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'Nothing But Wind'? The Past and Future of Comparative Corporate Governance

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"Nothing But Wind"? The Past and Future of Comparative Corporate Governance†

Corporate law scholarship has come a long way since Bayless Manning some four decades ago famously pronounced it dead. Not only has doctrinal scholarship continued its project of critique and rationalization, but empirical and economic approaches have injected new life into the field.

Recent years have seen the rise of comparative corporate governance (CCG) as an increasingly mainstream approach within the world of corporate governance studies. This is a function partly of an increasing international orientation on the part of legal scholars and partly of an increasingly empirical turn in corporate law scholarship generally. Different practices in other jurisdictions present at least the possibility of natural experiments that attempt to find causal relationships between particular features of a corporate governance regime and real-world outcomes. This body of research has become particularly relevant as we enter the second decade of the twenty-first century. The financial crisis has called into question many of our traditional ways of thinking about corporate governance and the relationship between business enterprises and the state. Are there other countries that do it better?

This Article discusses what is unique about CCG as an approach to corporate governance studies. It begins by examining the concepts of corporate governance and comparative corporate governance, making the point that comparative corporate governance has in general been focused on agency problems between shareholders and managers but need not be so. It then looks at methodological issues in comparative corporate governance, critiquing in particular economic Darwinist theories and the failure of theories of international competition in corporate governance to incorporate the notion of comparative advantage. Finally, it reviews major lessons learned from this body of work and

* Professor of Law, George Washington University Law School. I wish to thank Larry Ribstein for our many conversations about corporate law and for inspiring me to write this Article, and Barry Naughton for his close reading and helpful suggestions.

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suggests direction for future research. Among other things, it calls for more comparative research into alternative business entities dubbed "uncorporations" by Larry Ribstein and into corporate governance in increasingly important economies such as China and India.

I. Introduction

Corporate law scholarship has come a long way since Bayless Manning some four decades ago famously pronounced it dead, with "nothing left but our great empty corporate statutes—towering skyscrapers of rusted girders, internally welded together and containing nothing but wind."[1] Not only has doctrinal scholarship continued its project of critique and rationalization,[2] but empirical and economic approaches have injected new life into the field.

Recent years have seen the rise of comparative corporate governance (CCG) as an increasingly mainstream approach within the world of corporate governance studies. In part, this stems from a recognition by legal scholars—traditionally somewhat insular in most countries, and perhaps even more so in the United States—that globalization calls for an increased understanding of how things are done in the rest of the world. And in part, it is a function of an increasingly empirical turn in corporate law scholarship generally. Different practices in other jurisdictions present at least the possibility of natural experiments that attempt to find causal relationships between particular features of a corporate governance regime and real-world outcomes.

What specifically is unique about CCG as an approach to corporate governance studies? What have we learned, and where should we go? These questions are particularly urgent as we enter the second decade of the twenty-first century. The financial crisis has called into question (if it has not yet, perhaps, definitively overturned) many of our traditional ways of thinking about corporate governance

1. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 245 n.37 (1962).

2. By "rationalization" I mean attempts to rid doctrine of irrationalities and inconsistencies; I do not mean providing apologetics for the status quo. A personal favorite in the critique-and-rationalization genre is Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 Colum. L. Rev. 1491 (1999).

and the relationship between business enterprises and the state.[3] Are there other countries that do it better?[4]

But there is another economic trend that makes comparative corporate governance research more urgent than ever: the rise of what we might call "non-traditional" jurisdictions. As this Article will show, CCG research has dealt extensively and skillfully with Anglo-American jurisdictions, Europe, and Japan. But the last thirty years have seen a startling rise in the economic importance of other countries, particularly China and the rest of non-Japan Asia. From 1980 to 2006, for example, China's share of world GDP (estimated on the basis of purchasing-power parity) rose from about three percent to about sixteen percent. The rest of non-Japan Asia went from about twelve percent to about eighteen percent.[5] Students of business organization simply cannot ignore what is going on in those countries.

With these questions in mind, this Article reviews where we have come in the last several years and the prospects for the future. Part II examines and clarifies the concepts of corporate governance and comparative corporate governance in order to set the stage for the ensuing discussion. It makes the point that comparative corporate governance has in general—although not uncontroversially—been focused on agency problems between shareholders and managers. It need not, however, always be so.

Part III looks at the methodology of comparative corporate governance, focusing particularly on the problems of functionalism and empirical studies.

Part IV reviews briefly some of the major lessons learned from comparative corporate governance scholarship, while Part V lays out some future directions and challenges for research, focusing particularly on the vexed problem of convergence. Part VI offers a brief conclusion.

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3. *See, e.g.*, DAVID A. WESTBROOK, AFTER THE CRISIS: RETHINKING OUR CAPITAL MARKETS (2009); J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice* (Aug. 24, 2009), *available at* http://ssrn.com/abstract=1461143 (examining the unforeseen consequences for corporate and securities law of widespread government ownership of large corporations). Alan Greenspan famously recanted his belief that "the self-interest of lending institutions [would] protect shareholders' equity," *see* Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 23, 2008, *available at* http://tinyurl.com/5onusv, and Richard Posner's apostasy is in print as RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009). On the turmoil in the Chicago School generally, see John Cassidy, *Letter from Chicago*, THE NEW YORKER, Jan. 11, 2010, at 28.

4. This is the suggestion of Paul Krugman in a recent column; *see* Paul Krugman, *An Irish Mirror*, N.Y. TIMES, Mar. 7, 2010, *available at* http://tinyurl.com/ybrklxj.

5. *See* Jim Manzi, *A Post-American World?*, THE AMERICAN SCENE, May 7, 2008, *available at* http://www.theamericanscene.com/2008/05/07/a-post-american-world.

II. What is Comparative Corporate Governance?

A. *The Concept of Corporate Governance*

To understand the field of CCG, we must first clarify how the field understands the notion of corporate governance itself. Corporate governance can mean many things to many people, and the definition typically will depend on what the definer cares about. I canvass some definitions below in order to clarify what CCG typically excludes as well as includes.[6]

The simplest definition may be that of the (British) Committee on the Financial Aspects of Corporate Governance in the Cadbury Report, which defines corporate governance as "the system by which companies are directed and controlled."[7] Economist Margaret Blair also supplies a broad definition: "the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated."[8]

Institutional economists favor a narrower definition. Oliver Williamson, for example, sets out in his chapter on corporate governance to examine the relationship between the firm and what he calls its constituencies: labor, capital (equity and debt), suppliers, customers, the community, and management.[9] This conception of corporate governance in essence tries to cover all who participate in some way in the process by which a firm's product is produced and sold. It sees these parties as voluntarily interacting with the firm, and asks what the terms are on which they interact as well as why those terms look the way they do. "Governance" in the work of Williamson and others of the same school refers to the institutional structure parties set up to deal with the inevitable incompleteness of their contracting, and attempts to explain voluntary relationships in those terms.

Finally, some scholars use a quite narrow concept of corporate governance. This concept is concerned with issues of finance and agency cost and has a policy component: the prevention of the exploitation of those who supply the money by those who control it.[10] It

6. This review of corporate governance definitions draws on my discussion in Donald C. Clarke, *The Independent Director in Chinese Corporate Governance*, 31 Del. J. Corp. L. 125, 143-44.

7. Financial Reporting Council, London Stock Exchange, *Report of the Committee on the Financial Aspects of Corporate Governance* 2.5 (1992), *available at* http://www.ecgi.org/codes/code.php?code_id=132.

8. *See* Margaret M. Blair, Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century 3 (1996).

9. *See generally* Oliver E. Williamson, The Economic Institutions of Capitalism (1985).

10. *See generally* Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

centers on the relationship between stockholders, the board of directors, and senior management, and in effect asks, with Shleifer and Vishny, "[H]ow can financiers be sure that, once they sink their funds [into a firm], they get anything but a worthless piece of paper back from the manager?"[11]

The approaches of the Cadbury Report and of Blair are typically too broad for CCG. In its simplicity, the definition of the Cadbury Report does little more than repeat the term "corporate governance" using different words. At the same time, the Blair definition seems to encompass not only shareholder-management relations and other internal governance institutions, but also external constraints such as environmental and labor regulations.[12] Such a definition might be useful for some purposes, but it is not generally used in CCG. Instead, CCG has typically focused on the issues implicated in the approaches of Shleifer and Vishny and of Williamson: (1) agency problems between investors and management—i.e., the narrow definition of corporate governance—and in particular how this is related to ownership patterns; and (2) shareholder versus stakeholder theories—i.e., questions of for whose benefit the corporation should be run.[13]

B. *The Concept of CCG*

Once we have decided what corporate governance is, it would seem to follow that comparative corporate governance involves asking what other jurisdictions do and seeing how they differ. But such inquiries do not take place in a realm of abstract purposelessness; they are invariably driven by some purpose of the inquirer. Thus, the question of "what is CCG?" can best be answered by asking "*why* do CCG?"

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11. Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 740-41 (1997). In Edward Rock's words,

> The question that has motivated many American corporate law scholars since Berle and Means, and certainly much recent scholarship, has been, at heart, the question of how we can make managers sufficiently accountable so that they will manage the corporation for the shareholders.

Edward C. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 389 (1996).

12. This is not completely clear. In restricting her definition to public corporations, Blair may mean only such restrictions as apply only to public corporations as such.

13. *See generally* John Cioffi, *State of the Art* [Review Essay], 48 AM. J. COMP. L. 501, 507 (2000) (noting discussion of whose interests the corporation is supposed to serve); Lawrence A. Cunningham, *Comparative Corporate Governance and Pedagogy*, 34 GA. L. REV. 721, 723 (2000) (noting that comparison is typically on the basis of financing characteristics); Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WISC. INT'L L.J. 477, 477 (2005); Gregory Jackson, *Comparative Corporate Governance: Sociological Perspectives, in* THE POLITICAL ECONOMY OF THE COMPANY 265, 270 (John Parkinson, Andrew Gamble & Gavin Kelly eds., 2000) (criticizing focus on agency costs).

CCG began, and continues, as an approach to corporate governance studies that found inspiration for solutions to problems in one jurisdiction by looking at the practice of other jurisdictions. The policy orientation is explicit.[14] It has developed into something much richer, however, and now encompasses studies that are aimed less at policy recommendations than at simply attempting to understand, through comparison of different regimes, why certain approaches to common problems work or do not work in different contexts.[15]

These studies have also taken various approaches to comparison. Some studies have been of single countries, in which the explicit comparative lesson, if any, comes tacked on at the end. Thus, we see studies of takeover law in England[16] or derivative suits in Japan[17] or fiduciary duties in China.[18] Some studies explicitly take a few countries that are similar enough to make comparison worthwhile—for example, they are all advanced economies—but that have differences from which hopefully something can be learned.[19] These studies examine particular national solutions in great detail.

Then there is the "LLSV" and LLSV-inspired literature,[20] which codes particular traits of national corporate governance regimes in a

14. *See, e.g.*, COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH v (Klaus Hopt et al. eds., 1998) ("[T]he ability to give welfare-enhancing recommendations is still poor and needs substantial improvement."). A good example of this type of approach is John C. Coffee, Jr., *A Theory of Corporate Scandals: Why the United States and Europe Differ, in* CORPORATE GOVERNANCE POST-ENRON: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 3 (Joseph J. Norton, Jonathan Rickford & Jan Kleineman eds., 2006).

15. *See, e.g.*, COMPARATIVE CORPORATE GOVERNANCE, *supra* note 14, at v ("Comparative corporate governance research may bring forth new insights that research conducted only within one system may fail to produce."). Two good examples of this type of approach—trying to explain what we see, without aiming for specific policy recommendations—are Mark J. Roe, *Path Dependence, Political Options, and Governance Systems, in* COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS 165, 165 (Klaus J. Hopt & Eddy Wymeersch eds., 1997), and PETER GOUREVITCH & JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005).

16. *See, e.g.*, Tony Shea, *Regulation of Takeovers in the United Kingdom*, 16 BROOK. J. INT'L L. 89 (1990).

17. *See, e.g.*, Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351 (2001).

18. *See, e.g.*, Nicholas C. Howson, *The Doctrine that Dared Not Speak Its Name: Anglo-American Fiduciary Duties in China's 2005 Company Law and Case Law Intimations of Prior Convergence, in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 193 (Hideki Kanda, Kon-Sik Kim & Curtis J. Milhaupt eds., 2008).

19. *See* John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the UK and US*, 6 J. EMPIRICAL LEGAL STUD. 687 (2009).

20. "LLSV literature" refers to a series of studies by the economists Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny. Representative early works are Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POLIT. ECON. 1113 (1998) (hereinafter *Law and Finance*); 2nd Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate*

large number of countries and then attempts to correlate those traits with other features of a country's economy, such as per capita GDP or capital market development.

In some cases, scholars have used law to explain economic and financial phenomena. For example, the LLSV literature asserts that patterns of dispersed shareholding can be explained by the rights shareholders are given under the law. The common law protects minority shareholders and therefore supports dispersed shareholding; civil law systems do not, and therefore blockholding emerges as the efficient solution to agency problems. And Mark Roe has had a major influence on the field by arguing, on the basis of the experience of different jurisdictions, that what supports dispersion is not laws on shareholder rights so much as it is populist-inspired legal restrictions on economic concentrations.[21]

At other times, scholars have used economics and finance to explain law. John Coffee, for example,[22] argues that "[m]uch historical evidence suggests that legal developments have tended to follow, rather than precede, economic change[,]"[23] and Stuart Banner surveys three centuries of international history to argue that waves of securities regulation typically follow securities market collapses (and are therefore not attributable to broader political factors such as populism à la Roe).[24]

The "why" of CCG can perhaps best be explained through its history. Although CCG came into its own in the 1990s, its modern reform-oriented version can be traced back to the 1960s and 1970s. Ever since Berle and Means published *The Modern Corporation and Private Property*,[25] American corporate law scholarship has been focused on the separation of ownership from control, and on the ways of mitigating the problems created by that separation. But the problems stubbornly persisted, and it seemed impossible that directors could ever truly play a significant role in managing the corporation, given their limitations of time and information. The late 1960s and early 1970s then saw essentially the abandonment of the ideal of the managing board; the board was reconceptualized as a body that *monitored* but did not manage. As part of this shift in thinking,

Ownership Around the World, 54 J. FIN. 71 (1999) (hereinafter *Corporate Ownership*). Three of the group summarize their work in Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (hereinafter *Economic Consequences*).

21. *See infra* text accompanying notes 30-31.

22. John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001).

23. *Id.* at 7.

24. *See* Stuart Banner, *What Causes New Securities Regulation?: 300 Years of Evidence*, 75 WASH. U. L.Q. 849, 850 (1997).

25. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

American academics began to look in particular at the German system of a two-tier board.[26]

At the same time, CCG scholarship remained largely doctrinal, focusing on differences in rules.[27] Ronald Gilson writes that prior to globalization, "[t]his area of scholarship had been largely the domain of taxonomists, intent on cataloguing the central characteristics of national corporate governance systems, and then classifying different systems based on the specified attributes."[28]

Several events brought gradual changes to this picture. First, as early as 1976, Jensen and Meckling's seminal article, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*,[29] turned the focus of corporate law scholarship in the United States to issues of agency cost and ownership structure. This focus naturally made American scholars interested in ownership structures outside the United States and in the implications of their differences. Second, Mark Roe's work on the political roots of American corporate ownership patterns and their associated governance institutions[30] suggested that corporate governance might be not just a matter of market-driven evolution toward an optimal set of arrangements, but instead the product of political choices.[31] Other scholarship showed that the lifetime employment system in Japan,

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26. *See generally* Rock, *supra* note 11, at 368-73.

27. *See, e.g.*, André Tunc, *A French Lawyer Looks at American Corporation Law and Securities Regulation*, 130 U. PENN. L. REV. 757 (1982); ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 75-93 (1976); *see generally* Pinto, *supra* note 13, at 477, 482.

28. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function, in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 128, 128 (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

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

30. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

31. Professor Roe's work is not unchallenged. John Coffee has argued that

> [t]he most convincing explanation for this sharp disparity [between the importance of equity markets in the U.S. and in France, Germany and Italy] is that only those legal systems that provide significant protections for minority investors can develop active equity markets . . . . But once this explanation is accepted, it amounts to a rejection of the "political theory" offered by Professor Roe and others.

John C. Coffee, Jr., *The Future as History; The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U.L. REV. 641, 644 (1999). Ronald Gilson briefly summarizes his view of the merits of the two positions in Gilson, *supra* note 28, at 134-35 n.21.

Brian Cheffins has also challenged the Roe thesis, pointing out that Britain, despite its very different politics, has developed a capital market and ownership structure very similar to that of the United States. *See* Brian R. Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle-Means Corporation in the United Kingdom, in* CORPORATE GOVERNANCE REGIMES—CONVERGENCE AND DIVERSITY 147 (Joseph McCahery, Piet Moerland, Theo Raaijmakers & Luke Renneboog eds., 2001).

The most extended and sophisticated approach to political explanations of corporate governance patterns of which I am aware is GOUREVITCH & SHINN, *supra* note 15.

explained variously as a venerable tradition or as an effort to encourage workers to invest in human capital, in fact grew out of a postwar political deal.[32] What all this meant was that the institutions of any one country were not necessarily the most efficient ones for it, and thus research into alternatives could have real payoffs.[33]

Finally, as globalization made issues of national competitiveness increasingly salient, scholars viewed governance systems as competing in much the same way that products do.[34] CCG studies began to proliferate in the 1980s and 1990s. When Japan and Germany were riding high economically in the 1980s, there was great interest in the apparent strengths of German and Japanese models and what was thought to be their contribution to economic performance both at the corporate and at the national level. Some scholars produced studies of the monitoring benefits of the Japanese main bank system[35] and *keiretsu* structure,[36] while others argued that American equity markets forced executives to focus on quarterly results whereas "the bank centered capital markets of Germany and Japan allowed executives to manage in the long run."[37] In a word, Japan and Germany were

32. *See* Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COL. L. REV. 508 (1999); Gilson, *supra* note 28, at 129.

33. *See* Gilson, *supra* note 28, at 130.

34. *Id.* at 129.

35. *See, e.g.*, Masahiko Aoki, *Toward an Economic Model of the Japanese Firm*, 27 J. ECON. LIT. 1 (1990); Masahiko Aoki, *The Japanese Firm as a System of Attributes: A Survey and Research Agenda, in* THE JAPANESE FIRM: THE SOURCES OF COMPETITIVE STRENGTH 11 (Masahiko Aoki & Ronald Dore eds., 1994); THE JAPANESE MAIN BANK SYSTEM (Masahiko Aoki & Hugh Patrick eds., 1994).

36. Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 271 (1993); Eric Berglof & Enrico Peroti, *The Governance Structure of the Japanese Financial Keiretsu*, 36 J. FIN. ECON. 259 (1994). Mark Ramseyer and Yoshiro Miwa deny the existence of both the main bank system and the *keiretsu* structure in a series of articles collected in YOSHIRO MIWA & J. MARK RAMSEYER, URBAN LEGENDS OF THE JAPANESE ECONOMY (2006). The relevant articles are Yoshiro Miwa & Mark J. Ramseyer, *The Myth of the Main Bank: Japan and Comparative Corporate Governance*, 27 LAW & SOC. INQUIRY 401 (2002) and Yoshiro Miwa & Mark J. Ramseyer, *The Fable of the Keiretsu*, 11 J. ECON. & MANAGEMENT STRATEGY 169 (2002). Curtis Milhaupt challenges the challengers in Curtis J. Milhaupt, *On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions*, 27 LAW & SOCIAL INQUIRY 425 (2002), as do three other Japanese law scholars in Luke Nottage, Leon Wolff & Kent Anderson, *Japan's Gradual Transformation in Corporate Governance, in* CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION 1, 2 (Luke Nottage, Leon Wolff & Kent Anderson eds., 2009) (calling the Ramseyer-Miwa account "iconoclastic and idiosyncratic"). *See also* Luke Nottage, *Perspectives and Approaches: A Framework for Comparing Japanese Corporate Governance*, *in* CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION 21, *supra* (citing studies rebutting the Ramseyer-Miwa account).

37. *See* Gilson, *supra* note 28, at 130.

going to eat our lunch unless we improved our corporate governance system.[38]

By later in the 1990s, however, the worm had turned, and the U.S. economy seemed to be outperforming the others. CCG then became, for both Americans and many non-Americans, a study of the superiority of the American system in raising capital and constraining agency costs.[39] The focus changed from *importing* foreign practices to *exporting* American ones.[40] But whoever was viewed as on top, the research agenda of CCG had pretty much crystallized by this time: in the words of two leading scholars in 1999, "In these globalizing times, corporate law's leading question is whether there is a national corporate governance system (or component thereof) that possesses relative competitive advantage."[41] The second question that dominated the field was what the future would bring: if one model was indeed better than another, would national corporate governance regimes converge? Or would national differences remain?

There was by then no shortage of excellent and detailed studies,[42] but the question of convergence seemed as unsettled as ever. Into this morass of doubt and uncertainty, Hansmann and Kraakman in 2001 tossed their bombshell, entitled "The End of History for Corporate Law":[43] the debate was over, U.S.-style corporate governance had won, convergence had already taken place at the ideological level, and formal convergence was "only a matter of time."[44] I shall return to this claim later.

Alongside the discussion of convergence, carried on largely by legal scholars, was a parallel research agenda carried on largely by economists that sought to draw causal links between features of a country's legal system—in particular, its rules about corporate governance—and various economic indicators. This body of research was launched in the late 1990s by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny (LLSV) with several arti-

38. *See, e.g.*, Michael Porter, *Capital Disadvantage: America's Failing Capital Investment System*, HARV BUS. REV., Sept.-Oct. 1992, at 65; Joseph Grundfest, *Subordination of American Capital*, 27 J. FIN. ECON. 89 (1990).

39. *See, e.g.*, Jonathan Macey & Geoffrey Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 STAN. L. REV. 73 (1995); Curtis Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate*, 91 NW. UNIV. L. REV. 865 (1997).

40. See generally the history recounted in William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 235 *et seq.* (1999).

41. *Id.*

42. See, for example, the mammoth COMPARATIVE CORPORATE GOVERNANCE, *supra* note 14. For an extensive review, see Cioffi, *supra* note 13.

43. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEORGETOWN L.J. 439 (2001).

44. *Id.* at 439.

cles on law, finance, and corporate governance,[45] and the authors have continued, both together and with other collaborators, to produce research in this vein in subsequent years. While the methodology of this research has been criticized,[46] it is sufficient for present purposes to note that its conclusion—that law mattered—added new urgency to the quest for optimal corporate governance rules. In addition, the work of financial economists such as LLSV has moved CCG out of the realm of traditional corporate law. Not only are economists getting into the game, but business school professors—which could only be expected—political scientists,[47] and sociologists[48] are doing so as well.

III. Methodologies of Comparative Corporate Governance

A. *Functionalism and its Problems*

The overall methodology of CCG has traditionally been, and remains, functionalism. In other words, the scholar identifies a need or a function or a problem that is shared by several jurisdictions, and then asks how they address it.[49] The solutions will by definition be functionally equivalent and therefore comparable. This approach is widely used in comparative law generally.[50] An often-cited example in the CCG field is Ronald Gilson's "Globalizing Corporate Governance: Convergence of Form or Function."[51] In this paper, Professor Gilson explicitly takes a function-centered approach to CCG in examining various problems, stating, for example, that "[a]ny successful system must find a way to replace poorly performing senior managers,"[52] and then showing that different systems manage to do it with similar levels of efficiency despite formally different structures. As noted above, CCG scholarship has traditionally taken the cross-na-

45. *See supra* the works cited at note 20.

46. *See infra* text accompanying notes 66-73.

47. *See* Mary O'Sullivan, *The Political Economy of Comparative Corporate Governance*, 10 Rev. Polit. Econ. 23 (2003), and sources cited in the bibliography; Gourevitch & Shinn, *supra* note 15.

48. *See, e.g.*, Neil Fligstein & Jennifer Choo, *Law and Corporate Governance* (Mar. 2005); Neil Fligstein & Robert Freeland, *Theoretical and Comparative Perspectives on Corporate Organization*, 21 Ann. Rev. Sociology 21 (1995); Jackson, *supra* note 13.

49. *See, e.g.*, Petri Mantysaari, Comparative Corporate Governance: Shareholders as a Rule-maker 12 (2005) ("The functional method . . . means the comparison of how a social need has been dealt with by legal norms."). The classic statement of functionalism in sociology is Talcott Parsons, The Social System (1951).

50. See, for example, Law in Radically Different Cultures (John Barton et al. eds., 1983) (examining the treatment of "inheritance," "embezzlement," and "contract" in various jurisdictions).

51. Gilson, *supra* note 28.

52. *Id.*

tional problem to be that of minimizing agency costs in the shareholder-management relationship.

Although this approach has been praised as "value-neutral,"[53] the injection of values into a study is in fact unavoidable, and can only be managed, not eliminated. First, values enter the picture because there is no objective way of knowing what function or need a particular practice serves. What is a problem in one system may not be a problem (or perceived as one) in another. The very act of deciding what is a problem involves a value judgment. Thus, for example, the separation of ownership and control is perceived as a central problem in American corporate law and is therefore assumed often to be a central problem in other jurisdictions.[54] But it has been embraced as a *solution* in much of Chinese corporate governance discourse.[55] While one could argue (as I have)[56] that this discourse misconceives the nature of the problem that separating ownership from control is supposed to solve, the fact remains that a search for Chinese solutions to the "problem" of this separation is going to yield odd results.

This leads to the second problem: that if the function is exogenously determined, we can always, if we look hard enough, find something that we judge attempts to accomplish it. Consider this passage from Max Gluckman's *The Judicial Process Among the Barotse*:

> [I]n contract cases the court begins by defining the social positions of the litigants: buyer and seller, lender and borrower, employer and servant, cattle-owner and herder, owner and share-cropper in fishing, partners. These positions are linked by agreement (*tumelano*), in sale (*muleko*) or barter (*musintana*), loan (*kukalimela*), employment (*kusebezisa*), herding (*kufisa*), share-fishing (*munonelo*), or partnership (*kopanyo*).[57]

It may well be that the Lozi terms in question are the closest one can get to the English term preceding it. And it is of course possible that Lozi society happened to come up with a legal system that also uses abstract definitions such as "buyer" and "seller," "lender" and "borrower," and so on, and has business organizations like partnerships as we know them. But one cannot escape the suspicion that

53. *See* Mantysaari, *supra* note 49, at 11.
54. *See, e.g.*, Gilson & Roe, *supra* note 36, at 871, 874 ("To date, comparative analyses of the Japanese corporate governance system have assumed that the central *purpose* of the Japanese system, like that of the American system, is solving the Berle-Means monitoring problem.").
55. *See* Donald C. Clarke, *Corporate Governance in China: An Overview*, 14 China Econ. Rev. 494, 497-98 (2003).
56. *See id.*
57. Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (Zambia) 315 (1955).

Gluckman began with the concept from English or Roman-Dutch law, proceeded to look for its equivalent, and inevitably (because the methodology required it) found one.[58]

A third problem with functionalism crops up when starting not with a posited function, but instead coming from the other direction: starting with an institution and attempting to attribute to it a function. In Teemu Ruskola's colorful example,

> Explaining in a functionalist framework why the medieval French chose to try rats, for example, would require considerable ingenuity. How would one even begin to frame the inquiry? ("How did the French deal with the problem of criminal rodents in the Middle Ages?" Or, "How did medieval French law address cross-species disputes?")[59]

Thus, we might see a foreign practice as a response to the "need" to limit controlling-shareholder exploitation of non-controlling shareholders, whereas in fact it serves some other, quite different social purpose.[60] This risk is admittedly small when we are looking at foreign jurisdictions similar to our own, and where there is considerable cross-communication among scholars, so that we have a good sense of how people in the jurisdiction in question view the practice. But once we move to more unfamiliar and exotic jurisdictions without much of a shared legal tradition, and in particular if we do not go below the surface but simply code the rules on the books, the danger of missing something important is very high.

Finally, functionalism is problematic because it requires one in effect to take for granted the function that is served in the analyst's home jurisdiction. For example, much of the discussion in CCG is over whether there is a single optimal form of corporate governance, and if so, what it is. But although this discussion has resulted in many different views, even to have it requires agreement on what corporate governance is supposed to be optimizing. Although many would say it is or should be about maximizing shareholder returns, there is a sizable dissent from those associated with stakeholder theory and the progressive corporate governance school.

None of this is to condemn functionalism out of hand or to deny its usefulness in some circumstances. Many corporate governance re-

58. See Paul Bohannon's critique of what he calls "backward translation" in Paul Bohannon, *Ethnology and Comparison in Legal Anthropology, in* LAW IN CULTURE AND SOCIETY 401, 410-11 (Laura Nader ed., 1969).

59. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 203-34 (2002).

60. Roberto Romano, for example, posits that institutional blockholding in Germany and Japan exists not to minimize agency costs in that particular institutional environment, but to prevent hostile takeovers or to allow the blockholders "to safeguard or favor their non-shareholder positions at the public shareholders' expense." *See* Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2033 (1993).

gimes do indeed face common problems. For example, to whom do assets used by the corporation belong, and to whose creditors shall they be made available? Who can act for the corporation, and how shall that actor's performance be monitored and controlled? CCG studies have gotten a great deal of mileage out of the comparative approach by showing how similar results can sometimes be achieved in spite of different formal legal norms.[61] Functionalism can also be useful in naturalizing the exotic, as it were; in showing that what seems at first glance to be utterly strange can in fact be reduced to familiar terms. As CCG extends its reach beyond the familiar jurisdictions of the industrialized world to transition and developing economies, this approach may still prove valuable. The key is to be alert to, and avoid, functionalism's tendency to reduce to familiar terms that which truly *is* exotic, thereby hiding precisely what is different and interesting about it.

B. Cross-Sectional Studies Versus Longitudinal Studies

A marked feature of CCG in recent years has been its focus on cross-sectional studies. These studies can examine the relative efficiency of given structures at given times and yield policy recommendations, but do not tell us how structures change over time.[62] One notable exception is an admirable 2002 study by Katharina Pistor and her colleagues of the evolution of corporate law in several jurisdictions since about the late eighteenth century.[63] Another exception is a 2001 article by Mark West showing how Japanese corporate law began after World War II looking like Illinois corporate law, and then gradually diverged over time.[64] West then uses this phenomenon to develop a theory about the differences between Japanese and U.S. corporate law understood as systems; it is their larger unchanging features that explain the way subsidiary features change over time.

C. Empirical Studies using Standardized Data

The well-known LLSV literature and its progeny are empirical studies using standardized data.[65] Particular areas of importance are

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61. *See, e.g.*, Gilson, *supra* note 28.

62. Michael Bradley, Cindy A. Schipani, Anant K. Sundaram & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 L. & CONTEMP. PROBS. 9, 12 (1999).

63. Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002).

64. Mark West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527 (2001).

65. The relevant literature is discussed in La Porta et al., *Economic Consequences*, *supra* note 20, *passim*.

identified, the relevant rules are found and coded, and then attempts are made to make correlations.

Although one must admire the energy and ambition behind these coding efforts, this genre of literature has been the subject of extensive criticism. First, it is said to focus too much on law on the books, with inadequate attention to whether the law is actually enforced,[66] and that when it does pay attention to enforcement issues, it again looks at law on the books.[67] Second, the literature's descriptive account of the law is sometimes simply wrong or inconsistent.[68]

Related to the second critique is a third: that the indicia the literature focuses on do not in fact measure something useful. Some of the shareholder rights measured in the literature supply only partial protection to shareholders and are easily circumvented.[69] In other cases, bad or good rules can be varied by contractual arrangements. In still other cases, such as shareholders' pre-emptive purchase rights for new issues, it is not clear that shareholders—particularly minority shareholders, who are the main objects of this literature's concern—are better off in a regime that mandates such rights and makes it impossible for shareholders to decide that a different rule might be of greater collective benefit.[70] Cumulative voting, prized by the literature as a measure of small shareholder protection,[71] is another example. It has been criticized as in fact allowing greater power to directors who are either shareholders themselves or hold the proxies of smaller shareholders.[72] More obviously, cumulative voting cannot

66. See, for example, the parlous state of enforcement in Indonesia described in Andrew Rosser, *Coalitions, Convergence and Corporate Governance Reform in Indonesia*, 24 THIRD WORLD Q. 319, 329 (2003); *see generally* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 244, 250-51 (2007).

67. *See* Coffee, *supra* note 66, at 244, 250–51.

68. *See* Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697 (2005); Udo C. Braendle, *Shareholder Protection in the USA and Germany—On the Fallacy of LLSV* (Univ. of Manchester Sch. of Law, Working Paper, 2005), *available at* http://ssrn.com/abstract=728403; Robert Schmidbauer, *On the Fallacy of LLSV Revisited—Further Evidence About Shareholder Protection in Austria and the United Kingdom* (Univ. of Manchester Sch. of Law, Working Paper, 2006), *available at* http://ssrn.com/abstract=913968; Holger Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.'s "Anti-Director Rights Index" Under Consistent Coding* 68 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus., Fellows' Discussion Paper Series, Discussion Paper No. 7, 2006), *available at* http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_7.pdf.

69. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 4 n.6 (2001).

70. *See* Pistor et al., *supra* note 63, at 805 n.39.

71. *See, e.g., Law and Finance*, *supra* note 20, at 1127. In cumulative voting, each shareholder gets a number of votes equal to the number of shares he holds multiplied by the number of directors and can spread those votes over several candidates or concentrate them on one.

72. *See* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 142-60 (1994).

help the typical public shareholder in a listed company, who holds far less than the minimum proportion—one divided by the total number of directors—required to elect a single director. In a company with a board of as many as twenty directors, the only kind of "small shareholder" who benefits from cumulative voting will be one who already holds at least five percent.

Finally, it has been argued that the correlations this literature finds are spurious and the product of data mining.[73]

On the other hand, some of the LLSV literature has shed valuable light on comparative questions. It was the LLSV literature that showed how rare regimes of dispersed ownership actually are around the world,[74] suggesting therefore that rules designed for such a regime, where the main agency problem is the vertical one between shareholders and management, are of limited transplantability to countries where the main agency problem is the horizontal one between controlling shareholders and non-controlling shareholders. It also suggested, although not irrefutably, that existing ownership structures are an equilibrium response to domestic legal environments. Controlling shareholders in blockholder-dominated systems do not lobby for more protection for minority shareholders, even though that might increase overall firm value, probably because they would lose more than they would gain by it.[75]

More generally, the problem pointed out over a decade ago by Jonathan Macey remains:

> [T]here are no generally accepted criteria for the appropriate means to *measure* alternative systems of corporate governance. That is to say, there are no formalized, generally accepted criteria for determining whether a particular system of corporate governance is working. Once such criteria are developed, it should be possible to begin serious comparative empirical work in corporate governance.[76]

Macey proposes a set of criteria of his own. First, how successful is the system in preventing managers from diverting firm resources to private use? To answer this question, one could look at the premium

73. *See* Mark D. West, *Legal Determinants of World Cup Success* (Univ. of Mich. Law Sch. John M. Olin Ctr. for Law & Econ., Paper No. 02-009, 2002), *available at* http://ssrn.com/abstract=318940 (correlating legal origins with World Cup success).

74. *See* La Porta et al., *Corporate Ownership*, *supra* note 20.

75. Bebchuk and Roe demonstrate this point mathematically in Lucien Arye Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

76. Jonathan R. Macey, *Institutional Investors and Corporate Monitoring: A Demand-Side Perspective in a Comparative View*, *in* COMPARATIVE CORPORATE GOVERNANCE, *supra* note 14, at 903, 908.

on voting over non-voting stock, or on control-block stock over non-control-block stock.[77]

Second, how willing are entrepreneurs to sell stock to the public? In a well functioning system, entrepreneurs can credibly promise not to expropriate investors, and therefore receive a high price for the stock. In a poorly functioning system, their promise is worth much less and so they receive much less from investors, making even honest entrepreneurs less willing to sell.[78]

Third, are there well functioning internal and external markets for corporate control? If so, inefficient management can be replaced by action of the board or by a hostile takeover.

While these criteria are good ones for particular purposes, they are unlikely to solve the problem of general acceptance pointed out by Professor Macey because they do not make explicit the goal that a "working" corporate governance system ought to achieve. Is it control of agency costs as between shareholders and management? Maximization of stock price? Maximization of contribution to gross national product? None of these goals will command universal agreement. Yet without answering this question, it is impossible to know how, for example, to weight the scores on the various suggested criteria for the purpose of comparing different regimes even if we could come up with such scores.

IV. Lessons from Comparative Corporate Governance

Despite the suspicion that it is somewhat dull work,[79] taxonomy in CCG has been quite illuminating. Scholars have distinguished between insider- and outsider-dominated systems, with the latter relying more heavily on disclosure and markets than the former,[80] and Hansmann and Kraakman classify corporate governance systems by their orientation to shareholders, managers, labor, or the state.[81] Gourevitch and Shinn go further to produce a typology of six political coalitions resulting from different outcomes of alliance and conflict between owners, managers, and workers.[82]

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77. *See id.* at 910. On the latter measure, it seems, the United States scored well: 5.4% compared with Italy's 82%. *See id.*

78. This is, of course, the lemons problem famously analyzed in George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

79. *See* Gilson, *supra* note 28, at 128 ("The result [of the taxonomists' work] was an interesting, if somewhat dry, enterprise.").

80. *See generally* Stilpon Nestor & John K. Thompson, *Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?, in* Organization for Economic Cooperation and Development, Corporate Governance in Asia: A Comparative Perspective 19 (2001).

81. *See* Hansmann & Kraakman, *supra* note 43.

82. *See* Gourevitch & Shinn, *supra* note 15, at 21, Table 2.3.

CCG scholarship also led to the discovery that national systems varied dramatically along dimensions of ownership—some countries have large groups of related corporations (for example, *chaebol* in South Korea, holding companies in Europe, *keiretsu* in Japan[83]); others show patterns of family control (for example, Canada, Italy, and Hong Kong); and others show relatively dispersed shareholding (for example, the United States and the United Kingdom).[84] A great deal of CCG scholarship has been about trying to explain cross-country variations in patterns of corporate ownership. Different studies have reached different conclusions, not all of them mutually reconcilable. But it is a sign of the vigor of the field that so many different theories have been raised and discussed, and it is hardly a sign of failure that no consensus on a definitive conclusion has yet been reached.

The simplest hypothesis of the CCG literature is that economics, and only economics, matters. Corporate governance is a technology of business organization, just like lean production or indeed the assembly line itself. Countries faced with similar economic pressures will, over time, adopt similar corporate governance institutions. Evolutionary processes will ensure the elimination of unsuccessful competitors.[85]

CCG research has forced this hypothesis into some major qualifications. Significant differences do persist that are hard to explain as the result of different competitive pressures.[86] The response of the "economics matters" school has essentially been to say that economics matters within the constraints imposed by politics,[87] which has something of a tautological flavor, or to maintain that economics still matters in the long run; that even though short- or mid-term differences may persist, long-term trends are decided by competitive economic pressures.

83. Mark Ramseyer and Yoshiro Miwa challenge what they call the "myth" of the *keiretsu*; see the discussion at *supra* note 36.

84. *See* Gilson, *supra* note 28, at 128-29.

85. This economic Darwinist explanation is discussed more fully and critiqued in Part V.B below.

86. Doremus et al., for example, write:

> [S]triking differences in firm behavior persist. These differences correlate most obviously with corporate nationality, not with sectoral characteristics or investment maturity . . . . Those differences . . . are systematic. Across firms, sectors, and in the aggregate, only one set of behavioral variations shines through: national ones.

PAUL N. DOREMUS, WILLAM W. KELLER, LOUIS W. PAULY & SIMON REICH, THE MYTH OF THE GLOBAL CORPORATION 139 (1999).

87. *See, e.g.*, Frank Easterbrook, *International Corporate Differences: Markets or Law?*, 9 J. APPLIED CORP. FIN. 23 (1997). *But see* Romano, *supra* note 60, at 2037 ("[P]rivate parties are persistent in devising institutions that circumvent, or minimize the effect of, political constraints on economic activity.").

A second hypothesis is that law matters. This is essentially the message of the LLSV literature, which finds a correlation between formal law on the one hand and systems of finance and corporate governance, including ownership patterns, on the other. Whether the link is indeed one of cause and effect, and whether the link is more than spurious, can be (and has been) debated.[88] But in any case, the hypothesis is out there, and it has not been decisively refuted.

A third hypothesis is that history and politics matter. This is, of course, the position of Mark Roe, who argues, "The economic model cannot alone explain foreign structures and their differences with the American structures; it needs a political theory of American corporate finance to provide an adequate explanation."[89] This hypothesis incorporates path dependency:[90] different ownership patterns prevail because of previous choices in corporate structures and corporate law itself. Both result in regimes that are costly to change even though if we were starting from scratch we might not choose them.

While the Roe hypothesis is far from unchallenged,[91] it has inspired a number of inquiries into the details of various national corporate governance regimes, and has proven a useful lens through which to view national differences. It is hard to find a work of CCG these days that does not cite Roe's work on path dependency and the importance of history and politics, even if it does not always completely agree with it.

A fourth hypothesis is that culture matters. A traditional concern of comparative law scholarship generally has been that of the transplantability of laws and legal institutions. Will the transplant take? Why or why not? Are there things that need to be considered beyond market pressures and interest-group politics? The "culture matters" school answers "Yes," and the argument has been applied in the corporate governance context. The problem with culture as an independent variable is that it is very susceptible to vague cliché-mongering, and often used by vested interests as a reason to oppose change. Amir Licht is probably the scholar most prominently associated with an effort to be more rigorous about looking at the relationship between culture and corporate law.[92]

Finally, another effort to get at deep-structure issues can be called the "property rights matter" approach essayed by Curtis

88. The LLSV literature and critiques of it are discussed more fully in Part III.C above.

89. Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927, 1935 (1993).

90. *See generally* Bebchuk & Roe, *supra* note 75.

91. See the discussion at *supra* note 31.

92. *See* Amir N. Licht, *Legal Plug-Ins, Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY INT'L L.J. 195 (2004); Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001).

Milhaupt in his 1998 article, "Property Rights in Firms." The hypothesis here is that we need to understand the claims on corporate assets and behavior that can be made by state as well as private actors, and that the security and predictability of property rights in a polity will affect the ownership structure of firms. In particular, the claim is that dispersed ownership is possible only in countries where private property rights are highly secure, and that concentrated ownership is a response to insecure property rights.

V. Future Directions and Challenges

A. *Comparative Corporate Ecology*

One criticism leveled at the LLSV literature is that it mistakes the rules on the books for actual practice. This is so in two ways. First, it neglects enforcement issues. But perhaps more importantly, it neglects the ways in which actors can often negotiate around the rules if they wish, to the extent that Bernard Black has famously called corporate law "trivial."[93] A contractarian theory of corporate law would hold that the rules we see applying to participants in the corporate enterprise are all rules that they have in some sense chosen. The LLSV literature in effect rejects by implication this theory of corporate law without ever directly engaging it or even acknowledging its existence.

More broadly, CCG would benefit from a stronger focus on the institutional environment for corporate governance.[94] This means comparing not just rules, no matter how well selected, but also the various institutions that exist to make the rules meaningful, as well as non-legal institutions that may work to accomplish the purposes—for example, the reduction of agency costs—attributed to corporate governance rules. A decade ago, for example, John Cioffi asserted that

> even under the liberal legal tradition and pluralist political conditions in the United States, fiduciary duties cannot fulfill their governing function unless one assumes the existence of powerful, pervasive, and effective extra-legal social mechanisms of norm internalization. Whatever the moral force and effect of fiduciary duty law, the hypertrophy of the business judgment rule reveals the impracticability of structuring corporate governance through formal rights and

93. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542 (1990). Black does not actually assert that *all* corporate law is trivial in the sense that unwanted rules can be avoided at low cost. He argues that where such rules cannot be avoided, political pressures will be brought to bear to change them.

94. I have tried to do this myself in Donald C. Clarke, *Law Without Order in Chinese Corporate Governance Institutions*, 30 Nw. J. Int'l L. & Bus. 131 (2010).

> judicial enforcement . . . . Economically functional corporate governance regimes thus require alternative or additional legal mechanisms of governance such as disclosure regulations, proxy rules, board structure and operation, and board and/or works council codetermination. Hence, corporate governance regimes and their reform reflect a *politics of institutional mechanisms*.[95]

The last ten years have seen numerous studies of the "alternative or additional legal mechanisms" noted by Cioffi, plus others not mentioned. A few scholars have produced comparative studies of shareholder derivative actions, for example.[96] And the CCG community is certainly aware of the importance of institutional context in general. But further comparative research on many specific institutions is needed; surely interesting insights could be gained by studying the role in other countries of the financial press or of gatekeepers such as lawyers and accountants.[97]

B. The Issue of Convergence

A key question occupying CCG almost from the beginning has been that of the prospects for convergence.[98] Most of the arguments on convergence—whether it is going to happen, and what pressures exist either for or against it—were already out there in the literature ten years ago.[99] Yet there was no consensus then[100] and there is none now.

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95. Cioffi, *supra* note 13, at 523-24 (internal footnotes omitted) (emphasis in original).

96. *See, e.g.*, Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 Nw. U. L. Rev. 1436 (1994); Kristoffel Grechenig & Michael Sekyra, *No Derivative Shareholder Suits in Europe—A Model of Percentage Limits, Collusion and Residual Owners* (Columbia Univ. School of Law, Center for Law and Economic Studies, Working Paper No. 312, 2007); Alessandro de Nicola, Shareholder Suits: The Roles and Motivations of Minority Shareholders and Directors in Derivative Suits (2007); Scott H. Mollett, *Derivative Suits Outside Their Cultural Context: The Divergent Examples of Italy and Japan*, 43 U.S.F. L. Rev. 635 (2008-09). Professor Daniel Puchniak of the National University of Singapore's Faculty of Law is editing a forthcoming symposium volume tentatively entitled *Derivative Actions in Major Asian Economies: Legislative Design and Legal Practice*.

97. *See* Coffee, *supra* note 31 (studying gatekeepers in other countries).

98.
> In these globalizing times, corporate law's leading question is whether there is a national corporate governance system (or component thereof) that possesses relative competitive advantage . . . . If only the fittest practices can survive in the global market, it also becomes plausible to project that national governance systems will converge upon them and systemic differences will disappear.

Bratton & McCahery, *supra* note 40, at 216.

99. *See, e.g.*, Bebchuk & Roe, *supra* note 75; Bratton & McCahery, *supra* note 40; Gilson, *supra* note 28; Coffee, *supra* note 31.

100. *See* Bratton & McCahery, *supra* note 40, at 216 ("[A]s descriptions have become thicker and more cogent, answers to the bottom-line questions respecting

The definition of insanity is said to be doing the same thing over and over and expecting different results.[101] If so many scholars after so many years still cannot get any traction on the problem, perhaps this is a clue that we are asking the wrong question.

The issue of convergence can be divided into three main sub-issues. First, why might it happen? Second, is it happening? Third, is it a good thing?

The CCG literature has proposed several reasons why convergence might happen. Foremost among these explanations is the economic Darwinist one: convergence will occur because one system must necessarily be more efficient than the others, and that system will prevail in economic competition between corporations. A typical statement of this view is as follows:

> In the long run, product market competition resulting from the increased openness of national economies to foreign trade may demonstrate which of the two local [corporate governance] optima is also optimal for the world as a whole. While there may be no unique answer, it may turn out that one or the other is better suited for particular industries.[102]

This view sees corporate governance as an organizational technology, and firms must adopt the best available technology to survive.[103] With the increased flow of information, lack of knowledge about this technology is no longer an obstacle to its diffusion. Countries that fail to adopt efficient rules will suffer; their corporations

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competitive advantage have become more elusive and convergence predictions have become more qualified.").

101. The expression is often attributed to Einstein or Franklin, but I have found no specific citation.

102. Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 186 (2009).

103. *See* Nestor & Thompson, *supra* note 80, at 35. An interesting field of research within this approach is the degree to which there is a necessary correlation between production technology and organizational technology. Ronald Gilson writes:

> [I]t was thought that Japanese lean production, supported both by employees rendered cooperative and inventive by lifetime employment, and by close, long-term ties to suppliers, could not be matched without dramatic changes in US governance institutions. In fact, American manufacturers adopted lean production, but adapted lean production to fit their governance institutions, rather than adapting their institutions to lean production.

Gilson, *supra* note 28, at 131-32. For more on the relationship between governance and production systems in the United States and Japan, see Charles Sabel, *Ungoverned Production: An American View of the Novel Universalism of Japanese Production Methods and Their Awkward Fit with Current Forms of Corporate Governance, in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE, *supra* note 28, at 310.

will be worth less, and will have a harder time raising capital. Business will suffer, or will move elsewhere.[104]

To be complete, this explanation must be supplemented by another one setting forth the mechanism by which competitive adaptation takes place. The literature offers a number of suggestions: technological determinism, in which similar problems dictate similar solutions; emulation, where policymakers consciously imitate the practices of other countries; elite networking, where a cosmopolitan group of experts forms a consensus and then proselytizes it back in the members' home countries; harmonization, where policymakers recognize interdependence and the need to avoid unnecessary incompatibilities; and penetration, where states face serious externally imposed costs of some kind for not adopting converging structures.[105] For example, investors might plausibly threaten to leave (or not to come) if there is not reform. An interesting development in recent years has been the explicit promotion of a corporate governance agenda by international financial institutions such as the World Bank, the International Monetary Fund, and the Asian Development Bank.[106]

Whether political factors lead to convergence or divergence seems to be indeterminate. Scholars such as Mark Roe have emphasized the importance of social-democratic politics in the making of national corporate governance regimes.[107] If he is right, then corporate governance will converge at about the same time politics converges. Other scholars see politics as a force for convergence. Mary O'Sullivan argues, for example, that while social democratic values may drive political decisions, it does not follow that they will drive corporate governance regimes. Quite the opposite may occur (and, she argues, did occur in France in the 1990s[108]): if social democratic values mean that society assumes the cost of redundancies, then it may be easier for corporations to make decisions that maximize profits and do not take labor and other "stakeholder" interests into account.[109]

Indeed, it is not even undisputed that economic factors will lead to convergence, as argued by the Darwinian view. The "varieties of capitalism" perspective holds that

104. This story is presented in Bebchuk & Roe, *supra* note 75, at 134-38, although it is not clear that they subscribe to it.

105. *See* LARRY CATÁ BACKER, COMPARATIVE CORPORATE LAW 20 (2002).

106. *See* Rosser, *supra* note 66, at 320.

107. *See* ROE, *supra* note 30.

108. *See* O'Sullivan, *supra* note 47, at 53.

109. *See id.* at 63. On the other hand, the state's reluctance to bear the cost of generous redundancy benefits may lead to regulatory regimes that make it difficult for employers to fire workers. For political sources of convergence generally, see *id.* at 30.

> an understanding of the foundations of economic performance suggests the persistence of diversity in systems of corporate governance. [This perspective] emphasize[s] the importance of institutional diversity for shaping enterprise behaviour and economic performance. [It] reject[s] the assumption that there is one best way to organize an economy and, in particular, that the free flow of economic resources through "perfect" capital, labour and product markets will lead to optimal economic outcomes.[110]

Moreover, the argument that firms must adopt international norms in order to attract investment is empirically questionable. The standard view is expressed by Nestor and Thompson, who state that in an era of globalized capital markets, firms know that "in order to tap this large pool of global financial resources, they need to meet certain governance conditions."[111]

> Institutional investors also insist that companies respect international norms of governance, particularly concerning the duties of management and controlling shareholders to respect the demands of minority investors concerning transparency and the procedures for exercising corporate control, especially at the shareholders meeting.[112]

This argument is not implausible on its face, and may well be true at least at the margin and when all other things are equal. But all other things are never equal, and the question is whether corporate governance survives as a decisive factor when other factors have been taken into account. Particularly in emerging markets with poor and unreliable disclosure, investment decisions are as often driven by predictions about broad economic trends or government policies as they are driven by company-specific matters such as governance. Randall Morck found a high degree of synchronicity in stock prices in emerging market countries, suggesting that investors in those markets pay more attention to systemic risk factors than to corporation-

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110. *Id.* at 27 (internal references omitted). Further literature in this vein includes MASAHIKO AOKI, TOWARDS A COMPARATIVE INSTITUTIONAL ANALYSIS (2001); RONALD DORE, BRITISH FACTORY, JAPANESE FACTORY: THE ORIGINS OF NATIONAL DIVERSITY IN INDUSTRIAL RELATIONS (1973); VARIETIES OF CAPITALISM: INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); David Soskice, *The Institutional Infrastructure for International Competitiveness: A Comparative Analysis of the UK and Germany, in* THE ECONOMICS OF THE NEW EUROPE (Anthony B. Atkinson & Renato Brunetta eds., 1991); Richard Whitley, *Internationalization and Varieties of Capitalism: The Limited Effects of Cross-National Coordination of Economic Activities on the Nature of Business Systems*, 5 REV. INT'L POLIT. ECON. 445 (1998); RICHARD WHITLEY, DIVERGENT CAPITALISMS: THE SOCIAL STRUCTURING OF CHANGE IN BUSINESS SYSTEMS (2000).

111. Nestor & Thompson, *supra* note 80, at 20.

112. *Id.* at 34.

specific information.[113] The foreign business community has been telling China for years that it must improve its corporate governance regime or face a loss of investment, but the threat has proved empty. And foreign investment continues in Russia, despite corporate governance practices described by Bernard Black and his co-authors with terms such as "kleptocracy," "looting," and "plunder."[114] In short, investment in many emerging markets seems to be driven by a desire simply to be there, with little attention paid to the quality of the company in which the investment is made.[115]

But even if economic pressures do drive firms *toward* a single model, it does not follow that Darwinian selection will actually result in convergence. First, for this result to obtain, selection pressures brought about by corporate governance differences would have to operate quickly and massively. To say that selection pressures push firms toward a particular destination is a different thing from saying that they will actually arrive there, and to show that some structure is efficient in the long run is not to show that at any given moment no inefficient structures can be observed.[116]

113. *See* Randall Morck et al., *The Information Content of Stock Market: Why Do Emerging Markets Have Synchronous Stock Price Movement?*, 58 J. FIN. ECON. 215 (2000); *see also* Art Durnev et al., *Capital Markets and Capital Allocation: Implications for Economies in Transition*, 12 ECON. OF TRANSITION 593 (2004); Merritt Fox et al., *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331 (2003).

114. *See* Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, *passim* (2000). It is of course very plausible to suppose that foreign investment in Russia would be higher if it had better corporate governance. The point is that it would also be higher if many other things were true—for example, if oil prices were higher or if taxes were lower—and it may be that investors are willing to overlook a lot of poor corporate governance if an investment has other attractive features.

115. An excellent if ultimately anecdotal account of this phenomenon is TIM CLISSOLD, MR. CHINA (2005), which tells the tale of how two investment managers lost half a billion dollars in China. A recurring theme is the pressure they faced from investors in their China fund to invest in something—*any*thing—even when no good prospects were available.

116. Miwa and Ramseyer, for example, while sometimes acknowledging that competitive pressures "drive firms toward" a firm-specific optimum number of outside directors, elsewhere go much further and assert in effect that all firms are always already there. *See* Yoshiro Miwa & J. Mark Ramseyer, *Who Appoints Them, What Do They Do?: Evidence on Outside Directors from Japan* 6 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 374, 2002), *available at* http://papers.ssrn.com/abstract_id=326460 (analogizing a sub-optimal number of outside directors to $20 bills lying on the sidewalk in order to conclude that all firms in their survey must already have the optimal number). This vastly overestimates the flexibility of human institutions. *See also* RATIONAL CHOICE 26 (Jon Elster ed., 1986) (questioning the applicability of the biological analogy to economic activity on the grounds that the economic environment changes rapidly relative to the speed with which inefficient firms are eliminated from competition, and that therefore at any given time we are likely to observe efficient and inefficient firms coexisting); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIOLOGY 481, 503 (1985) ("The operation of alleged selection pressures is

Even if one believes in the effect of selection pressures, they will not push toward convergence unless the political, economic, and social environments for all competing firms are identical, such that the same set of rules turns out to be optimal for all. While the economic Darwinist view quoted above[117] is intuitively appealing at first glance, it ultimately fails for two reasons. First, corporate governance structure is only one cost of production. There are many other reasons for differences between countries in production costs, and those reasons might easily swamp any effect from corporate governance. Second, and more important, the argument does not take into account the concept of comparative advantage and its role in international trade. In a two-product world of wine and wheat, if it is relatively cheaper in terms of wine for Ruritania to produce wheat with Corporate Governance Regime *X* than for Freedonia to produce it with Corporate Governance Regime *Y*, then Ruritania will end up supplying wheat to the world even though Country *N* might be able to produce it at lower absolute cost and even if the only difference in production costs is the corporate governance regime.[118] Thus, the more efficient corporate governance regime, even if we define it on an industry-by-industry basis, will not necessarily prevail unless all other differences between countries have been removed.

Finally, if the story of selection pressures were true, then not only would we see convergence in corporate governance, but we would long ago have seen convergence in political and economic systems. All societies would look the same now. But they do not, and therefore the optimal set of corporate governance rules in each society is likely to be different even if you believe that selection pressures push companies toward optimality. Since corporations have not as an empirical matter all migrated out of all countries except one (the one that has the best rules), it must not be true that selection pressures work the way the story says they do. In short, while it is plausible to believe that selection pressures can push firms in a certain direction, it is not clear that that is the same direction for all firms, and even if it were the same direction, it is not clear that firms ever actually get there.

. . . neither an object of study nor even a falsifiable proposition but rather an article of faith."). This footnote is taken from Clarke, *supra* note 94, at 150, n.64.

117. *See* text accompanying *supra* note 102.

118. The demonstration of this result must be left to the economics textbooks. See, for example, PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 11-37 (3d ed. 1994). Needless to say, the result depends on various simplifying assumptions. But the basic insight remains valid. An experienced mechanic might be able to do six oil changes in an hour, as opposed to his apprentice, who can do only three. But the mechanic will still leave oil changes to the apprentice and focus on higher-value transmission repair work, since his income from using his time in that way more than makes up for the lost income stemming from less efficient oil change operations.

Are we actually seeing convergence? Despite Hansmann and Kraakman's provocative bombshell, there is no consensus that we are. In the advanced industrial countries, there has been little movement toward convergence. German-style co-determination, for example, has not proven attractive to other countries, but the Germans for their part show little inclination to reject it. In what for CCG studies has traditionally been the key realm of shareholder rights, an extensive recent study concludes that it is "a mixed picture."[119] There has been some convergence in management compensation practices, but no noticeable convergence in the area of defenses against hostile takeovers.[120]

At the same time, we should not overlook some important specific instances of convergence. Over the last several years, Japanese corporate law has undergone "massive"[121] revisions in what could be called an American direction,[122] culminating in the consolidated Company Law of 2005. Most observers, however, maintain that despite revisions to the formal law, the practice of corporate governance in Japan is changing only slowly.[123]

The same might be said about China. Given that the People's Republic of China did not even have a general corporate statute for the first four-plus decades of its existence, the very adoption of such a statute in 1993 could be viewed as a formidable example of convergence. More to the point, the 2005 revisions of China's company and securities laws were unquestionably in a direction that brought them closer to, and not further from, the mainstream.[124] Yet the reality of

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119. MATHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 358 (2008).

120. *See id.* at 358-59 and sources cited therein.

121. Nottage, Wolff & Anderson, *supra* note 36, at 1, 2. A table showing the reforms is appended to the article; *see id.* at 11.

122. *See* R. Daniel Keleman & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269, 303-15 (2002) (discussing corporate and securities law reforms).

123. *See* Nottage, Wolff & Anderson, *supra* note 36, *passim*; John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, 19 J. JAPANESE L. 5, 13 (2005) (concluding that although "the 1990s brought more separate corporate law revisions than any other period of Japanese history . . . [,] the fundamentals of Japanese corporate governance have not changed."). For a thoughtful discussion of the debate over the extent of change, see Bruce E. Aronson, *Changes in the Role of Lawyers and Corporate Governance in Japan—How Do We Measure Whether Legal Reform Leads to Real Change?*, 8 WASH. U. GLOBAL STUD. L. REV. 223 (2009).

124. For an analysis of revisions, see Nils Krause & Chuan Qin, *An Overview of China's New Company Law*, 28 COMPANY LAW. 316 (2007); Steven M. Dickinson, *Introduction to the New Company Law of the People's Republic of China*, 16 PAC. RIM L. & POL'Y J. 1 (2007); Baoshu Wang & Hui Huang, *China's New Company Law and Securities Law: An Overview and Assessment*, 19 AUSTL. J. CORP. L. 229 (2006); on the original Securities Law, see Roman Tomasic & Jian Fu, *The Securities Law of the People's Republic of China: An Overview*, 10 AUSTL. J. CORP. L. 268 (1999); Xian Chu Zhang, *The Old Problems, the New Law, and the Developing Market—A Preliminary Examination of the First Securities Law of the People's Republic of China*, 33 INT'L LAW. 983 (1999); Minkang Gu & Robert C. Art, *Securitization of State Ownership:*

corporate governance practices in China remains very different from what appears in the statute books, and indeed is so opaque that it is difficult to measure reliably where it is, let alone to know in what direction it is moving.[125]

Finally, it is worth considering the question of whether convergence would be desirable even if we had it. Here the argument for cross-national convergence or uniformity seems less compelling than in other areas of the law. In transnational bankruptcy cases, for example, there is value in a system that ensures uniform principles of distribution regardless of where the debtor's property happens to be or who first brings the case to court in which country. Consistent rules of contract on matters such as offer and acceptance make business transactions more predictable and forum-shopping less rewarding. But while there is general agreement that forum-shopping in those types of cases is a bad thing, there is much less agreement that the corporate law equivalent of forum-shopping—that is, incorporating in the jurisdiction that offers the best form of business entity for one's particular needs—should be discouraged.[126] It has long been allowed in the United States, and is increasingly allowed in Europe following the landmark *Centros* decision.[127] Clearly, there is substantial political as well as intellectual force behind the idea that choice is a good thing. It has even been argued that diversity in corporate governance regimes is per se a good thing, in the same way that biological diversity is a good thing: it preserves alternative ways of organizing that may prove superior to current ways if the relevant environment changes.[128]

Chinese Securities Law, 18 MICH. J. INT'L L. 115 (1996); on the original Company Law, see Robert C. Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People's Republic of China*, 20 YALE J. INT'L L. 273 (1995); Sunny Huo, *The Company Law of the People's Republic of China*, 13 UCLA PAC. BASIN L.J. 373 (1995).

125. *See generally* Clarke, *supra* note 94.

126. There is, of course, a "race to the bottom" theory of jurisdictional competition in corporate law that sees choice as a bad thing. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (discussing the United States); Laura Jankolovits, *No Borders. No Boundaries. No Limits. An Analysis of Corporate Law in the European Union After the* Centros *Decision*, 11 CARDOZO J. INT'L & COMP. L. 973 (2004) (discussing Europe).

127. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. 11459. In that case, two Danish citizens and residents with no connections to the United Kingdom established Centros Ltd. under English law. The company then attempted to register a branch in Denmark in order to do business there. (It was assumed for the sake of the decision that the shareholders followed this procedure to avoid Danish minimum capitalization requirements.) The Danish government refused registration, but the refusal was overturned by the European Court of Justice. For a sample of commentary on the case, see Jankolovits, *supra* note 126; Wolf-Georg Ringe, *Sparking Regulatory Competition in European Company Law—The Impact of the Centros Line of Case-Law and its Concept of "Abuse of Law," in* PROHIBITION OF ABUSE LAW—A NEW GENERAL PRINCIPLE OF EU LAW (R. de la Feria & S. Vogenauer eds., forthcoming 2010).

128. *See* Brett H. McDonnell, *Convergence in Corporate Governance—Possible, But Not Desirable*, 47 VILL. L. REV. 341, 382-83 (2002). The metaphor is a little strained; a

The whole discussion of convergence in corporate law is, in fact, oddly different from discussions of convergence in other fields of law, because convergence in corporate law does not necessarily mean uniformity. For corporate governance models do not vary only on the substantive rules they apply to business organizations. They vary also on the degree to which they offer and respect choices about which form of organization to use. Thus, if Model *A* offers one form and forbids the adoption of others, worldwide convergence to Model *A* might mean the elimination of choice. But convergence to Model *B* might mean the preservation of choice, if Model *B* is (for example) Delaware, which allows choice between a wide variety of organizational forms, one of which—the Delaware business trust[129]—itself has virtually no mandatory rules.[130]

Given, then, that the very meaning of convergence is so uncertain, as well as the failure over so many years to come to any consensus as to whether it is occurring, perhaps it is time to abandon the crystal-ball approach to CCG studies. After all, what purpose is really served by trying to figure out if convergence is inevitable or not? There is value in determining which features of which system do what well and do what badly. If policy advocacy has any real-world effect, then one should advocate what seems to work well, regardless of what direction the rest of the world is going in.

The debate about convergence seems really to be a debate about the conclusion to a number of debatable premises, and it would be better to debate the premises directly. In other words, the point is not whether it *will* rain tomorrow. The point is whether cloud-seeding today is an effective way to make it rain. The issues therefore become: (1) is there really a single best corporate governance system that is determined solely by economics, and (2) what is the process by which a country might come to adopt that system? Will it be the inevitable outcome of competitive processes, or might it not happen at all without proper policy advocacy, with the result that a country could become a laggard? These are the questions that matter from an academic and policy standpoint.

biological species, once gone, is gone for good, at least until *Jurassic Park*-like technology is invented. A species of organization, by contrast, can exist in the minds of human beings even if there are no examples of it on earth, and thus can be resurrected any time someone thinks it might be useful.

129. DEL. CODE ANN. tit. 12, §§ 3801-3824.

130. *See* Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 326 (2002) (the Delaware Business Trust Act "contains highly permissive provisions, allowing promoters of business trust a staggering degree of freedom to design their relationships with beneficiaries-investors.").

C. Breadth of Focus

1. Focus on the Public Corporation

CCG studies have tended to focus on publicly listed corporations. There are probably several reasons for this: they are the type of corporation that law professors tend to know best, and disclosure laws around the world mean that they produce the most numbers for economists to crunch. Furthermore, such companies feature almost by definition the involvement of small, passive shareholders, and thus present public policy questions arguably not present in business entities involving a small number of people who bargain with each other. Finally, if large public corporations dominate the economy, then the value of studying them is self-evident.

Although the focus on public corporations is for all these reasons understandable, it means that a great deal of interesting territory has been left largely unexplored. American corporate law scholarship and teaching has long been moving from a "corporations" approach to a "business organizations" approach, and scholars such as Henry Hansmann and Larry Ribstein have written extensively about alternative business structures.[131] It is time for CCG to do the same. Non-public-corporation business organizations (NPCBOs) play a major role not just in advanced industrialized economies,[132] but even more in the transition and emerging market economies that have become increasingly important.[133] They are major sources of employment, and are an essential stage in the life cycle of the large, successful public corporation. To focus on public corporations without understanding how NPCBOs operate, then, is to overlook a major part of

131. *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996); LARRY RIBSTEIN, THE RISE OF THE UNCORPORATION (2010).

132. In the United States, for example, small businesses (not the same thing as NPCBOs, but close enough for present purposes) have generated sixty to eighty percent of net new employment since the mid-1990s. *See* SMALL BUSINESS ADMINISTRATION, THE SMALL BUSINESS ECONOMY 2009, at 9 (2009).

133. *See* Frederick Nixson & Paul Cook, *Small and Medium Sized Enterprises in Developing Countries, in* FINANCE AND DEVELOPMENT: SURVEYS OF THEORY, EVIDENCE AND POLICY 333, 333 (Christopher J. Green, Colin H. Kirkpatrick & Victor Murinde eds., 2005) ("There is general agreement that small and medium sized enterprises . . . have played a crucial role in the process of economic development."); *see also* Christopher J. Green, Colin H. Kirkpatrick & Victor Murinde, *Finance for Small Enterprise Growth and Poverty Reduction in Developing Countries*, 18 J. INT'L DEVELOPMENT 1017 (2006); John Weeks, *Small Manufacturing Establishments in Developing Countries: An Empirical Analysis*, 17 INT'L REV. APPLIED ECON. 339 (2003); Paul Cook & Frederick Nixson, *Finance and Small and Medium-Sized Enterprise Development* (University of Manchester School of Economic Studies, Finance and Development Research Programme Working Paper Series, Paper No. 14, Apr. 2000), *available at* http://tinyurl.com/yb8oezn; Moha Asri Abdullah, *Small and Medium Enterprises (SMEs): Some Pertinent Issues, in* SMALL AND MEDIUM ENTERPRISES IN ASIAN PACIFIC COUNTRIES 3 (Moha Asri Abdullah & Mohd. Isa Bin Baker eds., 2000); CARL LIEDHOLM & DONALD C. MEAD, SMALL ENTERPRISES AND ECONOMIC DEVELOPMENT (1999); Dennis Anderson, *Small Industry in Developing Countries: A Discussion of Issues*, 10 WORLD DEVELOPMENT 913 (1982).

the global economic landscape. Therefore, if the CCG approach has any value at all, attention to NPCBOs would benefit scholars and policymakers from all types of jurisdictions: common law and civil law, advanced economies and developing economies.

What insights might such an approach yield? If we accept a basic premise of CCG scholarship—that national differences in the governance of public corporations matter for national economic performance—then we must also accept the premise that national differences in the governance of NPCBOs also matter (assuming NPCBOs matter at all in the economy). This in turn suggests the possibility that to the extent the current perceived superiority of American over Japanese capitalism can be attributed to differences in corporate governance, we should study the differences not in the governance of large, public corporations—after all, General Motors did not outperform Toyota—but rather in the way innovative start-ups such as Apple and Google could be governed and funded through venture capital.[134]

2. Focus on the Boundaried Firm

As noted earlier in the Article, the focus of CCG studies, particularly in the United States, has tended to be on the relatively narrow set of issues involving the relationship between shareholders and managers—in other words, on corporate law and securities law. Some voices have urged greater attention to labor issues.[135] But the desirability of broadening CCG's focus goes beyond the familiar shareholder vs. stakeholder conceptions of the corporation. Those competing conceptions still have one important thing in common: a vision of the corporation as a well-defined entity, with insiders and outsiders, employees and non-employees, shareholders and creditors.

But CCG, at least as practiced by legal scholars, needs to come to grips with patterns of industrial organization in which the boundaries of the firm are by no means clear. As William Klein pointed out almost three decades ago, although "[t]he notion that activity is organized either within firms or across markets does seem useful" for some purposes,

> [t]he types of organization people use to accomplish their economic goals, however, vary greatly; one can draw a clear line between firms and nonfirms only by adopting simplistic and unhelpful definitions. More realistically, one should envision a spectrum with varying degrees of "firmishness" and treat the firm not as an entity, but as an abstraction that

134. I am grateful to Barry Naughton for suggesting this point.
135. *See, e.g.*, Cioffi, *supra* note 13, at 524.

facilitates the examination of complex relationships among different actors.[136]

In his 1983 article "The Contractual Nature of the Firm," Stephen Cheung argued that the notion of a firm with boundaries made no sense and that, from an economist's standpoint, "it is futile to press the issue of what is or is not a firm."[137] And Ronald Coase himself, in his seminal article "The Nature of the Firm," admitted that "it is not possible to draw a hard fast line which determines whether there is a firm or not."[138]

The essential insight of all three authors is that the complexity of explicit and implicit contractual relationships among all those involved in production often makes it impossible, and indeed pointless, to say who is inside the firm and who is outside.[139] In real life, of course, it has long been true that a great deal of production takes place within the traditional hierarchical firm analyzed in Alfred Chandler's classic work, *The Visible Hand: The Managerial Revolution in American Business*.[140] But that has not been true everywhere[141] or in all industries,[142] and it may well be less true in the future as developments in communications and transportation technology make the economic environment more hospitable to what has been called the "virtual firm" or the "networked company."[143]

So far, however, these insights into the complexities of contracting have not been extensively explored in the CCG literature. What might such an exploration show—that is, what insights might

136. William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1523 (1982) (internal footnotes omitted).

137. Stephen N.S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1, 18 (1983).

138. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 391 (1937).

139. This is not to deny that sometimes the law requires us to make precisely those distinctions. Consider the number of politicians and would-be government officials who have had "nanny tax" issues precisely because they treated their nannies as independent contractors (outside the firm, so to speak) when they should have treated them as employees (inside the firm) and paid social security taxes.

140. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

141. *See, e.g.*, Yoshiro Miwa & J. Mark Ramseyer, *Rethinking Relationship-Specific Investments: Subcontracting in the Japanese Automobile Industry*, 98 MICH. L. REV. 2636, 2649 and *passim* (2000) (noting extensive use of subcontracting in the Japanese automobile industry and describing the automobile manufacturers as "assemblers").

142. Consider, for example, mutual funds, which outsource virtually all their activities, *see Schools Brief: Moneyed Men in Institutions*, ECONOMIST, Nov. 6, 1999, at 83, 83; the technology industry in Silicon Valley, *see* ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); and the construction industry, *see* William A. Klein & Mitu Gulati, *Economic Organization in the Construction Industry: A Case Study of Collaborative Production Under High Uncertainty*, 1 BERKELEY BUS. L.J. 137 (2004).

143. *See* Remo Häcki & Julian Light, *The Future of the Networked Company*, 3 MCKINSEY Q. 26 (2001); Anne E. Conaway Stilson, *The Agile Virtual Corporation*, 22 DEL. J. CORP. L. 497 (1997).

be gained by approaching comparative corporate governance from a "firmishness" perspective? Such a perspective means abandoning the focus on the large integrated firm and opening up our field of vision to networks of many small firms connected by formal or informal contractual relations in a production chain; it means abandoning the effort to figure out if those relationships should be labeled hierarchical ones of ownership or horizontal ones of contract. In such a network, the concept of "corporate governance" would have to be broadened to mean institutions intended to prevent, at reasonable cost, excessively opportunistic behavior by network members.[144]

As discussed earlier, a core concept of corporate governance in its traditional sense is the idea that all participants in the corporate enterprise have an interest in assuring minority investors that their powerlessness will not be unduly exploited; this is the only way they can be induced to invest in the first place. Similarly, network members need some assurance that other members will not take advantage of their transaction-specific investments to hold them up.[145] Comparative corporate governance from a "firmishness" perspective would look at the various arrangements in different societies that appear to prevent the kind of excessive opportunism that would cause production networks to collapse.

One reward might be a better understanding of the trade-offs between contractual governance arrangements and hierarchical ownership arrangements, and perhaps even insights into arrangements that are completely outside this duality. For example, vertical integration is often thought of as the solution to excessive contracting costs—costs that include not only negotiation, but also enforcement. In societies where contracts cannot be reliably enforced, we would expect to see a higher degree of vertical integration. But do we? China poses the example of highly specialized production chains involving complex networks of firms not tied together through vertical integration, and yet its courts are generally considered unreliable as contract enforcers. What institutions are performing the governance function, and what do we find in other countries that appear to exhibit the same combination of weak contract enforcement and low levels of vertical integration?

3. Moving Beyond the Traditional Jurisdictions

As the previous point suggests, CCG would benefit by moving to newer and more exotic—but still very important—jurisdictions and

144. I specify "excessively" because network members cannot be expected to be fiduciaries for each other; a certain amount of selfish behavior must be expected and allowed.

145. The concept of asset specificity and the vulnerability this entails is discussed extensively in WILLIAMSON, *supra* note 9.

truly taking account of foreignness. This means countries like India and China. The challenge is that they are going to look in some respects very familiar, with familiar forms. But in other respects they are quite different, especially China, since at least India shares a common legal tradition with the United States (and, more directly, England). Even that, however, can be misleading. How well can India fit into theories of legal governance designed for the United States or Europe when simple cases can drag on for decades?[146] Both of these countries are going to challenge legal scholars to think about how corporate governance can work when it cannot rely on a reasonably efficient court system. Can gatekeepers and reputation effects do all the work? And if so, does this suggest that a sound court system, even in countries where it exists, is not as important as we might have thought?

4. Contingency of Problem Issues

One of the original insights from CCG was that others are not necessarily concerned with the same problems that we are. This in turn is a lesson about the contingency of our own concerns; maybe there are problems we should be worrying about other than shareholder-management agency costs. Back in 1996, Edward Rock wrote about the comparative scholarship of Richard Buxbaum, for whom the interesting question was not how we can make managers sufficiently accountable to shareholders, but rather "why society permits the establishment and persistence of massive private concentrations of economic and political power over which the political process exercises relatively little control."[147] Comparative scholarship can thus show us that what we think is fundamental may not be so fundamental, and that we may be taking for granted issues that outsiders find of intense interest.

CCG has not really taken up this challenge. By and large it is still interested in the basic issue of convergence or divergence, and the fundamental issue is that of reducing agency costs. The virtues and vices of dispersed ownership versus blockholding are typically discussed in terms of their monitoring capacities, not in terms of, say, their contribution to social cohesion.

Of course, it can be objected that this is outside the realm of corporate governance studies, properly understood. But what does and does not count as corporate law is also a contestable proposition. If one defines corporate law as the law governing the relationship be-

146. *See* Jeremy Page, *Delhi Judges Face 466 Years' Hard Labour*, THE TIMES, Feb. 17, 2009, *available at* http://tinyurl.com/c98qsp (even working at its current rate of less than five minutes per case and assuming the rate of new filings does not increase, it will take the Delhi High Court 466 years to clear its current backlog of cases).

147. Rock, *supra* note 11, at 389.

tween shareholders and managers, then almost by definition it is going to be about the agency costs of this relationship, and one can persuasively claim that corporate law neither does nor should deal with the claims of employees, customers, etc.

But if corporate law is defined more broadly as a kind of business law, then it is clear that we do have a lot of law dealing with these claims, and in different ways.[148] Let me be clear: I am not advocating here a stakeholder theory of corporate governance as a normative matter. I want only to make the point that a focus on agency costs is not self-evidently the only way to go in comparative work. Simple and even self-evident though this point may be, it does suggest a new area of research in CCG: the comparative meta-study, as it were, of the key issues in corporate governance *as they are perceived* in different societies. Current research is focused largely on understanding the different ways in which legal systems solve similar problems. But there is much to be gained from understanding the different ways in which societies understand the problems they face. Not only can this alert us to the potential importance of problems we may have overlooked or deemed trivial, but it can also help us understand why transplants go wrong: the adopting jurisdiction may not have understood the problem the transplanted institution was designed to address in the home jurisdiction.[149]

VI. Conclusion

Despite the somewhat undertheorized nature of the comparative project generally, CCG has proven a successful approach to corporate governance scholarship, if success is measured by the ability to generate interesting insights that provoke further scholarship and seem likely to continue to do so. This Article's call to enlarge the scope of CCG scholarship is not a lamentation of its failures but an appreciation of its accomplishments.

One of CCG's important successes is really an achievement of corporate law scholarship generally, and that is to bring comparative law—an interest in what people in other countries do—into the mainstream of a branch of American legal scholarship. Corporate law scholars who do not do CCG are still likely to be familiar with much of what this Article has discussed, and to have read at least some of the literature. Much of this popularization of CCG has occurred in

148. *See* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109-33 (2004).

149. See, for example, the discussion of how Chinese corporate governance discourse looks at the separation of ownership and control, text accompanying *supra* notes 54-56; *see generally* Ralf Michaels*, The Functional Method of Comparative Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

the last decade or so. One does not see a pervasive sense of American exceptionalism in the field of corporate law; even those who think we do it better than foreigners have some sense of how foreigners actually do it, and there have been periods in which the mainstream view was that foreigners do it better than we do. Regardless, therefore, of how the debates on convergence or other issues come out, corporate law scholars can give themselves a pat on the back for that.