

DECONSTRUCTING THE “ANGLO-AMERICAN” CORPORATE MODEL

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While approaches to corporate law and corporate governance vary globally, often the U.S. and the U.K. are placed into a single bucket—the “Anglo-American” corporate model. In this article, we deconstruct this model with the first wide-ranging comparison of fundamental corporate law concepts in the two countries for decades. We undertake our analysis from both a black-letter “law in books” perspective and a functional “law in action” perspective. We draw upon these to offer novel insights regarding corporate law in the U.S., which we canvass by reference to Delaware law and applicable federal and listing rule regulations, and the U.K.

Our “law in books” analysis shows the two jurisdictions employ corporate law mechanisms that often differ substantially, meaning that there is no single, unified “Anglo-American” approach. Still, from a “law in action” perspective, ultimately there are many functional similarities. Given these similarities, we do not make claims that either jurisdiction has “better” corporate law than the other. We do argue, however, that if policymakers are seeking to change outcomes by transposing corporate governance features between the two jurisdictions, reforms may well fail to have the anticipated beneficial impact.

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INTRODUCTION

Seventy years ago, L. C. B. Gower, a preeminent U.K. corporate law academic, compared and contrasted U.S. and U.K. company law in multiple respects in a 1956 *Harvard Law Review* article.¹ While the analysis of corporate governance took on a strong comparative dimension more than a quarter century ago, multitopic comparisons of American corporate and British company law similar to Gower’s have been largely unknown since his article. The predominant tendency has instead been to combine the salient features of American and British corporate governance and corporate law into a single “Anglo-American” model, and to contrast that model with arrangements elsewhere.

This article deconstructs the Anglo-American corporate model by undertaking the first thorough comparison of U.S. and U.K. corporate law in decades. What we characterize for terminological convenience as “U.S. corporate law” conceals a considerably more complex reality. Corporate law varies by state, and in the case of the publicly traded companies we focus on here, federal securities laws and stock exchange listing rules impart further regulatory flavor. To make our analysis of state corporate law tractable, we focus on Delaware, the most popular U.S. state for company incorporations. When making comparisons to the U.K., since we are also considering federal and stock listing rules alongside Delaware law, we refer regularly to “U.S. corporate law” even though commentators in the United States rarely deploy that term.

With our deconstruction of the Anglo-American corporate model, a key finding is that there are significant doctrinal corporate law differences between the U.S. and the U.K. Correspondingly, one should not reflexively assume that the applicable law in one jurisdiction will be the same in the other. Referring to an “Anglo-American” model at all thus can be misleading. However, despite significant doctrinal disparities, for the purposes of corporate governance, the notion of an Anglo-American model cannot be dismissed out of hand. This is due to an additional key finding—substantial similarities exist between the U.S. and the U.K. from a practical perspective.

How can these propositions be squared? The key is a distinction distinguished American jurist Roscoe Pound drew in the early twentieth century, namely between “law in books” (substantive legal doctrine) and “law in action” (enforcement and compliance).² His peer, and former Supreme Court justice, William O. Douglas echoed the logic in a 1934 review of a 1933 book canvassing the position of the shareholder in the U.K., saying this “is the way to study comparative law. A careful reading of all decided English cases and

¹ L. C. B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1369 (1956).

² Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14–15 (1910).

a meticulous comparison section by section of the Companies Act and the Securities Act are quite meaningless unless it is known what the two systems in fact are doing.”³ We apply this lesson to show that there is substantial resemblance between outcomes in the U.S. and the U.K. despite significant differences in legal detail.

The functional similarities cast doubt on arguments advanced by those who have emphasized differences between the U.S. and the U.K. rather than commonalities. For instance, some observers maintain that the U.K. is “a shareholder paradise”⁴ compared to the U.S. As we show, shareholder rights operate similarly in practice in many respects. Also, while a frequent assumption is that U.S. corporate governance offers a stricter environment for boards of publicly traded companies than its U.K. counterpart due to the U.S. having a rules-oriented regime rather than the flexible code-based approach prevailing in Britain, there are many similarities between board arrangements in the two countries.

We refrain in this article from passing judgment on the superiority of particular facets of U.S. or U.K. corporate governance. Correspondingly, our findings do not provide the basis for advocating substantive changes to the law in either jurisdiction. Nevertheless, our finding that “law in action” outcomes regularly mirror each other despite “law in books” often diverging has significant policy implications. In the most basic terms, those recommending that corporate governance-related law in the U.S. should be amended to resemble that in the U.K. and vice versa may well miss the mark due to insufficient appreciation of functional equivalence.

Topics we canvass to compare and contrast the U.S. and the U.K. include legal principles governing the board of directors, director liability, director selection, rights shareholders exercise when acting collectively, individual shareholder rights focusing on litigation, minority shareholder rights against dominant shareholders, and takeover regulation. While our analysis is distinctively multifaceted, it is beyond the scope of a piece such as this to offer a comprehensive analysis of *all* key aspects of U.S. and U.K. corporate law. We focus instead on corporate governance-related corporate law, expanding the notion of corporate law somewhat beyond legislative provisions and case law precedents in so doing. An important filter the corporate governance orientation offers is that we deal only with publicly traded companies, following on from the fact that analysis of corporate governance has typically focused on such firms.⁵ The caveat is an entirely appropriate one given the

³ William O. Douglas, *Shareholders' Money*, 34 COLUM. L. REV. 787, 788 (1934) (book review).

⁴ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 56 (2012).

⁵ See, e.g., ORG. FOR ECON. COOP. AND DEV. [OECD], *G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE* 9 (2015) (indicating that the principles focus on publicly-traded

tenor of debate, with discussions of models of corporate arrangements around the world implicitly focusing on large, typically publicly traded, companies rather than smaller firms.⁶

In recent decades the notion of Anglo-American corporate governance has been drawn upon with regularity to put global arrangements into perspective. At the same time, commentators have contrasted specific features of U.S. and U.K. corporate law. Such analysis has been salutary but has occurred without substantial regard for how matters function in the round. This has been occurring, moreover, as much has been changing on both sides of the Atlantic. In the U.S., major alterations have included corporate law-related modifications by way of securities law through the Sarbanes-Oxley Act of 2002 (SOX)⁷ and the Dodd-Frank Act of 2010 (Dodd-Frank).⁸ There has additionally been a rapidly burgeoning common law jurisprudence in Delaware and much discussion of the possibility of “Dexit,” involving the migration of companies from Delaware to other states such as Texas,⁹ which in turn likely influenced recent controversial revisions to Delaware statutory corporate law.¹⁰ The U.K. enacted a new corporate law statute in 2006¹¹ and is currently undergoing a substantial overhaul of stock market regulation intended to reverse a chronic stock market retreat featuring a migration of U.K.-listed companies to American stock exchanges.¹² A comprehensive assessment of the Anglo-American corporate model correspondingly is long overdue.

The analysis we provide demonstrating that U.S. and U.K. corporate laws and regulations display doctrinal differences and functional similarities is not merely an academic exercise. It is also crucial for policymakers and regulators looking for guidance from across the pond, who need to be aware that outcomes may vary little despite the legal arrangements in place.

companies, even if they might be relevant for other firms); BOB TRICKER, *CORPORATE GOVERNANCE: PRINCIPLES, POLICIES, AND PRACTICES* 284 (4th ed. 2019); BOBBY V. REDDY, *FOUNDERS WITHOUT LIMITS: DUAL-CLASS STOCK AND THE PREMIUM TIER OF THE LONDON STOCK EXCHANGE* 6–8 (2021).

⁶ BRIAN R. CHEFFINS, *ADVANCED INTRODUCTION TO CORPORATE GOVERNANCE LAW AND REGULATION* viii (2024).

⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of the U.S. Code).

⁹ Andrew Ross Sorkin et al., *A Silicon Valley Giant Calls for a Delaware Exodus*, N.Y. TIMES DEALBOOK, July 10, 2025, <https://www.nytimes.com/2025/07/10/business/dealbook/andriessen-horowitz-delaware.html>

¹⁰ *Infra* notes 83, 332 and accompanying text.

¹¹ Companies Act 2006, c. 46 (U.K.).

¹² On the decline of U.K. equities market and migration to the U.S. being a feature, see Brian R. Cheffins & Bobby V. Reddy, *Murder on the City Express—Who Is Killing the London Stock Exchange’s Equity Market?*, 44 CO. LAW. 215, 217–18, 222 (2023). On the reforms, see, for example, Brian R. Cheffins & Bobby V. Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK?*, 86 MOD. L. REV. 176, 190–95 (2021) and 2024 reforms discussed in Part VIII.

Ultimately, this article addresses a glaring gap in current knowledge regarding comparative corporate governance and corporate law, and its findings have substantial theoretical and practical implications.

Our article is organized as follows. We start by providing necessary context in the form of a jurisdictional overview and a literature survey. We next turn to our detailed comparative analysis, beginning with board composition and structure, followed by the duties which directors owe. We then pivot to shareholders, focusing on the rights shareholders can exercise. In so doing, we distinguish between rights deployed on a collective basis by way of shareholder resolutions and rights relied upon on an individual basis, primarily via litigation. Relatedly, we discuss rights minority shareholders have against dominant shareholders. Finally, we turn to takeovers, and more particularly “hostile” bids for control where the putative acquiror offers to buy out shareholders of the target company on terms the board does not find acceptable. We identify in relation to each of these topics substantial doctrinal differences while indicating that practical outcomes are frequently similar, ultimately showing that the notion of an Anglo-American model is plausible if deployed with substantial caveats in mind.

I. JURISDICTIONAL OVERVIEW

To place our comparative analysis of U.S. and U.K. corporate law into proper context, we begin with a jurisdictional overview that indicates who promulgates company law rules in the two countries. In the United States, the entities capable of issuing rules affecting the internal affairs of a publicly traded corporation are the state in which the firm is incorporated, the federal government, and the stock exchanges on which the company’s shares are listed.¹³ Incorporation occurs under the laws of a state, rather than federally, with Delaware currently being by far the most popular choice with businesses that opt for a state other than the one in which they are headquartered.¹⁴ For ease of exposition we will focus on Delaware law when considering state law.

Although incorporating under U.S. federal law is not an option, federal authorities have jurisdictional capacity to make corporate law and often do so collaterally with federal securities law, such as through SOX and Dodd-Frank. The national stock exchanges on which public companies list their shares—primarily the New York Stock Exchange (NYSE) and Nasdaq—additionally have listing rules with which such companies are obliged to adhere and over

¹³ ANDREAS CAHN & DAVID C. DONALD, *COMPARATIVE COMPANY LAW: TEXT AND CASES ON THE LAWS GOVERNING CORPORATIONS IN GERMANY, THE UK AND THE USA* 45 (2d ed. 2018).

¹⁴ Steven A. Bank & Brian R. Cheffins, *Corporate Law’s Critical Junctures*, 77 *BUS. LAW.* 1, 5 (2021).

which the federal Securities and Exchange Commission (SEC) has a substantial say pursuant to federal securities law.¹⁵

While U.S. companies can choose the state laws under which they incorporate, in the U.K. the focus is on one statute, the Companies Act 2006. The Companies Act 2006 creates a distinction between private companies and public limited companies (PLCs), with only PLCs being eligible to have their shares traded on a stock market,¹⁶ such as the London Stock Exchange’s Main Market or its secondary public company exchange, the Alternative Investment Market (AIM).¹⁷ Only the Main Market cohort are referred to as “listed” due to being admitted to the Official List that the Financial Conduct Authority (FCA), the U.K.’s financial markets regulator, controls.¹⁸

The FCA promulgates listing rules¹⁹ and disclosure and transparency rules²⁰ for listed companies that supplement requirements under the Companies Act 2006. A key corporate governance facet of the FCA’s U.K. Listing Rules (UKLR) involves the U.K. Corporate Governance Code (U.K. CG Code) that the Financial Reporting Council (FRC), an accounting regulator, oversees. The UKLR require listed companies to disclose the extent to which they comply with U.K. CG Code guidance and offer explanations when they fail to adhere to Code provisions (“comply-or-explain”).²¹ The U.S., with no direct counterpart to the U.K. CG Code, is part of a tiny minority of developed economies that lacks a corporate governance code.²²

II. LITERATURE SURVEY

Although the wide-ranging analysis of the Anglo-American corporate model that this article undertakes is well overdue, various comparisons of individual facets of U.S and U.K. corporate law have taken place over the decades. The themes emphasized have changed significantly over time, with the development of comparative corporate governance as a topic for research particularly altering the tenor of discussion.

L.C.B. Gower, drawing on his experience at Harvard as a visiting professor, compared U.S. and U.K. company law in multiple respects in his 1956

¹⁵ CAHN & DONALD, *supra* note 13, at 51.

¹⁶ Companies Act 2006, c. 46, §§ 4, 58, 59, 755 (U.K.).

¹⁷ See LOUISE GULLIFER & JENNIFER PAYNE, *CORPORATE FINANCE LAW: PRINCIPLES AND POLICY* 489 (4th ed. 2025).

¹⁸ *Id.* at 489.

¹⁹ Financial Services and Markets Act 2000, c. 8, § 96 (U.K.).

²⁰ *Id.* at § 89A (UK); Companies Act 2006, c. 46, Part 15 (U.K.).

²¹ FCA Handbook, UK Listing Rules (hereinafter UKLR), para. 6.6.6(6)R; *U.K. Corporate Governance Code*, FINANCIAL REPORTING COUNCIL, 2 (2018) (hereinafter U.K. CG Code).

²² OECD, *OECD CORPORATE GOVERNANCE FACTBOOK 2023* 41 (2023), https://www.oecd-ilibrary.org/finance-and-investment/oecd-corporate-governance-factbook-2023_6d912314-en (noting the U.S. was one of only three out of 49 jurisdictions the OECD analyzed that lacked a code).

Harvard Law Review article.²³ Gower noted that “[t]his branch of comparative study has been little explored.”²⁴ He correspondingly set out the case for the exercise, maintaining that despite “the rapid and independent growth of case law and legislation in the two countries . . . each country can still learn much from the other.”²⁵ Gower made his point with a wide-ranging essay canvassing topics such as the closely held company, issuances of shares to the public, insider dealing, derivative litigation, and shareholder meetings and voting.²⁶ Gower concluded by saying that even though “American corporation law is now incomparably richer and more highly developed than its English parent,”²⁷ “cross-fertilization might still improve the . . . strain of both breeds.”²⁸

Over the next quarter century, a few commentators picked up on Gower’s invitation to compare U.S. and U.K. corporate law, writing on topics such as shareholder litigation²⁹ and directors’ duties.³⁰ It was not until 1983, however, that Douglas Branson, a U.S. academic, offered in a law review article a substantial multitopic comparison.³¹ Aspects of corporate law Branson canvassed included the issuance of shares, disclosure regulation, executive pay, and minority shareholder relief.³² A key theme of Branson’s was that while, during Gower’s time, U.K. company law afforded those running companies greater flexibility than their American counterparts,³³ the pattern no longer held because in the intervening period British lawmakers had added “numerous substantive commands” while U.S. corporate statutes had “greatly become enabling.”³⁴

²³ Gower, *supra* note 1, at 1369.

²⁴ *Id.* Gower addressed some of the same themes in a short article published a year earlier: L. C. B. Gower, *Corporation Law in England and America*, 11 *BUS. LAW.* 39 (1955). For earlier exceptions, see ARTHUR R. KUHN, *A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS* 97–115, 144–54, 166–73 (1912); Douglas, *supra* note 3 (observing, though, in relation to analysis in the U.S. “Hitherto what has been written about the English Act has been highly legalistic, being for the most part an analysis of the statutory provisions and the English cases decided thereunder” (at 788)).

²⁵ Gower, *supra* note 1, at 1369–70.

²⁶ *Id.* at 1375–86, 1389–95.

²⁷ *Id.* at 1400.

²⁸ *Id.* at 1401–02.

²⁹ A. J. Boyle, *The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History*, 28 *MOD. L. REV.* 317 (1965); Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 *VA. L. REV.* 1043 (1969).

³⁰ Kenneth W. Nielsen, *Director’s Duties under Anglo-American Corporation Law*, 43 *U. DET. L.J.* 605 (1966); see also Leslie Peppiatt, *British and American Business Law: A Brief Comparison*, 16 *BUS. LAW.* 54 (1960) (providing a succinct overview of U.K. company law for an American audience).

³¹ Douglas M. Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 *MINN. L. REV.* 53, 55–56 (1983).

³² *Id.* at 58–68, 76–87.

³³ See Gower, *supra* note 1, at 1372, 1376–77, 1396.

³⁴ Branson, *supra* note 31, at 73.

Soon after Branson wrote, scholarly trends substantially reshaped comparative analysis of U.S. and U.K. corporate law. Debates about managerial accountability, board structure, and shareholder rights first became channeled through the term “corporate governance” during the 1970s.³⁵ At this point in time, and throughout the 1980s, analysis of corporate governance mainly focused on U.S. corporations.³⁶ As the 1990s got underway, the U.S.-centric bias unraveled as those in the U.S. interested in corporate governance began to consider the comparative angle in earnest and, shortly thereafter the study of corporate governance burgeoned globally.³⁷ In order to facilitate cross-border analysis, commentators classified countries on the basis of common characteristics, with the U.S. and the U.K. commonly grouped together under the banner of the Anglo-American approach to corporate governance.³⁸ The key shared features identified were a common law heritage the U.S. inherited as a colonial legacy from England, well-developed equity markets, the prioritization of shareholder interests, and diffuse share ownership in publicly traded firms, an arrangement where a bias in favor of shareholder apathy means the top corporate governance challenge should be constraining “agency costs” executives impose on shareholders.³⁹

Combining the salient features of American and British corporate governance into a single “Anglo-American” model fostered the impression that arrangements were largely identical in the U.S. and the U.K.⁴⁰ Nevertheless, a literature developed that explored corporate governance disparities between the two countries. There was a tendency to assume the distinctions were matters of degree rather than kind.⁴¹ Still, in the mid-2000s, the Institute of Chartered Accountants of England and Wales (ICAEW) did commission a series of papers intended to lay bare “the myth of Anglo-American corporate governance.”⁴²

³⁵ CHEFFINS, *supra* note 6, at 1–3.

³⁶ See Brian R. Cheffins, *The History of Corporate Governance* in OXFORD HANDBOOK OF CORPORATE GOVERNANCE 46–47, 56 (Mike Wright, Donald S. Siegel, Kevin Keasey & Igor Filatotchev eds., 2013).

³⁷ *Id.* at 56–58.

³⁸ THOMAS CLARKE, INTERNATIONAL CORPORATE GOVERNANCE: A COMPARATIVE APPROACH 17, 147–48, 172–73, 222–23 (3d ed., 2024).

³⁹ See, e.g., Ruth V. Aguilera, Cynthia A. Williams, John M. Conley & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE: INT’L REV. 147, 147–48 (2006); Andrew F. Tuch, *Proxy Advisor Influence*, 99 B.U. L. REV. 1459, 1470–72 (2019).

⁴⁰ See Steven Toms and Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950–2000*, 47 BUS. HIST. 267, 267 (2005); Christopher M. Bruner, *Power and Purpose in the Anglo-American Corporation*, 50 VA. J. INT’L L. 579, 580–81 (2010).

⁴¹ Tuch, *supra* note 39, at 1471; Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England*, COLUM. BUS. L. REV. 51, 51 (1998).

⁴² ICAEW, PRESSURE POINTS: CONTRASTING US AND UK SECURITIES MARKETS: HOW THEY IMPACT INTERNATIONAL POLICY, INVESTMENT, BUSINESS AND ACCOUNTING 5 (2005); ICAEW,

Disparities within the Anglo-American model that commentators identified included “startlingly different” takeover regulation,⁴³ more extensive private enforcement of corporate law in the U.S.,⁴⁴ and “softer touch” public enforcement in the U.K.⁴⁵ represented by a principles-based rather than a rules-based approach.⁴⁶ Some commentators suggested that the principles-based approach gave U.K. equity markets a valuable boost⁴⁷ while others argued the opposite.⁴⁸

The most remarked upon corporate governance difference between Britain and the United States was the extent to which the former empowered shareholders compared to the latter. American law professor Christopher Bruner argued in a 2013 book that U.K. shareholders “possess an arsenal of governance powers . . . that would be the envy of shareholder activists anywhere.”⁴⁹ Various other commentators concurred.⁵⁰

While the general consensus has been that U.K. company law empowers shareholders to a greater extent than U.S. corporate law, there has been a sharp division of opinion on whether the U.S. drew the short straw as a result. Lucian Bebchuk, a prominent advocate of shareholder rights, has praised arrangements in the U.K.⁵¹ Likewise, Robert Monks, a high-profile American shareholder rights advocate, said of Britain, “you almost have it right.”⁵² On the other hand, Lynn Stout, an American law professor and stern critic of the

EMERGING ISSUES: DIFFERENCES BETWEEN US AND UK SECURITIES MARKETS CREATE PRESURES AND POINT TO OPPORTUNITIES FOR INTERNATIONAL POLICY, INVESTMENT, BUSINESS AND ACCOUNTING 4–5 (2007); Robert Bruce, *Oceans Apart on the Rights and Wrongs of Control*, FIN. TIMES, Jan. 18, 2007, at 12.

⁴³ John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1729 (2007). See also Miller, *supra* note 41, at 54–60.

⁴⁴ John Armour, Bernard Black, Brian R. Cheffins & Richard Nolan, *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUDS. 687, 687 (2009).

⁴⁵ John C. Coffee Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 239 (2007).

⁴⁶ CLARKE, *supra* note 38, 267; SRIDHAR ARCOT, JULIA BLACK & GEOFFREY OWEN, FROM LOCAL TO GLOBAL: THE RISE OF AIM AS A STOCK MARKET FOR GROWING COMPANIES 57 (2007); Allison Dabbs Garrett, *A Comparison of United Kingdom and United States Approaches to Board Structure*, 3 CORP. GOVERNANCE L. REV. 93, 93–94 (2007).

⁴⁷ Anna Fifield, *Greenspan Predicts US Governance Revamp*, FIN. TIMES, April 13, 2006, at 2.

⁴⁸ Coffee, *supra* note 45, at 300–02; Lina Saigol, *New Money Put City’s Reputation at Risk*, FIN. TIMES, May 18, 2013, at 15.

⁴⁹ CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 29 (2013).

⁵⁰ See Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 509 (2019); see also John Armour, *Shareholder Rights*, 36 OXFORD REV. ECON. POL. 314, 317–18 (2020).

⁵¹ Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 725 (2007).

⁵² Florian Gimbel, *Corporate Campaigner Has Plenty of Fight Left in Him*, FIN. TIMES (Nov. 11, 2022), at 4; see also John Plender, *Lex: Not So Anglo*, FIN. TIMES (Jan. 16, 2005), at 20.

prioritization of shareholder interests, retorted that the U.K., as “a shareholder paradise”, hardly had “the world’s best track record in developing successful global companies.”⁵³

“Leximetrics”—tools for the quantitative measure of law—have featured prominently in the comparative corporate governance literature that has developed since the 1990s.⁵⁴ Leximetric analysis has focused on multiple jurisdictions. For instance, the study Lele and Siems call “the most popular” focused on forty-nine countries.⁵⁵ Nevertheless, the indices that have been compiled often cover the U.S. and U.K., thereby providing insights into these two jurisdictions.

The most influential leximetric analysis⁵⁶ is based on a six-element antidirector rights index (ADRI) that economists Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert Vishny (LLSV) developed in the mid-1990s.⁵⁷ LLSV scored both the U.S. and the U.K. as “5” out of “6,” which implied that both countries protected shareholders well.⁵⁸ With subsequent ADRI recoding, the score remained much the same for the U.K. but fell substantially for the U.S.,⁵⁹ which aligns with the proposition that Britain is a “shareholder paradise” compared with the U.S. The pattern was the opposite with a securities law index that La Porta, López-de-Silanes, and Shleifer relied upon in a 2006 article to measure enforcement of disclosure rules governing public offerings of shares.⁶⁰ The U.K.’s scores were above average, but no country scored higher than the U.S.⁶¹

La Porta, López-de-Silanes, and Shleifer deployed a third leximetric index, an anti-self-dealing index (ASDI), in a 2008 article with Simeon Djankov that focused on regulation of transactions between a company and those who control it.⁶² The U.S. and the U.K. both struck out with respect to ASDI public enforcement, scoring 0.00 against a global average of 0.41 out of

⁵³ STOUT, *supra* note 4, at 56.

⁵⁴ Priya P. Lele & Mathias M. Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17, 18–19 (2007).

⁵⁵ *Id.* at 18 (citing Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998)).

⁵⁶ Lucian Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Corporate Governance Standards*, 157 U. PA. L. REV. 1263, 1276 (2009) (on ADRI: “[a]mong academic researchers, the most influential metric for evaluating governance arrangements worldwide”).

⁵⁷ The ADRI was initially fully deployed in a published paper in La Porta et al., *supra* note 55, but a working paper version was distributed in 1996 as part of the NBER Working Paper Series: <http://www.nber.org/papers/w5661.pdf>.

⁵⁸ La Porta et al., *supra* note 55, at 1130.

⁵⁹ Simeon Djankov et al., *The Law and Economics of Self-Dealing*, NBER (Working Paper no. 11883 Table XII, 2005); Holger Spamann, *The “Antidirector Rights Index” Revisited*, 23 REV. FIN. STUD. 467, 470, 475 (2010).

⁶⁰ Rafael La Porta, Florencio López-de-Silanes & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (2006).

⁶¹ *Id.* at Table II.

⁶² Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008).

1.00.⁶³ Turning to private enforcement, the U.K. outpaced the U.S. with a perfect score of 1.00 for *ex ante* regulation compared to the U.S.'s 0.33 (slightly below the global average of 0.37).⁶⁴ On *ex post* private enforcement, the U.S. did much better, scoring 0.97 (inferior only to Singapore),⁶⁵ with the U.K. also scoring well at 0.85, markedly ahead of the global average of 0.53.⁶⁶

A fourth leximetric index offering scores for the U.S. and Britain is a ten-variable shareholder protection index⁶⁷ an academic team from the Cambridge Centre for Business Research developed (CBR SPI).⁶⁸ This index was a distilled version of a more expansive index encompassing sixty variables.⁶⁹ The ten-variable CBR SPI was deployed in a longitudinal study spanning 1990 to 2013.⁷⁰ For 2013, the U.S. and the U.K. scored similarly and both ranked highly among the thirty jurisdictions canvassed.⁷¹ As for the more expansive sixty-variable index, only five countries were canvassed, with the most recent scores being for 2005.⁷² The 2005 scores were very similar for all jurisdictions, with the U.K.'s 37.5 ranking third just below the top score of 38 out of 60.⁷³ The U.S. score was 34.⁷⁴

Drawing matters together, with respect to the tools for the quantitative measure of law, they offer some support for the view that the U.K. provides shareholders with more substantial protection than the U.S. Still, the pattern overall with such indices is mixed. The U.K. clearly outscored the U.S. in recodings of ADRI, but other indices either showed mixed results or modest differences. Overall, therefore, leximetric analysis tilts in favor of the U.S.-U.K. equivalence narrative rather than the U.K. shareholder paradise characterization.

Having canvassed the key jurisdictional points and the salient academic literature, we turn now in earnest to our comparison of key corporate law elements affecting publicly traded companies in the U.S and the U.K. We begin our deconstruction of the Anglo-American corporate model with boards.

⁶³ *Id.* at 443 (global average); Djankov et al., *supra* note 59, at Table IV (scores for the U.K. and the U.S.; this version of the paper offers a country-by-country breakdown unavailable in the published version).

⁶⁴ Djankov et al., *supra* note 59, at Table II.

⁶⁵ *Id.* at Table III.

⁶⁶ *See id.*

⁶⁷ *See* Mathias M. Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 DEL. J. CORP. L. 111, 116–99 (2008) (explaining development and use of a ten-variable shareholder protection index).

⁶⁸ Simon Deakin, Prabirjit Sarkar & Mathias M. Siems, *Is There a Relationship Between Shareholder Protection and Stock Market Development?*, 3 J. L. FIN. ACCT. 115, 119 (2018) (discussing origins of ten-variable shareholder protection index).

⁶⁹ *See also* Lele & Siems, *supra* note 54, at 23 (2007) (explaining development of the sixty-variable index).

⁷⁰ *See* Deakin, Sarkar & Siems, *supra* note 68, at 117.

⁷¹ *See id.* at 123.

⁷² *See* Lele & Siems, *supra* note 54, at 31.

⁷³ *See id.*

⁷⁴ *Id.*

We then consider director liability and the selection of directors. Next, we discuss various aspects of shareholder rights and conclude by discussing takeovers.

III. BOARD OF DIRECTORS

The board of directors is the logical place to start our topical analysis of U.S. and U.K. corporate arrangements, given that the board has been hailed as “the heart of the corporation,”⁷⁵ “the epicenter of power relations in the corporation,”⁷⁶ and “the fulcrum of corporate governance.”⁷⁷ As we will see, U.S. public companies have considerably less discretion when structuring their boards than their U.K. counterparts. Functionally, however, American and British public company boards end up in much the same place.

The U.S.-U.K. bifurcation with regard to the structuring of boards begins with the grant of managerial authority. Section 141(a) of the Delaware General Corporation Law provides “[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.”⁷⁸ The statutory provision only lays out the default position because theoretically a corporation’s charter, the foundational document for a U.S. corporation, can reallocate managerial authority.⁷⁹ Nevertheless, the statutory allocation of managerial control to the board has been described as “a defining feature of American corporate law.”⁸⁰

Despite the grant of managerial authority not being mandatory under Delaware corporate law, there is a firm statutory foundation that is lacking in the U.K.’s Companies Act 2006. In the U.K., the allocation of managerial authority is a matter for the corporate constitution of individual companies, the key element of which is the “articles of association.”⁸¹ This arrangement theoretically offers considerable flexibility. In contrast, in the U.S., courts disfavor attempts to reallocate managerial authority away from the board.⁸²

⁷⁵ Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 *YALE L.J.* 782, 833 (2022).

⁷⁶ Amir N. Licht, *Culture and Law in Corporate Governance*, in *THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE* 129, 151 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2015).

⁷⁷ CLARKE, *supra* note 38, at 33.

⁷⁸ DEL. CODE ANN. tit. 8, § 141(a) (2020).

⁷⁹ *See id.* (“except as may be otherwise provided in this chapter or in its certificate of incorporation”).

⁸⁰ Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *VA. L. REV.* 247, 251 (1999).

⁸¹ *See* Companies Act 2006 §§ 17–18 (U.K.); BRENDA HANNIGAN, *COMPANY LAW* 97 (3d ed. 2012).

⁸² *See, e.g.,* West Palm Beach Firefighters’ Pension Fund v. Moelis & Co., 311 A.3d 809, 816 (Del. 2024) (“a cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.”).

The Delaware legislature has recently authorized specified contractual adjustments to the statutory grant of managerial authority.⁸³ Managerial authority nevertheless remains contractible in the U.K. to a substantially greater extent than in Delaware because U.K. companies legislation deems the articles of U.K. companies to be a contract and empowers the shareholders to amend the articles by way of a “special” resolution passed with a majority of three-fourths of votes cast.⁸⁴

While theoretically there is greater flexibility to allocate corporate managerial authority in the U.K. than in the U.S., it is the universal practice of British public companies for the articles to allocate to the board the power to run the company. The Companies Act 2006 contains an appendix with a default set of model articles for public companies.⁸⁵ Although the precise wording can differ, publicly traded companies inevitably have articles that mimic the model articles and vest managerial authority in the hands of the board.⁸⁶ Ultimately, then, in the U.K., as in the U.S., “by default, the board is empowered to manage the corporation.”⁸⁷

U.S.-U.K. regulatory bifurcation, but functional similarity, is evident as well with board composition. NYSE and Nasdaq listing rules both require that boards of listed companies consist of a majority of independent directors.⁸⁸ Federal securities law also nudges those companies to split the roles of CEO and chair of the board, with Dodd-Frank requiring the disclosure of why they either combine or split the roles of CEO and chair.⁸⁹

U.K. expectations with respect to board composition and splitting the CEO and board chair roles are similar to those in the U.S. However, U.K. expectations operate on a less prescriptive comply-or-explain basis through the U.K. CG Code, which stipulates that at least half of board members be independent and that the CEO and chair roles be split.⁹⁰ Companies listed on the London Stock Exchange can comply or simply explain their rationale for

Also, see Bobby V. Reddy and Brian R. Cheffins, *What Can Delaware Learn from the U.K.’s Moelis Moment*, 1, 13–16, 22–23 (2025) <http://dx.doi.org/10.2139/ssrn.5385285>.

⁸³ DEL. CODE ANN. tit. 8, § 122(18) (2024).

⁸⁴ Companies Act 2006 §§ 21, 33, 283.

⁸⁵ The Companies (Model Articles) Regulations 2008 (SI 2008/3229), Sch. 3, Model Articles for Public Companies (U.K.).

⁸⁶ *Id.* art. 3; Kym Sheehan, *Shareholder Directions and FTSE 100 Directors’ General Powers to Manage the Company and its Business* 10 (2018) (unpublished working paper), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112972 (noting in a study of the articles of ninety-four constituents of the FTSE 100, a stock market index comprising the largest companies traded on the London Stock Exchange, that all ninety-four vested managerial authority in the hands of the board).

⁸⁷ Tuch, *supra* note 39, at 1471, n.13.

⁸⁸ NYSE Listed Company Manual § 303A.01 (“Listed companies must have a majority of independent directors”); Nasdaq Stock Market LLC Rules § 5605(b)(1) (“A majority of the board of directors must be comprised of Independent Directors . . .”).

⁸⁹ Dodd-Frank § 972, 15 U.S.C. § 78n-2.

⁹⁰ U.K. CG Code, Provisions 9, 11; *supra* note 21 and accompanying text.

non-compliance and, therefore, have ample theoretical discretion to structure boards compared with their American counterparts.

The regulatory bifurcation pattern is sustained with board committees. The U.K. CG Code stipulates that a listed company should have a board-level audit committee made up of independent directors that oversees the preparation and auditing of a company’s financial statements and reviews internal control and risk management systems,⁹¹ a compensation (remuneration, in British parlance) committee comprised of independent directors, to oversee the setting of executive pay,⁹² and a nomination committee, with a majority of members who qualify as independent, to make recommendations to the board on director nominations.⁹³ Flexibility is theoretically preserved because all of the foregoing guidance operates on a comply-or-explain basis, albeit with a caveat. The FCA’s Disclosure and Transparency Rules mandate that listed companies establish a body akin to an audit committee, and the most straightforward way to comply is to follow U.K. CG Code guidance on point.⁹⁴

As for the U.S., with board committees the flexibility that theoretically features in the U.K. is largely absent. A SOX amendment to federal securities law requires the NYSE and Nasdaq listing rules to mandate that listed companies have audit committees composed entirely of independent directors.⁹⁵ The position with compensation committees has been the same since the enactment of the 2010 Dodd-Frank Act.⁹⁶ There is no equivalent statutory mandate with nomination committees. Nevertheless, the NYSE listing rules require companies to have such a committee staffed by independent directors.⁹⁷ A company listed on Nasdaq, on the other hand, has a choice whether to establish a formal nomination committee staffed by independent directors or to procure the board’s independent directors to choose nominees.⁹⁸

Notwithstanding the U.K.’s greater flexibility in relation to board structure, there is a pattern of functional similarity. More than four-fifths of directors in larger U.S. public companies are placed in the independent category,⁹⁹ and, since the 2000s, independent directors have featured prominently in the U.K.¹⁰⁰ Evidence suggests that fewer than four percent of the largest 350

⁹¹ U.K. CG Code, Provision 24.

⁹² *Id.* Provision 32.

⁹³ *Id.* Provision 17.

⁹⁴ FCA Handbook, Disclosure & Transparency Rules, c. 7.1 (U.K.) (indicating that compliance with U.K. CG Code will be deemed as compliance for the purposes of the chapter).

⁹⁵ Sarbanes-Oxley § 301, 15 U.S.C. § 78j-1(m).

⁹⁶ Dodd-Frank § 952, 15 U.S.C. § 78j-3.

⁹⁷ NYSE Listed Company Manual, § 303A.04(a).

⁹⁸ Nasdaq Stock Market LLC Rules, § 5605-6(e)(1).

⁹⁹ Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AMER. J. COMP. L. 265, 276–77 (2017).

¹⁰⁰ Harald Baum, *The Rise of the Independent Director in the West: Understanding the Origins of Asia’s Legal Transplants*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 21, 23 (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017).

companies traded on the London Stock Exchange disclose a failure to comply with the Code provision stipulating that at least half of board members are to be independent.¹⁰¹ With splitting the role of CEO and board chair, U.K. firms have gone further than their American counterparts despite the topic being dealt with by the U.K. CG Code rather than by statute. In the U.S. a substantial minority of companies continue to combine the roles,¹⁰² but this is a rarity in the U.K.¹⁰³ As for board committees, since the mid-2000s, virtually every large U.S. public company has had audit, compensation, and nomination committees staffed entirely by independent directors.¹⁰⁴ Similarly, in the U.K., evidence indicates that over ninety percent of the largest 350 companies traded on the London Stock Exchange are compliant with the U.K. CG Code provisions dealing with these committees.¹⁰⁵

In contrast with board composition and with audit and compensation committees where arrangements are stricter in the U.S. than the U.K., the U.K. has a more prescriptive regime with directors affiliated with dominant shareholders. A policymaking emphasis on independent directors serving on boards and board committees is consistent with a monitoring model of the board under which the board's primary role is to keep in check the executives to which the board has delegated managerial authority.¹⁰⁶ The reasoning loses traction, however, when a company has a dominant shareholder since that shareholder should be motivated to monitor management because of the substantial value of their stake in the company and because they should, due to their voting clout, have sufficient leverage to orchestrate change if senior executives prove to be disloyal or ineffective.¹⁰⁷ There is, however, a risk that the dominant shareholder of a publicly held firm will use their leverage to exploit other shareholders and extract private benefits of control,¹⁰⁸ particularly if that dominant shareholder can rely on what is referred to as dual-class stock to exercise voting power exceeding their economic stake.¹⁰⁹ Given this, with companies with dominant shareholders, independent directors have

¹⁰¹ THOMPSON REUTERS, ANNUAL REPORTING AND AGMS 2024: WHAT'S MARKET PRACTICE? 21 (2024) (indicating that ten companies out of 254 FTSE 350 companies reviewed disclosed that they were non-compliant with Provision 11).

¹⁰² Kastiel & Nili, *supra* note 75, at 836 (stating that 43% of companies in the S&P 500 had a dual CEO-Chair structure as of 2020).

¹⁰³ Paul L. Davies & Klaus J. Hopt, *Corporate Boards in Europe - Accountability and Convergence*, 61 AM. J. COMP. L. 301, 331 (2013) (96% of FTSE 350 companies split the role).

¹⁰⁴ Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 989, 1024–25 (2010).

¹⁰⁵ THOMPSON REUTERS, *supra* note 101, at 21.

¹⁰⁶ On the origins of this model and its basic nature, see Puchniak & Lan, *supra* note 99, at 273–74.

¹⁰⁷ Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in INDEPENDENT DIRECTORS, *supra* note 100, 89, 98.

¹⁰⁸ María Gutiérrez & Maribel Sáez, *Deconstructing Independent Directors*, 13 J. CORP. L. STUD. 63, 71 (2013).

¹⁰⁹ See REDDY, *supra* note 5, at 32.

a governance role they might be able to play productively instead of monitoring management: act as a check on the dominant faction.¹¹⁰

Consistent with the foregoing reasoning, the U.K. CG Code indicates that where a director represents a significant shareholder, this is a factor likely to compromise their independence for the purposes of board and committee composition.¹¹¹ In contrast, the NYSE and Nasdaq listing rules do not preclude directors connected with significant shareholders from qualifying as “independent” and also explicitly exempt companies with a controlling shareholder from any requirement to have a board with a majority of independent directors.¹¹² The underlying logic appears to be that with dominant shareholders keeping executives in check, independent directors are redundant from a governance perspective,¹¹³ backed by an implicit assumption that the board monitoring model is not designed to constrain dominant shareholders so as to protect the interests of other shareholders.¹¹⁴ What seems like a clear ideological difference between the U.S. and the U.K. is not reflected in practice, however. Instead, in firms with dominant shareholders, the percentage of independent directors—including independent of any substantial shareholder—is greater in the U.S. than the U.K.¹¹⁵ Accordingly, as with other facets of boards, differences in applicable rules between the U.S. and the U.K. do not drive outcomes decisively.

IV. DIRECTORS’ LIABILITY

While directors have the power to manage companies, they also have correlative responsibilities in the form of duties they owe to the companies they serve. There are some key differences between the U.S and U.K. on this front. For instance, while in Delaware directors owe duties of care and loyalty to their companies,¹¹⁶ in the U.K. directors’ duties are not formally bifurcated in the same way. Also, while in the U.S. case law is the source of duties directors owe, supplemented to some degree by statutory measures,¹¹⁷ in Britain, a statutorily codified set of directors’ duties is generally interpreted as having

¹¹⁰ Gutiérrez & Sáez, *supra* note 108, at 74–75.

¹¹¹ U.K. CG Code, Provision 10.

¹¹² Puchniak and Lan, *supra* note 99, at 279; NYSE Listed Co. Manual, §§ 303A.00 and 303A.02; NASDAQ Stock Market LLC Rules, §§ IM-5605(a)(2) and IM-5615-5.

¹¹³ Puchniak and Lan, *supra* note 99, at 278–79.

¹¹⁴ Baum, *supra* note 100, at 56.

¹¹⁵ Jay Dahya, Orlin Dimitrov & John J. McConnell, *Does Board Independence Matter in Companies with a Controlling Shareholder?*, 35 J. APPLIED CORP. FIN. 72, 76 (2023).

¹¹⁶ ARTHUR R. PINTO & JAMES A. FANTO, UNDERSTANDING CORPORATE LAW 248 (online) (6th ed. 2023).

¹¹⁷ A. A. Sommer Jr., *Duty of Loyalty in the ALI’s Corporate Governance Project*, 52 GEO. WASH. L. REV. 719, 720 (1984).

displaced common law rules.¹¹⁸ Despite these key differences, there are substantial similarities. To illustrate this we follow the Delaware care/loyalty bifurcation of duties.

A. *Duty of Care*

By virtue of the duty of care that Delaware directors owe, they must inform themselves of all materially pertinent information prior to making a business decision, and, having become so informed, must take care in making that decision.¹¹⁹ The level of care is that which “ordinarily careful and prudent men would use in similar circumstances,”¹²⁰ equating to a requirement to avoid gross negligence.¹²¹ Gross negligence is in turn defined to be “reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason.”¹²² If a person has been appointed to a board for their unique expertise, actions will be measured against a standard that takes account of their specific skills.¹²³

In the U.K., section 174 of the Companies Act 2006 sets out the equivalent duty to exercise reasonable care, skill, and diligence.¹²⁴ As in Delaware, the duty embeds an objective standard, based upon the care, skill, and diligence that would be exercised by a reasonably diligent person with the knowledge, skill, and experience (i) reasonably expected of a person carrying out similar functions in that position and (ii) that the director actually has.¹²⁵ The statutory formulation seems stricter than Delaware’s, however, since “gross” negligence is not required for a breach of duty. Also, the U.K. lacks a direct doctrinal equivalent to Delaware’s business judgment rule,¹²⁶ under which directors are presumed to have acted (i) on an informed basis, (ii) in good faith, and (iii) with an honest belief that they were acting in the best interests of the company.¹²⁷

¹¹⁸ Companies Act 2006, § 170(3) (U.K.); see also Jennifer G. Hill, *Transnational Migration of Laws and Norms in Corporate Governance*, in *TRANSNATIONAL FIDUCIARY LAW* 216, 223 (Seth Davis et al., eds., 2024) (“UK directors’ statutory duties . . . eradicate and replace common law and equitable duties.”).

¹¹⁹ See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

¹²⁰ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

¹²¹ E. Norman Veasey & William E. Manning, *Codified Standard – Safe Harbor or Uncharted Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law*, 35 *BUS. LAW.* 919, 928 (1980).

¹²² See, e.g., *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005).

¹²³ See, e.g., *In re Emerging Communications, Inc. Shareholders’ Lit.*, C.A. No. 16415 1, 107–08, 112 (Del. Ch. 2004).

¹²⁴ Companies Act 2006 § 174(1) (U.K.).

¹²⁵ Companies Act 2006 § 174(2) (U.K.).

¹²⁶ Andrew Keay & Joan Loughery, *The Concept of Business Judgment*, 39 *LEGAL STUDIES* 36, 36–37 (2019).

¹²⁷ *Aronson*, 473 A.2d at 812.

While there are features of the duty of care that appear to be stricter in the U.K. than the U.S., from a functional perspective the differences are not substantial. U.K. courts have consistently adopted a deferential approach when assessing board decision-making, meaning they will generally respect the commercial judgment of directors and will refrain from using hindsight to assess whether there has been a breach of duty.¹²⁸ In other words, courts in the U.K., as in Delaware, give boards substantial leeway to discharge managerial responsibilities. Correspondingly, notwithstanding the absence in the U.K. of a “gross” negligence standard and a formal business judgment rule, it is unlikely the duty of care is markedly stricter in Britain than in the U.S.

While there are substantial similarities between the duty of care in the U.S. and the U.K., it is more difficult in the U.K. for companies to protect their directors from liability. Delaware corporations can, and regularly do, include exculpation provisions in their certificates of incorporation excusing directors from monetary liability for breaches of the duty of care that do not involve a failure to act in good faith or intentional misconduct.¹²⁹ In contrast, in the U.K., exculpation provisions for directorial negligence and other breaches of directors’ duties are precluded by statute.¹³⁰ It falls instead to the courts to excuse directors from liability, which the judiciary can only do if a director has acted “honestly and reasonably” and “having regard to all the circumstances of the case ... ought fairly to be excused”.¹³¹ Balancing this out is the fact that directors’ duties litigation is less likely to occur in the U.K., a point we pick up on when we consider minority shareholder protection.

B. *Duty of Loyalty*

With respect to the duty of loyalty, Delaware case law establishes that directors must prioritize the interests of the corporation and its stockholders over their own personal interests.¹³² A classic situation when this duty operates is where a director is presented with a business opportunity they are tempted to pursue personally, thereby potentially creating a conflict of interest between the director and the corporation.¹³³ In Delaware, a director in this position must present the business opportunity to the company first if it is

¹²⁸ *In re Smith & Fawcett, Ltd.* [1942] Ch 304, 306 (U.K.); *Burland v. Earle* [1902] AC 83, 93 (U.K.).

¹²⁹ DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

¹³⁰ Companies Act 2006 § 232(1) (U.K.).

¹³¹ Companies Act 2006 § 1157(1) (U.K.); *see also* *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) (U.K.), at 45 (suggesting that directors can be excused even when found to be negligent).

¹³² *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

¹³³ PINTO & FANTO, *supra* note 116, at 282 (online).

within the “line of business” of the company.¹³⁴ If, after proper disclosure, the board decides against pursuing the opportunity, the relevant director can then pursue it.¹³⁵ A decision not to proceed should be made by directors independent from the director potentially benefiting from the opportunity because if interested directors form the majority of the board, or dominate the board generally, the board will likely forfeit the protection the business judgment rule affords.¹³⁶

Delaware directors must also act in good faith. This means they must act in the honest belief that actions they take are in the best interests of the company for the benefit of its stockholders.¹³⁷ Good faith is therefore subjective in nature, and bad faith necessitates intent.¹³⁸ Additionally, Delaware has recognized a duty to disclose material information to stockholders where the board requests stockholder approval.¹³⁹

In the U.K., the codified directors’ duties in the Companies Act 2006 do not specify a duty of loyalty *per se*.¹⁴⁰ Nevertheless, taken collectively, various directors’ duties in the Companies Act 2006 cover similar ground. Most obviously, under section 175 of the Companies Act 2006, directors must avoid personal interests that conflict with the interests of the company,¹⁴¹ and the provision accounts specifically for the potential exploitation of business opportunities.¹⁴² English case law suggests that, unlike in Delaware, conflicts of interest and duty can arise with business opportunities not within a company’s line of business scope.¹⁴³ Publicly traded companies can include, however, a provision in their articles of association authorizing disinterested directors to preapprove such conflicts.¹⁴⁴ When there is such a clause in the articles there is alignment between the U.K. with Delaware in this area¹⁴⁵ because in both jurisdictions a director will be under a compunction to obtain board preapproval prior to personally taking advantage of the opportunity.

¹³⁴ *Guth v. Loft*, 5 A.2d 503, 514 (Del. 1939); *see also Broz v. Cellular Info Systems, Inc.*, 673 A.2d 148, 155 (Del. Ch. 1996).

¹³⁵ *Broz*, 673 A.2d at 157.

¹³⁶ *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168; *In re infoUSA, Inc. S’holders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007).

¹³⁷ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

¹³⁸ *In re The Walt Disney Company Derivative Litigation*, 907 A.2d 693, 753 (Del. Ch. 2005).

¹³⁹ *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *Dohmen v. Goodman*, 234 A.3d 1161, 1171–72 (Del. 2020).

¹⁴⁰ John Lowry, *Codifying the Corporate Opportunity Doctrine: The (UK) Companies Act 2006*, INT’L. REV. L., Apr. 2012, at 1, 7.

¹⁴¹ Companies Act 2006 § 175 (U.K.).

¹⁴² Companies Act 2006 § 175(2) (U.K.).

¹⁴³ *Allied Business and Financial Consultants v. Shanahan* [2009] EWCA Civ 751 (CA) (U.K.); *Towers v. Premier Waste Management Ltd.* [2011] EWCA Civ 923 (CA) (U.K.). In relation to Delaware, *see supra* note 134 and accompanying text.

¹⁴⁴ Companies Act 2006 §§ 175(4)(b), 175(6) (U.K.).

¹⁴⁵ *Supra* note 135 and accompanying text.

Section 175 excludes from its purview a quintessential conflict of interest scenario, namely transactions between directors and their company.¹⁴⁶ In the Companies Act 2006, section 177 specifically addresses this scenario, merely requiring disclosure of the conflicting interest to the board.¹⁴⁷ There is, however, supplementary regulation. With transactions between a company and one of its directors (or persons connected with a director) involving a transfer of assets that is “substantial,” based upon prescribed thresholds that are relatively modest for publicly traded companies, the Companies Act 2006 requires shareholder pre-approval.¹⁴⁸ The situation is the same with loans to U.K. directors.¹⁴⁹ Moreover, with companies listed on the London Stock Exchange, the UKLR provide that disinterested directors must approve “large” related party transactions.¹⁵⁰

Unlike in the U.K., in the U.S. prescribed shareholder approval requirements are absent with transactions between companies and their directors. There are other restrictions, however. Federal securities law outright prohibits loans to directors.¹⁵¹ With other transactions between companies and their directors, board-related preapproval can also be a meaningful hurdle. NYSE and Nasdaq listing rules provide that the audit committee, which, as discussed, should be comprised of independent directors,¹⁵² or another independent body of the board, must review anything other than very small transactions between a listed company and one of its directors.¹⁵³ Moreover, the director-friendly Delaware business judgment rule discussed previously¹⁵⁴ is *prima facie* disappplied for conflicted transactions, meaning in the event of a court challenge a board must prove that such a transaction was “entirely fair” to disinterested shareholders on the basis of price and process.¹⁵⁵ The business judgment rule can be reinstated, however, restoring the presumption that the otherwise potentially conflicted director acted with all due loyalty, if a majority of disinterested directors or disinterested shareholders preapprove

¹⁴⁶ Companies Act 2006 § 175(3) (U.K.).

¹⁴⁷ Companies Act 2006 § 177 (U.K.).

¹⁴⁸ Companies Act 2006 §§ 190–96 (U.K.). Most pertinently for publicly traded companies any transaction involving assets with a value of £100,000 or more are governed by the provisions (§ 191).

¹⁴⁹ Companies Act 2006 § 197 (U.K.).

¹⁵⁰ UKLR 7 Annex 1 (U.K.) (determining “large” based upon the ratio of the size of the transaction to the size of the company pursuant to gross assets, consideration and gross capital “class tests”); UKLR 8.2.1R (specifying such disinterested board approval if any of the “class tests” is 5% or more).

¹⁵¹ Sarbanes-Oxley § 402, 15 U.S.C. § 78m(k).

¹⁵² *Supra* note 95 and accompanying text.

¹⁵³ NYSE Listed Company Manual, § 314.00; Nasdaq Stock Exchange LLC Rules, § IM-5630. The requirement applies to any such transaction of greater than \$120,000. Securities Exchange Act of 1934, Regulation S-K, Item 404.

¹⁵⁴ *Supra* notes 126–127 and accompanying text.

¹⁵⁵ *Cede*, 634 A.2d at 361.

the relevant transaction.¹⁵⁶ Therefore, in Delaware, boards have a strong incentive to procure disinterested director approval or disinterested shareholder approval for director conflicts. Ultimately, then, although shareholder approval is not mandatory with any director conflicted transactions in Delaware, as it sometimes is in the U.K., the level of scrutiny likely is similar overall.¹⁵⁷

When a conflict of interest involves a director gaining personal profits from a third party through being a director of the company rather than by way of a related party transaction, in Delaware it appears that this scenario would be treated in the same way as any other business opportunity.¹⁵⁸ The U.K. takes a more robust approach under section 176 of the Companies Act 2006, which specifically precludes a director from accepting benefits from third parties.¹⁵⁹ Section 176, by offering no scope for a company's board to white-wash a breach, deviates from the approach with conflicts of interest more generally under section 175 and from Delaware, where the business judgment rule is reapplied if the receipt is "cleansed" by disinterested directors.¹⁶⁰ Accordingly, only shareholder resolutions can regularize a section 176 breach, and there is considerable doubt about the circumstances where shareholder ratification will be effective.¹⁶¹

Mirroring the duty to act in good faith Delaware directors owe is section 172 of the Companies Act 2006, a provision derived from a common law duty directors owed to act in their company's best interests.¹⁶² Section 172 requires a director to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders as a whole.¹⁶³ The provision additionally requires directors to "have regard" to a nonexhaustive list of nonshareholder stakeholder interests.¹⁶⁴ Case law

¹⁵⁶ See, e.g., *Puma v. Marriott* 283 A.2d 693, 695 (Del. Ch. 1971); *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987); *Benihana of Tokyo, Inc. v. Benihana, Inc.* 906 A.2d 114, 121 (Del. 2006); *Espinoza v. Zuckerberg*, 124 A.3d 47, 63 (Del. Ch. 2015); see also DEL. CODE ANN. tit. 8, § 144(a) (2025). In relation to controlling shareholders, see *infra* notes 327–332 and accompanying text, and DEL. CODE ANN. tit. 8 § 144(b) (2025).

¹⁵⁷ Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 *FORDHAM L. REV.* 939, 982–84 (2019).

¹⁵⁸ PINTO & FANTO, *supra* note 116, at 306, 313 (online) (noting U.S. jurisprudence on corporate opportunities and abuse of position, "[a] corporate fiduciary should not be able to unfairly profit from her corporate role."). By way of analogy, see the Hawaiian case on undisclosed profits, *Hawaiian Int'l Fins, Inc. v. Pablo* 488 P.2d 1172, 1174 (Haw. 1971).

¹⁵⁹ Companies Act 2006 § 176 (U.K.).

¹⁶⁰ *Supra* note 156 and accompanying text.

¹⁶¹ *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All ER 378, 389 (U.K.); Stanley M. Beck, *Corporate Opportunity Revisited*, in *STUDIES IN CANADIAN COMPANY LAW*, v. 2, 193, 233 (Jacob S. Ziegel, ed., 1973).

¹⁶² PAUL L. DAVIES, SARAH WORTHINGTON & CHRISTOPHER HARE, *GOWER: PRINCIPLES OF MODERN COMPANY LAW* 274 (11th ed. 2021).

¹⁶³ Companies Act 2006 § 172 (U.K.).

¹⁶⁴ Companies Act 2006 § 172(1) (U.K.).

confirms, however, that directors only have to consider stakeholder interests in relation to their impact on the interests of the shareholders as a whole.¹⁶⁵

Delaware case law does not specifically oblige directors to take into account nonshareholder stakeholder interests as part of the duty to act in good faith. Nevertheless, due to the business judgment rule and the subjective nature of the duty of loyalty, directors in Delaware have broad scope to advance nonshareholder stakeholder interests, at least to the extent that actions taken also promote long-term shareholder value.¹⁶⁶ In Delaware as with the U.K., however, directors cannot prioritize stakeholder interests to the exclusion of shareholder interests.¹⁶⁷

Two further loyalty-oriented directors’ duties are codified in the U.K. The first is the duty to exercise independent judgment.¹⁶⁸ Essentially, directors must not fetter their discretion by acting as a proxy or conduit for others.¹⁶⁹ Although a similar duty is not expressed in explicit terms in Delaware, Delaware’s overarching duty of loyalty plausibly encompasses an obligation to exercise independent judgment.¹⁷⁰

The second introduces a consideration that Delaware law does not directly evoke, namely a duty to exercise powers for the purposes for which they have been conferred.¹⁷¹ In the U.K., where a director is acting in what they think are the best interests of the company, they can still be found liable if the act’s purpose is improper given the purposes for which the relevant power *should* be deployed.¹⁷² This would not occur in Delaware.

Consider the issuance of shares that would have the effect of frustrating an unwelcome takeover bid. Here, a Delaware court would likely employ an intermediate standard of review standing between the traditional business judgment rule and the fairness test associated with the duty of loyalty,¹⁷³ and

¹⁶⁵ BTI 2014 LLC v. Sequana SA [2022], 3 W.L.R. 709, 758 (U.K.).

¹⁶⁶ Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It*, 48 J. CORP. L. 32, 61 (2023).

¹⁶⁷ eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

¹⁶⁸ Companies Act 2006 § 173 (U.K.).

¹⁶⁹ Colin Gwyer & Assocs. Ltd. v. London Wharf (Limehouse) Ltd. [2003] 1 BCLC 153, 178 (U.K.); Hawkes v. Cuddy [2010] BCC 597, 605 (CA) (U.K.).

¹⁷⁰ In Delaware, see *Aronson*, 473 A.2d at 816 (“Independence means that a director’s decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.”); *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (“To establish lack of independence . . . [a plaintiff] must show that the directors are “beholden” . . . or so under their influence that their discretion would be sterilized.”); *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 311 A.3d 809, 833, 866 (Del. 2024) (citing *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956) (invalidating agreements that “have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters” or “tend[] to limit in a substantial way the freedom of director decisions on matters of management policy”)).

¹⁷¹ Companies Act 2006 § 171 (U.K.).

¹⁷² *Hogg v. Cramphorn* [1967] Ch 254 (U.K.).

¹⁷³ *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985). The intermediate “enhanced scrutiny” standard is also applied where a board action interferes with director

if the directors can establish that they met the relevant standard there will be no breach of duty. In contrast, case law indicates that in the U.K. issuing shares with the purpose of affecting the balance of power in a company is not a proper exercise of the board's power to issue shares and thus is a breach of duty, regardless of whether the board genuinely believed the action to be in the interests of the company.¹⁷⁴

In sum, if anything, aspects of the U.K. corporate law that correspond with Delaware's duty of loyalty regime are slightly stricter than the law in Delaware, particularly in relation to the types of business opportunities that should first be presented to the company, receipt of benefits from third parties, and actions taken for "improper" purposes. The differences are not stark, however. Crucially, as well, as we will see,¹⁷⁵ enforcement of directors' duties in the courts is more likely to occur in Delaware than in the U.K., meaning that legal risks in the duty of loyalty realm ultimately could be less substantial in the U.K. than in Delaware.

C. *Financially Distressed Companies*

A properly rounded comparison of directors' duties in the U.S. and the U.K. necessitates taking into account the position with directors of financially distressed companies. To anticipate, directors in U.K. public companies face greater theoretical legal risk in the event of financial distress than their Delaware counterparts, though the additional risk is not substantial in functional terms.

In Delaware, with a financially distressed company, the focus of directors remains on acting in the best interests of the corporation for the benefit of its shareholders despite a growing risk of debt default.¹⁷⁶ Only when a corporation actually becomes insolvent are directors obliged with respect to the duties they owe to their company to consider the interests of creditors as well as shareholders.¹⁷⁷ Even in the event of insolvency, if the directors are managing the corporation in good faith so as to maximize its value, they will not be held liable for breach of duty even if their actions ultimately reduce the

elections. *See* *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 671 (Del. 2023). For more details in relation to takeovers, *see infra* notes 350–355 and accompanying text.

¹⁷⁴ Hogg, [1967] Ch 254 (U.K.); *Howard Smith Ltd. v. Ampol Petrol. Ltd.* [1974] 1 All ER 1126; *Bamford v. Bamford* [1970] Ch 212 (CA). There were early twentieth-century cases in the U.S. where courts adopted a similarly strict approach. *See* E. Merrick Jr. Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 n.6 (1932). Directors in U.S. companies today have discretion, however, not afforded to their forerunners or present-day U.K. counterparts.

¹⁷⁵ *See infra* Part VII.

¹⁷⁶ Brad Eric Scheler, Gary L. Kaplan & Jennifer L. Rodburg, *Director Fiduciary Duty in Insolvency*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 15, 2020), <https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/> [<https://perma.cc/26VG-XATK>].

¹⁷⁷ *Id.*; *North Am. Catholic Educ. Programming v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007).

assets available to creditors.¹⁷⁸ Directors can correspondingly take risks in a good faith attempt to turn the company around without concerns about director liability.¹⁷⁹

Applicable legal doctrines provide U.K. directors with less scope to be adventurous when a company is in trouble. Although section 172 of the Companies Act 2006 obliges directors to seek to promote the success of the company for the ultimate benefit of its shareholders,¹⁸⁰ there is an exclusion that preserves any common law requirement to consider the interests of creditors.¹⁸¹ Case law in turn provides that in certain circumstances directors must take into account creditor interests as they seek to act in a company’s best interests.¹⁸² Under this jurisprudence, those interests intrude at an earlier stage than in Delaware, namely when a company is “bordering on insolvency.”¹⁸³ Creditor interests progressively dominate from that point until shareholder interests are completely displaced when insolvent liquidation becomes unavoidable.¹⁸⁴

Additionally, in the U.K., there is a “wrongful trading” regime which applies once a company has entered insolvent liquidation or insolvent administration.¹⁸⁵ Under this regime, directors can be required to contribute to the assets available for distribution to unpaid creditors if, prior to the company entering liquidation or administration while insolvent,¹⁸⁶ the directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid its fate.¹⁸⁷ Ultimately, then, as a company approaches death’s door, while directors in Delaware have substantial scope to gamble on a risky rescue at creditors’ expense, U.K. directors will have pause for thought.¹⁸⁸

While with financially distressed companies the theoretical liability risk for directors of U.K. public companies is greater than it is for their U.S. counterparts, logistical considerations do much to ameliorate that additional risk. In the U.K., when a financially distressed company is being wound up, the

¹⁷⁸ *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 547 (Del. Ch. 2015).

¹⁷⁹ Scheler, Kaplan & Rodburg, *supra* note 176.

¹⁸⁰ *Supra* notes 163, 165 and accompanying text.

¹⁸¹ Companies Act 2006 § 172(3) (U.K.).

¹⁸² Pedro Shilling de Carvalho & Bobby V. Reddy, *Credit Where Credit’s Due: The Supreme Court Take on Directors’ Duties and Creditors’ Interests*, 82 *CAMBRIDGE L. J.* 17, 18 (2023).

¹⁸³ *BTI 2014 LLC v. Sequana SA* [2022], 3 *W.L.R.* 709, 717 (U.K.).

¹⁸⁴ *Id.* at 735.

¹⁸⁵ “Administration” is a U.K. bankruptcy procedure under which the company is given legal protection from its creditors while an appointed administrator attempts to rescue the business. *Insolvency Act 1986, Part II* (U.K.). A “liquidation” involves an immediate winding up of the company with all assets sold to generate proceeds to satisfy creditor claims. *Id.* at Part III.

¹⁸⁶ *Insolvency Act 1986* at §§ 214, 246ZB (U.K.).

¹⁸⁷ Additionally, under a “fraudulent trading” regime, upon liquidation, any person could be required to contribute to the company’s assets if its business had been carried on with an intent to defraud creditors or any other fraudulent purpose. *Id.* at § 213.

¹⁸⁸ *Carvalho & Reddy, supra* note 182, at 20.

financial professional overseeing matters will decide whether to press claims against the directors based on allegations of breaches of directors' duties and/or wrongful trading. Those in charge will in all likelihood opt not to launch proceedings to recover from the directors, and for good reason. Prevailing in court will be far from certain, the proceedings could be lengthy and protracted, and it is often doubtful that meaningful amounts can be recovered from directors of financially troubled companies in the event of success.¹⁸⁹ Unsurprisingly, then, very few lawsuits are brought against directors of financially distressed U.K.-based publicly traded companies based on allegations of breach of duty or wrongful trading.¹⁹⁰

V. DIRECTOR SELECTION—SHAREHOLDER “APPOINTMENT” RIGHTS

Having discussed the powers vested in boards and the liabilities of directors, we shift our emphasis now to shareholders. We begin this process with a transitional topic, namely director selection, which shareholders formally dominate in both the U.S. and the U.K. To set the scene for the analysis of shareholders, it is helpful to distinguish at this point between rights they exercise collectively and individually.

The classic way for shareholders to exercise rights collectively is through the passage of resolutions at shareholder meetings. As we will see in a moment, in the U.S. and the U.K., shareholders acting collectively have substantial rights over the selection of directors. Shareholders usually have, in addition to these “appointment rights,” various “decision rights” that potentially impinge on the authority of the board, and in turn management, to run the company.¹⁹¹

In contrast, individual shareholder rights, such as the right to a declared dividend or to vote shares on a proposed resolution, should not impinge upon boardroom prerogatives in any direct way. However, a category of individual rights that may have an indirect influence on the manner in which a company is managed encompasses mechanisms affording scope to seek litigious redress in response to the conduct of corporate affairs. A shareholder invoking such mechanisms most likely will allege board misbehavior or mistreatment at the hands of dominant shareholders.¹⁹²

¹⁸⁹ Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1418 (2006).

¹⁹⁰ *Id.* at 1417–18; Richard Williams, *What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?*, 78 MOD. L. REV. 55, 60–61 (2015) (noting the rarity of wrongful trading proceedings generally).

¹⁹¹ On the nature of “appointment” and “decision” rights, see REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 51–53 (3d ed. 2017).

¹⁹² CHEFFINS, *supra* note 6, at 183–84.

With collective rights, we will consider now director appointment rights of shareholders. We focus next on decision rights exercised collectively. We then turn to rights shareholders exercise individually.

In the U.S., corporate legislation vests shareholders with the right to elect directors at annual shareholder meetings.¹⁹³ Conversely, in the U.K., as is the case with the managerial powers of boards,¹⁹⁴ the Companies Act 2006 says little about director election. The matter instead is left to corporate articles of association.¹⁹⁵ The U.S. and the U.K. align practically, however, because the articles of U.K. publicly traded companies almost inevitably provide for election of directors at annual shareholder meetings.¹⁹⁶ Most companies obliged to discuss compliance with the U.K. CG Code also follow its steer to put the entire board of directors up for election at each annual meeting, rather than having a “staggered” board involving retirement by rotation with only a portion of board seats at stake.¹⁹⁷

With removal of directors, there is a shift in approach in the U.K. as compared with director election because shareholders have a right to do this by an ordinary resolution (majority vote) by virtue of statute rather than arising from the corporate constitution.¹⁹⁸ The removal power has been described as the “[m]ost notable among the shareholders’ powers of strategic intervention under U.K. law.”¹⁹⁹ It does not distinguish the U.K. materially from the U.S., however. Shareholders have an analogous removal power under Delaware law.²⁰⁰ Shareholder director removal rights are substantially compromised if a Delaware company has a “classified” or “staggered” board because shareholders can only remove directors for cause.²⁰¹ Most large publicly traded companies, however, have abandoned such structures due to shareholder pressure.²⁰²

While shareholders in the U.S. have director selection powers with a statutory underpinning that their British counterparts at least partially lack,

¹⁹³ See, e.g., DEL. CODE ANN. tit. 8, § 211(b) (2009).

¹⁹⁴ *Supra* note 81 and accompanying text.

¹⁹⁵ DAVIES, WORTHINGTON & HARE, *supra* note 162, at 226.

¹⁹⁶ Suren Gomtsian, *Shareholder Engagement and Voting in the United Kingdom*, in THE CAMBRIDGE HANDBOOK OF SHAREHOLDER ENGAGEMENT AND VOTING 427, 447 (Harpeet Kaur et al., eds., 2022); DAVIES, WORTHINGTON & HARE, *supra* note 162, at 228; see also Companies (Model Articles) Regulations 2008, SI 2008/3229, sch. 3, arts. 20–21 (U.K.).

¹⁹⁷ Gomtsian, *supra* note 196, at 447; U.K. CG Code, Provision 18.

¹⁹⁸ Companies Act 2006 § 168 (U.K.).

¹⁹⁹ Marc T. Moore, *United Kingdom: The Scope and Dynamics of Corporate Governance Regulation*, in COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 913, 929 (2013).

²⁰⁰ DEL. CODE ANN. tit. 8, § 141(k) (2020).

²⁰¹ DEL. CODE ANN. tit. 8, § 141(k)(i) (2020); see also *id.* at § 141(d) (providing for the establishment of classified boards).

²⁰² See BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 320, 364 (2018); Scott Guernsey et al., *Thirty Years of Change: The Evolution of Classified Boards*, 80 J. FIN. 2971, 2971, 2972, 2973 n.3 (2024).

with respect to law in action as opposed to the law in books there is functional similarity. In the U.S., while there are proxy contests where there is a battle between board-selected nominees and those an activist shareholder has put forward, most board elections are uncontested walkovers with the only nominees being those the incumbent board has put forward that shareholders endorse.²⁰³ Corporate law academics Margaret Blair and Lynn Stout have cited practical obstacles, such as rational apathy affecting widely dispersed investors and the scope an incumbent board has to use corporate resources to solicit votes by proxy, to argue that in U.S. public companies “[b]oards elect themselves.”²⁰⁴

In the U.K. matters operate similarly. U.K. public companies routinely only nominate as many board candidates as there are vacancies, and shareholders for their part will not vote against nominated directors unless they think all is lost: “It’s a ballistic missile investors would rather not use.”²⁰⁵ For instance, according to a 2024 study encompassing annual shareholder meetings at 254 large U.K. public companies, only one of a tiny handful of company-sponsored shareholder resolutions that were defeated involved director selection,²⁰⁶ meaning shareholders elected virtually all board-backed nominees. Hence, in the U.K., as in the U.S., the key to becoming a director is to be nominated.²⁰⁷

VI. SHAREHOLDER “DECISION” RIGHTS

Having just discussed collective shareholder appointment rights in relation to director selection, we consider here collective shareholder “decision” rights that potentially impinge on the authority of the board, and in turn management. In the U.K., unlike with board powers and director selection, where much is left to companies to address via the corporate constitution, the matter is dealt with in some detail by statute. Indeed, consistent with the notion that the U.K. is a shareholder paradise compared with the U.S., in various ways legislatively based shareholder decision rights are more substantial in the U.K. than in Delaware. On the other hand, as we suggest in relation to various other topics, the way in which matters work out in practice is frequently similar.

Again, with publicly traded companies, shareholders exercise collective rights by the passage of resolutions at shareholder meetings. Corporate legislation in the U.K. and the U.S. provides additional mechanisms shareholders

²⁰³ C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 *YALE L.J.* 1392, 1415 (2020).

²⁰⁴ Blair & Stout, *supra* note 80, at 310–11 (emphasis in original).

²⁰⁵ Alison Smith, *Shareholders Show Restraint in Applying Voting Powers*, *FIN. TIMES*, June 27, 2014, at 22.

²⁰⁶ THOMSON REUTERS, *supra* note 101, at 33.

²⁰⁷ DAVID KERSHAW, *COMPANY LAW IN CONTEXT: TEXT AND MATERIALS* 246 (2d ed. 2012).

can use to express their collective will, such as through written consents, but these are rarely relevant practically in public firms.²⁰⁸ In both jurisdictions, public company boards are statutorily obliged to call annual shareholder meetings.²⁰⁹ Boards also have the power to call “special” (or “extraordinary”) shareholder meetings between annual meetings.²¹⁰

What if shareholders want to exercise their powers collectively between annual meetings where the board would prefer not to call a shareholder meeting? In the U.K., shareholders who own five percent or more of a company’s shares have the right to force the board to call such a meeting.²¹¹ Delaware law is more restrictive than the U.K. and numerous other U.S. states,²¹² with the right of shareholders to call a meeting depending upon the terms of the corporate constitution.²¹³ The distinction has become less important practically, though, over time. While traditionally only a minority of Delaware public companies entitled shareholders owning a designated percentage of shares to call a shareholder meeting, a majority now do so.²¹⁴

At annual shareholder meetings and other shareholder meetings boards call, the standard practice in publicly traded companies is for the board to formulate resolutions for that meeting on which shareholders will vote. A shareholder may have, however, a legal right to ensure a resolution is part of the agenda. Contrary to the U.K. shareholder paradise characterization, here shareholders are better positioned in the U.S. than in the U.K.

In the U.K., shareholders who own five percent or more of the shares can cause a resolution to be voted upon at an annual shareholder meeting.²¹⁵ Such proposals do occur but only rarely. With the previously cited 2024 study of annual meetings of 254 large public companies, shareholders put forward three such resolutions affecting three companies.²¹⁶

The shareholder resolution ownership threshold is considerably more liberal in the U.S. By virtue of Securities and Exchange Act Rule 14a-8, a shareholder who acts in a sufficiently timely manner can have resolutions included in proxy materials their company sends to shareholders prior to the annual shareholder meeting if they fulfill modest share ownership requirements ranging from \$2,000 to \$25,000, depending on how long they have

²⁰⁸ MATHIAS M. SIEMS, *CONVERGENCE IN SHAREHOLDER LAW* 91 (2008).

²⁰⁹ Companies Act 2006 § 336 (U.K.); DEL. CODE ANN. tit. 8, § 211(b) (2009).

²¹⁰ CARSTEN GERNER-BEUERLE & MICHAEL SCHILLIG, *COMPARATIVE COMPANY LAW* 391 (2019).

²¹¹ Companies Act 2006 § 303 (U.K.). The board can decline to do so for reasons specified in *id.* at § 303(5).

²¹² Emiliano M. Catan & Marcel Kahan, *The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent*, 99 B.U. L. REV. 743, 783–84 (2019).

²¹³ DEL. CODE ANN. tit. 8, § 211(d) (2009).

²¹⁴ Kastiel & Nili, *supra* note 75, at 830–31.

²¹⁵ Companies Act 2006 § 338 (U.K.).

²¹⁶ THOMSON REUTERS, *supra* note 101, at 34.

owned the shares.²¹⁷ Rule 14a-8 qualifies under a variety of circumstances the right of shareholders to use corporate proxy materials to get proposals put to a shareholder vote, but shareholders can quite often sidestep these by framing a resolution as advisory rather than binding.²¹⁸ Resolutions put forward by shareholders are much more common than in the U.K.²¹⁹ There were nearly 900 in 2023.²²⁰

While shareholders in U.S. public companies have broader scope to get resolutions put to a vote than their counterparts in the U.K., their British counterparts have broader decision rights. This aligns with cross-border trends. The “shareholder proposal culture” in the U.S. is robust by global standards,²²¹ but the range of issues where shareholders are vested with a veto is narrower in the U.S. than in many other jurisdictions.²²² According to a leading study of U.S. shareholder voting, veto rights shareholders have are limited “to . . . certain fundamental changes such as a merger.”²²³ More precisely, under state corporate law, shareholder veto rights focus on situations where a corporation has been put up for sale, or is proposing to sell all or substantially all of its assets, dissolve itself or amend its corporate constitution.²²⁴ NYSE and Nasdaq listing rules additionally require shareholder approval if more than 20 percent of a listed acquirer’s outstanding shares are to be issued to finance a corporate acquisition.²²⁵

U.K. shareholder decision rights operate in a specific merger context—known as schemes of arrangement—that Part IX discusses. U.K. shareholders additionally have veto rights in various other circumstances where their U.S. counterparts do not. One instance already discussed is substantial asset transactions involving a company and one or more of its directors.²²⁶ U.K. shareholders also need to approve share issuances,²²⁷ whereas in the U.S. boards deal exclusively with this topic so long as the corporate constitution does not

²¹⁷ 17 C.F.R. § 240.14a-8 (2025).

²¹⁸ GERNER-BEUERLE & SCHILLIG, *supra* note 210, at 420–22.

²¹⁹ Gomstian, *supra* note 196, at 440–41.

²²⁰ Gibson Dunn, *Shareholder Proposal Developments During the 2023 Proxy Season* (July 25, 2023), <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2023-proxy-season/> [https://perma.cc/9796-PPC2].

²²¹ Christoph Van der Elst, *Shareholder Engagement and Corporate Voting in Action: The Comparative Perspective*, in *THE CAMBRIDGE HANDBOOK OF SHAREHOLDER ENGAGEMENT AND VOTING* 501, 526 (Harpreet Kaur, Jennifer G. Hill & Randall S. Thomas eds., 2022).

²²² Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 *BROOK. J. INT’L L.* 843, 881–82 (2012).

²²³ Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 *S. CAL. L. REV.* 1359, 1367 (2014).

²²⁴ Paul Mason et al., *Does Shareholder Voting Matter? Evidence from the Takeover Market*, 53 *WAKE FOREST L. REV.* 157, 165–66 (2018); *DEL. CODE ANN.* tit. 8, §§ 242, 251, 271, 275 (2023).

²²⁵ NYSE Listed Company Manual § 312.03(c); Nasdaq Stock Market LLC Rules § 5635(a).

²²⁶ See *supra* note 148 and accompanying text.

²²⁷ Companies Act 2006 § 551 (U.K.).

have to be amended to increase the amount of equity capital authorized to be issued.²²⁸ U.K. shareholders additionally have waivable “preemption” rights U.S. shareholders lack in the form of a pro rata right of first refusal to subscribe to shares before issuance to the public.²²⁹

Dictating corporate constitution terms is another way in which U.K. shareholders have more extensive collective rights than their U.S. counterparts. In the U.K., while as a practical matter the board will most often formulate the agenda at shareholder meetings, formally amending the corporate constitution is purely a matter for the shareholders. They do so by way of “special” resolutions that must be designated as such and must be approved by seventy-five percent or more of the votes cast.²³⁰ In Delaware, a corporation’s shareholders can have substantial control over the content of the bylaws that set down internal rules for a corporation.²³¹ However, with the charter, referred to as the certificate of incorporation in Delaware, the board needs to initiate changes before the shareholders have a say.²³²

Executive compensation is one additional area where U.K. shareholders have more substantial decision-making rights than their U.S. counterparts. The listing rules applicable to London-, NYSE- and Nasdaq-listed companies all stipulate under specified circumstances that shareholder approval must be obtained to validate equity-based incentive schemes.²³³ The U.K., however, goes further than the U.S. with what is known as “say-on-pay,” where a company’s shareholders vote on a company’s general approach to executive compensation. Under U.S. securities laws, publicly traded companies must give shareholders a vote at least every three years on how the five highest-paid executive officers are compensated, and, every six years, a vote on increasing the frequency of such votes.²³⁴ No legal consequences automatically follow if shareholders vote against a company’s executive pay arrangements, meaning these say-on-pay votes ultimately are merely advisory.

The U.K. say-on-pay regime is more robust. Publicly traded companies can face two basic types of say-on-pay votes. First, at least every three years, such companies must give shareholders the opportunity to vote on a

²²⁸ Anne Lafarre, *Shareholder Engagement and Corporate Voting in a Comparative Perspective*, in *CAMBRIDGE HANDBOOK*, *supra* note 221, 461, 481.

²²⁹ Companies Act 2006 §§ 561, 571 (U.K.); GERNER-BEUERLE & SCHILLIG, *supra* note 210, at 796, 803.

²³⁰ Companies Act 2006 §§ 21, 283 (U.K.).

²³¹ DEL. CODE ANN. tit. 8, § 109(a) (2025).

²³² DEL. CODE ANN. tit. 8, § 242(b)(1) (2023); Sofie Cools, *Shareholder Proposals Shaking up Shareholder Say: A Critical Comparison of the United States and Europe*, in *COMPARATIVE CORPORATE GOVERNANCE* 302, 312–13 (Afra Afsharipour and Martin Gelter eds., 2021).

²³³ UKLR 9.3.1; NYSE Listed Company Manual § 303A.08, 312.03(b)(iii); Nasdaq Stock Market LLC Rules, § 5635(c).

²³⁴ Dodd-Frank § 951, 15 USC 78n-1.

forward-looking directors' remuneration policy.²³⁵ This vote is binding, in the sense that if shareholders vote "no," directors must be paid in accordance with the previously approved policy, and any purported payments under the new unapproved policy will be void.²³⁶ Second, shareholders have an annual advisory vote on the backward-looking implementation of their company's executive pay policy.²³⁷ Shareholders can disapprove of what directors have been paid in the immediately preceding fiscal year, but because the payments will have been made under contract in accordance with the preapproved directors' remuneration policy, any such "no" vote will not legally impact what has been paid to those directors.²³⁸

With collective shareholder rights, when comparing the U.S. and the U.K. it is essential to bear in mind Roscoe Pound's contrast between "law in books" and "law in action."²³⁹ While U.K. shareholders have more substantial collective rights than their U.S. counterparts, evidence that they rely on those rights to engage more substantially with publicly traded companies is lacking. As mentioned, shareholder proposals are vanishingly rare in Britain.²⁴⁰ It is also extremely uncommon for U.K. shareholders to vote against proposed resolutions. With the 2024 study of annual shareholder meetings of 254 large public companies cited earlier, this only happened eleven times.²⁴¹

Voting itself is not fully determinative of levels of shareholder engagement, and U.K. shareholders theoretically might exert substantial pressure on management in the shadow of their extensive shareholder rights. However, evidence of this is sparse. Hedge funds have achieved global notoriety for relying on shareholder rights to execute brash interventions in publicly traded companies, so it would seem to follow that hedge funds would feature prominently in the U.K. They do, but with a crucial caveat. Hedge fund activism is considerably more prevalent in the U.S.,²⁴² with campaigns involving U.S. public companies substantially outnumbering those occurring in all other countries combined.²⁴³

"Mainstream" institutional shareholders in the U.K., such as pension funds and mutual funds, have shown little inclination to engage in shareholder

²³⁵ Companies Act 2006 § 439A (U.K.). The vote on the directors' remuneration policy must be brought forward to the next annual shareholders' meeting to revise an existing policy or if any say-on-pay vote was lost at the previous annual meeting. *Id.*

²³⁶ Companies Act 2006 § 226E (U.K.).

²³⁷ Companies Act 2006 § 439 (U.K.).

²³⁸ Companies Act 2006 § 439(5) (U.K.).

²³⁹ See *supra* note 2 and accompanying text.

²⁴⁰ See *supra* note 216 and related discussion.

²⁴¹ THOMSON REUTERS, *supra* note 101, at 33.

²⁴² Dionysia Katelouzou, *Worldwide Hedge Fund Activism: Dimensions and Legal Determinants*, 17 U. PA. J. BUS. L. 789, 833 (2015).

²⁴³ Ruth V. Aguilera, Ryan Federo & Yuliya Ponomareva, *Gone Global: The International Diffusion of Hedge Fund Activism*, in THE OXFORD HANDBOOK OF HEDGE FUNDS 318, 321–24 (Douglas Cumming, Sophia Johan & Geoffrey Wood eds., 2021).

activism. In a 1994 article, U.S. corporate law academics Bernard Black and John Coffee analyzed activism patterns in Britain to see if such investors engaged more substantially with companies than stockholders of U.S. companies that faced regulatory constraints on activism absent in Britain.²⁴⁴ Black and Coffee acknowledged that major U.K. institutional investors were not entirely passive but nevertheless remarked upon “the reluctance of even large shareholders to intervene.”²⁴⁵ Little has changed in the years since. The *Financial Times*, in a 2018 article entitled *Leave Out the Aggression, Please, This is Britain*, noted that with respect to institutional shareholders there had been “years of criticism for their mostly unwavering support of British boardrooms.”²⁴⁶ A government-commissioned 2018 review of the FRC, the U.K. accounting regulator, similarly indicated when discussing shareholder involvement in overseeing publicly traded companies that “the investor community is . . . not as engaged . . . as it should be.”²⁴⁷

Executive compensation may be a partial exception to the general shareholder passivity pattern in the U.K. Voting support in favor of say-on-pay resolutions is very consistent between the U.S. and U.K., most often above ninety percent.²⁴⁸ Nevertheless, since the U.K. added a binding vote to its advisory vote regime in 2013, the rate of rise of executive compensation levels has arguably slowed while U.S. executive pay has grown substantially.²⁴⁹ The divergence may, however, have less to do with shareholders in the U.K. exercising influence than with the greater popularity of performance-related stock-based compensation in the U.S. as compared to Britain, and the value of stock-based awards increasing substantially in the U.S. in line with healthy shareholder returns lacking in the U.K.²⁵⁰ Furthermore, shareholder rights aside, U.K. boards may feel that they lack scope to authorize executive pay levels as high as seen in the U.S. as a result of governance norms in the two countries that favor more lucrative managerial compensation in the U.S.²⁵¹

Reverting to shareholder passivity generally, while misgivings have been expressed with respect to levels of engagement of U.K. shareholders, similar

²⁴⁴ Bernard S. Black & John C. Coffee, *Hail Britannia: Institutional Investor Behavior under Limited Regulation*, 92 MICH. L. REV. 1997 (1994).

²⁴⁵ *Id.* at 2086.

²⁴⁶ Attracta Mooney, *Leave Out the Aggression, Please, This is Britain*, FIN. TIMES, Apr. 30, 2018, at 6.

²⁴⁷ JOHN KINGMAN, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL 46 (2018).

²⁴⁸ Bobby V. Reddy, *Getting in a Bind—Comparing Executive Compensation Regulations in the U.S. and the U.K.*, 14 NOTRE DAME J. INT’L. & COMP. L. 1, 16–17 (2024).

²⁴⁹ *Id.* at 19–20.

²⁵⁰ *Id.* at 26. See also Jennifer Williams, *Meet the Highest Paid CFOs of 2023*, WALL ST. J., June 24, 2024, at 3 (noting that the bulk of U.S. executive compensation usually consists of restricted stock or stock options, the value of which fluctuates with the market).

²⁵¹ Reddy, *supra* note 248, at 24–25.

concerns exist in the U.S.²⁵² The exact prevalence of shareholder activism in the U.S. need not detain us further. The key point instead is “law in action” similarity—engagement by U.K. institutional investors is not markedly more robust than in the U.S. despite having more potent collective shareholder rights.

VII. INDIVIDUAL SHAREHOLDER RIGHTS

Again, when considering shareholder rights, it is helpful to distinguish between those exercised collectively and those exercised individually. We have assessed the former and now turn to the latter. To narrow the analysis for the purposes of our wide-ranging survey of the Anglo-American corporate model, we will focus primarily on options shareholders have to litigate in relation to alleged board misbehavior, discussed here, and mistreatment by a dominant shareholder, discussed in Part VIII.

With individual shareholder rights in the U.S. and the U.K., yet again it is necessary to distinguish between “law in books” and “law in action,” though in this case the bifurcation reveals a discrepancy between the two countries rather than a similarity. From the “law in books” perspective, there is no clear blue water between the U.S. and the U.K. In some circumstances, shareholder rights are theoretically more robust in the U.K. than in the U.S., and vice versa. “Law in action” is different. Shareholder litigation is considerably more prevalent in U.S. public companies.

With “law in books,” a key point to bear in mind is that “[s]hareholder lawsuits comprise two categories distinct as a matter of legal form: derivative actions and direct suits.”²⁵³ A derivative action will be the only option available in Delaware if the corporation has suffered the alleged harm and would benefit from recovery.²⁵⁴ The position is the same in the U.K., reinforced by a “no reflective loss principle,” which means a shareholder cannot sue personally, even if they have been adversely affected, if the relevant loss is reflective of loss suffered by the company.²⁵⁵

With a derivative action, a shareholder will most likely be seeking to launch litigation on their company’s behalf for an alleged breach of directors’ duties. Directors typically owe their duties to their companies, both in the U.S.

²⁵² See, e.g., Dorothy S. Lund, *Passive Investing and Corporate Governance: A Law and Economics Analysis*, in *CORPORATE LAW AND ECONOMICS* 60, 61 (Adam B. Badawi ed., 2023) (“At first, scholars celebrated the consolidation of the stock market in the hands of large institutional investors . . . [b]ut the consensus view is that institutional investors failed to live up to these high expectations.”).

²⁵³ Alan K. Koh, *Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law*, 21 *WASH. U. GLOB. STUD. L. REV.* 391, 396 (2022).

²⁵⁴ *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1262–63 (Del. 2021).

²⁵⁵ *Marex Financ. Ltd. v. Sevilleja*, [2020] UKSC 31, 4, 13–14 (U.K.).

and the U.K.²⁵⁶ A company’s board of directors, being vested with managerial authority,²⁵⁷ decides whether the company will sue for breaches of such duties. Unsurprisingly, boards will often be reluctant to launch lawsuits against particular directors or the directors collectively.²⁵⁸ Dishonest or manifestly careless director behavior correspondingly could go unaddressed. The ability of individual shareholders to launch derivative litigation on a company’s behalf is a response to this quandary.²⁵⁹

Corporate law in both the U.S. and the U.K. creates scope for derivative litigation, but neither jurisdiction offers minority shareholders an unconditional right to proceed due to concerns about wasteful, duplicative litigation and potential constant second-guessing of directors exercising managerial authority.²⁶⁰ As for how derivative suits are filtered, the departure point is considerably different in the U.S. and U.K., but the approaches do ultimately align functionally to a substantial degree. In the U.K., a shareholder must apply to and obtain leave from a court to bring a derivative action, with the judge focusing on factors laid down by statute in making the decision on point.²⁶¹ This can readily result in a derivative action being shut down judicially before it has even formally started, an outcome that logically will deter shareholders from attempting legal actions of this nature. This helps to explain why derivative claims involving publicly traded companies are rare in the U.K.²⁶²

With the filtering of derivative suits in the U.S., in contrast to the U.K., the board is formally center stage, with the reasoning being that the board has managerial authority and thus should decide whether the company will sue.²⁶³ Accordingly, dissident shareholders seeking to pursue Delaware derivative litigation are theoretically obliged to make a demand asking the board to bring the suit.²⁶⁴ Such shareholders, anticipating realistically that the board will reject their requests, usually do not bother asking and instead bring court proceedings to get demand excused on grounds of “futility”²⁶⁵ by raising doubts

²⁵⁶ GERNER-BEUERLE & SCHILLIG, *supra* note 210, at 365 n.181.

²⁵⁷ *Supra* notes 78, 80 and 87 and accompanying text.

²⁵⁸ CHEFFINS, *supra* note 6, at 190.

²⁵⁹ Mohammad Rizal Salim & Deborah Gurdial Kaur, *The Statutory Derivative Action in Malaysia*, 24 BOND L. REV. 125, 125 (2012).

²⁶⁰ CHEFFINS, *supra* note 6, at 190–91. On advantages with restricting the ability of individual shareholders to launch litigation on their company’s behalf, see Brian R. Cheffins, *Reforming the Derivative Action: The Canadian Experience and British Prospects*, 1 CO. FIN. INSOLVENCY L. REV. 227, 230–31 (1997).

²⁶¹ Companies Act 2006 §§ 263(2), (3), (4) (U.K.).

²⁶² A Lexis Library search conducted on Nov. 14, 2023, using the terms “derivative claim,” “PLC,” and “Companies Act 2006” revealed only six derivative claims against directors of public companies since the procedure was codified, with leave to proceed denied in all six cases.

²⁶³ Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously—Corporate Governance in the United States and Germany*, 53 AM. J. COMPAR. L. 31, 49 (2005).

²⁶⁴ Deborah A. DeMott, *Demand in Derivative Actions: Problems of Interpretation and Function*, 19 U.C. DAVIS L. REV. 461, 461–62 (1986).

²⁶⁵ Harald Baum & Dan Puchniak, *The Derivative Action: An Economic, Historical and Practice-Oriented Approach*, in THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND

that the board can exercise business judgment without self-interest when assessing the wisdom of litigation.²⁶⁶ This means that, as in the U.K., courts in the U.S. play a significant screening role with derivative suits, with the caveat that publicly traded companies can take steps to make it less likely for a judge to give the green light. Judges in the U.S. are unlikely to excuse demand when the directors slated to decide whether the lawsuit should go ahead are independent in relation to the litigation.²⁶⁷ Boards of publicly traded companies correspondingly frequently respond to a potential derivative suit by forming a special litigation committee comprised of directors who are independent in the sense that they are not implicated in the alleged wrongdoing, anticipating substantial judicial deference so long as sound procedures are used to investigate matters.²⁶⁸

If shareholders can point to an infringement of a legally protected *personal* right and seek redress through the courts, such litigation again is referred to as a direct suit.²⁶⁹ With such litigation, the justification for the procedural filters associated with the derivative action largely falls away. This is because the shareholders are acting on their own behalf rather than the company's.²⁷⁰

Across borders, “the diverse range of legal mechanisms comprising direct suits offer protection for shareholders in a wide range of scenarios.”²⁷¹ It is beyond the scope of this article to canvass such mechanisms systematically. We will instead focus on two. With one, the law is more shareholder-friendly in the U.S. With the other, the law appears to be more favorable to shareholders in the U.K., but there are few advantages in the publicly traded company context in practice.

The first mechanism is a statutory right to “appraisal,” meaning shareholders can demand that their company purchase their shares at fair value when they object to a transformative transaction such as a merger.²⁷² Appraisal rights are largely unknown under U.K. law, being restricted to a voluntary liquidation procedure under bankruptcy legislation that is popular with private or family companies.²⁷³ The situation is different in Delaware, where mergers

FUNCTIONAL APPROACH 1, 50 (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012).

²⁶⁶ *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021) (simplifying the requirements for futility).

²⁶⁷ Baum & Puchniak, *supra* note 265, at 50.

²⁶⁸ GERNER-BEUERLE & SCHILLIG, *supra* note 210, at 708; WILLIAM A. KLEIN, JOHN C. COFFEE & FRANK PARTNOY, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 212 (11th ed. 2010).

²⁶⁹ CAHN & DONALD, *supra* note 13, at 745.

²⁷⁰ *Id.* at 746.

²⁷¹ Koh, *supra* note 253, at 397.

²⁷² Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1558–59 (2015); CHEFFINS, *supra* note 6, at 192 (identifying the corporation as the buyer when appraisal rights are invoked)

²⁷³ Insolvency Act 1986, c. 45, § 111 (U.K.), discussed by DAVIES, WORTHINGTON & HARE, *supra* note 162, at 1084–85.

act as a triggering event for appraisal rights.²⁷⁴ In the mid-twentieth century, the remedy was “left for dead”²⁷⁵ since, for shareholders in a publicly traded company dissatisfied with a major change, selling their shares on the stock market was considerably more straightforward than appraisal. The appraisal remedy has undergone something of a public company renaissance, however, with appraisal petitions beginning to feature prominently in the 2010s with mergers involving Delaware public company targets.²⁷⁶

The second direct suit mechanism we focus on is known as the “unfair prejudice” remedy and is U.K.-specific. Section 994 of the U.K. Companies Act 2006 authorizes a shareholder in a company to petition the court for relief on the basis that the manner in which the company’s affairs have been conducted has been unfairly prejudicial to the interests of shareholders generally or some part of the shareholders, including the petitioning shareholder.²⁷⁷ With section 994 providing the foundation for a direct suit, a shareholder can petition for relief from unfair prejudice without having to navigate the leave procedure that governs derivative suits in the U.K.²⁷⁸ Delaware lacks a directly equivalent free-standing remedy, and with various states that have an “oppression” doctrine associated with applications to wind up companies the remedy is tied to the “special” nature of closely held companies arising from the lack of a market for shares of such firms.²⁷⁹

With this second direct suit mechanism, U.K. shareholders appear to be in a considerably more advantageous position than their American counterparts, particularly because the English judiciary has, with unfair prejudice petitions, forsaken a traditionally noninterventionist attitude in relation to the internal affairs of companies.²⁸⁰ Still, in practice the advantage in the public company context is modest. Shareholders invoking section 994 can, and often do, cite breaches of expectations derived from informal undertakings and agreements to support a claim for unfair prejudice.²⁸¹ The courts, however do not permit shareholders in publicly traded companies to do the same.²⁸² The granting of relief under the unfair prejudice remedy is not confined to this “informal arrangement” scenario.²⁸³ Nevertheless, there has never been a reported case

²⁷⁴ DEL. CODE ANN. tit. 8, § 262.

²⁷⁵ Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal’s Role in Corporate Law*, 84 GEO. L.J. 1, 3 (1995).

²⁷⁶ Korsmo & Myers, *supra* note 272, at 1566–74; Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 609, 612–13, 633 (2018)

²⁷⁷ Companies Act 2006 § 994 (U.K.).

²⁷⁸ Andrew Keay, *Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006*, 16 J. CORP. L. STUD. 39, 60–61 (2016).

²⁷⁹ Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 789–90 (2000).

²⁸⁰ DAVIES, WORTHINGTON & HARE, *supra* note 162, at 538.

²⁸¹ *Id.* at 542–44; *Re a Company* (No. 00709 of 1992); *O’Neill v. Phillips* [1999] 2 All E.R. 961.

²⁸² *Re Astec (BSR) PLC* [1998] 2 B.C.L.C. 556.

²⁸³ DAVIES, WORTHINGTON & HARE, *supra* note 162, at 548.

involving a publicly traded company where a successful unfair prejudice petition has been brought.²⁸⁴

On the “law in action” front, with respect to individual shareholder rights, the situation departs from what we have identified as the typical pattern of functional equivalence between U.S. and U.K. corporate governance, in addition to being inconsistent with the characterization of the U.K. as a shareholder paradise. The key practical difference is that shareholder litigation is considerably more prevalent in the U.S. than it is in the U.K.²⁸⁵

It is not surprising public company shareholders steer clear of lawsuits in the U.K.²⁸⁶ Preparing for trial is likely to be a significant distraction, and the legal expenses could be hefty. Concerns about legal fees could well be compounded by the U.K.’s “loser pays” cost-allocation regime under which a court will likely require those who lose to pay a proportion of the winning party’s legal expenses. Correspondingly, for a disgruntled shareholder in a publicly traded U.K. company, relying on the stock market as a convenient, low-cost nonlitigious exit option will have considerable appeal.²⁸⁷

Anticipated free riding is a further deterrent to shareholder lawsuits in the public company context. Consider derivative litigation. If a shareholder brings a derivative action and wins, shareholders only benefit to the extent that the company’s shareholder returns improve. This is a rather unlikely occurrence according to available evidence,²⁸⁸ but even if litigation bolsters shareholder returns, a prospective litigant shareholder will be no better off than fellow shareholders who made no effort to support the lawsuit. Correspondingly, they will be inclined to free-ride and leave it to someone else to sue.

Notwithstanding that such free-riding considerations are equally applicable to derivative lawsuits against publicly traded companies in the U.S., such lawsuits occur in the U.S. with considerably greater frequency than they do in the U.K.²⁸⁹ In addition, a majority of M&A transactions involving U.S. public companies are challenged by stockholders in court, and in mergers where shareholders of such firms are forced to accept cash in return for their shares, appraisal rights litigation can readily feature.²⁹⁰ The prevalence of public company shareholder lawsuits in the U.S. as compared to Britain can be

²⁸⁴ Brian R. Cheffins & Richard Williams, *Team Production Theory Across the Waves*, 74 VAND. L. REV. 1583, 1621 (2021).

²⁸⁵ Armour et al., *supra* note 44, at 689–90.

²⁸⁶ Cheffins & Black, *supra* note 189, at 1405–07.

²⁸⁷ Cheffins & Williams, *supra* note 284, at 1621.

²⁸⁸ James D. Cox and Randall S. Thomas, *Common Challenges Facing Shareholder Suits in Europe and the United States*, 6 EUR. CO. & FIN. L. REV. 348, 351 (2009).

²⁸⁹ See John Armour, *Derivative Actions: A Framework for Decisions*, 135 L.Q.R. 412, 426–28 (2019) (describing the relatively limited number of derivative actions in the U.K.).

²⁹⁰ Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1132–33, 1143–46 (2020); James D. Cox and Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 35–39 (2016) (discussing the rise in appraisal rights litigation).

attributed to a litigation environment that is in various ways more hospitable to such litigation than that in the U.K.

In the U.S., what is referred to as “loser pays” is the exception to the rule with litigation, so concerns about adverse costs orders in the event of losing in court will rarely deter litigation.²⁹¹ Also, in the U.S., unlike in the U.K., there is widespread acceptance of “no win, no fee” contingency fees, which opens the way for the downside financial risks associated with litigation to be shifted largely to the lawyers.²⁹² An additional catalyst for shareholder litigation absent in the U.K. is a convention that an attorney who brings a shareholder lawsuit that generates a “common fund” for other shareholders, whether as result of a judgment or a settlement, is entitled to a counsel fee award amounting to a percentage of the overall recovery due to the generation of benefits for all shareholders.²⁹³ The scope for shareholder litigation to generate a substantial common fund is reinforced by U.S. rules governing class actions that deem potentially affected plaintiffs to be automatically included in a class unless they specifically opt out, a position that is only replicated in the U.K. with antitrust proceedings.²⁹⁴ The common fund doctrine gives an entrepreneurial American legal profession a financial incentive absent in Britain to seek out corporations as potential targets for litigation and shareholders willing to act as plaintiff and thus serves as an engine that drives shareholder litigation.²⁹⁵

The fact that shareholder litigation features considerably more prominently in U.S. public companies than it does in British firms is a departure from functional equivalence that tends to prevail as well as the conventional wisdom that the U.K. is more shareholder-friendly than the U.S.²⁹⁶ The fact that public company directors in the U.S. rarely face out-of-pocket liability due to indemnification by their companies and directors’ and officers’ (D&O) insurance tempers the law in action difference.²⁹⁷ Still, with regard to how shareholders conduct themselves in practice, the greater use of shareholder rights to litigate in the U.S. constitutes something of a departure from the dominant pattern of functional U.S.-U.K. equivalence.

²⁹¹ Armour et al., *supra* note 44, at 692–93.

²⁹² *Id.*

²⁹³ See Cheffins, *supra* note 260, at 258.

²⁹⁴ See REDDY, *supra* note 5, at 349–50.

²⁹⁵ *Id.*

²⁹⁶ See Brian Cheffins, *A Response to Christopher Bruner by Brian Cheffins*, OPINIOJURIS (Apr. 14, 2010), <http://opiniojuris.org/2010/04/14/a-response-to-christopher-bruner-by-brian-cheffins/> [<https://perma.cc/AP4H-W9WG>].

²⁹⁷ See Christopher M. Bruner, *A Response to Brian Cheffins*, OPINIOJURIS (Apr. 14, 2010), <http://opiniojuris.org/2010/04/14/a-response-to-brian-cheffins/> [<https://perma.cc/54UQ-GDGB>].

VIII. MINORITY SHAREHOLDER RIGHTS AGAINST DOMINANT
SHAREHOLDERS

With diffuse share ownership tending to prevail in public companies in the U.K. and the U.S., the top corporate governance priority will typically be minimizing managerial agency costs.²⁹⁸ Nevertheless, publicly traded companies with dominant shareholders, while not widespread, are by no means unknown in the U.S. and U.K. markets.²⁹⁹ With such firms, the top corporate governance priority will typically be different than where there is a separation of ownership and control, namely constraining dominant shareholders inclined to extract private benefits of control to the detriment of other shareholders.³⁰⁰ Formally, the U.K. offers greater protection against this corporate governance risk, but in practice there is substantial convergence.

One U.S.-U.K. regulatory divergence salient for companies with dominant shareholders relates to expectations regarding “independent” directors. As discussed, in the U.K., directors with ties to a dominant shareholder do not qualify for this status, under the assumption that independent directors have a monitoring role to play in such companies.³⁰¹ In contrast, in the U.S., independence of directors is defined exclusive of such links because it is assumed boards are not well designed to impose checks on dominant shareholders.³⁰² Accordingly, dominant shareholders can influence the selection of directors without being concerned about compromising board independence.³⁰³

The leverage which dominant shareholders have with respect to director selection is, at least at first blush, compromised in another way in the U.K. in a manner lacking in the U.S. For U.K. publicly traded companies with a “controlling shareholder”, defined as a shareholder owning more than thirty percent of a company’s voting shares,³⁰⁴ the UKLR, in the first instance, give “independent” shareholders (any shareholder other than a controlling shareholder)³⁰⁵ a collective veto over the appointment of any director determined by the board to qualify as independent.³⁰⁶ However, if the independent shareholders vote down the election of an independent director, and that

²⁹⁸ See *supra* note 39 and accompanying text.

²⁹⁹ Brian R. Cheffins, *The Undermining of UK Corporate Governance(?)*, 33 OXFORD J. LEGAL STUD. 503, 505–09; Brian Cheffins & Steven Bank, *Is Berle and Means Really a Myth?*, 83 BUS. HIST. REV. 443, 464–66 (2009).

³⁰⁰ See *supra* text accompanying notes 108–109.

³⁰¹ See *supra* notes 110–111 and accompanying text.

³⁰² See *supra* notes 112–114 and accompanying text.

³⁰³ See *supra* note 114 and accompanying text.

³⁰⁴ FCA Handbook, Glossary (defining “controlling shareholder”) (U.K.), <https://handbook.fca.org.uk/glossary/G3382> [<https://perma.cc/U7PZ-GGVT>].

³⁰⁵ FCA Handbook, Glossary (defining “independent shareholder”) (U.K.), <https://handbook.fca.org.uk/glossary/G3384> [<https://perma.cc/ML4J-PDQJ>].

³⁰⁶ UKLR 6.2.8R (specifying that such appointments must be approved by the shareholders as a whole, as well as by independent shareholders). In relation to the board’s determination of independence, see UK CG Code, Provision 10.

nominee continues to seek a board seat, there will be a further vote where independent shareholders lack a specific veto.³⁰⁷ In practice, the controlling shareholder will often carry this vote endorsing the original nominee.³⁰⁸ Thus, the difference between the two jurisdictions regarding the influence dominant shareholders have over director selection is not as substantial as it first appears.

With respect to dual-class stock, an arrangement that can amplify the clout of a dominant shareholder, recent reforms have brought the U.K. and the U.S. closely into line.³⁰⁹ Dual-class stock enables a corporation to issue shares so as to give disproportionate voting control to insiders.³¹⁰ Most obviously, a controlling shareholder can own a majority of the voting rights while holding only a minority of the equity cash-flow rights (the right to profits) in the company, and can correspondingly potentially dictate the outcome on any shareholders’ resolution without regard for the shareholders who hold the bulk of the cash-flow rights.³¹¹ From a conceptual standpoint, a controller vested with voting rights disproportionate to its cash-flow rights may be more incentivized to use its voting power to extract private benefits of control than a regular “one share, one vote” controlling shareholder, since such a controller will feel commensurately less economic pain if the relevant action impairs overall shareholder returns.³¹²

A potential upside with dual-class stock is that it can facilitate stock market listings because key investors in a private company can retain voting control despite the company going public.³¹³ Since the 1980s, NYSE and Nasdaq have both permitted dual-class stock so long as it is not implemented after the IPO of a company in a manner that disenfranchises existing public shareholders.³¹⁴ Dual-class stock has become hugely popular with U.S. tech companies, with half of tech IPOs featuring dual-class stock in 2022.³¹⁵ Moreover, many of America’s most prominent tech companies, such as Alphabet, Meta, Square, Snap, and Zoom, have dual-class stock.³¹⁶

The U.K. has traditionally taken a considerably different approach to dual-class stock due to concerns about the prejudicing of noncontrolling

³⁰⁷ See UKLR 6.2.9R.

³⁰⁸ See Bobby V. Reddy, *The Fat Controller: Slimming Down the Excesses of Controlling Shareholders in UK Listed Companies*, 38 OXFORD J. LEGAL STUD. 733, 743–47 (2018).

³⁰⁹ Bobby V. Reddy, *The U.K. and Dual-Class Shares: From Dual-Class Shares Lite to Full Fat*, 22 EUR. CO. L. 86 (2025).

³¹⁰ REDDY, *supra* note 5, at 1.

³¹¹ *Id.* at 189.

³¹² *Id.* at 32.

³¹³ REDDY, *supra* note 5, at 213.

³¹⁴ *Id.* at 86–88.

³¹⁵ Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2024* tbl.23, UNIV. OF FLA., WARRINGTON COLL. OF BUS. <https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf> [<https://perma.cc/GUP4-G85B>] (last updated July 2, 2025).

³¹⁶ Bobby V. Reddy, *Up the Hill and Down Again: Constraining Dual-Class Shares*, 80 CAMBRIDGE L.J. 515, 541 (2021).

shareholders. New issues of dual-class stock were informally discouraged on the London Stock Exchange for decades before being formally prohibited in 2014 for companies listed on the most prestigious segment of the exchange.³¹⁷ However, 2024 UKLR reforms now permit listed companies to have fully fledged dual-class stock, albeit subject to the disapplication of multiple voting rights on a handful of shareholder decisions.³¹⁸ The intention is to attract more high-growth, innovative companies to the London Stock Exchange.³¹⁹

Reform in the U.K. and the U.S. has also aligned these jurisdictions in another area relevant to dominant shareholders—regulation of transactions between such shareholders and their companies. In the U.S., there are no mandatory shareholder preapproval requirements for transactions between a company and a substantial shareholder.³²⁰ In the U.K., on the other hand, in relation to related party transactions exceeding prescribed size thresholds,³²¹ the UKLR traditionally afforded shareholders independent of the related party a vote, including when a “substantial” shareholder³²² was on the other side.³²³ This requirement was abolished in the 2024 UKLR overhaul, thereby relieving publicly traded companies of the need to obtain independent shareholder approval for large related party transactions with, *inter alia*, substantial shareholders. Now, with transactions exceeding prescribed size thresholds, generally only disinterested director pre-approval combined with confirmation from the company’s stock market “sponsor”³²⁴ that the transaction is fair and reasonable to the company’s securities holders is required.³²⁵ The only exception is where the Companies Act 2006 requires shareholder approval of a “substantial” related party transaction when a dominant shareholder is a director or connected to a director, and, even if the dominant shareholder is in this position, that shareholder can vote on the relevant preapproval.³²⁶

³¹⁷ REDDY, *supra* note 5, at 78–79.

³¹⁸ UKLR 5.4.5R, 6.2.31R, 6.2.32R. Additionally, corporate investors can only hold multiple voting rights for up to ten years post-IPO. *Id.* at 5.4.5(2)R.

³¹⁹ HM Treasury, UK Listing Review 19 (Mar. 3, 2021), https://assets.publishing.service.gov.uk/media/603e9f7ee90e077dd9e34807/UK_Listing_Review_3_March.pdf [<https://perma.cc/F3MQ-R82X>].

³²⁰ FCA, *Primary Markets Effectiveness Review: Feedback to DP22/2 and Proposed Equity Listing Rule Reforms* (CP23/10) (May 2023), at 25, 49, <https://www.fca.org.uk/publication/consultation/cp23-10.pdf> [<https://perma.cc/C7ZB-ZJN3>] (drawing attention to the lack of shareholder pre-approval requirements in the US to make the case in favor of abolishing requirements of this sort in the UK).

³²¹ On the size thresholds, *see supra* note 150.

³²² Now, a “substantial” shareholder is a shareholder holding 20% or more of the votes. UKLR 8.1.12R.

³²³ *See* FCA, *supra* note 320, at 38, 46–48, <https://www.fca.org.uk/publication/consultation/cp23-10.pdf> [<https://perma.cc/C7ZB-ZJN3>].

³²⁴ Sponsors are expert bodies that companies listed on the London Stock Exchange’s Main Market must appoint to provide advice on obligations under the UKLR (*see* UKLR 4.2.1R).

³²⁵ UKLR 8.2.1R.

³²⁶ *Supra* note 148 and accompanying text.

Despite the lack of mandatory shareholder pre-approval requirements in Delaware, and the 2024 abolition of such a requirement in the U.K. with specified transactions, at the time when the U.K.’s 2024 UKLR reforms became effective, those reforms did not in fact functionally align the U.K. with the position in the U.S. regarding transactions between companies and their dominant shareholders. Instead, at least initially, the reforms resulted in the U.K. becoming functionally more relaxed than the U.S., since Delaware case law arguably steered publicly-traded companies to seek some form of shareholder pre-approval for such transactions. When “controlling” shareholders³²⁷ are on the other side of a conflicted transaction, by virtue of Delaware jurisprudence, they owe a fiduciary duty to the company and its shareholders in some respects akin to the duties directors owe.³²⁸ In the related party transaction context, this means a court will *prima facie* apply a reasonably exacting “entire fairness” standard to ascertain whether there has been a breach of that duty.³²⁹ Delaware case law provided that if *both* disinterested director *and* disinterested shareholder approval was obtained, the court would apply the considerably more forgiving business judgment standard of review, which encouraged boards to obtain such pre-approvals.³³⁰ Traditionally, such pre-approvals were sought with some regularity,³³¹ which meant that the U.K.’s 2024 UKLR reforms, which again only provide for disinterested director pre-approval rather than disinterested shareholder approval, were functionally less exacting than Delaware law in the context of related party transactions with substantial shareholders.

While the 2024 UKLR reforms initially meant that the U.K. had a more relaxed approach to related party transactions with substantial shareholders

³²⁷ Traditionally, under Delaware case law, even a minority shareholder with a dominant influence over the board that could prejudice the board’s independence could be held to be a “controlling shareholder.” See Gail Weinstein, Robert C. Schwenkel & Steven J. Steinman, *Controlling Shareholder Transactions*, HARV. L. SCH. CORP. GOV. (April 26, 2018). However, in response to several cases where the concept of “dominant influence” was expanded to find minority shareholders to be “controllers” (see *In Tesla Motors, Inc. Litigation* (Mar. 28, 2018); *In Oracle Corporation Deriv. Litigation* (Mar. 19, 2018); *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024)), Delaware legislation was amended to define and limit the meaning of “controlling shareholder.” See DGCL, § 144(e)).

³²⁸ *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

³²⁹ *Kahn v. Tremont*, 694 A.2d 422, 423 (Del. 1996).

³³⁰ *In re Match Grp., Inc. Deriv. Litig.*, 2024 C.A. No. 2020-0505 (Del. April 4, 2024); *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

³³¹ In relation to merger “freezeout” or “squeeze-out” transactions with controlling shareholders (see text accompanying *infra* notes 343-345), see Fernán Restrepo & Guhan Subramanian, *Declining MOM Conditions in Freezeout Transactions and the MOOM Alternative* 1, 10 (2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4965438 [<https://perma.cc/55XF-AHFU>]. Outside of freezeouts, and more recently, see, e.g., *Tesla*, *supra* note 327; *Tornetta*, *supra* note 327. It should be noted, however, that as a result of a series of Delaware cases involving mergers, the impetus to seek shareholder pre-approval may have been progressively waning, with companies becoming more likely to roll the dice on an entire fairness review with transactions between companies and dominant shareholders and proceed with only pre-approval by a special committee of disinterested directors. Restrepo & Subramanian, *id.* at 17–19, 26.

than the U.S., this changed quickly. In 2025, the DGCL was revised to provide that transactions between Delaware corporations and controlling shareholders need only be pre-approved by *either* a committee comprised of a majority of disinterested directors *or* disinterested shareholders to avoid an entire fairness scrutiny of the transaction.³³² Delaware companies can now therefore avoid entire fairness examination by taking an approach largely consistent with that required in the U.K. by ensuring that disinterested directors approve transactions between the corporation and controlling shareholders. This correspondingly is another instance where functional equivalence between U.S. and U.K. corporate models prevails.

To sum up, while constraining dominant shareholders is not a top corporate governance priority in either the U.S. or the U.K. due to the prevalence of diffuse share ownership in publicly traded companies, the U.K. has traditionally prioritized restraints on such shareholders to a greater extent than the U.S. Recent trends, however, suggest that, with respect to controlling shareholders, functionally the U.K. and U.S. are arguably in similar positions.

IX. TAKEOVERS

With our multidimensional assessment of the Anglo-American corporate model, we turn finally to takeovers, which we define as a corporate acquisition where the acquiror seeks to obtain control of a potential target company by making an offer to the target's shareholders to buy their shares. To narrow things further, we will focus on the most controversial type of takeover offer—a hostile bid where the target's directors are antagonistic toward the offer presented to the shareholders.

As we will see now, the U.S. and the U.K. regulate takeovers of publicly traded companies considerably differently, and this results in distinctive treatment of hostile bids. We then demonstrate that, consistent with various aspects of corporate law and corporate governance, from a law in action perspective, boards are likely to deal with hostile bids similarly in the U.S. and U.K.

In jurisdictions characterized by diffuse share ownership, such as the U.S. and U.K.,³³³ control of public companies is contestable in a way it is not when a controlling shareholder who can veto a takeover bid is present. This arrangement “subjects firms to a continuous auction process” in both countries.³³⁴ The possibility of an unwelcome change in control in turn serves as a potentially crucial check on managerial discretion because incumbent executives seeking

³³² An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, 153rd General Assembly (March 25, 2025). *Now see* DGCL, § 144(b).

³³³ *Supra* note 39 and accompanying text.

³³⁴ Mike Burkart & Samuel Lee, *One Share—One Vote: The Theory*, 12 REV. FIN. 1, 6 (2008).

to keep their jobs will want to run their firms well enough to deter uninvited takeover offers.³³⁵

In the U.S., takeover regulation is primarily the preserve of a company’s state of incorporation. To be sure, the federal Williams Act of 1968 imposes requirements on bidders in relation to takeover (“tender”) offers for publicly traded corporations, mandating offering the same price to each shareholder tendering shares, keeping offers open for a specified minimum period, making prescribed disclosures to shareholders, and giving shareholders the option to tender a *pro rata* proportion of their shares when a tender is oversubscribed.³³⁶ However, for a Delaware-incorporated corporation, Delaware law defines the scope a board has to defend against an unwelcome bid. Delaware has in place a statutory antitakeover provision, triggered upon a bidder acquiring fifteen percent of the voting stock of a company, that delays, absent a waiver by the target company’s board, a hostile takeover by three years unless the bidder acquires eighty-five percent of the voting stock in a single tender offer.³³⁷ Nevertheless, case law jurisprudence is the predominant influence.

In contrast to Delaware, where the courts take center stage in defining permissible takeover defense tactics, the U.K. has a body in place specifically established to oversee the takeover process. This is the “Takeover Panel,” which formulates rules to govern takeover bids, set down in the City Code on Takeovers and Mergers (hereinafter U.K. Takeover Code).³³⁸ The Takeover Panel has a statutory grounding,³³⁹ yet there is evidence of its self-regulatory roots, with the Takeover Panel being formally independent of government and comprised of members appointed by the business community.³⁴⁰ Unlike in the U.S., where scrutiny of takeovers and actions taken by boards and bidders are typically litigated after the event, the U.K. Takeover Panel makes real-time decisions during the course of a bid, with participants encouraged to seek Panel guidance throughout the process.³⁴¹

With a defining feature of hostile takeovers being that the target company board opposes the bid, a pivotal issue is the scope that the board has to frustrate or delay takeovers. In Delaware, case law on point developed dramatically in the 1980s, known as “the Deal Decade” due to substantial M&A activity that featured hostile takeovers prominently.³⁴² Coercive two-tier tender offers were

³³⁵ See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965).

³³⁶ See 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f).

³³⁷ DEL. CODE ANN. tit. 8, § 203 (2017).

³³⁸ The Takeover Panel, *The City Code on Takeovers and Mergers*, <https://code.thetakeover-panel.org.uk/code.pdf> [<https://perma.cc/FW9C-X9CJ>].

³³⁹ Companies Act 2006 § 943 (U.K.).

³⁴⁰ DAVID KERSHAW, *PRINCIPLES OF TAKEOVER REGULATION* 113, 122 (Oxford U. Press, 2016).

³⁴¹ Armour and Skeel, *supra* note 43, at 1729.

³⁴² CHEFFINS, *supra* note 202, at 162–67.

often involved,³⁴³ where bidders first made a tender for a majority interest in a corporation at “Price A” and created the possibility that shareholders who did not tender their shares at that point might subsequently be “squeezed-out” at a disadvantageous “Price B” through a “back-end” merger.³⁴⁴ Fears of this disadvantageous outcome could coerce target company shareholders into accepting the initial tender offer at “Price A”.³⁴⁵

The threat of coercive two-tier tender offers was often used by boards to justify the use of a takeover defense mechanism created in the 1980s known as a “poison pill,”³⁴⁶ although a desire of directors to protect their own positions no doubt also influenced its deployment. A poison pill gives target shareholders, other than an unwelcome bidder, the right to acquire shares in the target at a heavily discounted price upon the hostile bidder acquiring a prescribed percentage of the company’s voting stock.³⁴⁷ The pill potentially makes hostile acquisition of control economically unviable, since the triggering of the pill and issuance of discounted shares should result in massive dilution of a bidder’s shareholding.³⁴⁸

For a Delaware target company board, Delaware jurisprudence does much to define the scope to rely on a takeover defense such as a poison pill. Delaware courts have endorsed board deployment of poison pills as a potentially valid exercise of business judgment,³⁴⁹ albeit while subjecting decisions to “enhanced” scrutiny under what is known as the *Unocal* doctrine.³⁵⁰ Unlike the business judgment rule,³⁵¹ the board has the burden of proof in satisfying the *Unocal* test.³⁵² The board must show that “it had reasonable grounds for believing that a danger to corporate policy and effectiveness existed” and that the deployment of the poison pill “was reasonable in relation to the threat posed.”³⁵³ The Delaware courts have, however, given directors considerable

³⁴³ Robert A. Prentice, *Front-End Loaded, Two-Tiered Tender Offers: An Examination of the Counterproductive Effects of a Mighty Offensive Weapon*, 39 CASE W. RES. L. REV. 389, 394, 397 (1988–1989).

³⁴⁴ Note, *Protecting Shareholders against Partial and Two-Tiered Takeovers: The “Poison Pill” Preferred*, 97 HARV. L. REV. 1964, 1966 (1984).

³⁴⁵ Lucian Arye Bebchuk, *The Pressure to Tender: An Analysis and a Proposed Remedy*, 12 DEL. J. CORP. L. 911, 923 (1987). The same author has also noted the propensity (to a lesser degree) for even a tender offer without a back-end merger to pressure shareholders into accepting the offer. (*Id.* at 925–27).

³⁴⁶ Bernard S. Sharfman & Marc T. Moore, *Liberating the Market for Corporate Control*, 18 BERKELEY BUS. L.J. 1, 12 (2021). See also *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 956 (Del. 1985).

³⁴⁷ Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 904 (2001–02).

³⁴⁸ *Id.* at 904–05.

³⁴⁹ See, e.g., *Moran*, 500 A.2d at 1356.

³⁵⁰ *Unocal*, 493 A.2d at 954.

³⁵¹ *Supra* notes 126–127 and accompanying text.

³⁵² See, e.g., *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 598–600 (Del. Ch. 2010).

³⁵³ PINTO & FANTO, *supra* note 116, at 447 (online).

latitude with the *Unocal* doctrine, affording boards substantial scope to deploy defensive tactics even where a coercive two-tier tender offer is not involved.³⁵⁴ Accordingly, in many circumstances, a board may be able to validly implement defensive measures simply due to its belief in the inadequacy of an unwelcome bid.³⁵⁵

With U.K. companies, there is considerably less scope for permissible defensive tactics. Most obviously, the U.K. Takeover Code prohibits “frustrating actions” once a takeover offer has been announced, except with the approval of shareholders in the general meeting or the consent of the Takeover Panel.³⁵⁶ The intention with this “no frustration” rule is to ensure that the target’s shareholders can determine the merits of any takeover offer.³⁵⁷ The Takeover Code’s “no-frustration” rule falls in line with board “passivity” or “neutrality” in the takeover context, as advocated by noted corporate law academics Frank Easterbrook and Daniel Fischel in the 1980s.³⁵⁸

The U.K. Takeover Code does not directly prohibit companies from implementing takeover defenses prior to a takeover offer being announced. Aspects of U.K. corporate law mean, however, that advance creation of a U.S.-style poison pill would likely require shareholder approval.³⁵⁹ In the U.S., shareholders dislike this takeover defense,³⁶⁰ which suggests that a British public company will struggle to secure the needed support.

A U.K. company could theoretically embed other takeover defense mechanisms in its articles of association pre-IPO. However, if the board has the discretion to determine subsequently whether to disapply the relevant measure, a board’s decision not to do this when a bid is made could be construed as a breach of the U.K. Takeover Code’s no-frustration rule.³⁶¹ Companies refrain

³⁵⁴ Jonathan R. Macey, *The Politicization of American Corporate Governance*, 1 VA. L. & BUS. REV. 10, 34–35 (2006).

³⁵⁵ *E.g.*, *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987).

³⁵⁶ U.K. Takeover Code, Rule 21.1. Even without the Takeover Code, case law probably makes a U.S.-style poison pill unfeasible (*supra* note 174 and accompanying text). It is unlikely that the Panel will give consent without, for example, a majority-vote of the shareholders, the bidder consents, or if the action was taken pursuant to an obligation preexisting prior to the bid (*Id.* U.K. Takeover Code, Rule 21.1(e)).

³⁵⁷ Armour & Skeel, *supra* note 43, at 1736.

³⁵⁸ Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1194–1204 (1981).

³⁵⁹ KERSHAW, *supra* note 340, at 336; *cf.* Armour & Skeel, *supra* note 43, at 1736–37 (describing multiple features of U.K. corporate governance that prevent boards from insulating themselves from shareholder control).

³⁶⁰ Ram Charan, Denis Carey & Michael Useem, *Boards That Lead: When to Take Charge, When to Partner, and When to Stay Out of the Way*, 242–45 (2013) (indicating that institutional shareholder pressure prompted many public companies to drop poison pills in the 2000s); Louis Lehot et al., *The Return of the Poison Pill—Lessons Learned in 2010 from the Selectica and Barnes & Noble Cases*, 24 M&A INSIGHTS 23, 25–27 (2010) (noting the proxy advisor Institutional Investor Services’ voting policies in relation to poison pills).

³⁶¹ KERSHAW, *supra* note 340, at 324–25.

from adopting defensive measures that apply automatically because this could preclude bids that a board would deem to be beneficial.

Given the diverging approaches to takeover defenses in Delaware and the U.K., one would presume that hostile takeovers would be more prevalent in the U.K. Indeed, one study has suggested that hostile takeovers are more likely to be launched and be successful in the U.K. than in the U.S.³⁶² Nevertheless, functionally hostile takeover bids do not feature substantially more prominently in Britain. This is because boards of Delaware companies seeking to shut down hostile bids face obstacles, and because of regulatory factors in the U.K. that encourage bidders to make offers on terms a target company board is likely to endorse rather than oppose.

Starting with Delaware, boards will be very aware of possible ex post litigation scrutiny of their actions during the vicissitudes of a takeover battle. The *Unocal* doctrine puts boards under an onus to justify their actions if the matter is taken to court.³⁶³ Even though the courts have been fairly forgiving when applying *Unocal*, they have not given boards complete *carte blanche* to impede takeovers. For example, the fiduciary duties of directors intensify where a company either puts itself up for sale or progresses a change of control transaction.³⁶⁴ In such circumstances, what is referred to as a *Revlon* duty requires directors to secure the best price for shareholders under the various options.³⁶⁵

In Delaware the possibility of redemption also mutes the potency of poison pills. It is always open to a board to redeem a poison pill voluntarily, so a bidder may launch a proxy contest to replace an incumbent board inclined to exercise a poison pill with directors more welcoming to the bidder's overtures.³⁶⁶ If an incumbent board believes that a proxy contest of this sort is ultimately likely to succeed, it might well redeem a pill in an anticipatory manner.³⁶⁷ The presence of a "staggered" board can change the equation, since with such a mechanism in place, only a portion of the board (likely one-third) can be replaced at each annual meeting. However, staggered boards have become less prevalent in recent times amongst the S&P 500.³⁶⁸ Even if director election is staggered, a board may be inclined to redeem a poison pill rather than see one-third of the board replaced in a proxy contest

³⁶² Armour & Skeel, *supra* note 43, at 1738–39.

³⁶³ *Supra* notes 352–353 and accompanying text.

³⁶⁴ *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995).

³⁶⁵ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *PINTO & FANTO*, *supra* note 116, at 449 (noting that boards become "auctioneers").

³⁶⁶ *Bebchuk et al.*, *supra* note 347, at 905–07.

³⁶⁷ *See id.* at 904; Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 880 (2002).

³⁶⁸ *Supra* note 202 and accompanying text.

with disruptive directors supportive of a takeover.³⁶⁹ This may help to explain empirical evidence indicating that there is no correlation between state law governing the permissibility of poison pills and a post-1980s decline in hostile takeovers.³⁷⁰

As for the U.K., while hostile takeovers may well be more common than in the U.S.,³⁷¹ they remain very much the exception to the rule. In the twenty years between 2004 and 2023, for all companies to which the U.K. Takeover Code applied, only 146 takeover bids were announced that remained hostile at the time they were resolved because they closed successfully or lapsed.³⁷² With 43 of those 146 ultimately being unsuccessful,³⁷³ there were on average only five successful hostile takeovers per year. This is a tiny number compared to the size of the cohort of U.K.-listed companies during that period—an average of approximately 2,450 annually.³⁷⁴ Furthermore, hostile takeovers have become less prevalent in number in the U.K. recently (along with takeovers more generally), with only 46 takeover attempts remaining hostile at the time they were resolved occurring in the ten years between 2013 and 2023, and with 16 of those being unsuccessful.³⁷⁵ Takeovers have been identified as a major source of a persistent decline in the number of publicly traded companies in the U.K. over the past quarter-century,³⁷⁶ but the hostile variant has only been a tiny part of the story.

Available data indicate additionally that the substantial differences in approach regarding takeover defenses between the U.K. and the U.S. do not translate into substantial divergences with respect to the stance the target board ultimately takes when a bid is made. In the U.K. between 2004 and 2023, completed hostile takeovers as a percentage of all completed takeovers

³⁶⁹ See Kahan & Rock, *supra* note 367, at 914 (noting that directors opposed to the takeover may have to carefully reconsider maintenance of the pill under their Unocal duty when a third of the board wishes to redeem).

³⁷⁰ Matthew D. Cain, Stephen B. McKeon & Steven Davidoff Solomon, *Do takeover laws matter? Evidence from five decades of hostile takeovers*, 124 J. FIN. ECON. 464, 476 (2017).

³⁷¹ *Supra* note 362 and accompanying text.

³⁷² Data compiled by the authors from Annual Reports of the Takeover Panel 2004–2023, available at <https://www.thetakeoverpanel.org.uk/communications/reports> [<https://perma.cc/Z2SE-Q62L>].

³⁷³ *Id.*

³⁷⁴ We have used data provided by Cheffins & Reddy, *Will Listing*, *supra* note 12 to determine average Takeover Code-subject issuer figures for the London Stock Exchange’s Main Market and AIM.

³⁷⁵ Data compiled by the authors from Annual Reports of the Takeover Panel 2013–2023, available at <https://www.thetakeoverpanel.org.uk/communications/reports> [<https://perma.cc/Z2SE-Q62L>].

³⁷⁶ Cheffins & Reddy, *Murder*, *supra* note 12, at 216; Leah Montebello, *Takeovers leave UK stock market facing “death by a thousand cuts”*, THIS IS MONEY (Apr. 23, 2024), <https://www.thisismoney.co.uk/money/markets/article-13337857/Takeovers-leave-UK-stock-market-facing-death-thousand-cuts.html#:~:text=The%20London%20stock%20market%20is,removed%20from%20the%20UK%20market> [<https://perma.cc/M4MW-TU82>] (noting a swathe of takeover bids of London-listed FTSE 250 companies in 2024).

averaged 7.9 percent annually.³⁷⁷ This percentage is higher than for the U.S., but not substantially so.³⁷⁸

Why are hostile bids not more common in the U.K. given the open goal of a system where boards cannot frustrate takeover bids? A key regulatory factor is that the U.K. regime strongly discourages offers for anything less than all of a target's shares. Unless the Takeover Panel consents, unlike in the U.S., a bidder cannot make a "partial" bid for, say, just over fifty percent of the shares in a company.³⁷⁹ Generally, the Panel will only give consent if the partial offer cannot result in the bidder acquiring more than thirty percent of the voting rights, or if the partial offer has been approved by a majority vote of independent shareholders of the target.³⁸⁰ Therefore, in the normal course, a bidder is unlikely to contemplate a hostile tender offer unless it is prepared to make a bid for all the shares in a target and acquire all the shares tendered. Additionally, any U.K. tender offer must be conditional upon the bidder receiving sufficient acceptances to give it at least a majority of the company's voting rights.³⁸¹ A bidder correspondingly will be under a strong onus to make an offer that is sufficiently attractive to persuade those owning a large proportion of the shares to accept the bid within the timetable that the U.K. Takeover Code imposes. With an offer generous enough to meet this threshold, the target company directors may often surmise they could face dismissal by the shareholders if they fail to recommend the bid and so the takeover ultimately becomes "friendly."

Additionally, a "put-up or shut-up" mechanism in the U.K. Takeover Code can impede hostile takeovers. By virtue of this regime, if a target company announces an approach by a possible bidder, the bidder must, within twenty-eight days, either make a fully-funded, binding offer for all the shares of the target, or confirm that it will not make a bid for another six months.³⁸² A hostile bidder is, therefore, necessarily time-limited in its ability to launch a public campaign to persuade shareholders to accept a price deemed too low by the target board in order to put pressure on the board to recommend the offer. Essentially, the bidder must commit to a making a binding offer after the twenty-eight-day period expires or withdraw entirely, a choice which may well induce the bidder to be sufficiently generous on price to persuade the target board to recommend acceptance.

³⁷⁷ Data compiled by the authors from Annual Reports of the Takeover Panel 2004–2023, available at <https://www.thetakeoverpanel.org.uk/communications/reports> [<https://perma.cc/Z2SE-Q62L>].

³⁷⁸ See Cain, McKeon & Solomon, *supra* note 370, at 468, 484 (showing that between the late 1980s and 2014 annual hostile takeovers as a percentage of all U.S. takeovers was generally between 4% and 8.6%, aside from a few years of very low hostile activity).

³⁷⁹ U.K. Takeover Code, Rule 36.1.

³⁸⁰ *Id.*, Rules 36.1, 36.5.

³⁸¹ *Id.*, Rule 10.1.

³⁸² *Id.*, Rules 2.6, 2.8.

Two further elements of U.K. takeover regulation explain a dearth of hostile takeovers despite targets being precluded from taking defensive action after a bid has been launched. First, a Takeover Code principle that all target shareholders be treated “equally” essentially precludes two-tier tender offers in the U.K.³⁸³ In the U.S. a bidder can, after obtaining voting control, “squeeze-out” remaining shareholders at a discounted price by way of a back-end “merger” assuming compliance with legal rules governing related party transactions with dominant shareholders.³⁸⁴ In contrast, this is not feasible in Britain.

A bidder for a U.K.-listed target that wants to take the company private essentially has two options—(i) a statutory scheme of arrangement, or (ii) a tender offer an overwhelming majority of the shareholders accept.³⁸⁵ To complete a scheme of arrangement, the bidder must obtain at a court-convened shareholder meeting approval from at least seventy-five percent of the votes exercised, representing a numerical majority of shareholders exercising votes.³⁸⁶ If such approval is secured, the bidder acquires all of the shares with the shareholders exiting receiving the consideration offered under the scheme.³⁸⁷ A scheme correspondingly is an “all-or-nothing” process. Of particular importance in the present context, a scheme of arrangement is a court sanctioned process driven by the target company,³⁸⁸ meaning a scheme of arrangement is not feasible practically so long as a bid remains hostile.

In the U.K. a bidder who opts to conclude a hostile takeover by way of a tender offer rather than a scheme of arrangement must, under U.K. companies legislation, secure the tender of at least ninety percent of the outstanding shares to trigger a squeeze-out of the remaining shareholders,³⁸⁹ as compared to a simple majority of the total votes in Delaware to secure a back-end merger.³⁹⁰ Moreover, the price the holdouts in a U.K. publicly traded company ultimately receive must be the price offered in the tender.³⁹¹ Since there is no scope to impose substantive coercive pressure through a two-tier tender offer, for a bidder seeking to acquire all the shares in the target, as would be the case with a private equity acquiror for instance, the price a bidder offers must incorporate a substantial premium above the market price of the shares to induce a sufficiently sizeable majority of shareholders to tender their shares.

³⁸³ *Id.*, General Principle 1(i).

³⁸⁴ See *supra* text accompanying notes 327–330, 332.

³⁸⁵ In the U.K., tender offers are usually termed “contractual takeover offers.”

³⁸⁶ Companies Act 2006 § 899 (U.K.).

³⁸⁷ Jennifer Payne, *The Alternative to Takeover Offers in the UK: Using Schemes of Arrangement to Effect a Change of Control*, 1, 3, 4. Forthcoming in UNFINISHED BUSINESS: TWO DECADES OF THE EU TAKEOVER DIRECTIVE (Susan Emmenegger et al. eds., 2026), <https://ssrn.com/abstract=5489486> (2025).

³⁸⁸ *Id.* at 7, 9.

³⁸⁹ Companies Act 2006, § 979.

³⁹⁰ DEL. CODE ANN. tit. 8, § 251 (2020).

³⁹¹ Companies Act 2006 §§ 979, 981 (U.K.).

For reasons already canvassed, the result likely will ultimately be a friendly, recommended takeover.

Second, under what is known as the U.K. Takeover Code's "mandatory bid rule," if any shareholder acquires thirty percent or more of the voting rights in the company (or already owns between thirty and fifty percent and acquires further voting rights), it *must* make an offer for all the shares in the company at the same price paid for any shares in the last twelve months.³⁹² There is no equivalent rule under U.S. securities law or Delaware corporate law. This is another instance where U.K. regulation puts on a bidder to make a bid generous enough to result in a "friendly" takeover. In the U.S., a bidder can acquire the shares of dominant shareholders and then offer a considerably lower price to remaining shareholders.³⁹³ In the U.K., in contrast, if a target company has a dominant shareholder who sells out to a putative bidder, by virtue of the mandatory bid rule, that shareholder should not obtain any sort of control premium because the bidder will have to offer the same terms to all other shareholders.³⁹⁴ With the price a bidder offering being high enough to win over a dominant shareholder, the offer should usually be sufficiently generous to induce the target's board to forsake resistance and recommend a bid.

In sum, when it comes to hostile takeovers, substantial differences exist between the regulatory regimes in the U.S. and the U.K. Functionally, though, outcomes are not radically different. In the U.S., a target board theoretically has considerable scope to use defensive tactics, but if a bid is high enough the directors will likely ultimately acquiesce because they will know they could lose their board seats in a proxy contest if shareholders anticipate the board is going to try to block a takeover offer shareholders would welcome.³⁹⁵ In Britain, due to the U.K. Takeover Code, boards' hands are largely tied when a takeover offer is made. Other features of U.K. takeover regulation, however, push bidders toward making bids sufficiently generous to elicit a board recommendation in favor. Ultimately, this is another instance where despite legal differences, outcomes with U.K. and U.S. public companies are substantially similar.

³⁹² U.K. Takeover Code, Rules 9.1, 9.5.

³⁹³ For an example of a control premium being offered to a blockholder in the U.S., see Chris Hughes, *Paramount's Messy Sale has been Even Worse than Twitters*, BLOOMBERG (May 2, 2024, 7:32 AM), <https://www.bloomberg.com/opinion/articles/2024-05-02/paramount-s-sale-saga-rivals-musk-s-messy-twitter-bid?embedded-checkout=true> [<https://perma.cc/LBK3-7F4Y>], on Skydance's 2024 bid for Paramount.

³⁹⁴ See KERSHAW, *supra* note 340, at 249, 251.

³⁹⁵ An example is Elon Musk's 2023 initially hostile bid for Twitter (Olivier Baum & Guhan Subramanian, *Redemption Mechanisms in Poison Pills: An Underappreciated Element of Takeover Defense*, CLS BLUE SKY BLOG (Sept. 28, 2023), <https://clsbluesky.law.columbia.edu/2023/09/28/redemption-mechanisms-in-poison-pills-an-underappreciated-element-of-takeover-defense/> [<https://perma.cc/MV82-YUD8>]).

CONCLUSION

Comparisons of U.S. and U.K. corporate law can be traced back at least seventy years. The process continued into an era where “corporate governance” became the focus of attention, ultimately with a strong comparative dimension. The tendency with cross-border analysis has been to place the U.S. and U.K. in the same bucket, namely an “Anglo-American” corporate model. At the same time, though, differences have been flagged, with the U.K., on the one hand, supposedly being a “shareholder paradise” compared to the U.S., or, on the other hand, ostensibly, affording a less prescriptive environment than the U.S. in which boards can manage their companies. Where does the truth lie?

In this article, we have conducted a deep dive into the Anglo-American corporate model by undertaking a multithemed comparison of corporate governance-related corporate law for the U.S. and U.K. that has been lacking for decades. As part of this exercise, we have identified numerous differences between corporate governance-related corporate law in the U.S. and the U.K. This demonstrates that there is no monolithic Anglo-American corporate model. We also show, however, that simply focusing on ostensible doctrinal differences tends to conceal as much as it reveals. A consistent theme we have identified is that, despite frequent “law in books” divergences, from a “law in action” perspective there are substantial functional similarities between U.S. and U.K. corporate law.

Our findings have significant policy implications. For instance, our analysis underscores the fact that rules do not automatically dictate outcomes. Economic, market and noncorporate governance regulatory features can also be pivotal. This suggests that policymakers aiming to borrow regulatory strategies from across the Atlantic (or elsewhere) must be aware of the relevant context in the jurisdiction from which they are borrowing and their own jurisdiction, or they run a serious risk that outcomes may be very different than anticipated. For instance, a key difference between the U.S. and the U.K. is the former’s more hospitable litigation environment. Regulatory arrangements that might be suitable for the U.S. thus might be a poor fit in the U.K. and vice versa.

Two caveats. First, we have not sought to explain *why* similar functional outcomes are a persistent theme. With our article having identified the pattern, follow-up research can explore the reasons for the trend we have identified. Second, we do not claim to be offering the final word with respect to U.S. and U.K. corporate law. Arrangements are not fixed and immutable, and it remains to be seen whether the functional equivalence that typically features will prevail in the years ahead. Our article may be the first multifaceted comparison of U.S. and U.K. corporate law in decades, but with stock market competition and global regulatory reform high on the agenda, it may be wise not to wait as long for the Anglo-American corporate model to be deconstructed once again.

