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Team Production Theory Across the Waves

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ABSTRACT

Team production theory, which Margaret Blair developed in tandem with Lynn Stout, has had a major impact on corporate law scholarship. The team production model, however, has been applied sparingly outside the United States. This article, part of a symposium honoring Margaret Blair's scholarship, serves as a partial corrective by drawing on team production theory to assess corporate arrangements in the United Kingdom. Even though Blair and Stout are dismissive of "shareholder primacy" and the U.K. is thought of as a "shareholder-friendly" jurisdiction, deploying team production theory sheds light on key corporate law topics such as directors' duties and the allocation of managerial authority. In particular, the case study offered here shows that board centrality—a key element of team production thinking—features prominently in U.K. corporate governance despite Britain's shareholder-oriented legal framework. The case study also draws attention to the heretofore neglected role that private ordering can play in the development of team production-friendly governance arrangements.

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INTRODUCTION

Among Margaret Blair's many distinguished contributions to the related fields of corporate law and corporate governance, she is best known for her work on team production theory.[1] The team production model of corporate law debuted in a 1999 *Virginia Law Review* article Blair coauthored with Lynn Stout.[2] They characterized the board of directors as a "mediating hierarchy" tasked with balancing the interests of a corporation's various constituencies in a manner that would address the challenges associated with fostering productive activity requiring combined investment and coordinated effort, i.e., team production.[3] The theory's impact on corporate law scholarship has been substantial. Blair and Stout's 1999 article was described in 2014 as "one of the most important corporate law articles of the past twenty-five years,"[4] and it is one of the ten most-cited corporate and securities law

1. According to Google Scholar, Margaret Blair's most frequently cited academic publication is Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). This cornerstone of her research on team production had been cited 2,651 times as of mid-November 2021, compared with 2,636 times for her 1995 book, MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995). Given that Blair wrote about team production theory subsequently on numerous occasions—see *infra* notes 10–11—it is fair to say that she is best known for her work on team production theory.

2. Blair & Stout, *supra* note 1.

3. *Id.* at 305–06.

4. David Millon, *Team Production Theory: A Critical Appreciation*, 62 UCLA L. REV. DISCOURSE 79, 79 (2014).

articles of all time.[5] More generally, their work on team production has been described as "compelling"[6] and "path-breaking."[7]

When Blair and Stout published *A Team Production Theory of Corporate Law*, comparative analysis was well on the way to becoming a mainstream approach in corporate governance studies.[8] Nevertheless, Blair and Stout's analysis of team production lacked a cross-border dimension, with an occasional reference to Japanese scholars in footnotes being the only explicitly foreign content in their 1999 article.[9] Blair and Stout's approach would remain domestically focused as they continued to explore team production theory. Other than two mid-2000s articles published in European journals that lacked specific analysis of non-American jurisdictions,[10] each of the academic articles where Blair canvassed team production theory in detail were U.S.-centric pieces published in American journals.[11]

We are not drawing attention to the absence of an explicit comparative dimension in Margaret Blair's work on team production to find fault with her scholarship. Her intellectual contribution remains undiminished. The point instead is that it falls to others to do the spadework to assess the insights team production theory can provide outside the American context. This has indeed already occurred to a

5. Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1499 (2012) (ranking eighth).

6. *See* Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 670 (2002).

7. Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499, 499 (2015).

8. *See generally* Lawrence A. Cunningham, *Comparative Corporate Governance and Pedagogy*, 34 GA. L. REV. 721, 722 n.1 (2000) (stating that since the early 1990s, comparative corporate governance had " 'growed like Topsy,' bursting onto center stage in corporate law scholarship").

9. *See* Blair & Stout, *supra* note 1, at 270 n.47, 286 n.82 (citing, for example, the work of Masahiko Aoki).

10. *See* Margaret M. Blair, *Institutionalists, Neoclassicals and Team Production*, 43 BRIT. J. INDUS. RELS. 605 (2005); Margaret M. Blair & Lynn A. Stout, *Specific Investment and Corporate Law*, 7 EUR. BUS. ORG. L. REV. 473 (2006). The approach was the same in a chapter in a handbook with a British publisher—Margaret M. Blair, *Corporate Law as a Solution to Team Production Problems*, *in* THE OXFORD HANDBOOK OF THE CORPORATION 198 (Thomas Clarke, Justin O'Brien & Charles R. T. O'Kelley eds., 2019) [hereinafter *Corporate Law as a Solution*].

11. *See* Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 408 (2001) [hereinafter *Director Accountability*]; Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 719 (2006) [hereinafter *Specific Investment*]; Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297, 331 (2015) [hereinafter *Mediating Hierarchs*]; Margaret M. Blair, *What Must Corporate Directors Do? Maximizing Shareholder Value Versus Creating Value Through Team Production*, BROOKINGS 1 (June 2015) [hereinafter What Must Corporate Directors Do?], https://www.brookings.edu/wp-content/uploads/2016/06/Blairrevised-61115.pdf [https://perma.cc/7GZC-CXDS].

limited degree, most prominently with respect to Canada.[12] This Article travels across the waves of the Atlantic to identify lessons that can be derived by examining British corporate arrangements through a team production prism.

The U.K. seems to be a promising candidate for deploying team production theory on a cross-border basis. British corporate law academics who have engaged with the theory have been favorably disposed toward it.[13] Britain and the United States also resemble each other in ways that are highly relevant to corporate law and corporate governance.[14] Both are common-law jurisdictions with strong judiciaries and well-developed stock markets. Moreover, in both countries the typical large business enterprise is publicly traded and lacks a blockholder with sufficient clout to exercise continuous, detailed oversight of management. Correspondingly, ameliorating managerial agency costs is a higher priority than limiting misbehavior by major shareholders.

Drawing on team production theory to assess corporate arrangements in the U.K. is an exercise that potentially could be either normative or positive (descriptive) in orientation. Both approaches feature in Blair and Stout's team production scholarship.[15] From a descriptive standpoint, Blair and Stout maintain team production theory "does much to explain the actual structure of corporate law."[16] Or as Blair argued in a 2019 chapter offering a synopsis of the theory, "many of the details of corporate law are consistent with the idea that a primary function of boards of directors is to mediate among important competing interests in the corporation and thereby resolve or head off disputes."[17]

Normatively, Blair and Stout maintain team production governance is superior on economic grounds to a regime where directors

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12. *See, e.g.*, Stephanie Ben-Ishai, *A Team Production Theory of Canadian Corporate Law*, 44 ALTA. L. REV. 299 (2006); Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129 (2009) (drawing on team production theory as part of a multi-jurisdictional analysis of the shareholder/stakeholder balance in corporate governance).

13. *See infra* notes 58–65 and related discussion.

14. *See* 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, 689–90 (2009).

15. *See* Ben-Ishai, *supra* note 12, at 303–04; Ian B. Lee, *Efficiency and Ethics in the Debate about Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 541 (2006); Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1052 (2012).

16. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1756 (2001).

17. Blair, *Corporate Law as a Solution*, *supra* note 10, at 199.

prioritize shareholders ahead of other stakeholder groups ("shareholder primacy"). Corporations, Blair and Stout reason, will be more productive when directors have substantial discretion available to them and take advantage of this autonomy to balance judiciously the interests of all relevant stakeholders rather than seek to maximize stockholder returns. They say:

> From a normative basis, a team production analysis suggests that this is how the law *ought* to work. By preserving directors' independence and imposing on them fiduciary obligations that run to the firm as a whole and not to any particular team member, corporate law reinforces and supports an essential economic role played by hierarchy in general, and by corporate boards of directors in particular.[18]

British company law academics have considered Blair and Stout's team production theory pretty much entirely from a normative perspective.[19] Andrew Keay, a leading U.K.-based expert on directors' duties, has acknowledged the theory "seeks to describe what actually happens in the company."[20] To this point, however, British corporate law scholars have not used team production theory on any sort of systematic basis to seek to explain U.K. company law rules or governance arrangements. That is what this Article does.

While in various respects the U.K. is a promising candidate for testing team production theory, those with at least a passing familiarity with U.K. corporate governance might wonder if the team production model is being set up to fail with a British case study. "[T]he UK legal regime" is widely thought of as "an ideal playground for shareholders."[21] Paul Davies, a leading U.K. academic company lawyer, has referred to "the pervasive, dominant role of shareholders, who constitute the company in UK law" and to "a strong emphasis on shareholder autonomy in company governance and structures."[22] Lynn Stout herself christened the U.K. "a shareholder paradise," arguing that its "[s]hareholder-friendly laws . . . may have prevented the U.K. business sector from developing much beyond finance and commodities extraction."[23]

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18. Blair & Stout, *supra* note 1, at 289.

19. For isolated departures from the predominant trend, see *infra* notes 89, 93, and accompanying text.

20. ANDREW KEAY, THE CORPORATE OBJECTIVE 230 (2011).

21. Vincenzo Bavoso, *The Global Financial Crisis, the Pervasive Resilience of Shareholder Value and the Unfulfilled Promise of Anglo-American Corporate Law*, 6 INT'L CO. & COM. L. REV. 213, 215 (2014).

22. Paul Davies & Jonathan Rickford, *An Introduction to the New UK Companies Act*, 5 EUR. CO. & FIN. L. REV. 48, 51, 53 (2008).

23. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 56, 84–85 (2012).

Blair and Stout's team production theory is oriented differently. The board of directors is the fulcrum. The board, again, is supposed to balance the interests of a corporation's various constituencies so as to foster the "buy in" required to sustain effective team production. Correspondingly, boards should not be under the general control of shareholders or any other corporate constituency. Instead, to preclude constituency-specific rent-seeking that could undermine beneficial team dynamics, boards should be vested with ultimate decisionmaking authority.[24]

The strong shareholder orientation of U.K. company law does compromise to some degree the explanatory power of team production theory in the British context. Nevertheless, a U.K. case study is a worthwhile endeavor. For those well versed in U.K. company law, such an exercise provides a fresh take on familiar legal concepts. For instance, applying a presumption that boards should operate on an autonomous, independent basis insulated from external pressure sheds light on key corporate law topics such as directors' duties and the allocation of managerial authority. More broadly, a discrepancy between "law in books" and "law in action"[25] becomes evident. A team production-oriented case study reveals a high degree of board centrality in U.K. corporate governance despite a legal framework that is resolutely shareholder-friendly. This pattern in turn provides an insight into an aspect of Blair and Stout's work that merits more attention even in team production theory's American home, namely the possibility that corporate participants can establish team production-friendly governance arrangements through private ordering. Team production theory, then, travels well across the waves.

The organizational structure of the Article is as follows. Parts I and II set the scene for the U.K.-oriented case study of the team production model that Part III provides. Part I identifies team production theory's essential features. Part II considers how British company law academics have reacted to Blair and Stout's work on team production theory, indicating in so doing that the favorable reception the theory has received is attributable primarily to its stakeholder-friendly implications. Part III, which forms the bulk of the article, offers a U.K.-oriented case study of team production theory that assesses the extent to which Blair and Stout's model corresponds with key features of U.K. company law and corporate governance. A brief concluding section ties together the Article's key themes.

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24. *See* Blair & Stout, *supra* note 1, at 254, 291–92.

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

I. TEAM PRODUCTION THEORY – A PRÉCIS

Margaret Blair and Lynn Stout's team production theory presupposes a corporation can be best understood as a "team of people who enter into a complex agreement to work together for their mutual gain."[26] Individuals associating themselves with a company will be anticipating they will share in the benefits flowing from "team production." Those who see themselves as part of a corporate "team" will tend not to seek full contractual protection for the firm-specific investments they incur. Instead, they will be trusting the board of their company to act as the focal point of a "mediating hierarchy" that will balance the interests of the corporation's various constituencies in an unbiased manner.

Blair and Stout advanced their version of team production theory during an era of considerable intellectual ferment in the corporate law and corporate governance realms in the United States. During the 1990s, the "nexus of contracts" model of the corporation emerged amid often-acrimonious debate as the dominant intellectual construct in corporate law.[27] Shareholder value simultaneously moved to the top of the managerial priority list, displacing an ethos where many American corporate executives assumed they could and should seek to balance the interests of stockholders and other corporate constituencies.[28]

Blair and Stout suggested in their pioneering 1999 team production article that a corporation (or at least a publicly traded corporation) was "not so much a 'nexus of contracts' (explicit or implicit) as a 'nexus of firm-specific investments,' in which several different groups . . . find it difficult to protect their contribution through explicit contracts."[29] Nevertheless, they acknowledged substantial continuity with contractarian analysis. They suggested team production theory was "consistent with the 'nexus of contracts' approach to understanding corporate law" because the theory "views public corporation law as a mechanism for filling in the gaps where team members have found explicit contracting difficult or impossible."[30]

Unlike with the nexus of contracts approach, Blair and Stout did not seek in their 1999 article to reconcile the team production model

26. Blair & Stout, *supra* note 1, at 278. The summary of team production theory this paragraph provides was drawn from Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 485–86 (2004).

27. *See* Cheffins, *supra* note 26, at 484–85.

28. BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 180, 187, 247 (2018).

29. Blair & Stout, *supra* note 1, at 275.

30. *Id.* at 254.

with shareholder primacy.[31] There indeed was little common ground. Blair and Stout's "claim [was] that directors should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members."[32] Correspondingly, as Blair and Stout acknowledged, their "view challenges the shareholder primacy norm that has come to dominate the theoretical literature."[33]

Blair and Stout pressed the case in favor of team production theory versus shareholder primacy partly on the basis of descriptive accuracy, saying that "fundamental and otherwise puzzling characteristics of public corporation law can be explained as a response to the team production problem."[34] According to Blair and Stout, "[i]f directors are to act as hierarchs, it is essential for them to hold the ultimate decision-making authority within the firm and to be allowed full discretion to represent competing interests."[35] If there was a constituency with rights to exercise control over the board—the shareholders stand out as the obvious contender—that constituency "could use its power over the board to seek rents opportunistically from other members of the productive team, thus discouraging team-specific investment."[36]

Blair and Stout identify various features of U.S. corporate law that correspond with their description of boards as autonomous from stockholders and other corporate constituencies. For instance, they say that because under corporate law the board is "the ultimate decisionmaking body within the firm," the directors "are not subject to direct control or supervision by *anyone,* including the firm's shareholders."[37] Concomitantly, directors are trustees for the corporation, not mere agents of the shareholders.[38] Directors in turn owe duties to the corporation itself rather than directly to the corporation's shareholders.[39] Moreover, due to courts giving directors substantial leeway when evaluating board decisionmaking, directors

31. *See* Brian R. Cheffins, *The Team Production Model as a Paradigm*, 38 SEATTLE U. L. REV. 397, 411–12 (2015); Margaret M. Blair, *Why Lynn Stout Took Up the Sword Against Share Value Maximization*, ACCT. ECON. & L., Dec. 2020, at 1, 6–7 (indicating, when summarizing her work on team production theory with Lynn Stout, that "Lynn and I rejected shareholder value maximization as the only goal of corporations").

32. Blair & Stout, *supra* note 1, at 286.

33. *Id.* at 253.

34. *Id.* at 255.

35. *Id.* at 291–92.

36. *Id.* at 292.

37. *Id.* at 290.

38. *See, e.g.*, *id.* at 256, 280–81; Blair, *supra* note 31, at 6 ("In widely-held corporations, boards of directors are not, strictly speaking, 'agents' of shareholders.").

39. *See* Blair & Stout, *supra* note 1, at 288, 292–93.

have "tremendous discretion to sacrifice shareholders' interests" when deciding what is best for their firm.[40]

Blair and Stout maintain that board autonomy is sustained despite facets of corporate law that vest shareholders with rights that theoretically could tilt directorial priorities in a pro-shareholder direction.[41] One example is the selection of directors. While stockholders in American corporations have the right to elect board members,[42] Blair and Stout maintain this power is "almost meaningless" due to legal and practical obstacles such as the scope an incumbent board has to use corporate resources to solicit votes by proxy to secure backing for its nominees and rational apathy affecting widely dispersed investors.[43] Practically speaking, Blair and Stout say, "*boards elect themselves*."[44] Moreover, while shareholders have scope under corporate legislation to remove incumbent directors,[45] according to Blair and Stout "the removal process is difficult at best."[46]

Derivative litigation is another example. In the United States, shareholders are generally the only corporate participants able to launch a derivative suit to pursue litigation on a corporation's behalf.[47] Blair and Stout explain away this shareholder-friendly feature of corporate law on the basis that shareholders granted standing to pursue such an action will be litigating "*on behalf of the corporation as a whole*, not as aggrieved individuals or groups."[48] Moreover, courts, because they only permit a shareholder "to step into the shoes of the corporate entity and sue in its name and on its behalf" under very limited circumstances, ensure that derivative suits only proceed when

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40. *Id.* at 291.

41. *See id.* at 289 ("While in certain limited circumstances shareholders enjoy special rights not granted to other stakeholders, these rights are merely instrumental.").

42. *See* DEL. CODE ANN. tit. 8, § 211(b) (2020).

43. *See* Blair & Stout, *supra* note 1, at 310–11 (citing ROBERT C. CLARK, CORPORATE LAW 94 (1986)).

44. *Id.* at 311.

45. *See* tit. 8, § 141(k). If a Delaware company has, as is permitted by section 141(d) of the Delaware General Corporation Law, a classified (or "staggered") board, shareholders' director removal rights will be substantially compromised because shareholders can only remove directors for cause. *See id.* Classified boards used to be very popular in the United States, but most companies have abandoned the structure due to shareholder pressure. *See* CHEFFINS, *supra* note 28, at 320, 364.

46. Blair & Stout, *supra* note 1, at 311.

47. *See* Blair & Stout, *Director Accountability*, *supra* note 11, at 426; CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 59–60 (2013). Both acknowledge, though, that creditors can bring derivative suits when a corporation is at or near insolvency. *See* Blair & Stout, *Director Accountability*, *supra* note 11, at 426 n.59; BRUNER, *supra*, at 60.

48. Blair, *Corporate Law as a Solution, supra* note 10, at 204–05; *see also* Blair & Stout, *supra* note 1, at 293–94.

this "*benefits not only shareholders, but other stakeholders in the coalition as well*."[49]

Blair and Stout, in offering their analysis of the "fit" between team production theory and U.S. corporate law, concentrated on legal doctrine as they made the case that their model was accurate descriptively as well as normatively persuasive. They said very little about the possibility of market actors voluntarily establishing a team production-friendly environment. As Henry Butler and Fred McChesney said of Blair and Stout's work, "[b]y focusing on corporation law, they neglect other contractual solutions."[50] Our U.K. case study in Part III indicates the private ordering angle merits a closer look. This is because, to the extent that the "fit" between team production theory and U.K. corporate arrangements is a good one, voluntary arrangements play a central role.

While Blair and Stout have little to say directly about private ordering, they do appear to anticipate that the creation of institutions necessary for a team production approach (such as board discretion) has a strong voluntary underpinning. In their *Virginia Law Review* article, they expressly "locate the mediating hierarchy model of the public corporation within the nexus of contracts tradition because in the model, team members voluntarily choose to submit themselves to the hierarchy as an efficient arrangement that furthers their own self-interests."[51] In a shorter 1999 law review article in which they summarize the team production model's key features, they maintain "team members who cannot easily contract with each other over how to divide up the gains from team production instead *agree* to give up control over that decision, and over their team-specific assets, to a 'mediating hierarchy' dominated by the board of directors."[52] So, it seems private ordering has a role to play in team production theory. Our U.K. case study indicates just how important that role can be. We will show how private ordering moves U.K. corporate governance markedly in a team production direction from a shareholder-friendly legal departure point after we consider how team production theory has been received in the United Kingdom up to this point in time.

49. Blair & Stout, *supra* note 1, at 293, 298.

50. Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1217 (1999).

51. Blair & Stout, *supra* note 1, at 254 n.17.

52. Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743, 746 (1999) (emphasis added).

II. TEAM PRODUCTION AND CORPORATE LAW THEORY IN THE UNITED KINGDOM: THE STORY TO DATE

Team production theory has not been canvassed extensively in U.K. corporate law scholarship, but it has been warmly received. British corporate law academics who have turned their attention to team production theory have rarely sought to use it to explain company law doctrine. Instead, normative features of the team production model have attracted attention and have proved popular. The manner in which theorizing about company law has developed in the U.K. over the past twenty-five or so years explains the model's appeal.

According to Marc Moore, a leading British corporate law scholar, "the typical English corporate (or 'company') lawyer has tended to earn their crust by dwelling on the internal doctrinal logic and minutiae of the law."[53] Traditionally "the company law teaching establishment's attitude" indeed was "that theory is not important."[54] A change in attitude was evident, however, as the 1990s were drawing to a close, and concerns expressed that this pro-theory trend would prove fleeting turned out to be unduly pessimistic.[55] While empirical research would remain the exception to the rule in U.K. company law scholarship,[56] theoretical analysis became mainstream. As a 2013 study of the legal aspects of corporate governance and shareholder activism suggested, "moral and societal analyses fill the pages of many current UK journals."[57]

Given that theoretical discourse is an important feature of U.K. company law scholarship and given the prominence of team production analysis in the corporate theory realm, not surprisingly various British academics have engaged with Blair and Stout's work. The reviews have been favorable. Blair and Stout's team production work has been described as "an important theoretical development"[58] yielding a "[p]articularly notable"[59] and "interesting and important"[60] theory of

53. Marc Moore, Book Review, 74 CAMBRIDGE L.J. 370, 370 (2015) (reviewing CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013)).

54. Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMPAR. L. 573, 573 (2000).

55. *Id.* at 593–94.

56. Daniel Attenborough, *Empirical Insights into Corporate Contractarian Theory*, 37 LEGAL STUD. 191, 203 (2017).

57. SHUANGGE WEN, SHAREHOLDER PRIMACY AND CORPORATE GOVERNANCE: LEGAL ASPECTS, PRACTICES AND FUTURE DIRECTIONS 54 (2013).

58. ALAN DIGNAM & JOHN LOWRY, COMPANY LAW 401 (10th ed. 2018).

59. Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PA. ST. L. REV. 1, 35 (2013).

60. KEAY, *supra* note 20, at 229.

the firm. Lorraine Talbot, in a survey of "great debates" in company law, characterizes team production theory as one of a handful of theories deserving attention when considering the question "what is the company?"[61]

British company law academics treat team production theory as important primarily because it "has significantly enriched the ongoing 'shareholder versus stakeholder' debate."[62] Martin Petrin has said Blair and Stout's work "[n]otably . . . implies that the board should take into account interests other than only those of shareholders."[63] Talbot assumes Blair and Stout's work deserves attention because they "identify labour as a key part of the team productive process that is the company."[64] Keay is drawn to the team production model by the fact that under it shareholders do not have decisive control rights. Instead "directors have ultimate power . . . in reconciling conflicts between the various interests of team members."[65]

Given the analytical priors of theoretically inclined U.K. academic commentators, it is not surprising they have focused on the stakeholder implications of team production theory. Again, the U.K. is thought to be "an ideal playground for shareholders."[66] Reputedly, "[i]t is a commonly agreed fact that UK companies are managed for the ultimate interests of shareholders."[67] The sympathies, however, of Britain's corporate law theoreticians lie elsewhere. There is alignment with a "pluralist" approach to the company under which multiple corporate constituencies are thought to merit recognition because this should foster cooperative and productive relationships within companies.[68] Accordingly, "theoretical writers in the UK have, by and large, lent credence to pluralism, with a particular focus on stakeholder significance and engagement."[69] The team production model is assumed

61. LORRAINE TALBOT, GREAT DEBATES IN COMPANY LAW 2, 14–15 (2014).

62. MARC MOORE & MARTIN PETRIN, CORPORATE GOVERNANCE: LAW, REGULATION AND THEORY 47 (2017).

63. Petrin, *supra* note 59, at 36.

64. TALBOT, *supra* note 61, at 14.

65. KEAY, *supra* note 20, at 229.

66. *See supra* note 21 and related discussion.

67. WEN, *supra* note 57, at 91; *cf.* Gelter, *supra* note 12, at 190–93 (describing the U.K. as an "intermediate" case, citing the fact that Britain's employment protection laws are more robust than the United States').

68. CO. L. REV. STEERING GRP., DEP'T OF TRADE & INDUS. (UK), MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: THE STRATEGIC FRAMEWORK, at vi (1999), https://webarchive.nationalarchives.gov.uk/ukgwa/20070603185134/http://www.dti.gov.uk/bbf/co-act-2006/clr-review/page22794.html [https://perma.cc/5MW7-LHWA]; Mary Arden, *Reforming the Companies Acts - The Way Ahead*, 2002 J. BUS. L. 579, 587.

69. WEN, *supra* note 57, at 53.

to overlap substantially with stakeholder theory.[70] Blair and Stout's work has in turn been hospitably received in Britain.

The fact that the U.K. is assumed to be "a shareholder paradise"[71] while a stakeholder orientation has been popular with corporate law theoreticians merits brief elaboration. It is common ground amongst U.K. academics that British company law and corporate governance have a strong shareholder orientation, for better or worse.[72] Shareholder-friendly laws, examples of which Part III will canvass, help to justify the consensus. Corporate law theoreticians assume a conscious shareholder-friendly public policy choice has shaped U.K. company law's pro-shareholder bias.[73] They also cite a seemingly contractarian turn in companies legislation regarding the status of the corporate constitution that will be canvassed in a moment,[74] and assume in so doing a close link between contractarian analysis and shareholder primacy.

From a contractarian perspective, shareholders in a company constitute merely one constituency that is part of the nexus of contracts. Correspondingly, there is no intrinsic contractarian justification for shareholder primacy.[75] Nevertheless, contractarian scholars have typically embraced managerial prioritization of shareholder interests. They cite, for instance, the fact that all stakeholders should do well when stockholders—a corporation's core "residual claimants"—are thriving.[76] Contractarians also defend shareholder centrality on the basis that shareholders cannot bargain for contractual protection as

70. Andrew C. Wicks, F.A. Elmore & David Jonas, *Connecting Stakeholder Theory to the Law and Public Policy*, *in* THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 97, 98 (Jeffrey S. Harrison ed., 2019); *see also* Claudio R. Rojas, *An Indeterminate Theory of Canadian Corporate Law*, 47 U.B.C. L. REV. 59, 98 (2014) (maintaining that the team production model is "rooted in stakeholder theory").

71. *See supra* note 23 and related discussion; Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBRIDGE J. ECON. 837, 848 (2010).

72. Daniel Attenborough, *How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh*, 20 INT'L CO. & COM. L. REV. 339, 339 (2009) (acknowledging the consensus but maintaining the approach should change).

73. Andrew Johnston, *Reforming English Company Law to Promote Sustainable Companies*, 11 EUR. CO. L. 63, 63 (2014); LORRAINE TALBOT, CRITICAL COMPANY LAW 131, 157 (2d ed. 2015); Paddy Ireland, *From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism*, 29 KING'S L.J. 3, 27 (2018).

74. *See infra* notes 82, 84, and related discussion. On the point that the statutory characterization of the corporate constitution moves U.K. company law in a contractarian direction, see KEAY, *supra* note 20, at 29–30; JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS 4 (Barry Rider ed., 2000); MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE 137–40 (2013).

75. Cheffins, *supra* note 26, at 484.

76. Cheffins, *supra* note 31, at 408–09.

effectively as other stakeholders, given the highly open-ended nature of an investment in corporate equity.[77]

Critics of the economic logic underpinning the contractarian approach to company law abound in Britain.[78] It is also quite rare for a U.K. company law scholar to engage in contractarian analysis or to "advocate shareholder-oriented practices as being good economics."[79] Various British corporate law academics nevertheless maintain that contractarian thinking dominates in British company law circles.[80] Perhaps the prevalence of the nexus of contracts model stateside has obscured how rarely British academics explicitly invoke a contractarian approach.[81] The nature of the corporate constitution in U.K. companies—the articles of incorporation and the by-laws in the case of a U.S. corporation—is also relevant. The Companies Act 2006 ("CA 2006") deems the corporate constitution to be a contract with the company and its shareholders as parties.[82] The result is hardly a conventional contract, with shareholders only being entitled to enforce some of the terms of the corporate constitution and with amendments being feasible even if some parties (shareholders) dissent.[83] Nevertheless, the statutory declaration that the corporate constitution is a contract has served to give contractarian analysis prominence in the U.K. that belies the meagre scholarly output.[84]

Academic chilliness toward contractarian analysis has reinforced receptiveness to team production theory among British company law academics. There is awareness that team production theory is "based on contractarian ideas."[85] Nevertheless, the tendency

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77. *Id.* at 409.

78. *See, e.g.*, Attenborough, *supra* note 56, at 192, 194, 201; DINE, *supra* note 74, at 12–17; Ewan McGaughey, *Ideals of the Corporation and the Nexus of Contracts*, 78 MOD. L. REV. 1057, 1060–61 (2015) (reviewing MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE (2013)); Iris H-Y Chiu, *Operationalising a Stakeholder Conception in Company Law*, 10 L. & FIN. MKTS. REV. 173, 174 (2016).

79. WEN, *supra* note 57, at 53.

80. Attenborough, *supra* note 56, at 191–92, 199–200; MOORE, *supra* note 74, at 62, 71–72.

81. Even those who claim that contractarian analysis predominates in Britain acknowledge that this analytical approach is more popular in the U.S. than the U.K. *See* Attenborough, *supra* note 56, at 199–200; Marc T. Moore, *Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism*, 34 OXFORD J. LEGAL STUD. 693, 695 (2014).

82. Companies Act 2006, c. 46, § 33 (UK).

83. BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE, AND OPERATION 456 (1997). The shareholders can amend the corporate constitution by way of a special resolution. *See* Companies Act 2006 § 21; *infra* note 130 and related discussion (describing special resolutions).

84. Moore, *supra* note 81, at 715–16; Iris H-Y Chiu, *Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives of 'Stewardship,'* 66 CURRENT LEGAL PROBS. 443, 458–59 (2013).

85. MOORE & PETRIN, *supra* note 62, at 76. *See also supra* notes 29–30 and related discussion (indicating the link between team production theory and contractarian analysis); KEAY, *supra* note

amongst U.K. corporate law scholars has been to emphasize how team production analysis differs from contractarian reasoning, to the point where Blair and Stout's model has been characterized in a prominent student guide to company law as a "convincing alternative to a contracts analysis."[86] For instance, attention has been drawn to the fact Blair and Stout characterize a corporation as a "nexus of firm-specific investments" rather than a "nexus of contracts."[87] The primary distinctive feature emphasized, however, has been that team production theory offers room for protection of stakeholder interests in a way contractarian analysis generally does not.[88]

Given that British company law academics have responded favorably to team production theory and given that Blair and Stout maintain that their model can explain key features of corporate law and corporate governance, it might have been anticipated that British company lawyers would have sought to test the theory's explanatory power in a U.K. context. Some observers have suggested that section 172 of CA 2006, which imposes a duty on directors to consider the position of various specified corporate stakeholders as the board seeks to promote the success of the company, reflects the mediating hierarchy conception of the board central to team production theory.[89] Otherwise, however, the invocation of team production theory in the U.K. has been on a purely normative basis. The next Part of the Article departs from the prevailing trend and assesses the extent to which team production theory explains key features of U.K. company law and corporate governance.

III. TEAM PRODUCTION THEORY'S EXPLANATORY POWER: A BRITISH CASE STUDY

Margaret Blair and Lynn Stout maintain that team production theory does much to explain how corporate law is configured.[90] The claims they have advanced in this regard have related only to the

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20, at 37; Michael Galanis, *Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re)Balancing?*, 31 OXFORD J. LEGAL STUD. 327, 332 (2011).

86. DIGNAM & LOWRY, *supra* note 58, at 400.

87. *See supra* note 29 and related discussion; KEAY, *supra* note 20, at 37; Akio Otsuka, *Reforms of Corporate Governance: Competing Models and Emerging Trends in the United Kingdom and the European Union*, 14 S.C. J. INT'L L. & BUS. 71, 80 (2017).

88. Petrin, *supra* note 59, at 36; Galanis, *supra* note 85, at 332; Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE 11, 12 (2005).

89. John Kong Shan Ho, *Is Section 172 of the Companies Act 2006 the Guidance for CSR?*, 31 CO. LAW. 207, 212 (2010); Jingchen Zhao, *Promoting More Socially Responsible Corporations Through UK Company Law After the 2008 Financial Crisis: The Turning of the Crisis Compass*, 29 INT'L CO. & COM. L. REV. 275, 282 (2011).

90. *See supra* notes 16–17 and accompanying text.

United States.[91] It appears, though, that team production theory accounts successfully for key elements of Canadian corporate law.[92] This section considers team production theory's explanatory power in a British context. The analysis is by no means exhaustive, but extends well beyond section 172 of CA 2006, the single facet of U.K. company law where team production theory has been invoked in positive rather than normative terms.[93]

The team production theory-driven case study of U.K. company law offered here proceeds as follows. We will consider initially the legal personality of corporations, taking into account in so doing the fact that Blair and Stout anticipate that team production theory is more relevant for widely held corporations than for other types of companies. We will turn next to the allocation of managerial authority in companies, the doctrinal foundation for which is shareholder-focused in Britain in a way it is not in the United States. Nevertheless, by virtue of private ordering in U.K. companies the functional outcome—board control—is much the same in both countries. The focus then shifts to duties that directors owe, with particular reference to ascertaining the purposes for which companies are supposed to be run and assessing the extent to which the judiciary defers to the exercise of managerial discretion. We will turn finally to powers company law vests in shareholders, in particular the selection of directors and the launching of lawsuits by shareholders in relation to their companies.

With respect to each of these topics, we will elaborate where necessary on what we have already indicated Blair and Stout have to say on point. We will combine this summary of Blair and Stout's stance with a brief synopsis of the law on point in the United States. Following Blair and Stout's lead, Delaware law will be our doctrinal departure point, reflecting the fact that a majority of U.S. public companies are incorporated under Delaware law.[94] Our focus then shifts with each topic to the legal position in Britain. The discussion concludes in each instance with a succinct assessment of the fit between the team production model and U.K. company law. A recurring theme is that there is a strong degree of board autonomy in practice despite a shareholder-friendly legal regime.

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91. *See supra* notes 9–11 and related discussion.

92. *See, e.g.*, Ben-Ishai, *supra* note 12.

93. *See supra* note 89 and accompanying text.

94. John Armour, Bernard Black & Brian R. Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1348 (2012). In Blair and Stout's original team production article, the Delaware General Corporation Law is the only corporate law statute cited. *See* Blair & Stout, *supra* note 1, at 251 & n.8, 276 & n.62, 281 n.74, 289 & n.90, 292 & n.99, 298 & n.118, 300 n.123, 310–11, 310 nn.163–64, 311 nn.168–70.

A. Nature of the Company

1. Blair and Stout/U.S. Corporate Law

In the United States, incorporated entities are vested formally with legal personality.[95] Contractarians, for their part, tend to treat the corporate entity as a mere "legal fiction" of minimal analytical significance.[96] Despite team production theory being located within the nexus of contracts tradition,[97] Blair and Stout take a different approach, with corporate personality featuring as part of the theory. Blair and Stout only addressed the point briefly in the 1999 article where they introduced the team production model, indicating in so doing that the corporate entity fosters team production by serving as a repository for returns a team generates until distribution by the board of directors.[98] They elaborated in a 2006 paper, arguing that vesting ownership of an enterprise's assets in a corporation under the control of the board rather than in the hands of the shareholders encourages firm-specific investments by other corporate constituencies because these stakeholders will deduce opportunistic asset extraction is less likely to occur.[99]

The nature of the corporate intermediary is relevant in another way to team production theory. Blair and Stout acknowledge that the theory's explanatory power varies depending on the type of company involved. They say "the model applies primarily to public—not private—corporations," and single out "public corporations with widely dispersed share ownership" as ones where directors are "remarkably free from the direct control of any of the groups that make up the corporate 'team,' including shareholders, executives, and employees."[100] They reason that, with firms where a single shareholder or group of shareholders dominates, the directors will have to pay heed to concentrated voting power and thus will struggle to function effectively as mediating hierarchs in the manner team production theory hypothesizes.[101] The domain within which the theory is instructive is

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95. ROBERT CHARLES CLARK, CORPORATE LAW 15, 17 (1986).

96. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

97. *Supra* note 30 and related discussion.

98. Blair & Stout, *supra* note 1, at 269, 292.

99. Blair & Stout, *Specific Investment*, *supra* note 11, at 740.

100. Blair & Stout, *supra* note 1, at 281.

101. *Id.* at 281, 309.

correspondingly circumscribed.[102] Blair and Stout did not see this as a major limitation when they introduced team production theory because when they were doing so publicly traded companies dominated America's corporate economy.[103] In today's corporate America, public companies—the majority of which have dispersed share ownership—remain at the forefront, and this should remain the case for the foreseeable future.[104]

2. United Kingdom

A team production theory caveat that the theory's utility is open to question unless public companies with dispersed share ownership are involved would be crucial in a country with few public firms or in a jurisdiction such as Canada where publicly traded firms often have dominant shareholders.[105] The situation is different in the U.K. A divorce of ownership and control has been something of an "obsession" in corporate governance terms, with publicly traded companies having long been a crucial element of the British corporate economy and with diffuse share ownership having been the norm in such firms for decades.[106] Correspondingly, ownership structure does not limit the applicability of team production theory in the U.K.

With respect to corporate personality, the U.K. similarly falls into line with Blair and Stout's team production analysis. According to case law precepts, companies are not agents for their shareholders.[107] Instead, a company has full legal personality distinct from its "members," the label U.K. companies legislation uses when referring to shareholders.[108] This was put beyond doubt in the 1890s by the House of Lords in *Salomon v. A Salomon & Co. Ltd.*, "arguably the most significant and famous case in corporate law."[109] Even the smallest

102. John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 840–42 (1999); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 596 (2003).

103. Blair & Stout, *supra* note 1, at 256.

104. Brian R. Cheffins, *Rumours of the Death of the American Public Company Are Greatly Exaggerated*, 40 CO. LAW. 4, 16–22 (2019); Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV 445, 482–98 (2019); Margaret M. Blair, *Are Publicly Traded Corporations Disappearing?*, 105 CORNELL L. REV. 641, 642–43 (2020).

105. Gelter, *supra* note 12, at 154; Rojas, *supra* note 70, at 101–02.

106. BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 1, 14–16 (2008).

107. Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906] 2 Ch. 34.

108. SARAH WORTHINGTON, SEALY & WORTHINGTON'S TEXT, CASES, & MATERIALS IN COMPANY LAW 2 (11th ed. 2016).

109. [1896] UKHL 1, [1897] AC 22; Ernest Lim, *Of 'Landmark' or 'Leading' Cases:* Salomon'*s Challenge*, 41 J.L. & SOC'Y. 523, 524–25 (2014).

private "one-person" corporation (as in *Salomon*) can contract and own property in its own right; shareholders have no proprietary rights in corporate assets.[110] English courts, moreover, have historically been less inclined to disregard corporate personality than their American counterparts.[111]

B. Allocation of Managerial Control

1. Blair and Stout/U.S. Corporate Law

While the treatment of corporate personality under U.K. company law accords with Blair and Stout's team production theory, the situation appears to be much different with the allocation of managerial authority. The board of directors, functioning as a mediating hierarch, is the fulcrum of the corporation under team production theory. The board accordingly must be vested with the power to manage. As Blair and Stout say of the "internal hierarchy whose job is to coordinate the activities of the team members," at the peak "sits a board of directors whose authority over the use of corporate assets is virtually absolute."[112] The law in the United States conforms to this pattern. Blair and Stout cite section 141 of the Delaware General Corporation Law to make the point that the allocation of managerial control to the board "is a defining feature of American corporate law."[113]

2. United Kingdom

In the U.K., the principal piece of legislation governing companies, including publicly traded corporations, is CA 2006. At 1300 sections, this statute was the longest law on the U.K. statute book when it was enacted.[114] Despite this, the legislation's treatment of directors is far from comprehensive.[115] Every corporation is required to have directors.[116] The Act also does much to codify duties that directors owe,

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110. Macaura v. N. Assurance Co. [1925] AC 619, 626; Andrew Keay, *Shareholder Primacy in Corporate Law: Can It Survive? Should It Survive?*, 7 EUR. CO. & FIN. L. REV. 369, 394 (2010).

111. Alan Dignam & Peter B. Oh, *Disregarding the* Salomon *Principle: An Empirical Analysis, 1885-2014*, 39 OXFORD J. LEGAL STUD. 16, 18, 27 (2018).

112. Blair & Stout, *supra* note 1, at 251.

113. *Id.*

114. Michael O'Dwyer, *Have Governance Gripes and a Rise in Red Tape Driven Companies Away from the UK Market?*, TELEGRAPH (Jan. 4, 2020, 6:00 AM), https://www.telegraph.co.uk/business/2020/01/04/have-governance-gripes-rise-red-tape-driven-companies-away-uk/ [https://perma.cc/RA37-UQTY].

115. PAUL L. DAVIES & SARAH WORTHINGTON, PRINCIPLES OF MODERN COMPANY LAW 356, 399 (10th ed. 2016).

116. Companies Act 2006 § 154.

terrain covered by common law principles in the United States.[117] Strikingly, though, there is no provision equivalent to section 141 of the Delaware General Corporation Law from which it is possible to draw general conclusions about the role of directors as mediating hierarchs. Instead, the allocation of managerial authority to boards is a matter dealt with in the corporate constitution of individual companies, the key element of which is the set of internal ground rules laid down in a document known as the articles of association.[118]

Unlike in the United States, where statutes such as the Delaware General Corporation Law give the board of directors a substantial role in dictating the content of the corporate constitution,[119] CA 2006 vests the shareholders with exclusive power to amend the articles of association.[120] Correspondingly, in contrast with the position in the United States, in the U.K. the allocation of managerial power is entirely a matter for the shareholders. Nevertheless, the ultimate outcome is very similar. It is the universal practice in U.K. public companies for the articles to allocate the power to run the company to the board.[121] Shareholders thus choose to give boards the same managerial powers that Blair and Stout say are essential for boards to act as mediating hierarchs.

When shareholders voluntarily bestow managerial authority on the board, case law reinforces board centrality. Where the corporate constitution of a U.K. company vests the directors with responsibility to manage the company, the relevant jurisprudence establishes a basic principle of non-interference—"they and they alone can exercise [those] powers."[122] Hence, even though it is the shareholders who give boards managerial authority via the articles of association, boards are

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117. *Id.* §§ 171–77. For a comparison of these provisions with the law in the United States, see David W. Giattino, *Curbing Rent-Seeking by Activist Shareholders: The British Approach*, 25 TEMP. INT'L. & COMPAR. L.J. 103, 107–17, 122–34 (2011). Various other provisions in the Companies Act 2006 also regulate conduct of directors. See, for example, sections 190–96, which deal with substantial related party transactions, and section 437, which requires directors to present annual accounts and various reports to the shareholders.

118. Companies Act 2006 § 17; BRENDA HANNIGAN, COMPANY LAW 97 (5th ed. 2018).

119. DEL. CODE ANN. tit. 8, § 109 (2020).

120. Companies Act 2006 § 21.

121. Kym Sheehan, Shareholder Directions and FTSE100 Directors' General Powers to Manage the Company and Its Business 10 (Jan. 29, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112972 [https://perma.cc/MSY7-MEFH] (finding that in a study of the articles of association of 94 constituents of the FTSE 100, a stock market index comprising the largest companies traded on the London Stock Exchange, all 94 companies vested managerial authority in the hands of the board). The same practice is almost universal in private companies as well. *See* Jonathan Hardman, *Articles of Association in UK Private Companies: An Empirical Leximetric Study*, 22 EUR. BUS. ORG. L. REV. 517, 532–39 (2021).

122. Shaw & Sons (Salford) Ltd. v. Shaw [1935] 2 KB 113, 134; *see also* Scott v. Scott [1943] 1 All ER 582, 584–85.

insulated in the ordinary course from the shareholders in a manner similar to what would be expected if directors are going to act as mediating hierarchs. For instance, in *Automatic Self-Cleansing Filter Syndicate v Cuninghame*[123] the English Court of Appeal ruled that the board could ignore an "ordinary" resolution (a resolution passed by a simple majority of shareholder votes cast)[124] purporting to instruct the board what to do. This followed on from the fact that "by the consensus of [ ] the individuals within the company," a company's directors are agents of the company rather than agents of the shareholders.[125]

While shareholders in U.K. companies vest boards with the managerial power associated with mediating hierarchs, U.K. company law does not conform fully with team production theory on this count. For instance, CA 2006 provides in various prescribed circumstances for shareholder veto rights that potentially compromise board autonomy. These include "substantial property transactions" where a director is a party,[126] reductions in share capital,[127] share buy-backs,[128] and political donations.[129] Moreover, it is standard practice for the articles of publicly traded companies to authorize shareholders to "direct," "regulate," or "influence" the board, typically by way of a "special" resolution that must be passed by a three-quarters majority vote.[130]

It has been suggested that if a company's articles of association authorize the shareholders to issue directions to the board, the company, "with its board powers neutered, would be closer in form to an incorporated partnership than a corporation."[131] In fact, shareholder instruction provisions in the articles of association are largely irrelevant in practice. Shareholder proposals are a rare phenomenon in U.K. public companies,[132] and resolutions purporting to instruct boards

123. [1906] 2 Ch. 34.

124. Companies Act 2006 § 282.

125. Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906] 2 Ch. 34.

126. Companies Act 2006 §§ 190–96.

127. *Id.* § 641.

128. *Id.* § 694.

129. *Id.* § 366. For other examples, see DAVIES & WORTHINGTON, *supra* note 115, at 364.

130. Companies Act 2006 § 283 (defining "special" resolution); The Companies (Model Articles) Regulations 2008, SI 2008/3229, sch. 3, pt. 2, ¶ 4 (UK); Sheehan, *supra* note 121, at 10 (finding that only three of the 94 FTSE 100 companies studied made no provision for shareholder directions, and of the 91 companies that did offer this option, 80 required the passage of a special resolution).

131. Susan Watson, *The Significance of the Source of the Powers of Boards of Directors in UK Company Law*, 6 J. BUS. L. 597, 612 (2011).

132. Suren Gomstian, *Voting Engagement by Large Institutional Investors*, 45 J. CORP. L. 659, 685–86 (2020) (finding that among more than 10,500 resolutions put before shareholders in FTSE 100 companies between 2013 and 2017, only 13 were shareholder proposals); Bonnie G. Buchanan, Jeffry M. Netter, Annette B. Poulsen & Tina Yang, *Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and United Kingdom*, 49 AM. BUS. L.J. 739, 743,

are merely a subset of proposals advanced. It is also pertinent that the institutional investors that dominate share registers of U.K. public companies only exceptionally depart from managerial recommendations on how to vote.[133] By virtue of this voting pattern, a shareholder resolution instructing the board is only likely to be supported by the requisite majority—again typically three-quarters—if the board itself endorses the resolution, as happened in a small number of prominent U.K. public companies in the mid-2010s with resolutions dealing with climate change-related risk management.[134]

Ultimately, then, the allocation of managerial authority in U.K. public companies resembles that predicted by the team production model despite the legal departure point being fundamentally different than it is in the United States. This degree of board centrality is largely due to private ordering, with shareholders voluntarily vesting boards with managerial prerogatives. The pattern dovetails neatly with the contractarian foundations of team production theory Blair and Stout themselves identified.[135] Of course, we are only highlighting one feature of U.K. corporate governance here, and it would be inappropriate to draw broadly based conclusions about shareholders voluntarily submitting to the full force of the team production approach. Nevertheless, a U.K. case study of the team production model would be seriously incomplete without bearing private ordering in mind.

C. Corporate Purpose

1. Blair and Stout/U.S. Corporate Law

From the late twentieth century through to the present day, creating shareholder value has been widely recognized as the primary goal of American public companies.[136] For Blair and Stout, this shareholder primacy mindset is anathema.[137] Under team production theory, a corporation's board acts as the ultimate arbiter in a mediating hierarchy that pursues mutual gain on behalf of team members so as to

759–60, 762, 767 (2012) (reporting that 496 shareholder proposals were submitted to U.K. public companies between 2000 and 2006 but indicating that only 85 companies were affected because of substantial clustering with the submission of proposals).

133. Gomstian, *supra* note 132, at 666, 687–89 (finding that asset managers, who dictate how shares owned by institutional investors are voted, supported management recommendations with nearly 98 percent of all resolutions put forward in FTSE 100 companies between 2013 and 2017).

134. Sheehan, *supra* note 121, at 1.

135. *See supra* note 30 and related discussion.

136. CHEFFINS, *supra* note 28, at 367–68.

137. *See supra* notes 31–33 and related discussion.

foster the firm-specific investments essential for corporate success.[138] A board operating in this manner will seek to balance competing interests to ensure a potentially productive coalition of team members realizes its potential.[139] To that end, directors should forego consistently privileging any corporate constituency, whether the shareholders or otherwise. A board should instead aim "to protect the enterprise-specific investments of *all* the members of the corporate 'team,' including shareholders, managers, rank and file employees, and possibly other groups, such as creditors."[140] Accordingly, directors' duties should "run to the firm as a whole and not to any particular team member."[141]

As Blair has acknowledged, recently Delaware courts have on various occasions seemed "to endorse the share value maximizing norm"[142] and sought "to tie directors' hands more tightly to the task of acting for the sole benefit of common shareholders."[143] This trend casts doubt on the present-day veracity of Blair and Stout's claim in their pioneering 1999 team production article "that directors' fiduciary duties to 'the corporate enterprise' go beyond a simple duty to maximize shareholder wealth, and encompass the interests of a variety of other corporate constituencies."[144] Otherwise, though, it remains the case, as Blair and Stout have maintained, that in the United States a corporation's directors are trustees of the corporation, not agents of the shareholders.[145] Similarly, as Blair and Stout suggest should be the case, directors' duties are owed in the main to the corporation rather than to the shareholders.[146]

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138. Blair & Stout, *supra* note 1, at 278–79.

139. *Id.* at 280–81; *see also supra* note 18 and accompanying text.

140. Blair & Stout, *supra* note 1, at 253. Blair and Stout subsequently indicated boards should take into account "essentially any group that bears significant risks or makes significant firm-specific investments," which could include the local community. Blair & Stout, *Director Accountability*, *supra* note 11, at 445.

141. Blair & Stout, *supra* note 1, at 289.

142. Blair, *What Must Corporate Directors Do?*, *supra* note 11, at 13.

143. Blair, *Mediating Hierarchs*, *supra* note 11, at 331 (citing *In re* Trados, Inc. S'holder Litig. (*Trados I*), No. 1512-CC, 2009 Del. Ch. LEXIS 128 (Del. Ch. July 24, 2009)); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (holding that directors are bound to "promote the value of the corporation for the benefit of its stockholders").

144. Blair & Stout, *supra* note 1, at 296; *see also supra* note 40 and related discussion.

145. Blair & Stout, *supra* note 1, at 256, 280–81, 288, 290–91; Blair, *What Must Corporate Directors Do?*, *supra* note 11, at 9.

146. Blair & Stout, *supra* note 1, at 288, 292–93; Millon, *supra* note 4, at 79; Blair, *What Must Corporate Directors Do?*, *supra* note 11, at 5, 10; Luh Luh Lan & Loizos Heracleous, *Rethinking Agency Theory: The View From Law*, 35 ACAD. MGMT. REV. 294, 302 (2010).

2. United Kingdom

As is the case in the United States, in the United Kingdom the corporate purpose picture is a mixed one from a team production angle. There are features of company law that align with team production theory in the manner Blair and Stout say is the case in the United States. There are, however, also legal doctrines specifically directed toward boardroom priorities that encompass a stronger shareholder orientation than team production theory would predict.

In the U.K., like in the United States, the position of directors has been analogized to that of "trustees" managing the corporation on behalf of others, following on from the proposition that directors are fiduciaries in relation to corporate assets in the same way that trustees are fiduciaries with respect to trust property.[147] The analogy, however, between directors and trustees is not a perfect one. There is general awareness in the U.K. that while trustees must prioritize preservation of the trust property and avoid risk-taking accordingly, directors of companies operating as commercial ventures should not eschew risk as such but should instead decide from a business perspective which risks are worth taking.[148] Indeed, while Delaware courts tend to classify all duties that directors owe to the company as fiduciary in nature, U.K. courts only treat duties encompassed by what is known as the duty of loyalty in the United States as fiduciary.[149]

As team production theory suggests should be the case, directors of U.K. companies owe their duties to their companies as legal entities and not to shareholders. The CA 2006 codifies the common law position on this.[150] Correspondingly, shareholders usually lack standing to sue for breaches of duty by directors.[151] A shareholder can apply to obtain leave from the court to sue on a company's behalf by way of a derivative suit but, as will be discussed, such proceedings are rarities in U.K. public companies.[152] Directors can also owe duties to individual

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147. L.S. Sealy, *The Director as Trustee*, 25 CAMBRIDGE L.J. 83, 83–86 (1967) (summarizing the authorities on point without endorsing the view advanced).

148. *Id.* at 89.

149. Matthew Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 CO. & SEC. L.J. 403, 405 (2013); Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 307–08 (D.G. Smith & Andrew S. Gold eds., 2018).

150. Companies Act 2006 § 170(1); *see also* Percival v. Wright [1902] 2 Ch. 421, 423–25.

151. Foss v. Harbottle (1843) 67 Eng. Rep. 189; 2 Hare 461; HANNIGAN, *supra* note 118, at 549.

152. *See infra* note 248 and accompanying text.

shareholders due to "a special factual relationship," but this is unlikely to occur unless a closely held company is involved.[153]

With U.K. company law rules bearing upon corporate purpose, section 172(1) of CA 2006 merits particular scrutiny. The duty to promote the success of the company this measure provides for divides into two parts. The first obliges a director to "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." The second part of the section 172(1) duty requires that in "[promoting] the success of the company for the benefit of its members as a whole" directors "have regard (amongst other matters) to" a list of interests set out in the remainder of the subsection. These include some very general, though from a team production perspective potentially promising, matters. Directors are required to have regard to "the impact of the company's operations on the community and the environment," "the need to foster the company's business relationships with suppliers, customers and others," "the interests of the company's employees," and the "long term" consequences of business decisions, as well as the need to "act fairly as between members of the company."[154]

Introduced as part of the codification of directors' duties by CA 2006, section 172 was the first general statutory invocation to directors of U.K. companies regarding the interests they are supposed to act in as they manage companies.[155] Previously, common law principles defined what constituted the company's interests for the purposes of directors' duties.[156] Some verdicts on the change imply that the codification pushed U.K. company law in a direction fundamentally at odds with team production theory, given the model's antipathy toward the prioritization of shareholder interests. Reputedly, with section 172 asserting "the bald shareholder primacy norm,"[157] directors "now have a clear and unequivocal, legally-binding mandate that shareholder interests must take priority."[158] This implies "UK law, perhaps surprisingly, has gone farther in entrenching the shareholder wealth

153. DAVIES & WORTHINGTON, *supra* note 115, at 469; Peskin v. Anderson [2001] 1 BCLC 372, 379.

154. Companies Act 2006 §§ 172(1)(a)-(f).

155. Attenborough, *supra* note 72, at 345.

156. Daniel Attenborough, *Misreading the Directors' Fiduciary Duty of Good Faith*, 20 J. CORP. L. STUD. 73, 75–76 (2020).

157. Lorraine Talbot, *Trying to Save the World with Company Law?: Some Problems*, 36 LEGAL STUD. 513, 515 (2016).

158. Andrew Johnston, *The Shrinking Scope of CSR in UK Corporate Law*, 74 WASH. & LEE L. REV. 1001, 1032 (2017).

maximization principle than US law."[159] Section 172 in fact is not as antithetical to team production theory as these assessments imply.

It is the first part of the duty to promote the success of the company that underpins the argument that section 172 moved the law in a pro-shareholder direction at odds with team production theory. The thinking is that directors, instead of having scope to mediate between various corporate constituencies, are compelled by section 172 to act in the interests of members, with the obligation to "have regard to" other matters only being relevant to the extent that fulfilling this requirement enables the primary shareholder-oriented goal to be fulfilled.[160] Even if this accurately characterizes what the first part of section 172 does, it is doubtful whether this feature of section 172 changed the law markedly. The duty to promote the success of the company is the statutory successor to a common law duty of directors to act "bona fide . . . in the best interests of the [c]ompany."[161] The general consensus—contested by some[162]—is that the common law formulation of "the company" identified its interests with those of the present and future shareholders.[163]

While the enactment of the first part of section 172(1)'s duty to promote the success of the company probably did not push the law in a markedly pro-shareholder direction, the introduction of the second part likely did move the law to some degree toward Blair and Stout's board-as-mediating hierarch vision. The explicit invocation to directors to take into account considerations in addition to the shareholders likely enhanced board discretion, a team production-related theme the next section of the article explores.[164] In addition, the second part of section 172(1) obliges directors to consider non-shareholder interests in a way the common law did not, a shift congenial to a conception of boards as mediating hierarchs.

The possibility of directors explicitly focusing on interests other than those of the shareholders was contemplated pre-2006. Section 309 of the Companies Act 1985, which was enacted in 1980, provided a company's directors with scope to make decisions that favored the

159. BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC 49 (2019).

160. TALBOT, *supra* note 73, at 141; Johnston, *supra* note 158, at 1031.

161. Re HLC Env't Projects Ltd. [2013] EWHC (Ch) 2876 [2014], BCC 337, 361–63.

162. *See, e.g.*, Attenborough, *supra* note 156, at 75–76; Jonathan Mukwiri, *Myth of Shareholder Primacy in English Law*, 24 EUR. BUS. L. REV. 217, 229–30 (2013).

163. *See, e.g.*, DAVIES & WORTHINGTON, *supra* note 115, at 502; Talbot, *supra* note 157, at 524; DAVID KERSHAW, COMPANY LAW IN CONTEXT 336–37 (2d ed. 2012). Cases often cited to support the consensus view include Greenhalgh v. Ardene Cinemas Ltd. [1946] 1 All ER 512, [1951] Ch 286 and Gaiman v. Nat'l Ass'n for Mental Health [1971] Ch 317.

164. *Infra* note 188–194 and related discussion.

company's employees at the shareholders' expense.[165] More broadly, Norse L.J. of the English Court of Appeal suggested in a 1987 case "[t]he interests of a company, [as] an artificial person, cannot be [separated] from [those] . . . who are interested in it," implying scope for the potential recognition of a range of corporate constituencies.[166] Soon thereafter the courts confirmed that when a company was insolvent or near insolvency the interests of the company should be equated with those of the company's creditors,[167] a doctrine section 172(2) specifically preserves.

While pre-2006 U.K. directors had some explicit scope to consider non-shareholder constituencies, the second part of the section 172(1) duty to promote the success of the company deals with the issue in a systematic fashion previously lacking. This facet of section 172(1) was enacted to enshrine a new concept of "enlightened shareholder value" ("ESV") into U.K. law.[168] The intention, according to a company law academic closely involved in the law reform process, was to prompt a "shift in emphasis in managerial objectives" that gave "support to the idea that shareholder returns should be viewed as the result of running a successful business, rather than an end to be maximized directly."[169]

The obvious criticism of the ESV aspects of the section 172(1) duty, at least from the perspective of a communitarian approach to corporate law, is that directors are not specifically authorized to privilege stakeholder groups other than shareholders so as to run firms consistent with principles of social democracy.[170] From a team production perspective, however, this would not have been anticipated. Team production is not about directors favoring one corporate constituency and subordinating others but rather is oriented around boards mediating between different groups to corporate advantage.[171] The second part of section 172(1)'s duty to promote the success of the

165. Companies Act 1985, c. 6, § 309 (UK); Companies Act 1980, c. 22, § 46(1) (UK).

166. Brady v. Brady [1988] BCLC 20, 40.

167. W. Mercia Safetywear Ltd. v. Dodd [1988] BCLC 250, 252–53; Colin Gwyer & Assocs. Ltd. v. London Wharf (Limehouse) Ltd. [2003] 2 BCLC 153, 178; Re MDA Inv. Mgmt. Ltd. [2004] 1 BCLC 217.

168. Companies Act 2006, Explanatory Notes ¶ 325.

169. John Parkinson, *Models of the Company and the Employment Relationship*, 41 BRIT. J. INDUS. RELS. 481, 503 (2003). Parkinson was a member of a government-sponsored steering group that did much to influence the drafting of CA 2006.

170. Lorraine E. Talbot, *A Contextual Analysis of the Demise of the Doctrine of Ultra Vires in English Company Law and the Rhetoric and Reality of Enlightened Shareholders*, 30 CO. LAW. 323, 327 (2009); Brenda Hannigan, *Board Failures in the Financial Crisis: Tinkering with Codes and the Need for Wider Corporate Governance Reforms: Part 2*, 33 CO. LAW. 35, 39–40 (2012); Andrew Keay, *Having Regard for Stakeholders in Practising Enlightened Shareholder Value*, 19 OXFORD U. COMMONWEALTH L.J. 118, 124–26 (2019).

171. *See supra* notes 18, 24, and related discussion.

company can be commended at least partly from this perspective because it requires directors who continue to be obliged to prioritize shareholder interests to at least take into account a wide range of specified constituencies.

D. Board Discretion

1. Blair and Stout/U.S. Corporate Law

Blair and Stout, in analogizing directors to trustees, have done so to emphasize the independence of boards from external influence as well as to make the case board members are not agents of the shareholders.[172] Board autonomy indeed is a key team production model theme. As will be discussed in Section III.E, Blair and Stout have argued directors should be insulated from direct control by shareholders or any other corporate constituency so as to ensure boards have the final say over how companies are managed. In addition, Blair and Stout say, the judiciary should give boards a wide berth so as to leave directors substantial scope to run their companies. We address this board discretion theme here.

According to Blair and Stout, with challenges to the exercise of powers by directors, the default setting for the courts should be deference to the board.[173] Judicial forbearance should extend in particular to giving boards substantial latitude to favor particular constituencies at the expense of others. Blair and Stout reason that when the judiciary gives boards substantial room to maneuver this fosters confidence directors will run their firms in the team-oriented way that is congenial to corporate success, thereby fostering firm-specific investments that will reinforce the process.[174]

Blair and Stout have argued that U.S. corporate law aligns with their conception of boards, saying "directors of public corporations enjoy remarkable discretion in deciding how corporate assets should be used and how corporate surpluses should be distributed."[175] They draw on the business judgment rule to make their case. As Blair and Stout point out, by virtue of this doctrine, American courts will not second-guess decisions by directors operating on an informed basis who have acted in good faith and honestly believed actions taken were in the company's best interests.[176] According to Blair and Stout, one byproduct of this sort

172. *See supra* notes 37–40, 145, and accompanying text.
173. Blair & Stout, *supra* note 1, at 284–85.
174. *Id.* at 305.
175. Blair & Stout, *Director Accountability*, *supra* note 11, at 434.
176. Blair & Stout, *supra* note 1, at 300.

of judicial deference to boards is that a duty of care American directors owe to their companies has been "all but eviscerated."[177] Blair and Stout maintain the outcome is congruent with the team production model because it means a claim for a breach of this duty is only ever likely to succeed on the rare occasions where a finding of liability would serve the collective interests of all corporate constituencies, not just the shareholders.[178]

Directors of American companies owe a duty of loyalty as well as a duty of care. Blair and Stout acknowledge the duty of loyalty imposes constraints on "obvious self-dealing or takings of corporate opportunities," meaning it is difficult for directors "to extract any monetary gain from their position with the firm beyond their agreed-upon compensation."[179] Blair and Stout maintain, however, that limitations on this duty's operation mean the courts usually give directors a wide berth. In making this point, Blair and Stout focus in particular on what they call "mixed motive" situations where the exercise of corporate powers simultaneously confers upon directors "*nonmonetary* benefits, such as an increase in their own authority, security of position, and quality of life."[180] Blair and Stout say that with these "mixed motive" scenarios the business judgment rule should offer protection because the directors will often be generating benefits for corporate stakeholders, likely at the expense of shareholders.[181] Giving directors a free pass under such circumstances is congruent with the team production model because directors who are permitted "to sacrifice shareholder wealth in this fashion . . . may serve the interests of the corporate coalition even though it allows directors to serve their own nonmonetary interests."[182]

2. United Kingdom

When the U.K. codified directors' duties by way of CA 2006, no attempt was made to introduce a U.S.-style business judgment rule in statutory form. Correspondingly, it is not possible to point to a legislative provision directing courts to grant substantial leeway to directors of U.K. corporations in mixed motive scenarios or breach of

177. *Id.* at 299.

178. *Id.* at 300.

179. *Id.* at 306. They subsequently described the duty of loyalty in even more circumscribed terms, saying "the duty of loyalty works primarily to prevent directors from indulging in more blatant forms of theft." Blair & Stout, *Director Accountability*, *supra* note 11, at 427.

180. Blair & Stout, *supra* note 1, at 306.

181. *Id.*

182. *Id.* at 307.

duty cases more generally.[183] The absence of a statutory business judgment rule does not mean, however, that the judiciary will freely second-guess business decisions. Instead, there is a venerable tradition of judicial deference to business judgment evident in case law decisions that indicate English courts are reluctant to adjudicate in relation to the manner in which companies are run.

The reticence of the English judiciary to second-guess business decisions was described in 1902 in *Burland v. Earle* by Lord Davey as "an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers."[184] In making this point he said he was reiterating an aversion courts had to "[m]anag[ing] every [p]layhouse and [b]rewhouse in the Kingdom," evident nearly a century earlier.[185] Later in the twentieth century the English judiciary made it clear courts would not "act as a kind of supervisory board over decisions within the powers of management honestly arrived at"[186] and acknowledged directors of troubled companies should not be judged too harshly using hindsight because the directors of such firms understandably tend to "cling to hope."[187]

The manner in which the section 172 duty to promote the success of the company is framed is consistent with the judicial bias in favor of directorial discretion. This provision does not require directors as such to promote the success of the company for the benefit of shareholders. Instead, section 172(1) obliges a director to "act in [a] way *he considers,* in good faith, [is] most likely to promote the success of the company" (emphasis added). The subjective orientation of the duty reflects the common law.[188] As Lord Greene said in reference to the common law duty of directors to act in the best interests of their companies, "[t]hey must exercise their discretion bona fide in what they consider—not what the court considers—is the interests of the company."[189]

Under the common law, due to the subjective nature of the duty to act in the company's best interests, directors had considerable scope to prioritize non-shareholder constituencies. Bowen L.J. captured the point vividly in an 1883 case, saying of the scope directors had to look after employees so long as this was being done with the company in mind, "[t]he law [is] not . . . that there [shall] be no cakes and ale, but

183. KERSHAW, *supra* note 163, at 474.
184. [1902] AC 83, 93.
185. Carlen v. Drury (1812) 35 ER 61, 62; 1 Vesey & Beames 154.
186. Howard Smith v. Ampol Petroleum [1974] AC 821, 832.
187. Re C.U. Fittings Ltd. (1989) 5 BCC 210, 213.
188. Re HLC Env't Projects Ltd. [2014] BCC 337, 362–63.
189. Re Smith & Fawcett Ltd. [1942] Ch 304, 306.

there are to be no cakes and ale except such as are required for the benefit of the company."[190] By virtue of the subjective nature of section 172, reinforced by the explicit invocation to directors to consider a broad range of constituencies other than shareholders, this team production-friendly formulation of directorial responsibility remains apt under CA 2006.[191]

An additional duty CA 2006 sets down reinforces the discretion U.K. directors have to balance interests in the manner team production theory contemplates. By virtue of section 173, directors owe to their companies a "[d]uty to exercise independent judgment."[192] This duty, described at common law as a duty of directors not to "fetter their discretion,"[193] requires that directors refrain from binding themselves to act in a particular way in their capacity as a director without regard to the interests of the company. One implication is that with a director who is on a company's board due to the sway of powerful shareholders, the director will not owe legal duties to those shareholders that will compromise that director's freedom of action.[194]

While the law on directors' duties offers U.K. boards substantial discretion in the manner team production theory would predict, qualifications are in order. The mixed motives scenario Blair and Stout considered appears to fall into this category.[195] Section 172's duty to promote the success of the company is relevant in this context because of the possibility that boardroom decisions might simultaneously affect the fate of the company and the personal circumstances of the directors. Section 171(b), which requires directors to exercise their powers for intended purposes, can also come into play because when directors make decisions, there might be improper personally oriented purposes combined with proper corporate ones. A breach of duty is possible under these provisions in circumstances where directors stand to benefit personally while taking actions they believe will advance the corporate enterprise's interests. Directors, for instance, have been found to be in breach of duty under the common law equivalents to sections 171(b) and

190. Hutton v. W. Cork Ry. (1883) 23 Ch D 654, 673.

191. Luca Cerioni, *The Success of the Company in S. 172(1) of the UK Companies Act 2006: Towards an 'Enlightened Directors' Primacy?,'* 4 ORIGINAL L. REV. 8, 32 (2008); Deryn Fisher, *The Enlightened Shareholder: Leaving Stakeholders in the Dark—Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties?*, 20 INT'L CO. & COM. L. REV. 10, 15 (2009).

192. Companies Act 2006, § 173.

193. Cabra Ests. plc v. Fulham Football Club [1994] 1 BCLC 363, 392 (citing *Thorby v Goldberg* (1964) 112 CLR 597, 605–06 (Austl.)).

194. *See* Hawkes v. Cuddy [2010] BCC 597, 605–07.

195. *See* Blair & Stout, *supra* note 1, at 306.

172 when issuing shares so as forestall an unwelcome change of control likely imperiling their continued service with the company.[196]

An additional qualification is that, even making due allowance for the judiciary's reluctance to second-guess the exercise of managerial discretion by boards, directors will not necessarily be shielded in the event of manifest incompetence or serious inattentiveness. Risks on this count have increased since the closing decades of the twentieth century, a pattern confirmed by a significant increase in the number of reported cases involving directors where the cause of action presumed a failure to exercise meaningful business judgment.[197] This trend is partly explained by substantial growth in the number of companies that have been liquidated, the circumstance where the competence and diligence of U.K. directors is most likely to be challenged in court.[198] The fact that reporting of case law judgments has become more assiduous over time has also played a role.[199] In addition, though, the law relevant to directorial competence and attentiveness has become more stringent in various ways that have increased risks for directors.

One way in which the law governing U.K. directors has become stricter since the late twentieth century is via a reconfiguration of the duty of care, skill, and diligence directors owe to their company. With this duty, which initially arose under the common law, section 174 of CA 2006 puts in place a dual standard, obliging directors to exercise the care and skill that could be reasonably expected of a person carrying out their role as well as to exercise their directorial responsibilities in a reasonably diligent manner commensurate with the particular skills they possess.[200] This dual standard approach was first introduced through case law in the early 1990s[201] and marked a toughening of a duty thought to treat directors as little more than well-meaning amateurs.[202]

The tightening of common law care, skill and diligence standards did not occur in a vacuum. U.K. insolvency law underwent

196. Hogg v. Cramphorn [1967] Ch 254, 255, 266–68; Howard Smith v. Ampol Petroleum [1974] AC 821, 822.

197. Andrew Keay, Joan Loughrey, Terry McNulty, Francis Okanubuan & Abigail Stewart, *Business Judgment and Director Accountability: A Study of Case Law Over Time*, 20 J. CORP. L. STUD. 359, 385–86 (2020).

198. *Id.* at 375.

199. *Id.* at 373, 375, 386 (acknowledging the possibility but not exploring it in depth).

200. Companies Act 2006, § 174(2).

201. Norman v. Theodore Goddard [1992] BCC 14; Re D'Jan of London Ltd. (1994) 1 BCLC 561, 563.

202. Vanessa Finch, *Company Directors: Who Cares About Skill and Care?*, 55 MOD. L. REV. 179, 200–04 (1992); PAUL L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 642–43 (6th ed. 1997).

far-reaching reform in the mid-1980s,[203] with one result being enactment of new statutory measures providing for the sanctioning of directors of companies that entered insolvency proceedings. Directors of such firms who had continued to operate the business when insolvency was the obvious fate, perhaps because they had failed to remain abreast of their company's worsening financial position, could henceforth be ordered under section 214 of the Insolvency Act 1986 to compensate unpaid creditors on grounds of "wrongful trading."[204] Also, by virtue of the Company Directors Disqualification Act 1986, a court could disqualify directors of insolvent companies from serving as a director in the future on grounds of "unfitness," with evidence of "incompetence or negligence [to] a very marked degree" being treated by the judiciary as a sufficient basis for such an order.[205]

Due to enforcement patterns, the extent to which the toughening of legal standards compromised directorial discretion in publicly traded companies—again the companies Blair and Stout maintained team production theory was primarily relevant for[206]—is open to question. Occasionally those serving as directors of insolvent public companies are disqualified from serving as directors for a specified period of time.[207] Lawsuits involving alleged failures by directors to exercise meaningful business judgment are largely restricted, however, to private companies.[208] This follows on from the fact that litigation where damages are sought against directors of publicly traded U.K. companies is extremely rare.[209]

Even if the increased stringency of the laws applicable to directors arguably failing to exercise business judgment with sufficient rigor have compromised director discretion, the trend has not necessarily moved U.K. company law away from what the team production model would predict. With the privileging of shareholders in companies being antithetical to team production theory, legal trends that compromise director discretion in a shareholder-friendly direction

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203. BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES 3 (1998).

204. Insolvency Act 1986, c. 45, § 214 (UK), originally Insolvency Act 1985, c. 65, § 15 (UK); DAVIES, *supra* note 202, at 153 n.37; Re Produce Mktg. Consortium (No. 2) Ltd. [1989] BCLC 520, 521. Due to subsequent statutory amendments, wrongful trading actions can now also be brought against directors of companies in administration. Insolvency Act 1986, § 246ZB.

205. Company Directors Disqualification Act 1986, c. 46, §§ 6–9 (UK); Re Sevenoaks Stationers (Retail) Ltd. [1991] Ch 164, 184.

206. *Supra* notes 100–101 and related discussion.

207. *See* Re Barings plc (No. 5) (2000) 1 BCLC 523; Re Queens Moat Houses plc (No. 2) (2005) 1 BCLC 136, 162.

208. Keay et al., *supra* note 197, at 360, 371, 386.

209. Armour et al., *supra* note 14, at 690.

are highly problematic from a team production perspective. This terrain is canvassed in the next section of the Article. The pattern is different with respect to the tougher stance the U.K. began to take with respect to directorial competence and attentiveness as the twentieth century drew to a close. Sanctioning directors for failings on these counts has been a creditor-oriented affair.

The creditor-protection orientation is most obvious with actions under the "wrongful trading" remedy. This is creditor-focused recovery litigation whereby a claim is brought against directors of an insolvent company in bankruptcy proceedings on the basis they increased creditor losses by allowing their company to trade beyond the point where they had "reasonable grounds to believe" the company could avoid insolvent liquidation.[210] Conduct that is harmful to corporate creditors, such as opting to continue trading on the verge of insolvency while failing to comply with accounting and record keeping obligations, are core concerns as well with the director disqualification regime introduced in the mid-1980s.[211] This is of practical significance because of the volume of disqualification orders. Between April 2019 and April 2020, for example, there were 1,245 successful disqualifications against directors of U.K. corporations based on the rationale their conduct as directors made them unfit to be involved in the management of companies.[212]

Creditor protection is by no means the only policy objective underpinning the disqualification regime. Given the breadth of the "unfitness" disqualification criteria and given the large number of individuals whose conduct is subject to review via disqualification proceedings, there is the potential to project standards of expected behavior across many aspects of directorial conduct. For instance, some directors have been disqualified for employing individuals who did not have the legal right to work in the U.K.[213] From a team production perspective, however, the key point is that direct protection of shareholder interests was not a priority when the U.K. cracked down in relation to directorial competence and attentiveness.[214] Other regulatory strategies have been deployed instead to bolster shareholders. We consider next the extent to which shareholder rights

210. Insolvency Act 1986, §§ 214(4), 246ZB(4).

211. Re Barings plc (No. 5) [1999] 1 BCLC 433.

212. *Companies House Management Information Tables 2019-20*, GOV.UK (Aug. 27, 2020), https://www.gov.uk/government/statistical-data-sets/companies-house-management-information-tables-2019-20 [https://perma.cc/2NLM-RCUU] (access via link on webpage).

213. Sec'y of State for Bus. Innovation & Skills v. Rahman [2017] EWHC 2468 (Ch).

214. *See* INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE, 1982, Cmnd. 8558, at 390–97 (UK) [hereinafter CORK REPORT].

under U.K. company law run counter to what team production theory would predict.

E. Shareholder Rights

1. Blair and Stout/U.S. Corporate Law

Under team production theory, the bestowal of wide discretion on boards should not be restricted to generous ex post judicial evaluations of directorial judgment calls. Instead, according to Blair and Stout, the board of directors should be "largely insulated from the direct control of any of the various economic interests that constitute the corporation."[215] Boards in a team production world should have an unencumbered final say over how their companies are run, meaning they need to be able to operate independently of the shareholders and any other corporate constituency.[216] Correspondingly, control rights in a corporation should not be vested in the hands of shareholders or any other stakeholder group. Boards instead must be "the ultimate decisionmaking body within the firm" so as to ensure that a particular corporate constituency cannot "use its power over the board to seek rents opportunistically from other members of the productive team, thus discouraging team-specific investment."[217]

Blair and Stout contend that U.S. corporate law aligns with team production theory on this count. Directors, they have said, "are not subject to direct control or supervision by *anyone,* including the firm's shareholders."[218] Instead, as Blair has observed, "corporate law gives boards of directors total authority over corporations."[219]

There are shareholder-friendly doctrinal features of U.S. corporate law that appear to be at odds with Blair and Stout's characterization of public company governance arrangements. For instance, shareholders have substantial scope to select directors and exclusive standing to launch derivative litigation.[220] For Blair and Stout, however, these are mere legal niceties of limited practical significance.[221] Substantively, then, corporate law conforms with team production theory.

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215. Blair & Stout, *supra* note 1, at 320.
216. *Id.* at 279; *see also supra* note 24 and accompanying text.
217. Blair & Stout, *supra* note 1, at 291–92; *see also supra* note 36–37 and related discussion.
218. Blair & Stout, *supra* note 1, at 290.
219. Blair, *Corporate Law as a Solution, supra* note 10, at 203.
220. *See supra* notes 42, 47 and accompanying text.
221. *See supra* notes 43–44, 48–49 and related discussion.

2. United Kingdom

With respect to shareholder rights, Britain is sufficiently widely known as a "shareholder-friendly" jurisdiction for Wikipedia to describe the U.K. as "pro-shareholder . . . relative to its European and American counterparts."[222] To the extent Britain is a shareholder paradise the explanatory power of a theory, such as team production, that rejects shareholder primacy seemingly must be fundamentally compromised. In fact, shareholder-friendly features of U.K. company law do not rule out team production model as a source of insights. Shareholder rights need to be properly contextualized to gauge the extent to which U.K. company law departs from what team production theory would predict. When the focus is on the "law in action" rather than the "law in books," the gap is not as substantial as it would seem.

A statutory right shareholders have under section 168 of CA 2006 to remove directors by means of a simple majority vote in a general meeting of shareholders illustrates the importance of proper contextualization. Section 168 has been described as the "[m]ost notable among the shareholders' powers of strategic intervention under UK law."[223] When the director removal power was introduced in 1948,[224] reputedly this "shifted ultimate control of the direction of the company from the board (and, often, the management) to the general meeting [of the shareholders], which came to be viewed as the ultimate controller of the company's assets because of its power to 'hire and fire' the directors."[225]

Section 168 no doubt is, in theoretical terms, a powerful shareholder tool.[226] The mere existence of section 168 cannot fundamentally discredit team production theory, however, in the British context. After all, the ostensibly team production-friendly Delaware General Corporation Law provides shareholders with a similar director removal right.[227]

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222. *United Kingdom Company Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_Kingdom_company_law (last visited Sept. 27, 2021) [https://perma.cc/7SEH-C8D6] (internal quotation marks omitted); *see also* Marc T. Moore, *United Kingdom: The Scope and Dynamics of Corporate Governance Regulation*, *in* COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 913, 925 (Andreas M. Fleckner & Klaus J. Hopt eds., 2013).

223. Moore, *supra* note 222, at 929.

224. Companies Act 1948, c. 38, § 184 (UK).

225. Andrew Johnston, Blanche Segrestin & Armand Hatchuel, *From Balanced Enterprise to Hostile Takeover: How the Law Forgot About Management*, 39 LEGAL STUD. 75, 91 (2019).

226. DAVIES & WORTHINGTON, *supra* note 115, at 360, 379.

227. *Supra* note 45 and accompanying text.

Despite broadly equivalent director removal rights, shareholders minded to proceed are theoretically better positioned in the U.K. than Delaware. Removal will always be contingent on getting a resolution on point before the shareholders, and here U.K. shareholders have the advantage. In addition to empowering boards to call shareholder meetings at any time,[228] CA 2006 provides members of a company owning at least five percent of the shares with the right to request the calling of a shareholder meeting.[229]

Shareholders lack equivalent rights to call meetings under Delaware law. Section 211(d) of the Delaware General Corporation Law states that the board of directors or persons authorized by the articles of incorporation or the by-laws can call a meeting. The right of a company's shareholders to call a meeting is therefore dependent on the terms of the corporate constitution.[230] The advantage that shareholders minded to remove directors have in the U.K. seems to be more important, however, in theory than practice in the public company space team production theory focuses on. While Delaware companies traditionally rarely entitled shareholders owning a designated percentage of shares to call a shareholder meeting, such an arrangement is now fairly common, with the ownership threshold usually being ten or fifteen percent of the shares.[231] Also, shareholder resolutions proposing the removal of directors are rare in publicly traded U.K. companies.[232]

The discrepancy between shareholder-oriented rules and team production-friendly reality is evident in other areas of U.K. company law. One is appointment of directors. As is the case with the managerial powers of boards, CA 2006 says little about how directors are elected.[233] The matter instead is left to corporate articles of association. Annual reelection of directors by the shareholders is nearly ubiquitous in larger

228. Companies Act 2006, § 302.

229. Companies Act 2006, § 303.

230. Blair & Stout, *supra* note 1, at 311 n.168.

231. *See* Sofie Cools, *Shareholder Proposals Shaking Up Shareholder Say: A Critical Comparison of the United States and Europe*, in COMPARATIVE CORPORATE GOVERNANCE 302, 311–12 (Afra Afsharipour & Martin Gelter, eds., 2020).

232. *See* Gomstian, *supra* note 132, at 685 (reporting that with the tiny number of shareholder proposals brought forward in FTSE 100 companies between 2013 and 2017—again thirteen—eight were "director related"). *Cf.* Buchanan et al., *supra* note 132, at 770, 773 (also indicating that a majority of shareholder resolutions are related to director removal but reporting a higher number of resolutions).

233. *See supra* note 118 and related discussion; DAVIES & WORTHINGTON, *supra* note 115, at 367.

publicly traded U.K. companies.[234] That might sound shareholder friendly, but in practice directorial elections are board-driven exercises.

Blair and Stout square director election of shareholders under Delaware law with team production theory on the basis "[*b*]*oards elect themselves*."[235] The election of directors is not widely different in U.K. public companies: "[T]he nomination of a person to serve as a board member rarely comes from the shareholders themselves. The board nominates a person and that nomination is invariably approved by the shareholders in general meeting."[236] Institutional shareholders in the U.K. will refrain from voting against board-nominated director candidates "unless all is lost. It is a ballistic missile investors would rather not use."[237] Hence, consistent with Blair and Stout's verdict for Delaware, public company shareholders treat "director election as a business matter that is better left to the management."[238]

The same discrepancy between "law in books" and "law in action" is evident with rights that public company shareholders exercise on an individual rather than a collective basis, in the form of litigation. Section 994 of CA 2006, which has been described as "[t]he most important shareholder remedy in practice,"[239] illustrates the point. This provision empowers a court to grant relief to a petitioning shareholder where a company's affairs have been conducted in a manner that is unfairly prejudicial to that shareholder or the interests of shareholders generally. Only members (i.e., shareholders) can apply.[240] This shareholder-friendly feature of U.K. company law is more important, however, theoretically than practically, at least with publicly traded companies.

Minority shareholders in closely held companies have frequently relied on breaches of expectations derived from informal undertakings and agreements to support a claim for unfair prejudice under section

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234. Bobby V. Reddy, *Thinking Outside the Box – Eliminating the Perniciousness of Box-Ticking in the New Corporate Governance Code*, 82 MOD. L. REV. 692, 715–16 (2019). The Companies (Model Articles) Regulations 2008, SI 2008/3229, art. 21 (UK) for plcs provide for three-year director terms. Pretty much full compliance with what is now Provision 18 of FINANCIAL REPORTING COUNCIL, UK CORPORATE GOVERNANCE CODE (2018) does much to explain this pattern. *See* Gomstian, *supra* note 132, at 696.

235. *Supra* note 44 and related discussion.

236. KERSHAW, *supra* note 163, at 246.

237. Alison Smith, *Shareholders Show Restraint in Applying Voting Powers*, FIN. TIMES, June 27, 2014, at 22 (quoting Sarah Wilson, chief executive of Manifest, a shareholder advisory group).

238. Gomstian, *supra* note 132, at 696.

239. HANNIGAN, *supra* note 118, at 503.

240. Companies Act 2006, §§ 994(1), 994(2) (noting the only nonmembers who can apply are people to whom shares in a company have been transferred or transmitted by operation of law).

994.[241] In contrast, there does not appear to have ever been a reported case involving a publicly traded company where an unfair prejudice petition has been successful.[242] This is partly because case law precedent leaves minority shareholders in publicly traded companies with very little scope to launch petitions on the basis informal undertakings have been breached.[243] Also, the remedy most commonly sought in section 994 proceedings—a buyout of the petitioner's shares at fair value[244]—will have little appeal for public company shareholders because the stock market should provide a convenient non-litigious exit option.[245]

Litigation realities similarly imply that the scope shareholders have to bring derivative suits under U.K. company law does not draw Britain as far away from the team production model as might be anticipated. Consistent with the position in the United States, when the U.K. law on derivative litigation was codified by CA 2006, the right to bring such proceedings was allocated exclusively to shareholders.[246] The intention with codification was to make the conduct of derivative actions simpler, more flexible, and more efficient for individual shareholders seeking to launch such proceedings, subject to the filter of having to convince a judge under criteria specified by statute that it would be desirable for the particular litigation to proceed.[247]

The overhaul of derivative action rules seemingly ran contrary to what team production theory would predict because the change increased scope for shareholder second-guessing of board decisions not to litigate. In practice, however, in public companies any such shift has been incremental at best. There have only been three reported cases since the enactment of CA 2006 where a minority shareholder in a

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241. Brian R. Cheffins, *The Undermining of UK Corporate Governance (?)*, 33 OXFORD J. LEGAL STUD. 503, 528 (2013).

242. *Id.* at 528–29.

243. *See* VICTOR JOFFE, DAVID DRAKE, GILES RICHARDSON, DANIEL LIGHTMAN & TIMOTHY COLLINGWOOD, MINORITY SHAREHOLDERS: LAW, PRACTICE, AND PROTECTION 352–55 (6th ed. 2018).

244. *Id.* at 432, 437.

245. HANNIGAN, *supra* note 118, at 504.

246. *See supra* note 47 and related discussion; Companies Act 2006, § 260(1); Daniel Attenborough, *The Neoliberal (Il)legitimacy of the Duty of Loyalty*, 65 N. IR. LEGAL Q. 405, 426–27 (2014). The law on this point was the same at common law as noted by JOFFE ET AL., *supra* note 243, at 42.

247. Companies Act 2006 §§ 260–63; DAVIES & WORTHINGTON, *supra* note 115, at 598; Andrew Keay & Joan Loughery, *An Assessment of the Present State of Statutory Derivative Proceedings*, *in* DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS 187, 189 (Joan Loughery ed., 2013).

publicly traded company has sought leave to bring a derivative suit.[248] The paucity of derivative suits bears out predictions that statutory reform would not open the door to litigation against public company directors, given the practicalities of derivative litigation.[249] A public company shareholder will have little incentive to bring such proceedings because the litigation likely will be time consuming and expensive for that shareholder and because, with recovery being the right of the company, a successful litigant will end up no better off than fellow "free riding" shareholders.[250] Statutory changes to derivative litigation correspondingly have done little, if anything, to move U.K. company law away from team production precepts in the public company context.

CONCLUSION

At first glance, team production theory and U.K. company law are ships passing in the night. While prioritization of shareholder interests is antithetical to team production theory, U.K. companies legislation reputedly betrays Britain's "predominant faith to shareholder primacy."[251] In fact, as this Article indicates, examining U.K. company law and the governance arrangements of British public companies through the prism of team production theory illustrates that the board centrality that is a hallmark of team production theory features prominently in Britain. The fact that structurally "board primacy" is a part of British as well as American corporate life has not been entirely ignored.[252] Nevertheless, deploying team production theory to assess key features of U.K. corporate law and governance brings this important point fully to the fore. At the same time, a U.K. case study draws attention to an underexplored facet of team production theory that likely merits further analysis even in an American context, namely the role private ordering can play in moving governance arrangements in a team production-friendly direction.

Sticking with the American angle for the moment, the team production driven account provided here should act as a beneficial corrective for those in the United States seeking to draw lessons from

248. John Armour, *Derivative Actions: A Framework for Decisions*, 135 LAW Q. REV. 412, 427 (2019) (listing two such cases brought between 2007 and 2017); Kallakis v. AIB Group plc [2020] EWHC 460 (Comm).

249. Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1408 (2006).

250. *Id.* at 1405–07.

251. JANET DINE & MARIOS KOUTSIAS, THE NATURE OF CORPORATE GOVERNANCE: THE SIGNIFICANCE OF NATIONAL CULTURAL IDENTITY 176 (2013).

252. MOORE, *supra* note 74, at 29.

the U.K. Advocates of stronger rights for stockholders in American public companies have cast envious glances across the Atlantic.[253] This is hardly surprising when, according to a well-known American corporate law academic, "[s]hareholders of a U.K. public company . . . possess extraordinary power to shape the rules of corporate governance."[254] The team production-oriented case study offered here suggests that in U.K. public companies the rights of shareholders are more important in theory than in practice. A shareholder-focused " 'black/white' depiction of the U.K. and U.S. corporate law regimes" correspondingly misses an important part of corporate reality.[255]

A similar team production-related invocation to pause before offering broad corporate-related generalizations is appropriate on the British side. U.K. academics have made various bold claims about the shareholder centrality of British corporate law. For instance, it has been said "[s]hareholders dominate UK company law."[256] This reputedly constitutes a victory of neoliberal thought in the corporate and legal realms that reflects "deeply rooted cultural principles of individualism and laissez-faire capitalism."[257] And adverse consequences have supposedly followed, as "the entrenched imbalance in company law in favour of shareholders," has fostered "many faces of flawed capitalism which has now put into doubt the social legitimacy of the modern corporation."[258] Analyzing public company arrangements through a team production prism indicates such rhetorical flourishes should not be taken at face value. Marc Moore has said that in practice U.K. shareholders are relegated "to the status of being *subject to* the corporation and the governing mandate of its board of directors."[259] The team production-driven case study this Article has presented suggests there is much to be said for this characterization of public company governance, even if the U.K. "law in books" prioritizes shareholders to a greater degree than American corporate law.

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

254. BRUNER, *supra* note 47, at 29.

255. Moore, *supra* note 53, at 373.

256. Andrea Bowdren, *Contextualising Short-Termism: Does the Corporate Legal Landscape Facilitate Managerial Myopia?*, 5 UNIV. COLL. LONDON J.L. & JURIS. 285, 287 (2016).

257. Marios Koutsias, *Shareholder Supremacy in a Nexus of Contracts: A Nexus of Problems*, 38 BUS. L. REV. 136, 139 (2017)*; see also* Talbot, *supra* note 157, at 528; Attenborough, *supra* note 246, at 428.

258. Chiu, *supra* note 78, at 174.

259. Marc T. Moore & Antoine Rebérioux, *Revitalizing the Institutional Roots of Anglo-American Corporate Governance*, 40 ECON. & SOC'Y 84, 100 (2011).

Margaret Blair, with her work on team production theory, has made a seminal contribution to debates on the American corporation. Thus far not much has been done to deploy the team production model internationally.[260] The U.K., given its shareholder-friendly reputation, poses a tough test for team production thinking. The case study offered here suggests that the model in fact may travel well, at least in relation to the publicly traded firms it is directed toward. Similarly, the fact that private ordering does much to explain why the U.K. is more team production-oriented than would be anticipated from "law in books" draws attention to an additional potential growth area for team production theory—exploration of the extent to which parties can and do adopt features of the model voluntarily. Margaret Blair's already substantial academic legacy thus may yet be burnished substantially in both a cross-border and contractarian manner.

260. *See supra* note 12 and related discussion.