Corporate Law as Law

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David Kershaw, **The Foundations of Anglo-American Corporate Fiduciary Law** (2018).

Corporate law has a short historical memory. One result is that conceptual battles that go nowhere get refought, as a look at much of the literature generated in the wake of *Citizens United* will confirm. There are a few historical classics in the academic literature though. The lead publication in this short stack is Harold Marsh's *Are Directors Trustees? Conflicts of Interest and Corporate Morality*, published in *The Business Lawyer* in 1966. Marsh told a stark story about the decline of the duty of loyalty, which he said went from flat prohibition of self-dealing transactions in 1880 to a general permission subject to judicial fairness review in 1960. Norwood Beveridge challenged Marsh's description of the early period in a couple of papers published in the 1990s, but the Marsh account has held its place.

Now comes LSE's (London School of Economics) David Kershaw with a masterful comparative history of corporate fiduciary law in the United States and the United Kingdom, *The Foundations of Anglo-American Corporate Fiduciary Law*. (The book's introduction is posted here.) Kershaw seconds Beveridge and dispatches Marsh in a splendid account. The comparison holds the key. Yes, the UK had a prohibition that could be relaxed with a shareholder vote, a prohibition that found its way into the law of a number of US states. But what worked in the UK proved dysfunctional in the US. The conceptual framework of UK corporation law came from partnership, while the US framework came from legislated incorporations. Where the UK had default rules, the US had mandates, with the result that the self-dealing prohibition really was a prohibition here where it was not in the UK. Meanwhile, many states never adopted it and, analogizing to trust law, let officers and directors contract with the company subject to approval by a disinterested director majority.

What in Marsh comes forth as a story of indefensible accommodation of the management interest, in Kershaw is a story of legal doctrine working itself out within its own four corners. Indeed, Kershaw is affirmatively, brazenly positivist and anti-realist. I cannot join him in that. But that doesn't stop me from thoroughly enjoying his treatment and according him much the better of the argument on this particular point. It turns out that what I thought was a contemporary turn to process review is in fact a reversion to a basic pattern.

Marsh and self-dealing transactions aren't the only thing on offer here—the law of self-dealing transactions is one of four modules. The others cover the business judgment rule, the duty of care, and the law of corporate opportunities. For each, Kershaw traces back to a start point in UK common law and then brings both systems forward in time. For example, the duty of care comes from bailments. As the doctrinal logic unfolds differently across the two national economies, a compelling story gets told. I particularly benefited from the account of the business judgment rule, as to which my understanding was embarrassingly imperfect. I also greatly benefited from what was for me a needed introduction to UK company law.

Kershaw cares deeply about corporate law as law and manages to communicate his enthusiasm to his reader. Such passion is surprisingly rare in the field, making this book all the more welcome.

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