Business and Law


By Gregory C. Shaffer

This chapter puts business center stage as a means to understand law. Law consists of systems of rules, standards and procedures that social institutions create and apply. These social institutions may be public or private. The rules, standards and procedures that they create provide a framework in which business strategizes and operates. Business, in turn, uses law as a resource to advance and defend business aims.2 This chapter assesses the reciprocal interaction of business and law. Law helps constitute business by recognizing business organizational forms, and business helps constitute law.

Business interests may be united or divided vis-à-vis government and the law government creates. Regulation provides some businesses with competitive advantages over others, dividing business and creating incentives for different public-private alliances (Vogel 1995). Business is divided on account of economic competition, an pubic actors are divided on account of political and ideological competition. Different factions within business thus ally with different factions within government. Business interests, however, may also converge to oppose government measures, as when government sides with consumer or environmental groups at the national level, and business believes it will be disadvantaged vis-a-vis foreign competition. With the rise of

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2 By business, we refer to all institutional forms, including peak business trade associations, sectoral lobbying groups, large corporations and small proprietorships. Although we have made clear that the interests of business as regards law are rarely, if ever, monolithic, we will at times focus on business as a whole in this chapter to simplify analysis. Corporate organization and state regulation have both grown dramatically in number and complexity over the last century, with each responding to the other. On the rise and global diffusion of the corporate form, see Braithwaite & Drahos 2000: 144. On the growing pervasiveness of law during the latter half of the twentieth century, as reflected in more regulation, litigation, number of lawyers and other legal actors, and greater diffusion of information and public awareness about law, see Galanter 1992: 1-2; Friedman 2002.
transnational institutions, businesses can also look to public actors at different levels of social organization to promote their interests.

Much legal scholarship addresses issues of compliance with law. This chapter reverses the telescope, addressing what shapes law, and, more particularly, what are the mechanisms through which business shapes law. To understand the relationship of business and law, we must look at the following three sets of institutional interactions: (i) horizontal public institutional interaction among legislative, administrative and judicial processes, in each of which business typically plays a critical role; (ii) vertical public institutional interaction involving national and transnational institutional processes, with transnational processes becoming more prominent in our economically globalized age; and (iii) the interaction among these public institutional processes and parallel private rule-making, administrative and dispute settlement mechanisms that business creates, again at different levels of social organization. It is these dynamic, reciprocal interactions that constitute the legal field in which business operates.

This chapter addresses the advantages that business holds in public and private law-making, and assesses the reciprocal interaction among these public and private legal systems. First, business has advantages before the different public institutions that make and apply law, be they legislatures, administrative bodies or courts. Second, business creates its own private legal systems, including what is traditionally referred to as lex mercatoria (or private merchant law) and private institutions to enforce it (such as arbitral bodies). These two sources of law, publicly-made and privately-made law, interact dynamically. Privately-made law is adopted in response to the public legal system, to preempt public law’s creation as unnecessary, to internalize public law through creating new organizational policies and procedures, or to exit from the public legal system through the development of alternative dispute resolution bodies. Publicly-made law is made in response to developments in the private sphere, sometimes addressing privately-made law’s purported deficiencies, and sometimes codifying or otherwise taking into account private business law, business custom, and business institutional developments (such as alternative dispute resolution) into national statutes, regulations

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3 By private legal systems and private law, we mean law made by and through private bodies, as opposed to traditional contract, property and family law. Cf. Michaels & Jansen 2006 (providing conceptual clarifications of private law in light of processes of globalization and privatization).

and institutional practices. The reciprocal interaction of public and private legal systems at different levels of social organization constitutes the legal field in which economic activity takes place. In short, to assess the relation of business to law, we need to examine how law is created and applied through public institutions, how it is created and applied through private entities, and how these systems interact, including between the national and the transnational levels.

Part I addresses business’ role in shaping law through public institutions. Part II addresses business’ creation of private legal rules and institutions. Part III examines how public and private legal systems interact, and, in particular, how private business-made law and business practice affect publicly-made law over time. Although Parts I-III focus on the relationship of law and business in the United States, the chapter’s aim is to provide a general framework for analysis which builds from existing empirical and theoretical work in discrete areas. Part IV addresses the interaction of business and law in comparative and global context. It shows how, on the one hand, much of international business law has developed in response to business demands and practices, in the process affecting national law. On the other hand, it explains why national law and legal practice nonetheless retain significant variation in reflection of local interests, institutional structures, and business and legal cultures.

**Part I. Business and Public Legal Systems**

Business and law interact in mutually supportive and mutually constraining ways. On the one hand, law can significantly constrain business choice so that business attempts to constrain law’s reach. On the other hand, law not only helps to stabilize expectations and thus create greater business certainty; it provides legitimacy for business and business operations, shielding them from fundamental challenge, and it can provide competitive advantages for some businesses over others. Business thus invests in law, both to shape law to support business interests and to legitimize business conduct, as well as to thwart law’s potential constraints.

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4 This is true not only of property and contract law which facilitate and legitimize business economic activity (Hurst 1970: 61), but of regulatory law more broadly in a capitalist economy.
Business has a complex relationship with law, which, at a minimum, must appear autonomous from business or law lacks legitimacy. Yet as Yves Dezalay and Bryant Garth write, “the autonomy of the law, which is necessary to its legitimacy, is not inconsistent with serving the needs of political and economic power” (Dezalay & Garth 1996: 98). There often exists an “unspoken deference of administrations, legislatures, and the courts to the needs of business” (Lindblom 1977: 179; Galanter 2006: 1399). Moreover, the processes of legitimation go both ways. Business also legitimates law through passive compliance and active support. This phenomenon is particularly salient at the transnational level where public institutions are weak and may seek allies with business, as exemplified by the United Nations’ Global Compact and its attempt to align business conduct with “universally accepted principles in the areas of human rights, labour, environment, and anti-corruption.”

Business and Legislation. Legislators may respond to business demands for many reasons, ranging from self-interest in campaign support, a desire not to harm business in light of business’ importance for the economy, and persuasion based on information that business provides. The extent to which they do so depends on “a larger number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources” (Schlozman & Tierney 1986: 317; Farber & Frickey 1991). Organized business enjoys significant advantages in the legislative process over other constituencies because of businesses’ monetary and organizational resources, arguably facilitated in the United States by a pro-business ideological orientation (Lindblom 1977; Farnsworth & Holden 2006: 475). They can fund political campaigns, hire well-connected lobbyists, create think tanks to circulate business-friendly ideas, access the media, and promote the exchange of their personnel into government positions. Because of these resources, organized business tends to have preferential access to the political process so that legislators take account of businesses’ views (Vogel 1983: 29; Farnsworth & Holden 2006: 475-80).

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5 See [http://www.unglobalcompact.org/AboutTheGC/index.html](http://www.unglobalcompact.org/AboutTheGC/index.html). I thank Fabrizio Cafaggi for our discussion on this point.
Business interests have long held a preferential position in law-making for structural reasons. Their importance for investment and employment in capitalist economies provides them with a privileged position in dealings with government, since critical market functions such as jobs, prices, production, growth, standard of living and economic security depend on business activity (Lindblom 1977: 172). Government thus has incentives to facilitate business performance by providing business with benefits, whether tax breaks, subsidies or business-favorable regulation (Lindblom 1977: 174). The globalization of production arguably “enhances the structural power of corporate capital” because business can threaten to invest elsewhere if national regulation is unfavorable (Held et al 1999: 270; Rodrik 1997).

Political representatives respond to popular concerns regarding business power, the intensity of which varies over time. In the United States, for example, the regulatory state grew significantly during the New Deal in the 1930s and in response to the public interest movement of the 1970s. Yet when faced with potentially constraining regulation, business lobbying can produce compromises that safeguard business interests, such as the inclusion of exceptions, loopholes and open-ended language subject to subsequent interpretation. In some cases, “public interest” statutes may serve as a facade, providing a symbol of government concern while masking government inaction (Edelman 1964 & 1971).

Business and Administration. Statutes often contain language that is sufficiently ambiguous so that their application depends on who mobilizes law before administrative agencies to advance their ends. There is a large literature, including that of public choice in law-and-economics, debating whether or not agencies are “captured” or “co-opted” by special interests, and, in particular, business interests (cf. Bernstein 1955; Noll 1971; Posner 1974). While it is an overstatement to maintain that agencies are simply captured by business (Wilson 1980), most agree that agencies are subject to significant business

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6 As Willard Hurst (1970: 59) wrote concerning developments of law affecting business in the United States, “[b]efore the late nineteenth century questions of legitimacy relating to the business corporation concerned in the main the legitimacy of the ends and means of government’s power as it affected corporations, rather than the legitimacy of corporations’ use of the facilities the law provided for them.” While progressive regulation of corporations grew in the twentieth century, corporate law limits withdrew. From the 1890s to 1930s, “[t]he function of corporation law [in the United States became] to enable businessmen to act, not to police their action” (Hurst 1970: 70).
pressure and influence, and that business often occupies a privileged position. Explanations for business’ influence range from sociological ones, with regulators learning to think like the regulated through constant interaction with them, to interest-based ones, where it is in regulators’ interest to accommodate business so as to avoid adverse consequences, such as contestation before legislative committees and the courts. Well-organized business groups can sometimes shape the application of regulation that is nominally to protect a public interest (such as clean air) to suit producer interests (such as the producers of “dirty coal”) (Ackermann & Hassler 1983). Business groups can also press legislatures to thwart regulation that business does not like, including through threats to limit agency funding for the relevant programs (Skrzyczyki 2003: 106-7; Quirk 1981: 176). Administrative law ultimately can be viewed as a negotiated legal order in which public officials and private actors must coordinate if public goals are to be achieved (Freeman 2000).

Representatives of organized interests are in constant contact with agency officials and the two sides have opportunities to exercise influence over each other. Regulatory officials deploy “soft” persuasive mechanisms and threaten “hard” enforcement to affect business conduct (Hawkins 1983; Kagan et al. 2003). Reciprocally, even lower-level officials who see their specialized position as technocratic can have their views shaped over time through regular interaction with business representatives, and the information that business provides (Coglianese et al 2004).

A “revolving door” political culture also furthers business access to administrative law-making and application. In the United States, business is often able to obtain the appointment of supportive political appointees to lead government agencies. More generally, lawyers and lobbyists in Washington D.C. enhance their resumes by splashing a few years in public life to subsequently—and lucratively—serve private commercial clients. As former United States Trade Representative Robert Strauss observes, lawyers often go to work for the U.S. government because “they know that [government work] enables them to move on out in a few years and become associated with a lobbying or

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law firm [where] their services are in tremendous demand." Whether or not regulators accommodate business to prop their own career prospects, a “revolving door” political culture forges better understanding among public and private representatives so that each side better appreciates the perspectives and needs of the other.

Business and the Courts. Law is also driven from below by litigants who initiate and defend cases resulting in law’s application, interpretation and elaboration over time (Black 1973; Scheingold 1974). Even where a statute or administrative regulation does not favor business, business can attempt to mobilize litigation and dispute settlement resources to build favorable judicial precedent. Just as in political and administrative processes, well-resourced actors have advantages. To start, organized businesses tend to have greater financial resources to attract the best lawyers to gather evidence and put forward legal arguments, and they benefit from economies of scale because of their experience with litigation. Corporate in-house counsel can hire leading external law firms employing scores of legal associates to scour statutes and jurisprudence and develop sophisticated factual and legal arguments. Legal counsel can also deploy procedural mechanisms to draw out litigation and impose costs on less-resourced parties to induce favorable settlements. Moreover, business can attempt to use soft law processes, such as through the American Law Institute which compiles “restatements” of the existing state of law, where business has been less successful in hard law processes, such as before legislatures (Rubin 1993; Schwartz & Scott 1995; Elson 1998). In this way, business can aim to affect subsequent hard law interpretation by courts. These advantages, however, can be countered, in part, where mechanisms exist — such as attorney fee awards and

9. Although this is clearly true in common law systems, it is also arguably the case in civil law systems where judges and legal scholars refer to judicial decisions as regards the law’s meaning and give weight to them, which helps to preserve legal certainty and consistency. See e.g. Cappelletti 1981: 392) (“there is no sharp cleavage between the two major legal traditions, not even to the topic [stare decisis] discussed in this article”).
10. These law firms have grown in size, as have litigation expenses, favoring those with greater resources (Galanter and Palay 1991). Heinz and Laumann (1982: 127) found that legal “fields serving big business clients” are at the top in ranking of prestige, and “those serving individual clients… at the bottom”).
class action law suits — which incentivize attorneys to bring lawsuits on behalf of consumers, investors and other constituencies.¹¹

Marc Galanter has theorized the limited prospects of social change through adjudication in his classic work “Why the Haves Come Out Ahead” (Galanter, 1974). As Galanter states, certain actors are more likely to be “repeat players” in litigation. These repeat players do not use the adjudicative process solely for the adjudication of single, unrelated cases; they also play for rules. As repeat players, they are well-positioned to settle unfavorable cases and litigate and appeal cases that are more likely to result in a favorable legal precedent. By selecting which cases to settle and thus extract them from the adjudicative process, repeat players are better positioned to reduce the likelihood of adverse precedent affecting their future operations (Galanter, 1974: 103). Even where subsequent legislation overturns a judicial precedent favorable to a repeat player, such new legislation triggers a new process of legal interpretation where well-resourced repeat players are favored.

Galanter defines a repeat player as a larger unit “which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests” (Galanter, 1974: 97-98). He defines a “one-shotter,” in contrast, as a smaller unit whose stakes in a given case are high relative to the actor’s total worth. One-shotters, as a result, are more likely to focus on the particular result from settling a dispute rather than the creation of long-term precedent affecting future operations. Galanter finds that “organizations roughly correspond to [repeat players],” whether the organizations be a business or government actor (Galanter, 1975: 348; Galanter 1974: 97, 113).

K.T. Albiston has examined how businesses have strategically used litigation to shape the interpretation of aspects of employment law over time. Applying Galanter’s framework, she finds that “[e]mployers may settle strong cases likely to produce adverse decisions, ensuring that these cases never become the basis for a published judicial opinion,” while they “may dispose of weak cases… through motions to dismiss or motions for summary judgment, which often do become part of the judicial interpretation

¹¹ These attorneys also have their own interests, complicating the assessment of the costs and benefits of these mechanisms.
of the law” (Albiston, 1999: 894). She finds that “published judicial determinations of rights… occur primarily when employers win” (902), which affects understandings of law in subsequent employment disputes. Employees’ successful settlements come “at the price of silence in the historical record of the common law” (906).

In the United States, businesses have successfully used litigation to be recognized as “persons” benefiting from constitutional rights, such as involving search and seizure, free speech and campaign finance, as opposed to mere instruments of natural persons. Mayer characterizes Supreme Court decisions recognizing constitutional rights protections for corporations against government action as symbolic of "the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives" (Mayer 1990:578). In contrast, although there have been stirrings of some change, corporations have remained relatively “immune from criminal punishment” since criminal laws are typically designed in contemplation of natural persons (Galanter 1999: 1118).

Negotiating in the Shadow of Law. Reading statutes, administrative regulations and judicial decisions tells us little about law’s operation. As socio-legal scholars have long shown, there is a difference between the law in the books (whether in statutes or published judicial decisions) and the law in practice, what they refer to as the “gap.”12 Only a few disputes are fully litigated. Most are settled through negotiation. As Galanter reminds us, “the career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and maneuver in the strategic pursuit of settlement through mobilization of the court process” (Galanter 2001: 579). Galanter calls this process “litigotiation” (Galanter 1984).

Two primary aspects of the law exercise shadow effects on bargaining: the law’s substance, and the law’s procedures. The substance of law, as set forth in statutes and administrative regulations and as interpreted in case law, can inform and constrain settlement negotiations conducted in the law’s shadow. As Robert Mnookin and Lewis Kornhauser (1979: 950) observe in their famous study of divorce law, “the outcome that

12 See, e.g., Freeley 1979 (demonstrating gap between law “on the books” and its implementation in criminal justice system); Macauly 1964 (documenting differences between written contracts and actual practices followed by parties); Stryker 2003 (institutions generally).
the law will impose if no agreement is reached gives each [party] certain bargaining chips– an endowment of sorts.\textsuperscript{13} Those more legally astute are more likely to be aware of the bargaining chips that they may deploy in order to use them strategically to their advantage. Repeat players in dispute settlement who can ‘play for rules’ may also affect the very nature of the bargaining chips.

The judicial decision itself may be viewed in terms of its “shadow effect” on the resolution of a dispute. Negotiations may take place in the context of, and be informed by, a judicial decision. As Stewart Macaulay (2003: 89) writes regarding contract law, “[w]hat appears to be a final judgment at the trial level may be only a step toward settlement. The judgment may affect the balance of power between the parties, but often it will not take effect as written.” Parties can settle the dispute in the shadow of a potential appeal, or they can settle it in light of their ongoing business relations with each other and third parties.

In addition, the law’s “shadow” effects include the costs of deploying the law procedurally. As Herbert Kritzer (1991: 73) states, “the ability to impose costs on the opponent and the capability of absorbing costs” affect how the law operates. Where large businesses can absorb high litigation costs by dragging out a case, while imposing them on weaker complainants, they can seriously constrain a person’s incentives to initiate a claim, and correspondingly enhance a person’s incentives to settle a dispute unfavorably (Trubek et al 1983). Law casts a weaker shadow for parties that lack the ability to hire and retain skilled lawyers, unless there are mechanisms, such as attorney fee awards and class actions, which create incentives for the plaintiff’s bar. When legal resources cannot be mobilized cost-effectively, then a party’s threat to invoke legal procedures against a business that wields greater legal resources has less credibility. A party may not even consider the threat of litigation, knowing the challenges that it faces. It has less of an incentive to even study the details of law, affecting what is called in socio-legal studies its “legal consciousness” (Cortese 1966). These aspects of the legal system most adversely affect individuals with fewer resources.

\textsuperscript{13} But compare Macaulay 1964 regarding the role of non-legal norms in the settlement of business disputes.
In sum, businesses have advantages in each of the public institutions discussed above and can look for allies in each of them when their interests are at stake. At times, businesses may find the legislature more favorable to their views, at others the executive and at others courts. Businesses can thus search for allies in one public institution to counter or constrain another. These institutional processes interact over time, giving rise to the public law system—concluding the first part of our analysis.

Part II. The Private Legal Sphere: Business Displacement and Internalization of Publicly-Made Law

Law-in-action refers to how law is received, interpreted by, and subsequently given meaning through practice — what Ehrlich (1936) called “the living law.” Law, whether formed through statute, administrative regulation or judicial judgment, not only must be put into action through practice; it also competes and interacts with private ordering mechanisms. Business can respond in three ways to publicly-made law. First, it can create its own private legal ordering regimes which, if accepted as legitimate, can displace the demand for public law (a private law alternative that is more centralized). Second, it can ignore existing law, even that in its favor, because of other concerns such as long-term client relations and reputation (a market-oriented alternative based on business relations and norms that is relatively more decentralized). Third, it can implement public law requirements through internal organizational policies and procedures in which it translates and potentially transforms the meaning of public law (an internal organizational business alternative which, in turn, may be diffused through customary practice and thus lies between the first two alternatives). Through the first and third mechanisms, in particular, the corporate organization can act, “to varying extents, as a legislator, adjudicator, lawyer, and constable,” constituting a private legal system (Edelman & Suchman 1999: 961; Macaulay 1986).14

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14 Edelman and Suchman contend that business organizations have internalized elements of the public legal system in at least four major ways which interact: “(1) the legalization of organizational governance [through internal policies and procedures]; (2) the expansion of private dispute resolution; (3) the rise of in-house counsel; and (4) the re-emergence of private policing” (Edelman & Suchman 2007: xxv). On the latter point, businesses use private police forces to patrol their premises and oversee their workforce. It is estimated that private police outnumber public police by 3:1. Suchman & Edelman 1999: 958.
Business has long created its own private legal systems, such as to govern commercial transactions under merchant law (or *lex mercatoria*) (Trakman 1983), or to govern the listing and trading of securities on stock exchanges (such as the New York Stock Exchange), although some self-regulatory organizations have become more regulated. These private business law regimes can be transnational or national in scope. At the national level, for example, business can create model contracts which effectively become the law in areas of industry, as has been the case with standards set by the American Institute of Architects for the design and construction of buildings (Macaulay 1986: 448). Similarly, Lloyd’s of London syndicates were effectively responsible for insurance law in the UK, and Lloyd’s power extended internationally because London was the financial center for international trade (Braithwaite & Drahos 2000: 113). Business self-regulation plays a central role in international harmonization today, often under the auspices of the International Chamber of Commerce (ICC) as we explore further in Part IV. To give just one example, the ICC periodically revises “Incoterms,” which set forth the definitions of, and interpretive guidance for, sales terms used for the shipment of goods. Through its creation of new institutions, this alternative is the most centralized of the privately-made variants.

Second, a business can simply disregard law in light of long-term client relations and reputational concerns. As Macaulay (1963: 61) found in his famous study of business contracts and the settlement of business disputes, “there is a hesitancy to speak of legal rights or to threaten to sue in these settlement negotiations.” Ian Macneil elaborated such insights in terms of “relational contact theory” under which social norms underpin contractual relations so that individual contracts and contract disputes are best viewed as “part of a relational web” (Macneil 2001: 18). In such cases, a business may not even engage with law to determine what legal rights, claims or defenses it may have. Non-legal sanctions, such as damaged reputation, are available if a business does not act in good faith. This alternative which relies on business relations and social norms is the most decentralized; law (in terms of formal rules, standards and procedures) plays the most limited role.

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15 See also Bernstein 1992: 115 (“The diamond industry has systematically rejected state-created law. In its pace, the sophisticated trader who dominate the industry have developed on elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disput4es among industry members”).
Third, business responds to public law by creating business internal organizational policies and procedures which parallel and overlap with public law. Like the external public legal system, organizations adopt increasingly detailed rules, policies and programs, and create new departments and positions to oversee regulatory compliance. In some cases, these new programs and institutions can facilitate other parties’ awareness and activation of the law. In other areas, they can lead to interpretations and applications of law that neutralize the law’s normative ambitions. In short, business internalization processes can help both to expand and weaken the law’s reach.

By internalizing public law, business can further law’s reach by internally incorporating public law norms and principles. Philip Selznick (1969) labeled such internalization “legalization,” arguing that legalization transforms business organizations into polities that provide substantial “citizenship” rights for their members. Public law, for example, in spurring the creation of internal corporate rules, can expand the “rights consciousness” of internal stakeholders, such as employees, who have reinforced expectations of social justice (Edelman 1990: 1410). Public law can, in parallel, spur the creation of new corporate compliance personnel within corporations. Company employees in these positions attend conferences on the applicable law, write memoranda on the relevant issues which they distribute within firms, and generally increase firm awareness of the legal issues in question. In formulating and overseeing the implementation of company policies, they affect internal business organizational culture, fostering company compliance with existing legal requirements and norms even where state enforcement is weak (Dobbin & Sutton 1998).

Business lawyers who defend their clients against advocates’ claims, may aid advocates’ ends in creating legal compliance procedures to avoid legal challenge. Even if the risk of restrictions is minute, in-house lawyers can benefit if their clients take the law seriously. In-house counsel has an interest in being heard within the firm’s hierarchy. When consulted by the firm’s business personnel, in-house counsel, together with employees from the firm’s human resources division, may overstate the risks to an enterprise from non-compliance by focusing on a legal reading of the law, its substantive requirements and sanctions, including any draconian risks such as imprisonment of
company executives. Outside law firms and other consultants likewise distribute to clients and prospective clients memoranda, manuals and other private assessments of the law. At symposia, they market contractual and other precautions which can be drafted and implemented to reduce the risk of legal intervention.

In the field of wrongful discharge law, for example, Edelman, Abraham and Erlanger (1992: 75) note how “employer’s in-house counsel may benefit from increased demands for their services within the firm and, like personnel professionals, may attain power by helping to curb the perceived threat of wrongful discharge lawsuits... The threat of wrongful discharge, then, may [also] help practicing lawyers [of outside firms] in the field of employment law expand the market for their services.” They conclude that “the personnel profession, with some help from the legal profession, has constructed the law in a way that significantly overstates the threat it poses to employers” (1992: 47). Ironically, in providing legal counsel to their clients on the law’s provisions and risks, in-house and external business lawyers and internal human resource employees can become unconscious abettors of the aims of otherwise underfunded and disparate advocates.

Data privacy regulation provides another example of private law regimes that complement and parallel public law regimes (Shaffer 2000). In the United States, private privacy seal programs are funded by business to adopt private privacy codes. This is done in part to ward off public regulation by demonstrating that business self-regulation is sufficient. Yet these private regimes also interact with public law regimes. For example, if a business does not comply with the rules it advertizes, it is subject to challenge by the US Federal Trade Commission for deceptive practices. Moreover, through the threat of data transfer restrictions and foreign litigation under European Union (EU) law (the data privacy directive), the EU helps raise the bar of what U.S. business is willing to sign. Existing public law and the threat of new public law, in this case domestic and foreign, stimulate business demand for privacy policies and independent certification of them.

These professionals serve as carriers and filters of law and the magnitude of law’s threat, giving rise to a convergence in business practice. Over time, business policies can become isomorphic in light of these professionals’ interactions, and business desires to gain legitimacy through the adoption of what is perceived as “fair” governance procedures (Meyer & Rowan 1977; DiMaggio & Powell 1983). In this way, business
internal policies affect organizational fields through parallel adoption of policies by individual firms (Edelman & Suchman 1999: 979). For example, internal U.S. business policies and procedures parallel civil rights laws (Edelman 1990) and health and safety laws (Bardach & Kagan 1982: 95).

The creation of internal business practices more than simply reflects and furthers law’s reach. In creating organizational policies and procedures, business has an incentive to interpret public law requirements to suit business interests. In some cases, business may do so to market itself as a good citizen in protecting the environment or labor rights or otherwise (Prakash 2000; Prakash & Potoski 2006). Businesses may even require their suppliers to conform to these policies, extending their effects. In other cases, business may do so in ways designed to limit regulation’s constraints. Law’s textual ambiguities facilitate their opportunity to do so. In internalizing public law business translates and transforms it. Corporate internal policies and administrative procedures, for example, mimic central legal principles of due process, but do so by displacing the intervention of public legal authorities. Adopting internal rules allows the organization to “symbolize compliance” and borrow the legitimacy accorded public law, while exercising greater control of its implementation and, in the process, its meaning (Edelman & Suchman 1999: 961).

Business can attempt to preempt public law by removing disputes from external controls, such as by including mandatory arbitration provisions in business contracts (Edelman & Suchman 1999: 963). Businesses have long created dispute settlement institutions to resolve conflict between them. *Lex mercatoria*, for example, was enforced by specialized merchant courts at trade fairs in the middle ages (Braithwaite and Drahos 2000: 46; Milgram et al. 1990). In contemporary international transactions, businesses still seek to avoid the biases and complexities of conflicts of law by avoiding adjudication before public courts. National legal systems recognize and enforce these private arbitration rulings (Leservoisier 2002: 256). The U.S. Federal Arbitration Act even curtails U.S. states’ ability to limit the use and enforceability of arbitration provisions in contracts with consumers.¹⁶ The rise of the alternative dispute resolution (ADR)

¹⁶ State attempts to protect consumers from mandatory arbitration “have been rendered irrelevant by [a] series of Supreme Court decisions” (Brunet et al. 2006: 159).
movement further facilitates businesses’ ability to resolve disputes outside the public domain (Stipanowich 2004).

The rise of in-house counsel also contributes to the internalization of law by business. Since the 1970s, the number and status of in-house counsel has grown dramatically. “Between 1970 and 1980, there was a forty percent increase in the number of lawyers working in-house; and between 1980 and 1991, there was a thirty-three percent increase” (Daly 1997: 1059). The use of in-house counsel involves lawyers at an earlier stage of transactions in strategic planning (Chayes & Chayes 1985: 281). In-house counsel not only helps business manage outside legal counsel, but also to manage the businesses’ internalization of legal regimes as part of programmatic prevention policies (Chayes & Chayes 1985). In the process, in-house counsel can help give law more of a business orientation since in-house counsel tends to blend both legal and business advice, blurring the distinction between doing law and doing business (Nelson & Nielsen 2000; Rosen 1989).

By symbolically incorporating public requirements in internal policies, by internalizing administrative control over its routine activities through complaint procedures, and by preempting external intervention through private alternative dispute resolution, business creates its own legal field which helps to legitimize its practices. While Galanter earlier explored the ability of repeat players to exploit the judicial process, internalizing the legislative and judicial processes circumvents the public law system. In a reflection piece twenty-five years after his article speculating “why the haves come out ahead,” Galanter finds that corporate internalization policies represent a “recoil against law” in response to reduced leeway afforded to business by the public law system (Galanter, 1999: 1116). Internalization policies remove issues from public rule-making and adjudication. By usurping the role of external legal processes and supplanting them with internal rules, large organizations can enhance their ability to limit legal change (Edelman & Suchman 1999: 944). Under these internal systems, the “haves” are arguably even more advantaged (Edelman & Suchman 1999: 944).

Part III. Law in the Shadow of Business Practice
Rather than being viewed as distinct, public law and business internal policies are interpenetrated, reciprocally affecting each other (Macaulay 1986: 449). On the private side, private legal systems do not exist in a vacuum. Even in domains where publicly-made law does not exist and business creates its own private standards, business does so in the shadow of the public law system’s potential intervention. The public legal system can also provide default rules around which businesses contract.\(^{17}\) On the public side, public legal systems can also be viewed as operating in the shadow of business practice. Legislators and courts have responded to private regimes by codifying and enforcing them. In addition, when business responds to new public regulation through adopting internal policies and practices, business may reciprocally shape the understanding of law within public institutions, including courts. While legal interpretation and enforcement affect economic behavior, organizational behavior, including business internalization practices, in turn, affects public law (Stryker 2003: 342).

To give an example, national courts have long enforced contracts based on customary business practices. As Braithwaite & Drahos (2000: 49) write, “the common law absorbed and adapted the Law Merchant,” such as private business regimes pertaining to bills of exchange, promissory notes and letters of credit. “Specialist commercial courts … in England bound themselves to the principle of recognizing the customary practices of merchants, which in turn helped to produce and reinforce the Law Merchant” (Braithwaite & Drahos 2000: 65). In civil law countries, this customary private law was codified in the commercial codes of Western Europe.\(^{18}\) In the United States, codification took place through the model Uniform Commercial Code which was subsequently adopted in all U.S. states but one (Braithwaite & Drahos 2000: 50). These codes and institutional practices then spread to other parts of the world through colonization and a general “modeling” of Western commercial law (Braithwite & Drahos 2000: 49-50).

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\(^{17}\) See, for example, the adoption by corporations of Board Audit Committees, which the New York Stock Exchange required for listing, but which non-listed companies adopted out of concern that courts in lawsuits claiming director liability might consider the practice as a standard for responsible conduct. Braithwaite & Drahos 2000: 171.

\(^{18}\) Moreover, in France, the lowest-level court for commercial matters, the Tribunal de Commerce, is composed of lay members from the business community. Many German Länder have created special chambers for commercial matters that include lay judges (Basedow 2008: 707).
Internal business policies and procedures may also shape how public law is perceived, transforming its meaning. To start, business practices under internal organizational policies and procedures can affect what individuals perceive to be the law through everyday social practice, shaping their “legal consciousness.” Corporate compliance officers share their policies and procedures in symposia, workshops, electronic list-serves, trade journals, and other fora, leading to similar institutionalized practices in the field. By “redefining what is seen as normal, reasonable, rational and compliant in terms of internal business grievance procedures created in response to public law,” internal business law and practice can colonize public law (Edelman & Suchman 963). For example, Edelman, Fuller and Drita (2001: 1591) find that managerial discretion in applying civil rights laws has appropriated legal ideas, transforming how the public views the scope and application of civil rights laws. Similarly, in their study of business “diversity” policies, Edelman, Fuller and Mara-Drita (2001: 1599) find that, “as legal ideas move into managerial and organizational arenas, law tends to become ‘managerialized,’ or progressively infused with managerial values.”

These business practices can affect courts’ interpretation and application of public law. In the civil rights field, internal business grievance procedures applying civil rights laws are not required by the laws themselves. Yet they can shape our understandings of the laws. As Edelman, Uggen and Erlanger (1999) find in their study of internal business practices applying the civil rights laws, professionals “promote a particular compliance strategy, organizations adopt this strategy to reduce costs and symbolize compliance, and courts adjust judicial constructions of fairness to include these emerging organizational practices” (406). The authors’ study finds that “courts have become more likely to defer to organizations’ grievance procedures and to consider them relevant to determinations of liability” (409). These socio-legal scholars have found that even where disputants ultimately bring their claims to the public legal system, courts “often defer to the results of internal hearings,” and “dismiss claims where plaintiffs’ have failed to exhaust their in-house remedies” (Edelman & Suchman 1999: 964). Judges in overstretched and

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19 Edelman, Fuller and Drita (2001: 1591) suggest that managerial discretion in implementing civil rights laws within organizations reframe diversity issues to include not only gender and race, but also issues of personality and cultural lifestyle traits. Including such issues changes not only the scope of civil rights laws, but transforms the legal ideals underlying civil rights.
underfunded public law systems have incentives to do so (Komesar 2001). In sum, public law acquires meaning and has effects through the intermediation of business practice.

**Part IV. Business and Law in Comparative and Global Context**

Legal rules, norms and institutions have diffused globally through processes of colonization, economic exchange and the growth of international and transnational institutions. This diffusion interacts with national and local legal cultures so that we find significant variation in outcomes despite these processes of convergence (Nelken 2007). We first address international developments and then turn to national law in comparative context.

**A. The International Level.** Business plays an important role in international law-making, which has spread, directly or indirectly, to most regulatory areas. As John Braithwaite and Peter Drahos find in their masterful study of thirteen areas of global business regulation, business actors frequently play leading roles, whether through exporting their internal standards globally, through the creation of transnational private orders, or through “enrolling” states to create public law. They find, for example, that “state regulation follows industry self-regulatory practice more than the reverse” (481). In some cases, international standards may simply formalize and legitimate informal practices of large dominant businesses (492).

Private parties have long engaged in private rule-making to facilitate cross-border transactions, constituting a *lex mercatoria*. When law merchant norms are codified by states, conflict-of-law issues arise between different national variants. Business has responded by trying to harmonize the law at the international level, giving rise to what is called a “new Law Merchant” (Trakman 1983).

Among international business organizations, the International Chamber of Commerce (ICC) stands apart as the premier lobbying body on behalf of business interests (Braithwaite & Drahos 2000: 488). The ICC lobbies the full spectrum of UN organizations, looking “for key loci of decision-making in the globe and build[ing] a poultice of influence around them” (Braithwaite & Drahos 2000: 488). The ICC has, for example, been central to international commercial law (70), tax law (and in particular the
creation of model tax treaties to avoid double taxation of business) (120), telecommunications and e-commerce law (344), and the drafting of environmental treaties (273).

In the field of international trade finance, transnational letters of credit are governed by a set of rules known as the Uniform Customs and Practice for Documentary Credit (UCP), written by the ICC. The ICC’s goal is to codify “international banking practices, as well as to facilitate and standardize developing practices” (Levit 2008: 1171). Most banks will not issue letters-of-credit unless they are subject to the UCP (Levit 2008: 1177). When exporters and importers identify the UCP as their choice of law, these rules are applied by national courts that enforce them (Levit, 2005: 141). Levit finds that “domestic courts, which are frequently called upon to hear actual letter-of-credit disputes, apply the UCP 500 even in the face of a domestic statute designed for related issues” (Levit, 2005: 141). The ICC interprets its own rules through issuing hundreds of “advisory opinions” intended to clarify ambiguities (Levit 2008: 1174-75).

International private law-making has particularly evolved in the area of technical standard-setting. Within the European Union, the Comité Européen de Normalisation (CEN) and Comité Européen de Normalisation Electrotechnique (CENELEC) play central roles. At the international level, business works through the Geneva-based International Organization for Standardization (ISO). Practically, businesses are pressed by market forces to apply those standards, and national courts can impose tort liability if they fail to do so and someone is harmed (Basedow 2008: 710).

Business also affects international law through enrolling state representatives to advance business goals. Examples of private international law include international treaties like the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as well as “soft law” norms such as the UNIDROIT Principles of International Commercial Contracts and the UNCITRAL Legislative Guide on Insolvency Law. A common form of regulatory export occurs where national industry associations shape the law in a dominant state, and this law becomes the model for other states, including through international regimes. While such influence varies by industry and country, Braithwaite and Drahos (482) find that “US corporations exert more power
in the world system than corporations of other states because they can enroll the support of the most powerful state in the world.”

Private business also enrolls states to advance its interests through inter-state litigation. Corporations frequently lie behind the claims that state representatives bring in international trade litigation. They lobby them, provide them with requisite background factual information, and hire outside lawyers to help write the legal briefs. As a result, most litigation before the renowned dispute settlement system of the World Trade Organization (WTO) involves the formation of partnerships between state representatives, private business interests and the lawyers that business hires (Shaffer 2003; Shaffer et al 2008).

International law of course can also be used against business. Non-business actors can deploy international law to challenge business conduct, including before national courts; this again exemplifies how international and national institutions interact. Human rights activists, for example, have repeatedly brought suits under international law before U.S. courts to challenge business conduct in third countries, such as mining in Indonesia, oil exploration in Burma and Nigeria, and aiding and abetting the apartheid regime in South Africa (Davis 2008; Stephens & Ratner 2008).

B. Comparative Legal Context. The relation of business to law varies in comparative national and local context as a function of the configuration of interests in a regulatory area, institutional structures, the role of elites, traditions of business-government relations, and differences in “legal culture” and “business culture.” By legal culture, we refer to attitudes and behavior as to “when, why and where people look for help to law or to other institutions, or decide just to ‘lump it’” (Nelken 2007: 370; Friedman 1994). By business culture, we refer to patterns of norms and behavior within which people and institutions in the business world operate. These norms and behaviors vary widely between (and within) countries, and they interact with and are shaped by local institutional structures and political interests. Any assessment thus must be careful

20 DiMaggio 1994 (within organizational studies, “culture” refers to the “shared cognitions, values, norms, and expressive symbols” associated with a discrete group).
not to reify or essentialize culture, especially without an appreciation of how norms are channeled by institutional structures which reflect political choices.\textsuperscript{21}

Robert Kagan’s work, in this respect, depicts how business-government relations in the United States are often characterized by "adversarial legalism," which he defines as "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation" (Kagan 2001: 3). Kagan finds that both cultural and institutional factors give rise to adversarial legalism. He maintains that U.S. attitudes that governmental power should be constrained and that individuals should invoke the law to protect their rights and achieve their goals further an adversarial legal culture (Kagan 2001: 15). He likewise maintains that, in the United States, "adversarial legalism arises from the relative absence of institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes, ensuring accountability, regulating business, and compensating victims of injury or economic misfortune" (Kagan 2001: 34).

Adversarial legalism is viewed as less prevalent in Europe, although there is disagreement about the extent to which Europe is changing (cf. Kelemen 2006; Levi-Faur; Kagan 2007). In a famous article from the 1970s, Rueschemeyer maintained that attitudes toward law in Germany are affected by more authoritarian traditions of rule "by an enlightened and supposedly neutral bureaucracy" (Rueschemeyer 1973: 274). He contended that lawyers within the German bar retained a greater "reserve toward the world of business" (Rueschemeyer 1973: 278). In France, Dyson (1993: 395) found that "state-industry relations remain notably intertwined," reflected in "the prevalence of members of the elite grand corps in the top management positions of the public and private sectors," giving rise to "a web of patronage spanning the public-private sector divide." Cohen-Tanugi (1985: 270) contended that French society is "sensitive to the power relations underlying a given legal framework" which leads to a "quasi-exclusive attention to power, whether political or economic, rather than to law, which is seen as either mere window-dressing or simply the result of the power relations." He argued that the French thus manifest "a fair amount of tolerance for failure to respect the rule of law”

\textsuperscript{21}The literature on pluralist, centralized and corporatist political systems provides institutional-oriented explanations for national approaches (Wilson 2003).
(Cohen-Tanugi 1985: 269). The place of law is changing in Europe, in reflection of
global competition, economic restructuring, the rise of the European Union and citizen
demands. Change nonetheless takes place in the context of institutional path
dependencies and different legacies of government-business relations.

It is commonly touted that people are more reluctant in Asia to use formal legal
processes compared to in Western nations, and especially in the United States, and thus
there is less adversarial legalism. The explanation for Japan’s lower litigation rates,
compared to the United States, for example, has sparked debate among those stressing
cultural and institutional factors (Feldman 2007). A focus on culture as an explanation,
such as the importance of “social harmony” and “social consensus” in Asian countries,
sparks charges of Orientalism in scholars’ characterization of Asian legal systems, which,
in themselves, vary significantly. Scholars today tend to stress how political choices
determine the availability of formal institutions for dispute settlement. Ginsburg and
Hoetker (2006), for example, show how litigation rates have risen in Japan in response to
structural reforms and institutional changes, including relaxed controls over the licensing
of lawyers. Rapid economic development, followed by the bursting of the Japanese
economic bubble and the 1997 Asian financial crisis, has significantly affected the role of
law for business. China, for example, has moved dynamically toward a market economy,
and has developed “new structures and processes for resolving disputes,” and, in
particular, commercial ones (Potter 2001: 26; Peerenboom & He 2008). In India, where
courts are plagued by a large backlog of cases, frequent adjournments and long delays,
companies have increasingly sought to resolve legal disputes through alternative dispute
resolution processes, including arbitration, but these processes also have given rise to
delay, backlog and frustration (Krishnan 2007). In sum, the articulation of competing
political and economic interests continues to be mediated by different institutional
structures and cultural norms, producing variations in the law-in-action in each country.

Scholars have used Marc Galanter’s framework to compare patterns of dispute
settlement by repeat players in different countries. A number of empirical studies have
found that Galanter’s “general thesis that “repeat player ‘haves’ tend to fare well and that

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22 For assessments of dispute settlement within Japan cf. Kawashima (1963), Haley (1978), Upham (1987),
Ramseyer (1988); within China, Macauley (1998); Peerenboom & He (2008); within Korea, Choi & Kahei
2007; Yoon 2000; and within Asia generally, Taylor & Prykes 2003.
one-shot litigants lose frequently appear to have considerable cross-national validation, at least among countries in the English common law tradition” (Songer et al. 1999: 814). In contrast, some studies of courts in other countries, particularly of higher courts, have come to different conclusions. Once again, however, we need to be careful to generalize the implications of these studies since higher court judgments represent only a small part of law and thus law’s implications for business. In a study of business dispute settlement in Russia, Hendley, Murrell and Ryterman (1999: 836-837) found Russian repeat players lack the impetus to “play for” rules because such efforts are pointless in light of the role of courts in the Russian legal system. However, they also noted the crisis situation in Russia at the time, with Russian enterprises “struggling for their very survival,” so that the business focus was short-term (859). In a study of litigation before the Israeli High Court of Justice (HCJ), Dotan (1999: 1062-1063) found that the “haves” benefit from only limited advantages over “have nots.” He attributed this situation, in part, to the accessibility and marginal expense of litigation before the HCJ and, in part, to the HCJ’s view of itself as a “protector” and “representative of the common citizen.” Similarly, Haynie (1994) found that, before the Philippine Supreme Court, individuals have higher success rates in court judgments than government or business litigants, the prototypical repeat players. She postulated that in less-developed countries generally, courts may tend to favor the “have nots” out of concern for “their own legitimacy” and domestic social “stability,” while nonetheless balancing elite concerns (754). Haynie’s study, however, only focused on Supreme Court decisions which may play a constrained role in practice, especially if repeat players have a long-term privileged relation with lower court judges, in some cases being able to buy them off. Moreover, the role of formal courts and law have not held as prominent a position in many less developed countries, in part because they have other political and economic priorities.23

The central point here is not to enter a debate as to which countries are governed to a greater extent by the “rule of law,” but rather that, in an era of economic and cultural

23 Cf. Carruthers & Halliday 2006: 544 (noting “historic irrelevance of law and the courts as institutions of market regulation, and hence the ineptness of current courts and their vulnerability to corruption”); Henderson 2006 (finding judicial corruption in 18 of 23 countries surveyed); and Peerenboom 2004: 26 (identifying problems common to Asian countries’ judicial systems—impaired access to justice, inefficient and expensive courts, corruption and incompetence).
globalization, even when law is harmonized at the international level, the impact varies significantly. Halliday and Carruther’s path-breaking work (2006, 2007) on international harmonization of corporate bankruptcy law provides a leading example. Their work depicts how bankruptcy law prescribed at the international level is differentially received in China, Korea and Indonesia. They examine the different types of mechanisms used to diffuse international bankruptcy norms, with coercive measures being relatively more effective in Indonesia (such as IMF loan conditionality) than in Korea, which is more likely to require persuasion to effect legal change, or in China, in which change is more likely to occur through Chinese modeling of reforms based on others’ practices. They address how different interests and institutional legacies at the national level, and a country’s position of relative power in global context, affect the implementation of international harmonization efforts. They show how the indeterminacy of law, internal contradictions within law, diagnostic struggles over problem-definition, and the fact that different actors (and, in particular, different business interests) participate in struggles over national implementation result in ongoing national divergences.

**Conclusion**

In sum, to understand the relation of business and law, one must assess business influence on the formation and application of public law before legislatures, administrative bodies and courts, together with business creation and application of private legal systems, whether to preempt public law, exit from public law, or internalize and, in the process, translate and transform public law. One next needs to assess the dynamic and reciprocal interaction of these public and private legal systems in different national and transnational contexts which constitutes the legal field in which business operates. Although public and private law-making for most regulatory fields has spread to the international level, the domestic implementation of harmonized rules and standards still varies considerably in light of ongoing differences in the relative power of business, government and law at the domestic level, as well as differences in local institutional structures and business and legal cultures. Thus, the relationship of business and law can be viewed in terms of three sets of institutional interactions: (i) horizontal public institutional interaction among legislative, administrative and judicial processes, in each
of which business can play a critical role; (ii) vertical public institutional interaction involving national and transnational institutional processes, with transnational processes becoming more prominent; and (iii) the interaction among these public institutional processes and parallel private rule-making, administrative and dispute settlement mechanisms that business creates.
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