that corporations are always legally separate (in the sense of *insulated*) from shareholders, and especially controlling shareholders.[290] This section explores some potential implications of entity

[288] For works suggesting the complementarities between the corporate law regime and other elements of the political economy and among different rules of corporate law, *see* Varieties of Capitalism: The Institutional Foundations of Comparative Advantage 387 (David Soskice & Peter A. Hall eds., 2001); Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies*, *in* Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the U.S (Klaus J. Hopt et al. eds., 2006). *See also* Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Corporate Governance Standards*, 157 U. Pa. L. Rev. 1263 (2009) (highlighting how investor protection requires different rules for companies with dispersed and concentrated ownership structures).

[289] Mariana Pargendler, *The Fallacy of Complete Corporate Separateness*, 14 Harv. Bus. L. Rev. Online 1 (2024), https://journals.law.harvard.edu/hblr/wp-content/uploads/sites/87/2024/04/01_HLB_14_1_Mariana-Pargendler_Online.pdf.

[290] *Id.* at 16.

transparency in corporate law for the treatment of asset partitioning as well as regulatory partitioning in other areas of law.

A. Regulatory Partitioning in Other Fields of Law

If informal logic does not justify complete corporate separateness as legal insulation, neither does doctrinal consistency across different areas of law. As I have demonstrated elsewhere, other legal fields—including antitrust, constitutional law, international investment law, and tax law—routinely disregard legal entity boundaries in applying relevant rules without requiring a showing of fraud or abuse.[291] Nevertheless, legal discourse still frequently articulates the myth that overcoming corporate separateness between corporate parents and subsidiaries is inadmissible in the absence of exceptional circumstances allowing for veil piercing as an exception to limited liability (commingling of assets, evidence of *alter ego* or fraud) or another doctrine such as agency. Significantly, this conclusion is thought to derive from principles of *corporate law*.

The U.S. Supreme Court's 2003 decision in *Dole Food Co. v. Patrickson* offers another example.[292] The key question in the case was whether an indirect subsidiary of a company controlled by the Israeli government enjoyed sovereign immunity under the Federal Sovereign Immunities Act of 1976, which grants instrumentality status to an entity "a majority of whose shares or other ownership interests is owned by a foreign state or a subdivision thereof."[293] The Court upheld regulatory partitioning, declining to give an indirect subsidiary the same immunity that would be available to its parent. Justice Kennedy's majority opinion observed that "[t]he veil separating corporations and their shareholders may be pierced in certain *exceptional circumstances*, but the Dead Sea Companies refer to no authority for extending the doctrine so far that, *as a categorical matter, all subsidiaries are deemed to be the same as the parent corporation*" (emphasis added).[294] Unbeknownst to the U.S. Supreme Court and the defendant's attorneys, corporate law now routinely peeks behind the corporate veil and deems subsidiaries to be the same as the parent corporation as a categorical matter when applying various governance rules.

In the U.S. Supreme Court decision in *Daimler v. Bauman*, a central question was whether California had jurisdiction over Daimler AG in a suit by Argentinean plaintiffs alleging that an Argentine subsidiary of Daimler had detained, tortured, and killed certain Argentine workers. Personal jurisdiction over Daimler was predicated on the contacts of Mercedes Benz USA,

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[291] *See generally* Pargendler, *Veil Peeking*, *supra* note 18.
[292] Dole Food Co. v. Patrickson, 538 U.S. 468, 471 (2003).
[293] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b) (2000).
[294] *Dole Food Co.*, 538 U.S. at 475–76.

a Delaware subsidiary of Daimler whose principal place of business was in New Jersey. In oral argument, the defendant's attorney argued that "it's proper for the court to look to background principles of *corporate law*, at least as a starting point or as a presumptive matter."[295] He then contended that "in this country, corporate separateness, under which a parent is not liable for the acts of a subsidiary, is the general rule"—a striking example of the conflation of asset partitioning, which was not an issue in the Daimler case, with regulatory partitioning for purposes of attributing jurisdiction, which was the core question.[296]

The rise of entity transparency in corporate law also has implications for international tax law and recent reform initiatives. A large fraction of subsidiaries is created precisely for purposes of tax arbitrage, which famously leads to the erosion of countries' tax bases. Recent proposals by the Organisation for Economic Cooperation and Development have sought to fight this problem through a series of interconnected pass-through tax rules to ensure that multinational corporate groups are taxed at a minimum rate of 15% wherever the member companies are located.[297] Critics of the proposal have relied on the "principle of legal personality," which "dictates that the legal personality of an entity should be respected, and a look-through approach should only be applied in exceptional cases, such as in situations of abuse."[298] This line of critique, however, reflects an antiquated view of corporate law and ignores the *new corporate law of corporate groups*: corporate law itself now routinely adopts a pass-through approach on a routine basis with no need to prove abuse.

Like other forms of veil peeking, entity transparency is widespread in corporate law, even at the cost of permitting extraterritorial application. Doctrinal requirements such as alter ego or lack of corporate formalities have long been abandoned in favor of strict "pass-through" of legal rules. This shows that not even doctrinal consistency within *corporate law* itself requires treating corporate separateness—understood as legal insulation between corporations and controlling shareholders—as sacrosanct. On the contrary, this Article has demonstrated that entity transparency is pervasive in corporate law and has been increasing around the world.

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[295] Transcript of Oral Argument at 24, Daimler AG v. Bauman, 571 U.S. 117 (2014) (No. 11-965).

[296] *Id. Daimler* was ultimately decided on different grounds, with the Supreme Court holding that "the paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business," thereby eschewing a corporation's substantial presence in a state. Daimler AG v. Bauman, 571 U.S. 117, 119 (2014).

[297] OECD, Tax Challenges Arising from Digitalisation – Report on the Pillar Two Blueprint (2020). For a discussion and defense of these proposals, see Allison Christians & Tarcisio Magalhães, *Why Data Giants Don't Pay Enough Tax*, 18 Harv. L. & Pol'y Rev. 119 (2023).

[298] Filip Debelva & Luc De Broe, *Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective*, 50 Intertax 898, 901 (2022). For a rebuttal of this view, *see* Christians & Magalhães, *supra* note 297.

B. Asset Partitioning and Involuntary Creditors

What are, then, the implications of entity transparency in corporate law for the academic and policy debates regarding the scope of shareholder limited liability? The law-and-economics literature has long suggested good reasons to treat limited liability differently vis-à-vis distinct types of creditors. Specifically, scholars have argued that upholding limited liability with respect to involuntary creditors can be inefficient, and especially problematic within corporate groups, as it promotes the externalization of harm.[299]

The rise of entity transparency contributes additional grounds to existing economic arguments favoring parent-company liability for corporate torts. First, from a functional perspective, it shows that corporate parents are far less legally insulated from corporate subsidiaries than previously assumed. Consequently, the elimination of limited liability for corporate torts will have smaller incremental costs to subsidiary autonomy.

Second, a relevant obstacle to the adoption of parent company liability for subsidiary torts lies in prevailing legal wisdom—oft-repeated by powerful business lobby groups—that appears to sanctify corporate separateness.[300] The testimony of John Ruggie (who served as the U.N.'s Secretary General Special Representative for Business and Human Rights and is the mastermind behind the influential 2011 U.N. Guiding Principles on Business and Human Rights) is illustrative in this respect. In justifying his abandonment of early proposals that would impose liability on parent companies for human rights violations, Ruggie quotes a corporate law scholar for the view that "as a matter of domestic law in most states, the autonomous legal personality of a corporation matters."[301] Ruggie also relies on purported "strong public

[299] Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 520 (1976) (separate incorporations to avoid tort liability allows the externalization of costs and is socially inefficient); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 111 (1985) (noting that absolute limited liability within the corporate group "would create incentives to engage in a socially excessive amount of risky activities"); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1932–33 (1991) (suggesting that a regime of pro rata shareholder liability for corporate torts may be more efficient that limited liability); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum. L. Rev. 1203 (2002) (arguing that controlling shareholders should be liable for corporate torts and statutory violations); Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* Oxford Handbook of Corp. Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2017) (explaining why asset partitioning produces greater costs and fewer benefits within the corporate group than outside of it). Even the fiercest opponents of veil piercing doctrine have defended enterprise liability in appropriate circumstances. Stephen M. Bainbridge & M. Todd Henderson, Limited Liability: A Legal and Economic Analysis 301 (2016).

[300] This, of course, would be above and beyond political pressure from large corporations and investors to keep limited liability.

[301] John Ruggie, Just Business: Multinational Corporations and Human Rights 163 (2013), ("The [previously proposed] Norms internationalize and adopt an enterprise liability model as the basis for determining the scope of liability for groups of related companies. This

policies in favor of legal autonomy" in concluding that "the abandonment of the foundational tenets of modern corporate law is not on the agenda."[302]

The problem here is that the conventional wisdom relied on by Ruggie is outdated and no longer reflects the current operation of corporate law in groups of companies. Appreciating the rise of entity transparency in corporate law helps debunk claims that "legal autonomy" is a "foundational tenet of modern corporate law" in corporate groups. On the contrary, contemporary corporate law has significantly, and increasingly, eroded the boundaries between corporate parents and subsidiaries for purposes of the application of its own rules of investor protection. Whether legal boundaries should be eroded in other contexts is an important policy question that should not be muddled by obsolete doctrine that no longer reflects the operation of corporate law.

Conclusion

We have a new corporate law of corporate groups. Corporate law around the world has increasingly looked through entity boundaries in the application of its own rules. This silent trend, which has accelerated in the twenty-first century, reflects the nature of shareholder's economic interests, who are also residual claimants of a corporation's subsidiaries. Economic exigencies have gradually overcome entity boundaries in the application of corporate law to make entity transparency routine and unexceptional in corporate groups, although the strength of this trend varies across jurisdictions.

This key development has gone unnoticed in large part due to the employment of wrong analytical lenses. Scholars of corporate groups from a comparative perspective have focused primarily on the existence of formal statutes on groups, thereby overlooking important developments that have come about without producing doctrinal categorization. Commentators have also emphasized the conundrum of "entity vs. enterprise" across various areas of law. Yet these categories, by conflating the analytically distinct phenomena of asset and regulatory partitioning, are simply too broad to paint a precise picture of

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approach does, in a very simple way, eliminate one of the great complaints about globalization through large webs of interconnected but legally independent corporations forming one large economic enterprise. The problem, of course, is that, as a matter of domestic law in most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy (quoting Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Hum. Rts. L. Rev. 101, 163 (2005))). For a more recent reiteration of the same argument, *see* Ho et al., *supra* note 17, at 2 ("Attributing liability for the conduct of any one entity within the group to its parent, to another affiliate, or to the group as a whole is therefore in tension with the basic attributes of legal personhood that define each constituent company within the group").

[302] Ruggie, *supra* note 301, at 164.

legal evolution. Moreover, the coverage of multiple areas of law simultaneously has obfuscated clear developments within a single field.

Neglecting the evolution toward entity transparency in corporate law has muddled doctrinal waters in corporate law and beyond. Different aspects of corporate law in various jurisdictions, as well as in other areas of law, have selectively stuck with the myth that overcoming corporate separateness must necessarily require exceptional circumstances or abuse. This view no longer corresponds to the content of corporate laws in a wide variety of contexts.

In corporate law, as elsewhere, the degree of regulatory and asset partitioning is not a corollary of immanent legal principles, but the result of changing policy choices forged by economic and social needs. In corporate law itself, the case for entity transparency is particularly strong. Consistent with this economic rationale, corporate law around the world has progressively, and increasingly, overcome entity boundaries to retain its effectiveness in protecting shareholders as well as other constituencies.

Annex

Table 1: Selected Aspects of Entity Transparency in Corporate Law Across Jurisdictions

Entity Transparency					
Jurisdiction	**Double derivative suits**	**Inspection rights**	**Approval of major asset sales**	**Consolidated accounting**	**Mandatory bid rule (chain principle)**
Brazil	N	Y (~2000s*[α]; 2010s[*δ], ~2010s[δ])	Untested	Y (1976)	Y (1982[α]; 2001)
France	N	Y* (2001)	N/A	Y (1985)	Y (1989)
Germany	N	N/A	N	Y (1965)	Y (1997[β]; 2002)
India	N	N/A	Y (2014)	Y (2001)	Y (1997)
Japan	Y (2014)	Y (1974*; 1999)	N	Y (1977[303]; 1999)	N
United Kingdom	Y[δ] (1975)	N/A	Y[∞] (1973)	Y (1930[∞]; 1947)	Y[β] (1976)
United States (Delaware)	Y[δ] (1940s)	Y (2003)	Y (2005)	Y (1940)	N/A

Notes: (Y) = strict entity transparency in statute or securities regulation; (N) = no entity transparency; (N/A) = corporate law rule does not exist in the jurisdiction.

* Inspection rights by statutory or court-appointed auditors. Unless otherwise noted, inspection rights concern shareholders.
δ Judicial decisions
α Interpretation of securities commission (limited to holding companies)
∞ Listing rules
β U.K. Takeover Panel; German Securities Acquisition and Takeover Act

[303] Deemed uninformative due to numerous exceptions.