

University of Pennsylvania  
Law Review

FOUNDED 1852

---

Formerly  
American Law Register

---

---

---

VOL. 150

DECEMBER 2001

NO. 2

---

---

ARTICLES

THE PUZZLING DIVERGENCE OF CORPORATE LAW:  
EVIDENCE AND EXPLANATIONS FROM  
JAPAN AND THE UNITED STATES

MARK D. WEST<sup>†</sup>

*The Model Business Corporation Act and the modern Japanese Commercial Code were both created in 1950 and based on the Illinois Business Corporation Act of 1933. This little-known historical quirk allows an empirical test of theories of corporate law development and convergence that have recently gained prominence in the literature. Using a fifty-year historical database of*

---

<sup>†</sup> Assistant Professor of Law, University of Michigan Law School. I thank Reuven Avi-Yonah, William Carney, Merritt Fox, Tomotaka Fujita, Ehud Kamar, Rick Lempert, Ronald Mann, Curtis Milhaupt, Geoffrey Miller, Masafumi Nakahigashi, Katharina Pistor, Adam Pritchard, Mark Ramseyer, Mathias Reimann, David Skeel, and participants at the 2000 Annual Meeting of the American Law and Economics Association. This Article was funded by a Faculty Research Grant from the Center for Japanese Studies of the University of Michigan and the Nippon Life Insurance Company's endowment at the University of Michigan Law School.

The *University of Pennsylvania Law Review* wishes to thank Ryoji Mori—EDS.

nearly 30,000 corporate law data points, I find that despite globalization pressures, these corporate laws have diverged over time. I also find that the common provisions among jurisdictions appear largely to be limited to less significant enabling (non-mandatory) rules, which may further structural diversity.

The finding of divergence between the corporate laws of Japan and the United States is especially interesting given the similar economic status of the countries, their extensive interaction, and similar corporate and securities law starting points that evolution-toward-efficiency and path-dependence theories suggest would foster similar patterns of statutory development. This Article attempts to identify precisely which institutions lead to such divergence. Through an archeological study of the development of Japanese corporate law, I argue that a likely explanation for this divergence is the tendency of the Japanese system to rely on exogenous shocks to stimulate statutory change. A substantial explanation for Japan's reliance on exogenous shocks lies in Japan's institutions—particularly in those institutions that lack jurisdictional competition and contemplate a limited role for lawyers. Continued institutional differences suggest persistent corporate law divergence despite globalization pressures.

#### INTRODUCTION

For some researchers, the dream experiment is the study of identical twins separated at birth and raised in dramatically different environments. If the twins turn out similarly, nature may be more important than nurture. If they turn out differently, nurture may be the more dominant force.

The results of a similar experiment for corporate law could be fascinating. Imagine if a researcher could “raise” a corporate law system from infancy in two different institutional settings. Fifty years later, the researcher could check the development of the systems to determine whether corporate law is, as Robert Clark puts it in a slightly different legal context, “determined by a set of genes fixed in its infancy” or responds instead “to the shifting pressures of a changing environment.”<sup>1</sup> Through such a study, we might gain a better understanding of one of the central debates in corporate law today: whether globalization is leading to the convergence of corporate law and governance systems, or whether national and systemic differences will result in

---

<sup>1</sup> Robert Charles Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90, 90 (1977) [hereinafter Clark, *Subchapter C*]. See generally Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1239 (1981) [hereinafter Clark, *Legal Evolution*] (arguing for the interdisciplinary study of legal evolution whereby scholars “formulate and test explanations of . . . general trends of [legal] change”).

continued diversity.

This Article identifies and conducts such a corporate law experiment. Due to a series of historical quirks, the Japanese Commercial Code and the Revised Model Business Corporation Act (the “MBCA”), on which most state corporate statutes are based,<sup>2</sup> are both based on the Illinois Business Corporation Act of 1933, a statute often described as the first “modern” United States corporate code.<sup>3</sup> I compare the development of these three corporate law sources by examining a hand-collected historical database of nearly 30,000 observations covering the period from 1950 to 2000. This database, which uses the MBCA as a baseline due to its widespread adoption and standardized use in previous studies, is the most comprehensive one assembled to date for investigating corporate law convergence. Through an analysis of these data, this Article presents and attempts to explain a corporate and comparative law puzzle of what factors influence statutory development. Although I rely particularly on the U.S.-Japan comparison for explanations, the separated-at-birth quirk suggests more widely applicable conclusions.

Three additional reasons make Japan a particularly good candidate for comparative analysis in this context. First, Japan is the world’s second largest economy and perhaps the single most economically significant corporate law jurisdiction in the world. Second, the Japanese system has a relatively public revision process, and to the extent that its details are private, prominent participants in the revision process often reveal them, either in published memoirs or in interviews that I conducted from 1998 to 2000. Finally, although a considerable literature has developed regarding the political economy of various Japanese corporate governance institutions,<sup>4</sup> and although

---

<sup>2</sup> See William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 743 (1998) [hereinafter Carney, *Corporate Law*] (“Twenty-two states have adopted new corporate statutes based on the Revised Model [Business Corporation] Act between 1985 and 1996.”).

<sup>3</sup> See, e.g., William H. Painter, *Introduction: Symposium on the 1983 Illinois Business Corporation Act*, 1985 U. ILL. L. REV. 635, 635 (describing the Illinois Business Corporation Law as “a landmark statute and forerunner of the Model Business Corporation Act”).

<sup>4</sup> See, e.g., Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 875 (1993) (discussing the managerial monitoring and producing functions of the Japanese keiretsu’s cross-ownership structure); Curtis J. Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate*, 91 NW. U. L. REV. 865, 868 (1997) (exploring “the linkage between corporate governance and innovation by examining the institutional environment for venture

some of those studies place particular reliance on general principles of Japanese corporate law,<sup>5</sup> there is virtually no literature in English that focuses on Japanese corporate law as a body of law. This gap in the literature fuels a common misperception among many academics that law in Japan is unimportant.<sup>6</sup> Due at least in part to this misperception, the bulk of scholarship on the important questions of comparative corporate governance and international jurisdictional competition has proceeded with little knowledge—and a largely superficial discussion—of the corporate law that governs the affairs of many of the world's largest and most powerful corporations.<sup>7</sup> This Article attempts to narrow that gap while telling—for the first time—the archaeological story of the evolution of Japanese corporate law.<sup>8</sup>

Although some scholars have argued that corporate law on the books is unimportant,<sup>9</sup> a detailed analysis of corporate law develop-

capital in the United States and Japan"). See generally Mark Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993) (examining the differences in corporate structure among German, Japanese, and American financial institutions).

<sup>5</sup> See, e.g., Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L.J. 3, 3-5 (1996) (highlighting the role of law in Japanese corporate governance mechanisms); Andrew H. Thorson & Frank Siegfanz, *The 1997 Deregulation of Japan's Holding Companies*, 8 PAC. RIM L. & POL'Y J. 261, 261 (1999) (exploring the "historic legal, political, and economic significance" of Japan's deregulation of holding companies in 1997); Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1441 (1994) [hereinafter West, *Derivative Actions*] (arguing that economics, not culture, plays the primary role in Japanese decision making regarding whether to pursue litigation in the context of shareholder derivative actions).

<sup>6</sup> See Milhaupt, *supra* note 5, at 8 ("Since most observers have focused on the absence of legal controls in Japan, law remains underconceptualized and largely static in much of the existing literature . . .").

<sup>7</sup> Moreover, the lack of study of Japanese corporate law leads to further misconceptions. A recent article, for instance, claims that "United States corporate law has never traveled anywhere, save perhaps Ontario, where an earlier version of the Modern Business Corporation Act influenced the Canadian provincial legislation." Douglas M. Branson, *Teaching Comparative Corporate Governance: The Significance of "Soft Law" and International Institutions*, 34 GA. L. REV. 669, 682 (2000).

<sup>8</sup> While the Japanese literature contains little discussion on the evolution of Japanese corporate law, two recent symposia celebrating the 100th anniversary of the Japanese Commercial Code addressed various revisions. See generally Tokushū, *Shōhō 100nen: Sono Kiseki to 21 Seiki e no Tenbō* [Special Issue: The 100th Anniversary of the Commercial Code: The Code and Developments into the 21st Century], 1155 JURISUTO 5-15 (1999); Tokushū, *Shōhō 100nen* [Special Issue: One Hundred Years of Corporate Law], HŌRITSU JIHŌ, June 1999.

<sup>9</sup> See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 3 (1991) ("[W]hat is open to free choice is far more important to the daily operation of the firm, and to investors' welfare, than what the

ment may nevertheless yield important insights. There seems to be emerging a general consensus, based largely on recent empirical studies by financial economists, that corporate law plays an important role in the development of corporate governance structures, as suggested by the close correlation between capital market success and legal system characteristics.<sup>10</sup> The triviality thesis also may not apply at all to developing economies,<sup>11</sup> a label that applies to much of the history of Japan discussed herein. Recent empirical work further suggests that corporate law can add value even in developed economies,<sup>12</sup> and law in a civil regime such as Japan may play a more important, less “trivial” role.

Moreover, proponents of the triviality thesis have yet to articulate a theory of corporate law that encompasses the subject of this Article: change. If corporate law does not matter, why does it change? A response that focuses on interest groups and political economy merely raises a further question: Why has so much energy been expended over so many years in an effort to change that which is merely trivial? Without a theory that accounts for corporate law change, the phenomena discussed in this Article may present a greater challenge to the triviality thesis than the triviality thesis presents to the subject of this Article.

My argument has three primary components. First, this Article

---

law prescribes.”); Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990) (developing a “triviality hypothesis that, appearances notwithstanding, state corporate law is trivial [in that] it does not prevent companies . . . from establishing any set of rules of governance they want”).

<sup>10</sup> See, e.g., Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 511 (1999) [hereinafter La Porta et al., *Corporate Ownership*] (“[E]quity markets are both broader and more valuable in countries with good legal protection of minority shareholders.”); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1114 (1998) [hereinafter La Porta et al., *Law and Finance*] (“The differences in legal protections of investors might help explain why firms are financed and owned so differently in different countries.”); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1149 (1997) [hereinafter La Porta et al., *External Finance*] (“[T]he legal environment—as described by both legal rules and their enforcement—matters for the size and extent of a country’s capital markets.”); see also Jeffrey N. Gordon, *The Shaping Force of Corporate Law in the New Economic Order*, 31 U. RICH. L. REV. 1473, 1474 (1997) (“[C]orporate law, and the associated corporate governance regime, is a very important variable in determining economic performance.”).

<sup>11</sup> See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1914 (1996) (recognizing that in emerging economies, where other legal, market, and cultural constraints are absent, corporate law is “a much more central tool for motivating managers and large shareholders to create social value”).

<sup>12</sup> See, e.g., Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (presenting evidence that Delaware corporate law improves firm value).

adds empirical evidence to the comparative corporate governance debate by showing that despite a growing literature on the convergence of corporate law and governance structures,<sup>13</sup> the corporate law regimes of Japan and the United States appear to have diverged, not converged, over time. Divergence is an especially interesting discovery in this context, as it appears to have occurred despite the similarities between the two largest economies in the world, despite the high level of interaction between the countries, and despite similar corporate and securities regulation<sup>14</sup> starting points—at least as of 1950—that might be expected to foster path-dependent constraints. Although Japan and the United States of course have differing institutional structures, if there is one place that theory would predict statutory convergence, this might be it. Convergence has not occurred, however. In fact, the evidence tentatively suggests that to the limited extent that common provisions exist, the provisions are not mandatory rules but enabling rules, which may lead to even further diversity in corporate structures. The limited convergence of

<sup>13</sup> See, e.g., Jeffrey N. Gordon, *Pathways to Corporate Governance?: Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219, 219 (1999) (discussing the cross-border acquisition as a convergence route that will become increasingly influential); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (arguing that “[d]espite very real differences in the corporate systems [among European, American, and Japanese companies], the deeper tendency is toward convergence, as it has been since the nineteenth century”). But cf. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 127 (1999) (“Our theory of path dependence sheds light on why the advanced economies, despite pressures to converge, vary in their ownership structures. It also provides a basis for why some important differences might persist.”); 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, 213 (1999) (“This Article advances the view that neither global convergence that eliminates systemic differences nor the emergence of a hybrid best practice safely can be projected because each national governance system is a system to a significant extent.”); Curtis J. Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145, 1148 (1998) (using a property rights analysis to argue that despite “increasing globalization of capital and product markets . . . the convergence of national corporate governance systems will be slow, sporadic, and uncertain”). See generally Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 737 (1997) (comparing corporate governance in several different countries “with special attention to the importance of legal protection of investors and of ownership concentration in corporate governance systems around the world”); Ronald J. Mann & Curtis J. Milhaupt, *Foreword to F. Hodge O’Neal Corporate and Securities Law Symposium: Path Dependence and Comparative Corporate Governance*, 74 WASH. U. L.Q. 317, 320 (1996) (“This symposium issue . . . focuses the application of path dependence to corporate institutions on a natural topic: comparative corporate governance.”).

<sup>14</sup> For a discussion on the U.S. origins of Japanese securities regulation, see Curtis J. Milhaupt, *Managing the Market: The Ministry of Finance and Securities Regulation in Japan*, 30 STAN. J. INT’L L. 423, 430 (1994).

corporate structures. The limited convergence of such diversity-facilitating rules helps elucidate recent claims in the theoretical literature that convergence of rules may not necessarily lead to convergence of corporate structures.<sup>15</sup>

Second, one observable phenomenon that fits the divergence data is the reliance of the Japanese system on exogenous shocks. Establishing a bright line between the endogenous and the exogenous is difficult.<sup>16</sup> In this Article, I use "exogenous" to refer to such factors as scandal, international competition, and foreign pressure, each of which is not directly internally generated. Japan relies on each of these factors to jump-start its legal development. By contrast, changes in U.S. corporate legal regimes tend to result from a combination of stimuli. Some U.S. stimuli are exogenous, such as scandal and reaction to judicial decisions. Others are endogenous, such as interest group pressures and state competition for charters, neither of which necessarily requires the "jump-start" of exogenous shock. Changes enacted in direct response to exogenous stimuli tend to occur on different corporate law provisions than those enacted in response to endogenous factors. The reliance on exogenous stimuli and the exclusion of other factors that may influence policy may thus lead to different patterns of corporate law development (but not necessarily fewer corporate law modifications) despite similar starting points and also suggests continued divergence despite increasing internationalization pressures.

Third and finally, I find that a potential explanation for the differing degrees to which U.S. and Japanese corporate legal regimes rely on exogenous shocks can be found in the institutions that create regulatory competition among jurisdictions. Systems in which the state creates a monopoly for corporate charters are more likely than internally competitive regimes to rely on external shocks to jump-start legal development. The reliance is further increased in Japan by policy-making institutions that tend to discourage, or at least do little to encourage, endogenous change, particularly those that limit lawyer participation in the decision-making process. Thus, while some readers may cast theory aside and predict divergence based on institutional differences between the United States and Japan, one additional con-

---

<sup>15</sup> See e.g., Bebchuk & Roe, *supra* note 13, at 138 (arguing that corporate rules do not necessarily facilitate convergence because they "are themselves influenced by the economy's initial pattern of corporate structures").

<sup>16</sup> Over time, the reliance on exogenous shocks may in effect become endogenized, thereby making a bright-line definition difficult.

tribution of this Article is a clear determination of *which* institutional differences matter and to what degree.

The Article proceeds as follows. In Part I, I briefly discuss the existing debate over convergence in corporate law and governance. In Part II, I examine the historical database to set forth the divergence-centered puzzle of corporate law development in Japan, Illinois, and the MBCA. In Part III, I discuss the historical development of the Japanese Commercial Code to show that the divergence can be explained, at least in part, by Japan's reliance on exogenous shocks to produce legal change. In Part IV, I tell an institutional story of corporate law development to explain the reliance on exogenous shocks. Part V discusses implications for the comparative corporate law and governance debate and the role of foreign legal advisors in corporate law development.

### I. THE CONVERGENCE DEBATE

Two of the central debates of corporate law in recent years have been about the convergence or divergence of corporate governance systems and of corporate law itself. The underlying debate is nothing new to comparative law scholars. John Merryman's near-classic article on the convergence and divergence of civil and common law systems, in which he discussed the "growing trend toward formal international economic, social and political integration" as a convergence force and suggested that convergence is more powerful than divergence, appeared in 1978 and cites a litany of historical predecessors.<sup>17</sup> But for comparative *corporate* law, which had traditionally been a descriptive exercise and the domain of corporate law scholars, apparent forces of globalization in the 1980s and 1990s resulted in a "new" genre of literature.

A quick glance at some of the recent leading articles in the field shows that consensus remains elusive on even the most fundamental issues. Ronald Gilson, for instance, states that "the most we can predict is substantial variation both across and within different national systems."<sup>18</sup> John Coffee argues that some form of convergence will be

---

<sup>17</sup> John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 195, 202 (Mauro Cappelletti ed., 1978).

<sup>18</sup> RONALD J. GILSON, *GLOBALIZING CORPORATE GOVERNANCE: CONVERGENCE OF FORM OR FUNCTION* 34 (Ctr. for Law and Econ. Studies, Working Paper No. 174, 2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=229517](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=229517).



facilitated through one form or another of worldwide securities regulations or standards.<sup>19</sup> Lucian Bebchuk and Mark Roe argue that path dependence makes structural convergence unlikely, and that even if corporate law (hypothetically) converges, corporate governance may not.<sup>20</sup> Curtis Milhaupt contends that the presence of property rights institutions make structural convergence unlikely.<sup>21</sup> At the opposite end of the spectrum, Henry Hansmann and Reinier Kraakman write that convergence of “most of corporate law” has already occurred.<sup>22</sup>

A major cause of the lack of consensus is the lack of empirical evidence. Anecdotal evidence to support convergence theories abounds. In recent years, the shrinking of physical distances through advances in communication at least suggests more frequent cross-border interaction and opportunities for borrowing,<sup>23</sup> if not convergence. Yet persistent observable differences remain. Given the number and diversity of corporate law systems around the world, it should not be too difficult to find anecdotal evidence to support either theory.<sup>24</sup>

As a matter of fact, empirical work has recently appeared. In a series of jointly authored articles, Rafael La Porta, Florencio Lopez-de-Silanos, Andrei Shleifer, and Robert Vishny found differences among systems in ownership concentration, capital market development, voting rights, and external finance.<sup>25</sup> But these broad “legal family” cross-

---

<sup>19</sup> 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, 650 (1999).

<sup>20</sup> Bebchuk & Roe, *supra* note 13, at 129; see also Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 201 (2001) (arguing that despite globalization trends, “national cultures will not be fully supplanted by a single global culture even for global players”).

<sup>21</sup> See Milhaupt, *supra* note 13, at 1148 (“[E]ven assuming the existence of both an optimal corporate governance system and exogenous forces that would inspire homogenizing changes in existing national patterns of industrial organization, the convergence of national corporate governance systems will be slow, sporadic, and uncertain.”).

<sup>22</sup> Hansmann & Kraakman, *supra* note 13, at 439.

<sup>23</sup> See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95-101* (1974) (outlining ways in which law gets transplanted across borders).

<sup>24</sup> For the most empirical evidence on the issue of convergence of corporate law, see Hansmann & Kraakman, *supra* note 13, at 440. The dominance of the shareholder-oriented model in the United States, Europe, and Japan, they argue, results in especially strong legal convergence in the areas of board structure, disclosure and capital market regulation, shareholder suits, takeovers, and judicial discretion in those jurisdictions. Their claims concerning those areas of law are intriguing, but their general descriptive comparisons of the relevant laws do not purport to substitute for rigorous empirical analysis.

<sup>25</sup> See generally sources cited *supra* note 10 (detailing differences among corporate

country studies, while interesting, do not examine provisions of corporate law in detail, and, as John Coffee has noted, they may overstate both the differences between civil and common law systems and the similarities among systems in each category.<sup>26</sup>

Other recent work avoids many of these difficulties. William Carney's excellent study of the adoption of European Community directives examines corporate law provisions in some detail.<sup>27</sup> But because that study does not track changes over time, it offers little insight into the convergence question. Katharina Pistor examines the development of corporate law provisions over time using a modified version of the variables used by La Porta and others, but still examines relatively broad themes over a relatively short period of time.<sup>28</sup> To better understand the legal convergence issue, a more detailed study of statutory development over time is required.

Before discussing my study, a caveat is in order. Like most of the above studies, I am concerned principally with corporate law and governance rules. This focus ignores other areas of law that affect corporations, such as rules regarding banking, labor, tax, commercial transactions, bankruptcy, antitrust, and securities. I ignore these areas not because I think that the study would not offer important insights, but largely because tracking the changes in all of these disparate areas of law would be virtually impossible. I justify the exclusion by noting that most of these areas of law, at least, share a similar American-influenced history in Japan.<sup>29</sup>

---

legal regimes worldwide).

<sup>26</sup> See John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1 (1999) (noting especially the heterogeneity of common law systems); see also Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 300 (1996) (reporting survey results that place some common law courts below some civil law courts in terms of "judicial daring").

<sup>27</sup> William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 318 (1997) [hereinafter Carney, *Political Economy*]. Carney's excellent work on domestic corporate law production, which focuses primarily on the political economy in a single system, also differs from this comparative study of corporate law development in differing national systems over time. Carney, *Corporate Law*, *supra* note 2, at 716-17.

<sup>28</sup> Katharina Pistor, *Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies*, 1 EUR. BUS. ORG. L. REV. 1 (2000) [hereinafter Pistor, *Patterns*]; see KATHARINA PISTOR ET AL., *LAW AND FINANCE IN TRANSITION ECONOMIES* 6-13 (Harvard Univ. Ctr. for Int'l Dev., Working Paper No. 49, 2000) (examining both laws "on the books" and law "in action" in transition economies and concluding that the latter has a greater impact).

<sup>29</sup> See, e.g., David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate*

Besides these substantive areas of law, I also do not discuss extensively such broader factors as enforcement, procedural rules, legal customs, and social norms.<sup>30</sup> In some areas, such as self-regulating institutional structures,<sup>31</sup> Japan is roughly equal to the United States; in others, such as ownership dispersion, differences are more obvious. Similar or not, these areas potentially could be important. If, for instance, the cross-shareholding and *keiretsu* systems in Japan limit the incentives of shareholders to assert various remedies, the law on the books may indeed be trivial. But these issues, which have been debated for years, lack easy solutions, especially without a clear picture of corporate law development as a guide.

My claims are more limited, and my methods more simplistic. The tools and methods that I use are not designed to measure systemic convergence, or even some measure of "overall" legal convergence, but simply convergence of corporate law rules. If my limited agenda has an advantage, it is that separating law into its several components and focusing squarely on codes within the institutional structure helps clarify developments in that area so that they may be better understood when reset into the broader context.

---

*Bankruptcy*, 51 VAND. L. REV. 1325, 1342 (1998) (arguing that in Japan, the United States, and Germany, the development of corporate governance and corporate bankruptcy institutions is complementary).

<sup>30</sup> See, e.g., Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1257-61 (1999) (defining the importance of social norms in corporate governance); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Non-Legal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2083 (2001) (analyzing the origins, persistence, and current evolution of a series of nonlegal rules (norms) in Japanese corporate governance); Zenichi Shishido, *Problems of the Closely Held Corporation: A Comparative Study of the Japanese and American Legal Systems and a Critique of the Japanese Tentative Draft on Close Corporations*, 38 AM. J. COMP. L. 337, 341 (1990) (discussing enforcement mechanisms and procedural flexibility in American and Japanese law).

<sup>31</sup> See Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 MICH. L. REV. 2574, 2574 (2000) (discussing self-regulating institutional structures); cf. JOHN C. COFFEE, JR., CONVERGENCE AND ITS CRITICS: WHAT ARE THE PRECONDITIONS TO THE SEPARATION OF OWNERSHIP AND CONTROL? (Columbia Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 179, 2000) (arguing that the common law advantage in creating self-regulating systems leads to widely dispersed ownership).

## II. A PUZZLE

### A. *The Common Starting Point of Japanese and U.S. Law*

Only fifteen years after the first published description of the corporate form appeared in Japanese,<sup>32</sup> the Japanese government in 1881 commissioned German legal scholar Hermann Roesler to attempt a first draft of a commercial code. The code that resulted from Roesler's efforts, which was promulgated in 1899, was based largely on the German code and is said to have drastically altered customary business practices.<sup>33</sup>

The 1899 legal structure remained basically intact until its revision by the officials (known as "SCAP" for Supreme Commander for the Allied Powers or "GHQ" for General Headquarters) of the U.S. occupation of Japan following World War II (the "Occupation"). SCAP officials saw a need for great change in Japan's commercial and financial structure. They believed that shareholding should be widely dispersed, corporate governance should be democratic, and the wartime *zaibatsu*<sup>34</sup> conglomerates should be dissolved and their executives purged.<sup>35</sup> Although a number of tactics could have been used to ac-

---

<sup>32</sup> YUKICHI FUKUZAWA, *SEIŌ JIJŌ* [CONDITIONS OF THE WEST] (Okadaya Kishichi 1958) (1866); see Azumi Ann Takata, *From Merchant House to Corporation: The Development of the Modern Corporate Form and the Transformation of Business Organization in Japan, 1853-1912*, at 185-192 (1994) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford University Library).

<sup>33</sup> See ROPPO ZENSHŌ, Law No. 48 of 1899 (applying the Code to all parties to any act which is a commercial act as to any one of the parties). The Code was revised in 1911, 1933, and 1938, but consistently retained its German flavor as well as its relatively anti-shareholder stance. See Makoto Yazawa, *The Legal Structure for Corporate Enterprise: Shareholder-Management Relations Under Japanese Law*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 547, 547 (Arthur Taylor von Mehren ed., 1963) ("The Commercial Code was transplanted from Germany to Japan in 1899 . . . . Subsequent amendments to the code in 1911, 1933, and 1938 . . . continued to reflect German developments.")

<sup>34</sup> "Industries which had been acquired or initially developed by the Government were sold, at very low sums, to favored individuals or firms. These favored few were further aided and protected through a series of wars. The firms which in this fashion rose to predominance became known as the *Zaibatsu*." Michiko Ariga & Luvern V. Rieke, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437, 437 (1964).

<sup>35</sup> See, e.g., ELEANOR M. HADLEY, *ANTITRUST IN JAPAN* 61 (1970) ("The Allied policy [was] to dissolve the combines and remove the *zaibatsu* families . . ."); Ariga & Rieke, *supra* note 34, at 438 (pointing out that in light of the close connection between the *zaibatsu* and the wartime Japanese government, "it is not surprising that the occupation powers regarded the *zaibatsu* as a structure of unique importance to military aggression

comply with these goals, the Occupation reformers had a New-Deal-nuanced vision of democracy that “relie[d] on law as a vehicle to effect social and political change.”<sup>36</sup> The bulk of the legal work of the Occupation was assigned to the SCAP Legal Section,<sup>37</sup> but the task of creating a revised Antimonopoly Law fell to the Anti-Trust and Cartels Division of the Economic and Scientific Section. The job was assigned to the then American attorney with the Antitrust Division of the Department of Justice Judge Posey T. Kime, and American lawyer Lester Salwin,<sup>38</sup> who created drafts of what became the Japanese Antimonopoly Law<sup>39</sup> in 1947 and the Trade Association Law<sup>40</sup> in 1948.<sup>41</sup>

These tasks completed, the Anti-Trust Division in 1949 turned its attention to a related body of law not yet appropriated by the Legal Section for examination: the Commercial Code.<sup>42</sup> The task fell specifically to Lester Salwin and newcomer Irving Eisenstein. Both, coincidentally, were sons of German-Jewish immigrants, 1931 graduates of the University of Illinois, and trial lawyers from Chicago.<sup>43</sup> In fact, of

which they felt must be dissolved in the interests of world peace”); Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115, 147 (discussing how Occupation forces “directed the democratization of industry through the deconcentration of economic power”).

<sup>36</sup> John O. Haley, *Consensual Governance: A Study of Law, Culture, and the Political Economy of Postwar Japan*, in 3 THE POLITICAL ECONOMY OF JAPAN: CULTURAL AND SOCIAL DYNAMICS 32, 38 (Shumpei Kumon & Henry Rosovsky eds., 1992); see also THEODORE COHEN, REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL 32-48 (1987) (describing the influence of New Deal ideology on Occupation policies); HITOSHI MISONO, NIHON NO DOKUSEN KINSHI SEISAKU TO SANGYŌ SOSHIKI [JAPANESE ANTIMONOPOLY POLICY AND INDUSTRIAL ORGANIZATION] 10-11 (1987) (same).

<sup>37</sup> ALFRED C. OPLER, LEGAL REFORM IN OCCUPIED JAPAN 220-21 (1976).

<sup>38</sup> Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1, 35-44 (2000); Seita & Tamura, *supra* note 35, at 168-69 & n.345.

<sup>39</sup> Shiteki Dokusen no Kinshi to Kōsei Torihiki no Kakuho ni Kansuru Hōritsu [Antimonopoly Law], Law No. 54 of 1947.

<sup>40</sup> Jigyōsha Dantai Hō [The Trade Association Law], Law No. 191 of 1948.

<sup>41</sup> The year 1948 also brought a minor Commercial Code revision that deleted provisions permitting the issuance of partially paid shares. See Law No. 148 of 1948, art. 176 (“A person who has subscribed for shares shall incur an obligation to effect payment in accordance with the number of shares allotted to him by the promoters.”).

<sup>42</sup> See Thomas L. Blakemore & Makoto Yazawa, *Japanese Commercial Code Revisions Concerning Corporations*, 2 AM. J. COMP. L. 12, 14 (1953) (describing this change in focus by Allied authorities). The Division received assistance from the Legal Section, particularly from Thomas Blakemore and Kurt Steiner. See, e.g., Lester Salwin, Note for File (Mar. 21, 1941) National Diet Library, Modern Japanese Political History Materials Room, NDL ESS(E) 06792; Kurt Steiner, Note for File (Mar. 26, 1949) National Diet Library, Modern Japanese Political History Materials Room, NDL LS 10304 [hereinafter cited as “NDL [microfiche number]”].

<sup>43</sup> Letter from Marjorie Salwin, Daughter of Lester Salwin, to Mark D. West (Feb. 3, 1999); Telephone Interview with Marjorie Salwin, Daughter of Lester Salwin (Jan.

the five members of the Division who worked on the Commercial Code, three (Salwin, Eisenstein, and First Lieutenant Robert W. Hudson) were Illinois lawyers.<sup>44</sup>

Of the three attorneys from Illinois, Lester Salwin (1911-1984) was the clear leader. Salwin was an experienced litigator,<sup>45</sup> a prolific scholar,<sup>46</sup> a dedicated public servant,<sup>47</sup> and, as a contemporary from the Anti-Trust Division told me more than fifty years after her introduction to Salwin, "[h]e was a peppery sort of character."<sup>48</sup> Apparently Salwin was known for his tendency to "pound the table" and was said to be "dramatic and authoritarian;" not much happened until Salwin arrived.<sup>49</sup>

Salwin began the Commercial Code revision process with his "Six Points Memo" of January 25, 1949. The main six points<sup>50</sup> address (1)

18, 1999); see also *Irving Eisenstein*, CHI. SUN-TIMES, May 14, 1992, at 68 (discussing Eisenstein); Kenan Heise, *Lawyer Irving Eisenstein, 82, Worked for U.S. in Far East*, CHI. TRIB., May 16, 1992, at C19 (same); Telephone Interview with Norman Eisenstein, Brother of Irving Eisenstein (Feb. 5, 1999) (same).

<sup>44</sup> See Masafumi Nakahigashi, *Sengo Shōhō no Saishuppatsu [The Postwar Restarting of the Commercial Code]*, HŌRITSU JIHŌ, June 1999, at 28, 29 (describing how and to what extent Illinois law was implanted in the Japanese Commercial Code).

<sup>45</sup> See, e.g., *Gold-Form, Inc. v. Bowles*, 152 F.2d 107 (Emer. Ct. App. 1945) (Salwin-litigated protest against an Emergency Price Control Act provision); *Mevorah v. Bowles*, 151 F.2d 766 (Emer. Ct. App. 1945) (Salwin-litigated arbitrary and capricious claim against Price Administrator); *DeMotte v. DeMotte*, 4 N.E.2d 960 (Ill. 1936) (Salwin-litigated divorce and contempt action).

<sup>46</sup> See, e.g., Lester N. Salwin, *Japanese Anti-Trust Legislation*, 32 MINN. L. REV. 588, 588 (1948) (providing an overview of the history and provisions of the 1947 Japanese Antimonopoly Law); Lester N. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 GEO. L.J. 478, 512 (1962) [hereinafter Salwin, *Commercial Code*] (discussing the longevity of the Code reforms in relation to the need for the "gradual democratization of virtually every aspect of Japanese Society"); Lester N. Salwin, *Uncertain Nationality Status of German Refugees*, 30 MINN. L. REV. 372, 377 (1946) (discussing the American Abrogation Law No. 1 and how it affects nationality status of refugees who emigrated from Germany). Salwin also authored case notes and comments on various subjects in 21 ILL. B.J. 41 (1933) (trusts); 22 ILL. B.J. 22 (1933) (tax); 27 U. ILL. L. REV. 308 (1932) (contracts); 27 U. ILL. L. REV. 228 (1932) (antitrust).

<sup>47</sup> At various times, Salwin was employed by the Social Security Administration, the Department of Justice, the Smaller War Plant Corporation, the Office of the Alien Property Custodian, the Office of Price Administration, the Small Business Administration, the American Embassy in Japan, and, of course, SCAP. Telephone Interview with Marjorie Salwin, *supra* note 43.

<sup>48</sup> Telephone Interview with Eleanor M. Hadley, Attorney, Anti-Trust Division of the Department of Justice (Feb. 7, 1999).

<sup>49</sup> *Id.*

<sup>50</sup> Despite the nomenclature, the memo actually contained sixteen points, as well as a separate section on foreign corporations. TAKEO SUZUKI, SHŌHŌ TO TOMO NI

stockholders' right to access books and records, (2) transferability of shares, (3) voting rights (including voting trusts, voting lists, proxies, and classes of shares), (4) protection against dilution, (5) minority stockholders' rights and remedies (including ultra vires acts, obligations of officers and directors, auditors, stock acquisitions, mergers and consolidations, "court actions re[garding] wrongful acts"), and (6) foreign corporations.<sup>51</sup>

The memo led to the establishment, in June 1949, of the first Legislative Council commissioned to study pending laws. In August of the same year, the Council created a Commercial Law Subcommittee,<sup>52</sup> which included five judges, six lawyers, fourteen bureaucrats, ten law professors (three from the University of Tokyo), and five industry leaders.<sup>53</sup> A lengthy series of negotiations followed between the Sub-

---

AYUMU [WALKING WITH COMMERCIAL LAW] 615-16 (1977). Japanese experts were surprised by the Six Points Memo. As Takeo Suzuki, the leading Japanese figure in the revision process, put it, "The request from GHQ for revision came just as we expected, but it included provisions on strengthening the role of and elevating shareholders beyond anything we had imagined. . . . If these requests became reality, wouldn't they simply be used by troublemakers?" *Id.* at 162.

<sup>51</sup> This document, as well as many other important documents in the revision process, are reprinted in MASAFUMI NAKAHIGASHI, SHŌHŌ KAISEI SHŌWA 25/SHŌWA 26—GHQ/SCAP BUNSHŌ [1950-1951 COMMERCIAL CODE REVISIONS: THE GHQ/SCAP DOCUMENTS] 16-17 (1999). Special thanks to Masa Nakahigashi for providing early drafts of this book.

<sup>52</sup> The Subcommittee was chaired by Kenzo Takayanagi, a constitutional scholar who had studied with Wigmore. See, e.g., KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 178-80 (1991) (providing Takayanagi's vision of Japan as a nation in which all Japanese people would be advisors to the Emperor); Kenzo Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, at 71, 72 (Dan Fenno Henderson ed., 1968) (describing how Takayanagi became a member, and later Chairman, of the Commission). Takayanagi had been instrumental, however, as the draftsman of the prewar Code. See 1 CODES TRANSLATION COMMITTEE, THE COMMERCIAL CODE OF JAPAN ANNOTATED, at iv-vii (1931) (describing Takayanagi's role as the draftsman).

<sup>53</sup> SUZUKI, *supra* note 50, at 628-29. Despite the importance of the revisions, there was little glamour for the participants in the revising process. Meetings were held at Akasaka Palace in Tokyo three times weekly, each lasting at least half a day and often continuing into the night. *Id.* at 157-58. One Japanese participant recalls bringing his food from home and spending the entire time in a room in a Ueno temple. 3 CHUSHAKU KAISHAHŌ [ANNOTATED COMPANY LAW] 1, 3 (Tadao Ōmori ed., 1967) (statement in introduction by Ōmori). Another remembers difficulty finding a hotel room (many were either destroyed in the war or occupied by SCAP personnel), and deciding upon lodging at the same temple. KEN'ICHIRO ŌSUMI, SHŌJIHŌ 60NEN: WATAKUSHI GA AYUNDA MICHİ [60 YEARS OF COMMERCIAL LAW: THE PATH I WALKED] 152 (1988). Still another remarks that although the furnishings were nice, the air conditioning did not work, the air was stifling, and he "had real problems with long meetings because [he was] allergic to cigarette smoke." SEIJI TANAKA, SHŌHŌ TO TOMO

committee and SCAP officials.<sup>54</sup>

It is difficult to say what the Commercial Code might have looked like without the Illinois attorneys (Salwin, Eisenstein, and Hudson), who relied heavily on Illinois law in the reform process. As a "helpful guide," Salwin began by furnishing the Japanese representatives with "citations to the Illinois Business Corporation Act of 1947" on each of the main points of the Six Points Memo.<sup>55</sup> Salwin's subsequent drafts relied heavily on Illinois law.

The use of Illinois law as a model has not been attributed by SCAP Legal Section contemporaries to the excellence of the legislation of that state but highlights the simple fact "that the particular SCAP officials in charge of revision hailed from Chicago."<sup>56</sup> In 1956, another observer noted that the Japanese adoption of the Antimonopoly Law was caused by the fact that "[s]ome dominant officer of the occupying forces was apparently familiar with and addicted to the Illinois law."<sup>57</sup> But the use of Illinois law as precedent appears to have been more than personal prerogative. The 1933 Illinois Business Corporation

NI ROKUJŪNEN [60 YEARS WITH COMMERCIAL LAW] 322 (1982).

<sup>54</sup> Eisenstein's handwritten notes show that the meeting held on July 11, 1949, at which it was decided that there would be "no more Commercial Code meetings unless we call for them," was the fifty-ninth such meeting. NDL ESS(C) 09679. The actual meetings between U.S. and Japanese representatives "were of a character unknown to Roberts Rules of Order." Blakemore & Yazawa, *supra* note 42, at 14. Regulations for the Council Amending the Commercial Code existed. *See* Regulations for the Council Amending the Commercial Code (Feb. 3, 1949) NDL ESS(C)06793. Apparently, however, the regulations were of little import. *See* Masafumi Nakahigashi, *GHQ Aite no Kentō no Seika [The Fruits of the Battle with GHQ]*, in NIHON KAISHA RIPPŌ NO REKISHITEKI TENKAI [THE HISTORICAL DEVELOPMENT OF JAPANESE CORPORATE LEGISLATION] 218, 229 (Michiyo Hamada ed., 1999). SCAP wanted results fast, and one Japanese participant remarked that "we really did too much too soon." TANAKA, *supra* note 53, at 322. According to Takeo Suzuki, Salwin was not particularly genteel at all times. When Suzuki remarked to Salwin, "you are focusing completely on American law, but how about the Continental system? To completely ignore it strikes me as strange." Salwin replied, "if you want to talk about Continental law, we've got an Austrian officer here who knows much more than you. What are you talking about?" After Suzuki stammered some more replies, Salwin said, "you're all red, Suzuki," and Suzuki reported that he never returned to the meetings. TAKEO SUZUKI, IKUSANGA: SHŌHŌGAKUSHA NO OMOIDE [MANY MOUNTAINS AND RIVERS: THE MEMORIES OF A COMMERCIAL LAW SCHOLAR] 54-55 (1993). In another version of the story, Suzuki told Salwin that labor reforms had gone too far, and Salwin accused him of being a Communist. SUZUKI, *supra* note 50, at 164-66.

<sup>55</sup> Salwin, *Commercial Code*, *supra* note 46, at 487; *see also* NAKAHIGASHI, *supra* note 51, at 23-24 (listing citations to the Illinois Business Corporation Act).

<sup>56</sup> Blakemore & Yazawa, *supra* note 42, at 15.

<sup>57</sup> Whitney Campbell, *The Model Business Corporation Act*, BUS. LAW., July 1956, at 98, 109.



Act was, by most accounts, “a landmark statute”<sup>58</sup> and “the most modern of state statutes.”<sup>59</sup> Among the more innovative features of the 1933 law included a replacement of the terms “capital stock” and “share stock” with “stated capital” and “shares” (Section 2), a purpose clause that enabled all activities other than banking, insurance, and railroading to be conducted under one law (Section 3), class voting (Section 54), and provisions for annual meetings of shareholders (Section 26).<sup>60</sup>

At least in part due to its modernity, the Illinois Act subsequently became the precedent document for the Model Business Corporation Act. As one of the Model Act’s drafters notes somewhat colloquially:

You may wonder what statute the model act was modeled upon. . . . The parent act is the Illinois Business Corporation Act enacted in 1933. . . . The reasons for this substantial use of the Illinois act are: first, the Illinois act was an original and modern statute containing most of the principles and approaches that the committee thought desirable, and, secondly, the members of the drafting subcommittee had been participants in the drafting and development of the Illinois act.<sup>61</sup>

A cynic might also note that the drafters of the Model Act were Chicago lawyers who had participated in the drafting of the Illinois statute.<sup>62</sup> Regardless, the provisions of the Model Act were eventually mimicked by most U.S. jurisdictions,<sup>63</sup> making the 1933 Illinois Act an early precedent for modern U.S. corporate law.

In fall 1949, Salwin circulated a draft based on Illinois law and solicited the views of legal experts and economic leaders. Japanese aca-

---

<sup>58</sup> Painter, *supra* note 3, at 635.

<sup>59</sup> Charles W. Murdock, *Why Illinois? A Comparison of Illinois and Delaware Corporate Jurisprudence*, 19 S. ILL. U. L.J. 1, 1 (1994).

<sup>60</sup> For all changes, and an in-depth analysis of the 1933 law, see generally Henry Winthrop Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357 (1934). See also Charles G. Little, *The Illinois Business Corporation Law*, 28 ILL. L. REV. 997, 1001 (1934) (making value judgments on the usefulness of the provisions in the Illinois Business Corporation Act). Ballantine points out that the Illinois statute lacked several advances of the 1931 California General Corporation Law (of which he, coincidentally, was a primary drafter), including provisions on voting trusts, removal of directors, and appointment of inspectors. Ballantine, *supra*, at 393.

<sup>61</sup> Campbell, *supra* note 57, at 100.

<sup>62</sup> See *id.* at 98-99 (discussing the membership of the Committee on Corporate Laws, which prepared the Model Act); Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, BUS. LAW., Nov. 1950, at 1, 1 (naming the members of the Committee on Business Corporations whose names were included in the report to the American Bar Association that accompanied the Model Act draft).

<sup>63</sup> See Carney, *Corporate Law, supra* note 2, at 731 (providing statistics that the vast majority of states have adopted many Model Act provisions).

democratic scholarship blossomed and was largely critical of the "drastic" proposed increases in shareholders' rights.<sup>64</sup> In October, *Keidanren* (the Federation of Economic Organizations), representing business interests, submitted its first opinion papers on the proposed law. In a sixteen-point memorandum, *Keidanren* supported the new law, but, among other things, opposed provisions granting shareholders rights to view corporate records and possess appraisal rights in mergers, recommended that derivative suits be available only to shareholders who held at least one percent of a firm's stock, and expressed its desire for discussions on cumulative voting for directors.<sup>65</sup> A similar seven-point memorandum from the Tokyo Chamber of Commerce followed in February 1950, in which it proposed limiting the right to sue derivatively to ten-percent shareholders, supported a requirement that plaintiffs bringing suits against corporations post bond, and opposed shareholders' rights to view corporate records, place restrictions on share transfers, and have appraisal rights in mergers.<sup>66</sup>

The two biggest controversies appear to have been shareholders' rights to view corporate records and cumulative voting. As for the right to view records, Japanese negotiators argued that such rights would be exercised by labor groups or corporate rabble-rousers, and, accordingly, wanted to require shareholders to apply to a court to view

---

<sup>64</sup> "[W]ith hardly a single exception, the scholars of Japan openly opposed these amendments. . . . [T]he Japanese uniformly felt that the measures required would encourage shareholder-strife and hamper honest management." Blakemore & Yazawa, *supra* note 42, at 20. For critiques, see, for example, Teruhisa Ishii, *Torishimariyaku Seido Kaisei no Hōkō* [*Direction of the Reform of the Director System*], 1 HŌSŌ JIHŌ 337 (1949); Jōji Matsumoto, *Kaishahō Keisei Yōkō Hihan* [*Critique of the Draft of the Company Law Amendment*], HŌRITSU JIHŌ, Mar. 1950, at 158; Makoto Yazawa, *Kabushikigaishahō Kaisei no Shomondai* [*Various Problems on Amendments of the Company Law*], 1 HŌSŌ JIHŌ 276 (1949); Teruhisa Ishii et al., *Zadankai: Kaisei Kaishahō no Shoronten* [*Roundtable: Points for Debate Regarding the Revised Company Law*], HŌRITSU JIHŌ, Mar. 1950, at 195-212. Even Takeo Suzuki, *see supra* note 50, found the contract theory on which shareholder empowerment was based to be "primitive." Takeo Suzuki, *Kabushiki Kaishahō Kaisei no Hōri* [*The Legal Theory Underlying the Company Law Reform*], 2 SHIHŌ 26 (1950), *cited in* Tatsuo Uemura, *Senryō to Kaishahō Kaisei* [*The Occupation and Company Law Reform*], 1155 JURISUTO 21, 24 (1999).

<sup>65</sup> Keizai Dantai Rengokai Shōhō Kaisei Iinkai, *Shōhō Kaisei ni Kansuru Iken* [Opinion Regarding the Commercial Code Revisions] (1949), *reprinted in* SUZUKI, *supra* note 50, at 622.

<sup>66</sup> Tokyo Shōkō Kaigijō Shōjihōoki Iinkai, *Shōhō Kaisei ni Kansuru Iken* [Opinion Regarding the Commercial Code Revisions] (1950), *reprinted in* SUZUKI, *supra* note 50, at 623-26. As participant Tatsuo Ōsumi puts it, referring especially to the strengthening of shareholders' rights, "The financial circle, the academic circle, and in fact every other group opposed the changes together." Tatsuo Ōsumi, *Shōhō Kaisei no Ikisatsu to Sono Shōrai* [*The Circumstances and Future of the Commercial Code Revisions*], HŌRITSU JIHŌ, June 1956, at 9.

records. SCAP rejected this theory and rejected a subsequent Japanese draft that would have allowed management to refuse a shareholder demand if it would “remarkably harass the management” in favor of simply providing that shareholders could not abuse the inspection right.<sup>67</sup> As for cumulative voting—an Illinois invention—the process was no easier.<sup>68</sup> As committee member Takeo Suzuki explained for the Japanese side, “[i]t’s no exaggeration to say that nearly half of the hard work and difficulty of the 1950 revision was spent trying to relax that requirement.”<sup>69</sup> Nevertheless, they failed.

Although the United States made compromises,<sup>70</sup> its position ultimately prevailed on both issues, as well as on most others, in the final draft passed by the Diet in May 1950.<sup>71</sup> As a result of the revisions, shareholders’ rights were dramatically increased, boards of directors were established, the prewar power of statutory auditors was curtailed, individual share ownership was fostered, and concepts of director accountability were introduced—all largely along the lines of the Illinois Business Corporation Act.<sup>72</sup> The revisions were relatively well received

---

<sup>67</sup> Memorandum of Kurt Steiner Regarding Revision of the Commercial Code (June 27, 1949) NDL LS 10304.

<sup>68</sup> See Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 142 (1994) (describing the origin of cumulative voting at the Illinois Constitutional Convention of 1870); see also Kenjiro Egashira, *Shōjihō* [*Enterprise Law*], AMERIKAHŌ 72 (1996) (discussing Illinois ancestry of cumulative voting).

<sup>69</sup> SUZUKI, *supra* note 50, at 168. The committee chair, in an eloquent letter to Eisenstein, stated that his studies with Edward Warren at Harvard Law School led him “personally” to agree with the introduction of cumulative voting, but he made it clear that his position as Chairman of the Committee was insufficient to persuade the entire Committee in the face of Bar and Chamber of Commerce opposition. Letter from Kenzo Takayanagi, Chairman, Commercial Law Subcommittee, to Irving Eisenstein, Member, Antitrust and Cartels Division of the Economic and Scientific Section, NDL ESS(E) 06787.

<sup>70</sup> See Salwin, *Commercial Code*, *supra* note 46, at 488 (noting three major compromises that went into the Commercial Code).

<sup>71</sup> See *id.* at 488, 497-510 (discussing Code reforms that for the most part satisfied the United States’ economic democratization objectives with regard to corporate practices).

<sup>72</sup> Although the 1950-51 revisions were based largely on Illinois law, they were not a wholesale importation. Some very *non*-Illinois provisions remained in Japan—the most prominent examples being the German internal auditor system, the corporate registration system, and directors’ liability to noncreditor third parties where directors have acted in bad faith or have committed gross negligence resulting in injury to third parties. SHŌHŌ, art. 266, para. 3 (“If directors have been guilty of wrongful intent or of gross negligence in respect of the assumption of their duties, they shall be jointly and severally liable in damages to third parties also.”); OLD COMM. CODE 177 (describing the 1950 revisions that added the requirement of gross negligence or bad faith). See

by the relevant interest groups, at least in part due to the solicitation of input from the various groups and the fact that the necessity of Code revisions had been recognized long before the Occupation.<sup>73</sup>

---

Robert W. Dziubla, *Enforcing Corporate Responsibility: Japanese Corporate Directors' Liability to Third Parties for Failure to Supervise*, 18 LAW JAPAN 55 (1986). Likewise, some Illinois concepts were not imported: Japanese companies have no by-laws, the Code contains no requirement that firms have officers and opts instead for "representative directors"—directors who have the power to bind the company—see SHŌHŌ, arts. 261, 262, and Illinois general preemptive rights provisions were rejected in favor of a menu listing issues on which such rights could be granted. This particular compromise was loosely based on California law. See Blakemore & Yazawa, *supra* note 42, at 22 ("This provision is the unfortunate result of a compromise reached between the SCAP component of the drafting committee, which advocated the recognition of a general preemptive right as provided in Illinois, and Japanese members who wished to provide such rights only in cases when the corporation's articles so specified.").

<sup>73</sup> See, e.g., Kenzo Takayanagi, *Historical Introduction to 1 THE CODES TRANSLATION COMMITTEE, THE COMMERCIAL CODE OF JAPAN ANNOTATED*, at ix, xxxix-xliii (1931) (discussing need of Code amendment in light of social, economic, and political changes in Japan); Takeo Suzuki, *Kabushikigaishahō Kaisei no Shomondai [Problems on Amendments of the Company Law]*, 1 HŌSŌ JIHŌ 83 (1949). When the 1950 revisions were passed, some observers thought that the effective date of enforcement—July 1, 1951—would come too soon after its May 1950 passage, and that firms would not be prepared for the drastic changes. SUZUKI, *supra* note 50, at 186-88. Worried about the reception in the business community, Justin Williams, then Parliamentary and Political Division Chief, Government Section, approached Takeo Suzuki at a dinner party at the home of the English Ambassador's scrivener. According to Suzuki, Williams expressed worry about the recent criticism of the revised Code's enactment date, and asked his opinion. Suzuki said that the effective date should proceed as scheduled, but said that there were "a couple of small matters that are problematic, but if we attend to them right away, I think that enforcement can proceed as scheduled." Williams asked Suzuki to draft a memorandum, which Suzuki then submitted to Salwin. *Id.* at 189-90. Suzuki's main point had been raised by the *Keidanren* previously and ignored by Occupation authorities. In effect, to limit abuses, Suzuki and the *Keidanren* wanted to require shareholders or creditors to post a bond when suing a corporation. When Suzuki raised the issue with Salwin, the latter opposed the provision on the grounds that it would prevent suits by persons without the requisite funds. But after negotiation, the two men reached a compromise—the new provision would allow a court to require a plaintiff shareholder or creditor to post a bond only if the defendant corporation could prove to a court that the suit or request was filed by the plaintiff—or, in Suzuki's example, a *sokaiya*—with wrongful intent. On his way home from the meeting, Suzuki dropped in at the Ministry of Justice, which gave its approval to the compromise. The Suzuki-Salwin compromise became Article 59 of the Code and was enforced simultaneously with the 1950 revisions. Law No. 290 of 1951. Suzuki proclaimed that "[t]his revision was like my own one-man play. It was such a trivial little thing, and I don't know whether it had any significance whatsoever." SUZUKI, *supra* note 50, at 191. Contemporary scholars disagree with the self-effacing comment, and the provision still remains important in derivative actions. NAKAHIGASHI, *supra* note 51, at 286.

### B. *Subsequent Developments*

To attempt to measure the degree of similarity among Illinois, Japan, and the MBCA in 1950 and over the ensuing half-century, I rely on a typology of MBCA provisions created by John A. MacKerron and developed in a series of articles by William J. Carney.<sup>74</sup> MacKerron identified MBCA provisions and typed them into six categories: pure enabling rules, enabling/empowerment rules, default opt-out rules, mandatory rules, and mandatory constraints on enabling rules. Carney used a slightly modified version of MacKerron's typology to examine the adoption of MBCA provisions in each of the fifty states, relying on comments to the MBCA that listed states of adoption as well as state-by-state searches.

Crucially, Carney did not catalog all of the MBCA provisions catalogued by MacKerron. MacKerron's list is nothing if not thorough; it details some 569 provisions, or 610 including definitions.<sup>75</sup> Carney pares this exhaustive list down to 142 important provisions, which are the focus of my study. The reduction of the list of MBCA provisions by more than seventy-five percent helps mitigate the possibility that any observed effects are on purely trivial or redundant provisions.

I take MacKerron and Carney's methodology two steps further by adding temporal and transnational dimensions. To track code developments over time, I examined each of the three codes—the MBCA, the Japanese Commercial Code, and the Illinois Business Corporation Act of 1933—in every year since 1950, a test facilitated by the systems' common history. In total, including the analysis of Delaware law that I added for comparison, I examined 142 provisions in four jurisdictions for each year in a fifty-year period for a total of 28,400 provision-year observations. I use the MBCA typology to attempt to answer two discrete questions: (a) How similar were the codes in 1950? and (b) How similar are the codes today?

Using the 142 MBCA provisions listed in Carney's study, I noted,

---

<sup>74</sup> See Carney, *Corporate Law*, *supra* note 2, at 730 (describing how the author's analysis modifies and builds upon the MacKerron framework); Carney, *Political Economy*, *supra* note 27, at 319-27 (using the MacKerron framework to analyze European Community corporate law); John A. MacKerron, *A Taxonomy of the Revised Model Business Corporation Act*, 61 UMKC L. REV. 663, 664-686 (1993) (enumerating, discussing, and summarizing a Revised Model Business Code Act typology). My analysis, and Carney's, omits from MacKerron's list "provisions that duplicate other provisions of general laws, codifications of common law rules, and certain redundant or trivial rules," as well as MBCA revisions adopted after 1992. Carney, *Corporate Law*, *supra* note 2, at 730.

<sup>75</sup> MacKerron, *supra* note 74, at 665 & n.12.

in each case, the date of adoption of a similar provision, if any, in each of the four jurisdictions.<sup>76</sup> I use 1950 (the date of the adoption of the new Japanese Commercial Code and the MBCA) as a baseline and assign 1950 as the adoption date for a provision adopted in any jurisdiction in 1950 or earlier. Provisions with pre-1950 roots conceivably might have some qualitative differences with 1950 revisions. I do not, however, investigate such distinctions in detail, in part because the origins are notoriously difficult to assess and, in part, because large-scale reform suggests an integration of the existing provisions into the new legal framework.

Although the MBCA is not adopted *in toto* in any single jurisdiction, the MBCA's typology nevertheless presents a convenient and relatively accurate metric by which all three systems can be measured. The methodology has been tested, and more scholars and practitioners are familiar with the MBCA model than with the law of either Japan or Delaware. Moreover, after the starting date of 1950, it is the MBCA, not the Illinois code, that becomes a standard model (along with Delaware) for development both in the United States and among Japanese policymakers who look to the U.S. system for answers. As Carney has shown, substantial uniformity (74.4% on the 142 provisions) exists between the MBCA and the statutes of the several states.<sup>77</sup> Although Delaware case law is often copied,<sup>78</sup> the MBCA remains the backbone of U.S. statutory corporate law.<sup>79</sup> Finally, the most thorough recent revision of the MBCA occurred more than seventeen years ago, a period of time that should be sufficient for jurisdictions to examine even the more recent provisions with care.

In his study, Carney takes a formal approach that focuses on the syntax of each corporate law provision. This approach makes sense if

<sup>76</sup> See generally SENGO 50-NEN KAISHAHŌ SHINENHYŌ 8 (Shōjihōmu Kenkyukai ed., 1995) (Japan); SUZUKI, *supra* note 50 (Japan); THE CORPORATION LAW COMMITTEE OF THE CHICAGO BAR ASSOCIATION, ILLINOIS BUSINESS CORPORATION ACT ANNOTATED (1934) (Illinois); JOSIAH MARVEL, DELAWARE CORPORATIONS AND RECEIVERSHIPS (4th ed. 1929) (Delaware); RODMAN WARD, JR., ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW (4th ed. 1998 & Supp. 1999) (Delaware).

<sup>77</sup> Carney reports that the 142 provisions are adopted in an average of 37.21 states, or 74.4% of the states, and that seventy-seven of those provisions are adopted in forty or more states. Carney, *Corporate Law*, *supra* note 2, at 731.

<sup>78</sup> See, e.g., *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1346 (D. Nev. 1997) ("Where, as here, there is no Nevada statutory or case law on point for an issue of corporate law, this Court finds persuasive authority in Delaware case law.").

<sup>79</sup> See Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 (2001) ("[T]he [MBCA] is the dominant model for state corporation statutes.").

one is attempting to measure the direct dispersion of MBCA provisions as Carney did,<sup>80</sup> but here my goal is to track broad similarities among systems to determine whether, and to what extent, convergence has occurred. Given that the institutional environments in which the systems function differ dramatically, and that the standard comparative law definition of convergence is “the phenomenon of similar solutions in different legal systems,”<sup>81</sup> I take a slightly different approach.

I classify a provision as functionally similar if its function, as expressed by the language of the statute and any accompanying commentary, is *substantially* similar.<sup>82</sup> I do not classify statutes as functionally similar if they simply serve the same broad corporate governance goal. I classify the following three examples (each involving Japan, the most difficult jurisdiction for side-by-side comparison if for no other reason than language) as functionally similar, although they may not have been necessarily so classified using Carney’s methodology:

- The MBCA requires a minimum of ten days’ notice before shareholders’ meetings.<sup>83</sup> Japan’s Code requires a minimum of two weeks.<sup>84</sup>

<sup>80</sup> See, e.g., Carney, *Corporate Law*, *supra* note 2, at 765 n.229, 769 n.271 (counting uniformity only if the state statute contains the specific terms “special meetings” or “redeemable shares”). While Carney takes a formal approach in most cases, a close reading of his work occasionally reveals a functional approach. See *id.* at 761 nn.181 & 187 (finding uniformity in all fifty states despite statutory differences); Carney, *Political Economy*, *supra* note 27, at 320 (“I treat public filings with state corporation officials as equivalent to publication for comparison purposes . . .”).

<sup>81</sup> Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3, 5 (1994).

<sup>82</sup> For the MBCA, commentary was limited to the annotated MBCA. For Illinois and Delaware, in the handful of cases in which similarity was ambiguous, I relied on annotations to those codes and occasionally to cited cases. For Japan, a civil law jurisdiction, I relied on both court opinions (particularly those cited in the commentary to 2002 MOHAN ROPPŌ [MODEL CODE] (Haneri Roppō Henshū linkai ed., 2001) and scholarly commentary to illuminate ambiguous provisions. Particularly helpful were MASAHIRO KITAZAWA, KAISHAHŌ [COMPANY LAW] 283-85 (1982); KEN’ICHIRO ŌSUMI, KABUNUSHI SŌKAI [SHAREHOLDERS’ MEETINGS] (1974); TAKEO SUZUKI, KAISHAHŌ [COMPANY LAW] 158 (5th ed. 1994); MISAO TATSUTA, KAISHAHŌ [COMPANY LAW] 110 (2d ed. 1991); CHŪ SHAKU KAISHAHŌ [COMPANY LAW COMMENTARY] (Katsurō Ueyanagi et al. eds., particularly KABUSHIKI (1) and (2), both 1986, and KABUSHIKI KAISHA NO KIKAN (1) (1986) and (2) (1987)); and TEIKAN SAKUSEI, HENKO NO TEBIKI [HANDBOOK OF ARTICLES OF INCORPORATION CREATION AND AMENDMENT] 5 (Shigekazu Torikai ed., 1998). In each jurisdiction, I of course may have missed case law that is not directly responsive to statutory provisions.

<sup>83</sup> MODEL BUS. CORP. ACT § 7.05 (3d ed. 1997).

<sup>84</sup> SHŌHŌ art. 232.

- The MBCA explicitly states that a director may resign at any time.<sup>85</sup> Although the Japanese Commercial Code has no such explicit provision, it does provide that directors are governed by the provisions that govern mandates,<sup>86</sup> and the Civil Code provides that a mandate may be rescinded at any time.<sup>87</sup>

- The MBCA explicitly states that shareholders may vote through a voting agreement.<sup>88</sup> Although the Japanese Commercial Code has no such explicit provision, the Japanese Civil Code and related case law provide that such agreements prevail over Commercial Code voting provisions so long as they are not contrary to public policy.<sup>89</sup>

In almost all cases, the proper classification seemed relatively clear.<sup>90</sup> Nevertheless, as a check on possible bias, I had two assistants—a Japanese corporate lawyer trained in the United States and a Japanese-speaking American corporate lawyer practicing in New York—code 100 provisions, including all those for which the proper classification might be ambiguous. Although this process does not eliminate bias, and I acknowledge that “[t]he rule ordinarily symbolizes far more than its bare text states,”<sup>91</sup> the finding of a high degree of coding consistency among the three of us, even on these relatively uncertain provisions, suggests that my individual coding methods were not unique.<sup>92</sup>

### 1. Baseline: 1950

First, I examine the similarities in 1950 among the three codes

<sup>85</sup> MODEL BUS. CORP. ACT § 8.07.

<sup>86</sup> SHŌHŌ, art. 254, para. 3.

<sup>87</sup> MINPŌ, art. 651, para. 1; see MASAHIRO KITAZAWA, KAISHAHŌ 328 (2d ed. 1982).

<sup>88</sup> MODEL BUS. CORP. ACT § 7.31.

<sup>89</sup> MINPŌ, arts. 90, 91; Meisei Kensetsu Kogyo K.K. v. Ogami, 1325 Hanji 140 (Kyoto D.C. Feb. 3, 1989) (upholding share transfer restriction agreement).

<sup>90</sup> While a functional approach may not yield unassailable results in every case, it is likely to provide more insights into the convergence question than a rigid formal approach, and it seems no less precise than the “legal family” classifications based on legal systems’ country of origin and other amorphous factors that dominate recent literature. See Coffee, *supra* note 26, at 8 (“[F]ormal legal convergence may be less important than functional convergence.”). Perhaps in part because of the size of the database, I still found the results using a formal approach such as Carney’s to be substantially similar. See Figure 1 and Part II.B.2 *infra*. The minor differences do not affect the analysis of this Article.

<sup>91</sup> Merryman, *supra* note 17, at 230.

<sup>92</sup> The average correlation coefficient for inter-rater reliability was 0.973. See generally EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 43-48 (1979) (outlining the calculation of a reliability coefficient).



with similar origins.<sup>93</sup> Two measures are useful: first, I examine the number of provisions adopted in 1950 that eventually became part of the MBCA.<sup>94</sup> In 1950, the MBCA had adopted sixty-eight of the 142 important provisions that would eventually be incorporated into the modern MBCA, while Japan had adopted seventy-nine provisions, and Illinois adopted seventy-six provisions.<sup>95</sup> Second, I examined the adoption in 1950 of the sixty-eight provisions of the modern MBCA in force *in* 1950. Of these sixty-eight provisions, Japan in 1950 had adopted forty-nine, and Illinois sixty-three.<sup>96</sup> In short, the data support the historical story, suggesting that while Japan and Illinois may not have been strictly identical, corporate law in 1950 did not differ substantially among Japan, Illinois, and the MBCA.

**Table 1: Provisions Adopted in Each Jurisdiction**

| Jurisdiction | A. Number of modern MBCA provisions adopted in 1950 | B. Number of 1950 MBCA provisions adopted in 1950 | C. Number of modern MBCA provisions adopted in 2000 |
|--------------|---|---|---|
| MBCA         | 68  | 68  | 142   |
| Japan        | 79  | 49  | 86  |
| Illinois     | 76  | 63  | 113   |

## 2. Convergence or Divergence? 2000

The best evidence of convergence or divergence among the juris-

---

<sup>93</sup> I also examined the twenty-three provisions of the Japanese Code considered “important” by its primary drafter, Lester Salwin, in a 1962 *Georgetown Law Journal* article. Salwin, *Commercial Code*, *supra* note 46, at 497-510. The list is essentially identical to that of Japanese scholars. See Osamu Mimura et al., *Zadankai, Rippō Tantōkan ga Kataru Sengo no Kaishahō Kaisei Jijō* [Roundtable: The Circumstances of Postwar Company Law Revision as Told by Those Persons in Charge of Legislation], in three parts, 1229 SHŌJI HŌMU 8, 1230 SHŌJI HŌMU 6, 1231 SHŌJI HŌMU 8 (1990), at 1229 SHŌJI HŌMU 13. Of these twenty-three provisions, fifteen are clearly and directly linked to the Illinois Code.

<sup>94</sup> In Part V, I attempt to measure the relative importance of these provisions, which are already judged to be the important ones of the entire lot of 560 provisions. But for now, I focus on the purely quantitative measure.

<sup>95</sup> See *infra* Table 1, Column A (listing the number of modern MBCA provisions adopted in 1950).

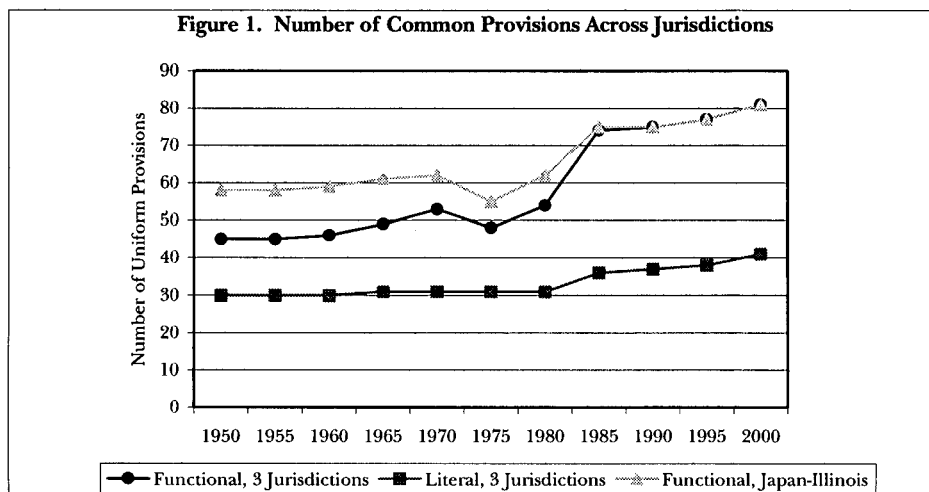
<sup>96</sup> See *infra* Table 1, Column B (listing the number of 1950 MBCA provisions adopted in 1950). Viewed formally, the three jurisdictions were uniform on thirty provisions in 1950; by 2000 that figure had risen to only forty-one, an increase of 37%. Using a functional approach, the jurisdictions were uniform on forty-five provisions in 1950 and eighty-one in 2000, an increase of 80%.

dictions should come from a comparison of 1950 commonality with 2000 commonality. Compare the Table 1 data in Column C with those in Columns A and B. The numbers reflect an increase in adoptions of laws in each jurisdiction; for some corporate law problems, jurisdictions have adopted similar solutions over the fifty-year period. Figure 1 shows this increase for all three jurisdictions using a functional approach, for Illinois and Japan alone using a functional approach, and, for comparison, all three jurisdictions using a formal approach such as Carney's, which relies on specific statutory language.

The higher initial uniformity between Illinois and Japan reflects the direct borrowing undertaken in 1950 by the occupation authorities. Note, however, that by 1985, the functionally common provisions among those two jurisdictions are equal to the number of functionally common provisions in all three jurisdictions, tentatively suggesting mild convergence. This development is largely due to the 1983 revision of Illinois' corporate law, through which it adopted several MBCA provisions that had already been incorporated into the Japanese code.<sup>97</sup>

---

<sup>97</sup> See, e.g., Painter, *supra* note 3, at 635 (providing history of the Illinois Business Corporation Law's revision in 1983). It is difficult to discern a distinct pattern from a comparison of Illinois and Japanese adoptions of MBCA provisions. Of the thirty-three MBCA provisions adopted in Illinois but not in Japan, thirteen were adopted by Illinois during the 1983 overhaul. The adoption rate among the fifty states (as reported by Carney) of those thirty-three MBCA provisions is 37.75 states, a number almost identical to the overall MBCA provision adoption rate. *Supra* note 77. Of the ten MBCA provisions adopted in Japan but not in Illinois, all were adopted in Japan in 1950, and six were not adopted by the MBCA until 1984, suggesting little post-1950 MBCA-based innovation in Japan. Those ten provisions are adopted in an average of only 23.7 states.



The gradual increase in the number of functionally common provisions indicates an increase in common solutions, but not necessarily convergence. As law expands to address a variety of new problems, we might expect to find an increase in the raw total number of common solutions over time between any two systems in virtually any field. To measure convergence using the MBCA metric, one must take into account the large number of post-1950 MBCA provisions on which the jurisdictions disagree. In percentage terms, the proportions of adoptions of modern MBCA provisions in 2000 are *lower* than the proportions of adoptions of 1950 MBCA provisions in 1950.<sup>98</sup> Compared to the degree of convergence in 1950, the evidence suggests *less* total convergence in 2000. Although the differences—about twelve percent each—are not huge, they do not suggest a trend toward convergence.

<sup>98</sup> See *infra* Table 2 (comparing the percentage of provisions adopted in each jurisdiction).

**Table 2: Percentage of Provisions Adopted in Each Jurisdiction**

| Jurisdiction | A. Percentage of 1950 MBCA provisions adopted in 1950 | B. Percentage of modern MBCA provisions adopted in 2000 |
|--------------|---|---|
| MBCA         | 100%  | 100%  |
| Japan        | 72.1%   | 60.6%   |
| Illinois     | 92.6%   | 79.6%   |

Under some definitions of convergence, it might be appropriate to count *all* “corporate law” provisions in the three jurisdictions to produce measures of the *total* similarity and *total* difference among the statutes over time. I conducted such an experiment for two jurisdictions, Japan and the MBCA. By my count of nontrivial provisions, 27.7% of Japan’s provisions were common with the MBCA in 1950, and 26.8% in 2000.<sup>99</sup> Put another way, if Japanese Company Law and the MBCA were combined into one statute, 20% of the total package would be duplicative in 1950, and only 18.6% in 2000. Although this measure is less precise than those of Table 2,<sup>100</sup> the resulting evidence

<sup>99</sup> MacKerron counts 569 provisions for the modern MBCA, of which Carney judges 142 to be important. *Supra* text accompanying note 75. In the 1950 MBCA, sixty-eight of Carney’s important provisions exist, out of a total, by my count, of 368 provisions. MODEL BUS. CORP. ACT (1950); Carney, *Corporate Law*, *supra* note 2, at 760-73. By contrast, in Japan, the 1950 Company section of the Commercial Code contains 878 provisions, while the comparable measure for 2000 is 1,342. COMMERCIAL CODE OF JAPAN (1950); COMMERCIAL CODE OF JAPAN (2000). Eliminating redundant and trivial provisions, as Carney did, I count 177 provisions in Japan in 1950, and 321 in 2000. In Japan in 1950, of 177 Company section provisions, 49, or 27.7%, were in common with the MBCA, while in Japan in 2000, of 321 provisions, 86, or 26.8%, were provisions commonly held with the MBCA. If all nontrivial provisions are summed, Japan and the MBCA combined in 1950 for a total of 245 provisions, of which 49, or 20%, are common, and in 2000, combined for a total of 463, of which 86, or 18.6%, are common.

<sup>100</sup> This measure is less accurate for two reasons. First, one of the primary goals of the project is to track the evolution of observed similarities over time, not to catalog a myriad of differences. While the number of similar provisions is confined to the baseline MBCA measure, the number of differing provisions is potentially infinite. Second, the tally of dissimilar provisions necessitates the creation of stark boundaries on the scope of what constitutes “corporate law.” This task is extremely difficult. The Company section of the Commercial Code includes many provisions that are not part of the MBCA, but which might appear elsewhere in U.S. law. But a definition of corporate law that includes all provisions affecting corporate governance is far too broad, implicating such diverse areas as employment law, bankruptcy provisions, and judge-made law such as Delaware rules regarding takeovers. Accordingly, I choose to rely primarily on MacKerron’s and Carney’s established methodology of measuring similar provisions using a common baseline, including a reliance on what constitutes a “provision,” with the understanding that this method may not necessarily encompass all potential defini-

provides mild support for, or at least does not directly contradict, the above findings, as the proportion of common provisions has fallen over time by this measure as well.

Divergence—or the lack of substantial convergence—is further demonstrated by the differences in the rates of MBCA provision adoptions. Figure 2 compares the adoptions of modern MBCA provisions in each jurisdiction and adds Delaware, the leading corporate law jurisdiction in the United States. The data are interesting for at least two reasons. First, despite a common starting point in the law, the results over time for the jurisdictions fantail away from convergence. Second, note that while the differences among jurisdictions are not grossly divergent, Japan is slowest to adopt MBCA-compatible provisions over time. While Japan begins in 1950 with more *modern* MBCA provisions than any other jurisdiction (almost identical to Illinois, from which it borrowed), its position is reversed by 2000.

The development of corporate law in these jurisdictions presents a bit of a puzzle. Why is it that despite relatively similar starting points, the systems diverge? At least three simple explanations, focusing particularly on Japan, have potential to explain the difference.

First, perhaps there is something institutionally different about Japan's legal system that leads to few Commercial Code reforms. Differences between civil and common law systems may indeed account for some differences, despite my efforts to account for case law differences.<sup>101</sup> But note that the "flatlining" of Japanese development seen in Figure 2 occurs only in relation to MBCA-compatible provisions. As Part III will show, Japanese corporate law changes often; the Japanese Commercial Code has been subject to eleven major revisions since 1950, more than most U.S. corporate law regimes operating in the common law system. In fact, the Japanese Commercial Code and related laws have been revised more times—and have been subject to more major revisions—in the postwar era than any other of the codes that comprise the core of Japan's civil law system, each of which was initially overhauled during the Occupation.<sup>102</sup> Moreover, more new provisions have been added to the Japanese Commercial Code than to the MBCA since their 1950 adoptions.<sup>103</sup> Divergence results not

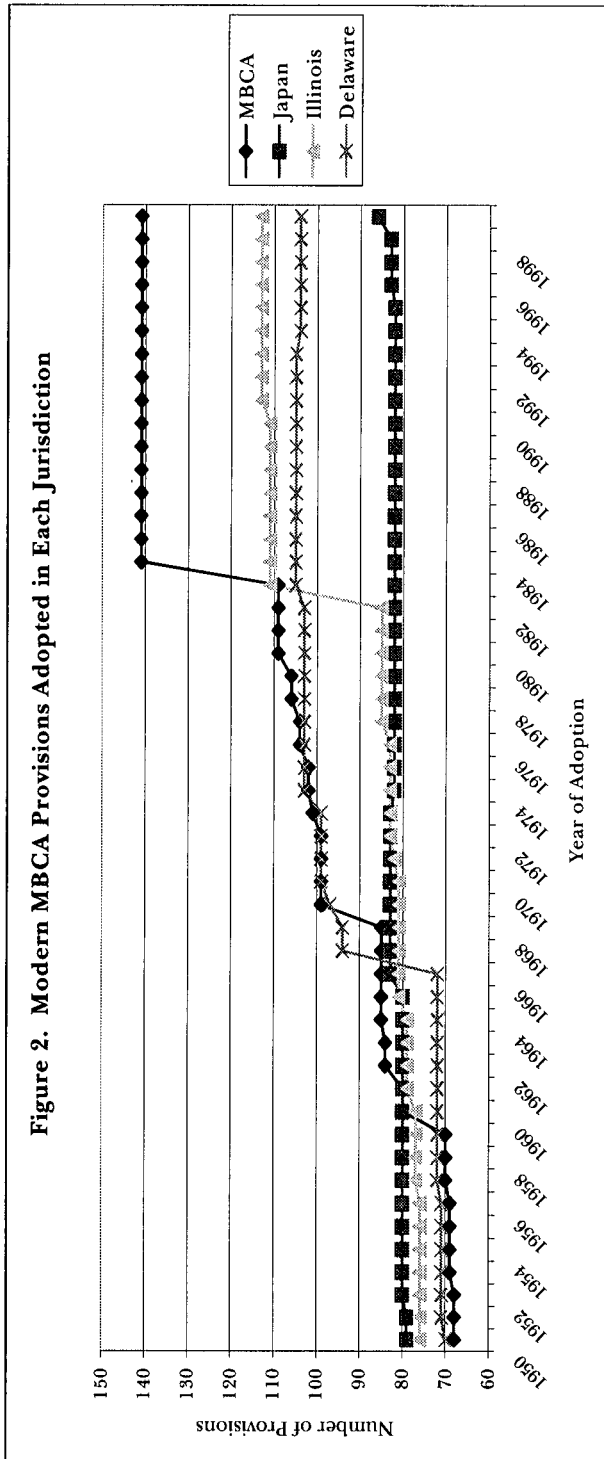
---

tional nuances of "convergence."

<sup>101</sup> See *supra* text accompanying note 81 (discussing the challenges in comparing legal rules in different legal systems).

<sup>102</sup> See *infra* Table 3 (listing the number of Japanese code revisions since 1950).

<sup>103</sup> See *supra* Table 1 and *supra* notes 93-96 and accompanying text (comparing the number of provisions adopted in Japan with the number adopted in the MBCA).



because of a lack of revision in Japan, but because the revisions implemented in Japan do not follow the MBCA pattern.

**Table 3: Japanese Code Revisions Since 1950**

| Code                       | Number of Revisions |
|----------------------------|---------------------|
| Civil Code                 | 24                  |
| Commercial Code            | 29                  |
| Criminal Code              | 11                  |
| Code of Criminal Procedure | 23                  |

Source: Revision tables in 2002 MOHAN ROPPŌ 1030-31, 1296-1301, 1919, 2108-09 (Haneri Roppō Henshō Iinkai ed., 2001).<sup>104</sup>

The fact that Japan has not followed the MBCA pattern suggests a second explanation based on a lack of direct continuing influence. Perhaps there is no reason to expect Japan to adopt MBCA provisions, or provisions that mimic those of the MBCA, after the Occupation reformers leave in 1950. It would not be surprising if, when Japan regained control of its legal system, it started making adaptations to the “imposed” code.

Although this explanation is possible, three factors suggest it is not a complete answer. First, the Japanese political process of corporate law revision almost always involves a thorough examination of solutions adopted in foreign (non-Japanese) legal systems, particularly the U.S. system, and particularly the MBCA approach. In fact, in my experience, the MBCA is more readily available in bookstores in Tokyo than in New York.<sup>105</sup> If Japan is rejecting foreign solutions, it is doing so systematically after intense, and arguably useless, evaluation. Second, although Japan could be slow in general to accept transplanted systems, it seems unlikely that Japan is still “getting used to” its transplanted corporate law after fifty years. Finally, it also seems unlikely that Japanese law reform leaders are rejecting MBCA solutions as a sort of backlash in which efficiency takes a backseat to politics.<sup>106</sup>

<sup>104</sup> This source does not contain tables of revisions for Japan’s two other major codes, the Code of Civil Procedure, which is interconnected with many other procedural laws, or the Constitution, which has never been revised.

<sup>105</sup> The MBCA is published in Japanese as AMERIKA MOHAN KAISHAHŌ (Mashiro Kitazawa ed., 1988).

<sup>106</sup> See generally Mark J. Roe, Essay, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998) (describing how “[p]olitics can disrupt markets” and lead voters to “see market arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements”).

Although some backlash to Occupation reforms occurred in the first revision after the end of the Occupation, reversal was not a continuing trend. Of the multitude of revisions imposed by Occupation officials in 1950, as Part III will show, only three—mandatory cumulative voting, share transfer restriction prohibitions, and a requirement that preemptive rights appear in a company's charter and apply to all future stock issuances—were flatly reversed in the ensuing years. That these reversals occurred over an extended period of time—in 1955, 1966, and 1974, respectively—at least suggests that decisions were based on changing conditions and not merely knee-jerk political backlash.

Finally, perhaps the system's substantial uniformity on MBCA provisions in 1950 means that the most logical subsequent development is divergence. Certainly the starting point matters.<sup>107</sup> Still, the common-measure divergence seen here would appear to directly contradict elementary notions of evolution-toward-efficiency and path dependence in legal development. Theories of efficient development of corporate law suggest that similar economic selection pressures will lead to similar corporate law solutions.<sup>108</sup> Path dependence theory further suggests that systems that begin with a common statutory starting point should be expected to adopt provisions that fit within that existing path-creating framework.<sup>109</sup>

It is true that in many aspects Japan is different from the United States; so different, in fact, that a differing pattern of corporate law development might at first glance not be terribly surprising. But as this discussion has shown, the differences that are most likely to affect corporate law development directly are small, the statutory starting points are remarkably similar, and existing theory strongly suggests that Japan would follow the MBCA pattern. This separation of theory

<sup>107</sup> Assuming similar rates of adoption of identical provisions as a percentage of total adoptions in two or more jurisdictions, the starting point may determine whether the subsequent general trend is one of convergence or divergence. If two systems with no common provisions at  $T_1$  adopt 10% common provisions, the outcome at  $T_2$  will be convergence. If two systems with 100% convergence at  $T_1$  adopt 10% common provisions, the outcome at  $T_2$  will be divergence. In this case, however, I am not measuring aggregate adoptions, but adoptions of a common, standardized set of provisions.

<sup>108</sup> See, e.g., Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 377 (1983) ("Two concepts of the firm motivate [economic theorists] to level the charge of social inefficiency at the modern corporation: their conception of the firm in economic theory and their contrasting conception of the real modern corporation.").

<sup>109</sup> As this Article suggests, a broader definition of "starting point" to include institutional factors may lead to a different analysis.



from the empirical reality that I have documented here, as well as the differing *degrees* to which the four jurisdictions depicted in Figure 2 comport with theory, suggest the need for a more complex and subtle explanation. Although part of that explanation may come from sources outside the scope of this Article such as corporate social norms and other practices, an explanation basing differences in the institutional environment of corporate law is nevertheless robust.

### III. JAPANESE CORPORATE LAW DEVELOPMENT

The study of the development of Japanese corporate law over time highlights an important feature of the system: the high degree to which it relies on exogenous shocks to instigate reform. Although reliance on exogenous shocks may not be the *only* reason why U.S. and Japanese laws have diverged, it is an observed trend that fits the data presented in Part II well. I first discuss the institutions that affect corporate law development in Japan. I then briefly discuss process, and finally relate a narrative of Japanese corporate law history to provide concrete examples of the exogenous shock phenomenon.

#### A. *Institutions*

In this section, I discuss five broad groupings of institutions and related organizations that are particularly important in contrasting the development of corporate law in Japan with that of the United States: (1) corporate governance institutions, (2) formal state policymaking institutions and organizations, (3) foreign relations constraints, (4) corporate enforcement institutions, and (5) the organized bar. This list is by no means complete, but should serve as a guide for understanding the development of Japanese corporate law discussed in the remainder of this Part.

##### 1. Corporate Governance Institutions

As in other systems, corporate governance constraints influence the path of corporate law in Japan. One particular group of institutions stands out: those that empower Japanese corporate managers. Due at least in part to a combination of the lack of a well-functioning market for corporate control, back-loaded compensation plans, historically weak enforcement of fiduciary duties, and a tendency to promote directors solely from the ranks of inside employees, Japanese managers have developed into a powerful force in the policymaking process.

Japanese managers are well represented by various business organizations. Japan has 14,000 business organizations, nearly twice as many per capita as the United States.<sup>110</sup> Four prominent national business organizations serve almost exclusively political functions, the most powerful of which is the Federation of Economic Organizations, or *Keidanren*, which includes more than 800 of Japan's largest corporations and 100 trade and industrial organizations.<sup>111</sup>

Still, it would be a mistake to infer from these data that either uniformity in the Japanese business community or an anti-shareholder stance among managers exists. Although business interests tend to aggregate during good times, they also tend to splinter during economic downturns, and the interests of small and large businesses often fail to coalesce. And while shareholder and managerial interests are occasionally at odds, the search for capital often leads managers to the same institutional arrangements favored by shareholders.

## 2. Formal State Policymaking Institutions and Organizations

The rules of the state policymaking game give rise to two organizations that are especially prominent in Japanese corporate law development: the bureaucracy and advisory committees. Of course, bureaucrats do not formally comprise an interest group. Nonetheless,

---

<sup>110</sup> Yutaka Tsujinaka, *Japan's Civil Society Organizations in Comparative Perspective*, in *THE STATE OF CIVIL SOCIETY IN JAPAN* (Frank J. Schwartz & Susan J. Pharr eds., forthcoming 2002). Many businesses were founded during the Occupation (48.8% of the most influential interest groups, and 44.3% of business and financial groups were founded during 1946-55). Michio Muramatsu & Ellis S. Krauss, *The Conservative Policy Line and the Development of Patterned Pluralism*, in *1 THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC TRANSFORMATION* 516, 522 (Kozo Yamamura & Yasukichi Yasuba eds., 1987).

<sup>111</sup> Besides *Keidanren*, the Japan Federation of Employers' Associations (*Nikkeiren*) has 30,000 employers and is primarily concerned with labor-management relations. *Nikkeiren*, at <http://www.nikkeiren.or.jp> (last visited Jan. 7, 2002). The Japan Chamber of Commerce and Industry (*Nissho*) is a broad organization composed mostly of small- and medium-sized businesses and serves as the central organ of 478 regional chambers of commerce. Although it is not without influence, as the former chairman of the Federation of Economic Organizations once said during the euphoria of the late 1950s, "it is just as hard to organize medium and small enterprises as it is to make imported rice stick together in a ball." T.J. PEMPEL, *REGIME SHIFT: COMPARATIVE DYNAMICS OF THE JAPANESE POLITICAL ECONOMY* 95 (1998). Finally, the Japan Association of Corporate Executives (*Keizai Dōyukai*, formerly translated as the Council for Economic Development) includes roughly 1,400 top business leaders from 900 companies and differs from the other three organizations in that it purports to be nonpartisan and is composed exclusively of individuals. See *Keizai Dōyukai*, at [http://www.doyukai.or.jp/E\\_index.htm](http://www.doyukai.or.jp/E_index.htm) (last visited Jan. 8, 2002) (describing the organization).

although there may be slack in any agency relationship, bureaucrats normally attempt to please their agents, who are elected politicians.<sup>112</sup> Politicians, in turn, attempt to please the groups that are able to lobby them most effectively, which often turn out to be corporate interest groups. In the corporate law context, policymaking government officials are primarily employees of the Ministry of Justice, but also include employees of the Ministry of Finance (MoF) and the Ministry of International Trade and Industry (MITI), and, to a lesser extent, academic advisors from public universities. Academic advisors enjoy somewhat greater flexibility but technically remain public servants. Disagreement between government and academics, and among the branches of government, is commonplace.<sup>113</sup>

An important part of the policymaking mix is the advisory committee institution, or *shingikai*.<sup>114</sup> Advisory committees play an important role in the policy development process. As Curtis Milhaupt and Geoffrey Miller note:

Although the committees are often derided as ornamental rubber stamps, to dismiss them as meaningless would be a serious mistake. In fact, the committees perform an important role in facilitating group decision-making and resolving disputes. This they accomplish in a number of ways. They provide a supplementary channel for public-private interaction beyond the means previously described. They serve as listening posts for ministry officials while shielding the bureaucrats from direct exposure to interest group influences, and they give affected interests a stake in policy outcomes, since interested parties participate in the proc-

---

<sup>112</sup> See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 99-120 (1993) (noting that while Japanese bureaucrats exercise a great deal of power, they are still largely controlled by the elected legislature).

<sup>113</sup> See SCOTT CALLON, DIVIDED SUN: MITI AND THE BREAKDOWN OF JAPANESE HIGH-TECH INDUSTRIAL POLICY, 1975-1993, at 33-34 (1995) (expounding on the tension between MITI, the Ministry of Education, and the Science and Technology Agency).

<sup>114</sup> See FRANK J. SCHWARTZ, ADVICE & CONSENT: THE POLITICS OF CONSULTATION IN JAPAN 48-115 (1998) (describing the role and importance of *shingikai* as an advisory body). Advisory committees appear to reflect Japanese social conditions but actually are inventions of the occupation authorities. In this case, Occupation authorities established committees through the National Administrative Organization Act, see *Kokka Gyōsei Soshiki Hō* [National Government Organization Law], Law No. 120 of 1948, art. 8 ("[E]ach administrative organ specified in Article 3 . . . can establish consultative bodies by law [that include] knowledgeable and experienced persons . . ."), in order "to limit bureaucratic power, open up and better integrate state administration, and pluralize participation in government policymaking, as well as to solicit outside advice." SCHWARTZ, *supra*, at 48; see also Ehud Harari, *Japanese Politics of Advice in Comparative Perspective: A Framework for Analysis and a Case Study*, 22 PUB. POL'Y 537, 539 (1974) (noting that the present system of public advisory bodies in Japan was "established by legislation in 1947").

ess of policy formulation.<sup>115</sup>

Members include scholars, lawyers, politicians, interest group representatives (including representatives from business groups), and bureaucrats. Members are paid small honoraria (reportedly ¥20,000 to ¥40,000 per meeting in 1995) but reap other benefits in the form of personal connections, prestige, and the ability to influence national policy.<sup>116</sup> In the case of the Commercial Code, the most important ad-

---

<sup>115</sup> Curtis J. Milhaupt & Geoffrey P. Miller, *Cooperation, Conflict, and Convergence in Japanese Finance: Evidence from the "Jusen" Problem*, 29 LAW & POL'Y INT'L BUS. 1, 15 (1997). It is tempting to find something "Japanese" in an area such as this—policy-making and big business should fit the shopworn models. Some who have examined the Japanese system argue that it reflects a tendency in the Japanese legislative and administrative rulemaking processes toward preclearance of decisions over postclearance. See David G. Litt et al., *Politics, Bureaucracies, and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan*, 139 U. PA. L. REV. 369, 430-46 (1990) (explaining the preclearance/postclearance distinction in how conflict is expressed and resolved in America and Japan, and noting that Japan relies more on the preclearance stage). In Japan, parties meet and develop consensus first, which reduces legal challenges later, while in the United States greater reliance is placed on postclearance conflict resolution mechanisms such as litigation and judicial decisions. *Id.* But the committee system operates similarly in the United States:

The current standard process to develop an amendment from within the Committee is as follows: First there is a preliminary discussion of a problem by the full Committee. . . . [Then,] a small subcommittee is appointed . . . to develop a position and prepare the text of the proposed amendment. . . . The drafts . . . are discussed by the full Committee and usually returned to the subcommittee for further refinement. . . . [T]he proposal may be approved "on second reading" and published in the *Business Lawyer* . . . .

Robert W. Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455, 1459-60 (1985). See generally Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1212 (1993) (providing an analysis of the reform process of the American Law Institute "from a sociological, anthropological, and public choice" point of view). A broad range of institutional roadblocks may also limit postclearance litigation in Japan and the Japanese "no explicit rule means prohibition" regulatory norm limits litigation over gray-area innovation. See Hideki Kanda, *Developments in Japanese Securities Regulation: An Overview*, 29 INT'L LAW. 599, 609 (1995) ("An important customary rule exists in the financial services area in Japan; that is, the nonexistence of an explicit legal rule endorsing a certain activity . . . is understood to mean that such activity is prohibited.").

<sup>116</sup> See SCHWARTZ, *supra* note 114, at 76 (explaining that while monetary compensation is small, members reap other benefits such as "inspection missions abroad[,] . . . personal connections that can result in profitable opportunities[,] . . . access to information that might be inaccessible[,] . . . bask in prestige; or enjoy the satisfaction of having their ideas reflected in public policy and making a contribution to society"). Although sometimes a decisive element in the policymaking process, the decisions of committees are not legally subject to review because "they are considered internal government behavior that does not directly affect the legal rights or duties of private citizens." FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 171 (1987). The same is true for the process of appointing committee members, establishing committee

visory committee is the Ministry of Justice's Legislative Committee, which encompasses the Commercial Code and Company Law Subcommittees, whose members, though chosen by the Ministry of Justice bureaucrats, are often closely watched by politicians.<sup>117</sup>

Although the Commercial Code Subcommittee is a standing body, it rarely meets to discuss abstractly the provisions that would make ideal law, as MBCA drafters purport to do. Nor does it often strike out on its own or even in direct response to specific interest group pressures, as committee-led change requires systemic input from many and varied constituency groups. In practice, the Subcommittee only meets intensely and discusses matters of substance when prompted by exogenous shocks as directed by the bureaucracy. Partly because of the need for input from various constituencies, Subcommittee-led change tends to be relatively slow, prompting calls from some corners to abolish the system.<sup>118</sup>

### 3. Foreign Institutional Constraints

In Japan as elsewhere, foreign pressure can influence the domestic decision-making process. In Japan, where access to formal mechanisms for policy change by nonbusiness interests often are limited by institutional barriers, such outside pressure is often thought to have particular force.<sup>119</sup> As with many other exogenous stimuli, government officials become actors in two-level games, forced to compete in two political arenas.<sup>120</sup> Foreign pressure is likely to be particularly

---

agendas, and the "ghost-writing" of their reports by bureaucrats. *See id.* at 199 ("Nor do MITI's actions in appointing shingikai members . . . reach the level of legal formality necessary for judicial review.").

<sup>117</sup> In February 1999, the Ministry of Justice announced that it would no longer appoint bureaucrats to the Legislative Committee. *Hoseishin, Kanryōin Zempai e [Bureaucrat Members on Legislative Committee to be Abolished]*, ASAHI SHINBUN, Feb. 17, 1999, at 1.

<sup>118</sup> *See* Ichirō Kawamoto, *Hōsei Shingikai to Shōhō [The Legislative Committee and Commercial Law]*, 1147 JURISUTO 69 (1998).

<sup>119</sup> *See, e.g.*, ROBERT M. ORR, JR., THE EMERGENCE OF JAPAN'S FOREIGN AID POWER (1990) (discussing the role of *gaiatsu* in the Gulf War); Glen Fukushima, *Gaiatsu Has Outlived Its Usefulness*, JAPAN TIMES WKLY., Nov. 16, 1991, at 1 (criticizing Japan's overreliance on foreign pressure as a means for policy change).

<sup>120</sup> *See, e.g.*, GEORGE TSEBELIS, NESTED GAMES: RATIONAL CHOICE IN COMPARATIVE POLITICS (1990) (discussing variations in game theory in the political context). In addition, Robert Putnam has commented:

The politics of many international negotiations can usefully be conceived of as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among these groups. At the international

powerful when it is linked to specific endogenous domestic pressures that encourage the co-participation of domestic interest groups.<sup>121</sup>

#### 4. Corporate Law Enforcement Institutions

Corporate law enforcement institutions such as rules regarding corporate disclosure, shareholder derivative suits, prosecutorial discretion, and judicial enforcement powers play an especially important role in determining what sorts of newsworthy corporate-related events may arise. With stronger enforcement mechanisms, change-inducing scandals might not occur.

One particular example of the influence of such institutions is the *sokaiya*. A *sokaiya* (literally, "general meeting operator") is usually a nominal shareholder who either attempts to extort money from a company's managers by threatening to disrupt its annual shareholders' meeting with embarrassing or hostile questions, or works for a company's management to suppress dissent at the meeting.<sup>122</sup> As I have discussed elsewhere, *sokaiya* historically have flourished in Japan because relatively noncompetitive Japanese corporate law and governance institutions lead to low levels of corporate disclosure.<sup>123</sup> As Part III.C shows, many Japanese corporate law provisions were enacted in direct response to *sokaiya*; in their absence, much of Japanese corporate law would make little sense.

#### 5. The Organized Bar

Of particular interest when comparing Japanese and U.S. corporate law development is the relative absence of lawyers in the Japanese process. Unlike a federalist system in which local attorneys compete for fees, Japan is unitary not only in its corporate chartering system

---

level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.

Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

<sup>121</sup> See LEONARD J. SCHOPPA, BARGAINING WITH JAPAN 23 (1997) ("What makes foreign pressure effective, therefore, may not be raw power as much as it is the ability of a nation to take advantage of the web of interests that bind, not just itself, but its partners as well."); see also Putnam, *supra* note 120, at 434 (setting forth a theoretical model from which Schoppa draws synergies between domestic and foreign pressure).

<sup>122</sup> See Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 767 (1999) [hereinafter West, *Sokaiya Racketeers*] (defining *sokaiya*, a specific type of shareholder).

<sup>123</sup> *Id.* at 769.

but also in its attorney-licensing institutions. Accordingly, while Japanese attorneys, like attorneys everywhere, attempt to maximize their revenues, the dynamics differ. In every system, in the absence of rules that directly result in attorney revenue maximization, attorneys are most likely to favor rules that their clients favor in order to maintain clients. In addition, there exist institutional roadblocks to shareholder litigation and a cartel-like monopoly on legal services that allows attorneys to choose the highest revenue-generating cases. As a result, attorneys in Japan are more likely to represent corporations than investor or anti-corporate interests, and in turn to support—if they publicly support any policy—managerial interests.

Yet there is little support for *any* corporate issue from the organized Bar. The Japan Federation of Bar Associations issues resolutions and recommendations relating to social issues but rarely to economic ones. One possible explanation for the seeming lack of interest is simply the size of the Japanese Bar. With fewer than 17,000 attorneys, most of whom have highly diversified practices that do not depend on corporate law as a large and irreplaceable source of income, the Bar as an organization may have relatively little incentive to press proactively for corporate law changes even if the opportunities existed.

Moreover, institutional restrictions on shareholder litigation and shareholders' rights ensure that virtually no active plaintiffs' bar exists in Japan. Due to the lack of a class action mechanism, and the lack of economic incentives to bring derivative suits until 1993,<sup>124</sup> only a handful of attorneys are self-identified as plaintiffs' attorneys.<sup>125</sup> These institutional constraints have engendered a system in which very few attorneys have strong incentives to support corporate law revisions.

## B. *Process*

### 1. General

Every Japanese corporate law revision from 1950 to 1999 follows the basic Ministry-of-Justice-designed pattern of Legislative Council and Commercial Law Subcommittee meetings, solicitation of opinions from affected groups, Subcommittee discussion of outline, Subcommittee de-

---

<sup>124</sup> See *infra* text accompanying notes 199-201.

<sup>125</sup> See Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 365 (2001) [hereinafter West, *Why Shareholders Sue*] (“[T]he small number of attorneys in Japan matters in the derivative-suit context because only licensed attorneys . . . may bring such suits.”).

cision on outline, presentation and decision by the full Legislative Council, drafting of bill by Ministry of Justice, presentation to cabinet, approval by cabinet, submission to Diet, Diet Justice Committee deliberations, enactment, promulgation, effectiveness.<sup>126</sup>

Within the Ministry of Justice, corporate law revisions are managed primarily by the Councillor's Office, which is primarily responsible for general legislative reform, and the Fourth Division of the Civil Affairs Bureau, which is generally responsible for commercial matters (particularly registration, a capacity in which it is not dissimilar to a Secretary of State), and the balance between the two depends on the specific issues and the personnel involved.<sup>127</sup> These organs are said to be understaffed, and the actual drafting (and ironing out to make compatible with other laws, such as the Civil Code) is usually undertaken by three or four members of the Ministry of Justice, a relatively small number compared to other types of revisions.

One hallmark of the Japanese corporate law revision process is the examination of foreign legal systems.<sup>128</sup> As one frequent advisory committee member told me, "All I have to do is make sure that I have a handle on what the Americans, the British, and the Germans do. I lay out the basic workings of those systems, give the pros and cons of each, and everyone oohs and aahs. That's almost always how solutions are narrowed down to a manageable list."<sup>129</sup> Given the degree to which Japan has imported much of its formal legal framework in the last 100 years, perhaps it is of little surprise that this system is not unique to the corporate law.

## 2. Comparison

Perhaps the most striking feature of the above process to a U.S. observer is the relative lack of lawyer involvement. Much is written on the U.S. process. With differences to be sure, one basic, nearly universal conclusion is that the primary actors are lawyers, legal academics, and, in common law creation, judges.<sup>130</sup> As Jonathan Macey and

<sup>126</sup> Mitsuo Suzuki, "Shōji Hōmu" 40-nen Shishi [Forty-Year History of "Commercial Law" Journal], 1402 SHŌJI HŌMU 11 (1995).

<sup>127</sup> Mimura et al., *supra* note 93, at 1229 SHŌJI HŌMU 8, 11-12 (statement of Tokyo District Court Judge Takeo Inaba).

<sup>128</sup> See generally Shigeru Morimoto, *Kōkai Kaishahō no Bapponteki Kaisei to Hikakuhō Kenkyū* [Dramatic Revision of Company Law and the Study of Comparative Law], 1568 SHŌJI HŌMU 44 (2000) (laying out the hierarchy of the Ministry of Justice).

<sup>129</sup> Interview with anonymous member of advisory committee, in Tokyo (July 10, 1999).

<sup>130</sup> See, e.g., Douglas M. Branson, *Recent Changes to the Model Business Corporation Act:*



Geoffrey Miller put it in the context of the leading corporate law jurisdiction, "Delaware law reflects a political equilibrium among the various interest groups within the state in which the lawyers enjoy a dominant position."<sup>131</sup> In the context of the MBCA, which serves less easily identifiable consumers, it has been argued that "the large law firm lawyers that dominate the ABA Committee on Corporate Laws have been unmindful of their proper role."<sup>132</sup>

In Japan, however, lawyers play a less dominant role. Instead, as the forgoing analysis suggests, the primary decision makers are bureaucrats and advisory committee members. Corporations heavily lobby each of these groups. In addition, in the case advisory committees, corporations often receive direct representation in the legislative process. In the case of bureaucrats, the political constraints that derive from corporate contributions to elected politicians create powerful incentives as well.

The resources available for influencing policy probably differ little in each system. But to make explicit claims that are only implicit in the previous section, the role of lawyers in the U.S. system may result in more direct financial incentives for change. Bureaucrats and committee members may be wined and dined (subject to increasingly strict rules) in Japan. But opportunities for *direct* financial benefit may be more numerous and lucrative in the United States, where primary decision makers in the legal decision-making process often report directly to corporate interests. As a result, U.S. corporate lawyers, who can profit quickly from enhanced legal fees, appear to be much more proactive in seeking corporate law changes than their Japanese counterparts.

---

*Death Knells for Main Street Corporation Law*, 72 NEB. L. REV. 259 (1993) (discussing the interplay of events and actors that led to the recent changes to the MBCA); Campbell, *supra* note 57, at 99 (describing the committee membership of those who drafted the MBCA); William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 670 (1974) ("Judicial decisions in Delaware illustrate that the Courts have undertaken to carry out the 'public policy' of the state and create a 'favorable climate' for management."); Garrett, *supra* note 62, at 1 (listing the members of the committee that prepared the MBCA); Hamilton, *supra* note 115, at 1456-57 (discussing the American Bar Association's role in developing the MBCA); Macey, *supra* note 115, at 1212 (analyzing the law reform process of the American Law Institute from "sociological, anthropological, and public choice" perspectives); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 469 (1987) (using "an interest-group theory of regulation to explain and predict the legal rules that affect the affairs of corporations chartered in Delaware").

<sup>131</sup> Macey & Miller, *supra* note 130, at 473.

<sup>132</sup> Branson, *supra* note 130, at 294.

### 3. Japanese Data Availability

The process of corporate law reform in Japan is relatively public. Drafts and abbreviated minutes of Subcommittee meetings are circulated to interested parties, reprinted in trade magazines and legal journals, and, more recently, uploaded on the Ministry of Justice's homepage.<sup>133</sup> The Subcommittee often specifically requests, and regularly receives, detailed comments on pending legislative plans from various policy and interest groups, including the Bar, universities, and economic organizations; these opinions are often published as well. For these reasons, in conjunction with interviews of many persons involved in the process, it is possible to sketch out a relatively detailed picture of Japanese corporate law development.

#### C. Developments

The history of corporate law development in Japan may be loosely divided into three periods: The Boom Years (1951-1979), Scandal and Reform (1980-1989), and Post-Bubble (1990-present). In each period, differing forms of exogenous shocks guide corporate law development.

##### 1. The Boom Years (1951-1979)

Although scholarship critical of the new foreign-induced 1950 Commercial Code had always been present,<sup>134</sup> a concerted attack by academics apparently began with the publication of Tatsuo Ōsumi's "Does the Revised Commercial Code Need to Be Re-Revised?" in May 1951.<sup>135</sup> Ōsumi cited several problems with the shareholder-democracy-flavored Code, including the potential for abuse that might arise from giving all shareholders the ability to enjoin directors (Article 272) or file a derivative suit (Article 267), or from giving three-percent shareholders the right to call a special meeting (Article 237) or apply to the court for the removal of a director (Article

---

<sup>133</sup> Japan's Ministry of Justice, at <http://www.moj.go.jp> (last visited Oct. 21, 2001). For English content, see <http://www.moj.go.jp/ENGLISH/index.html>.

<sup>134</sup> See, e.g., Suzuki, *supra* note 73 (listing the problems with the 1950 Commercial Code); Yazawa, *supra* note 64 (same).

<sup>135</sup> Tatsuo Ōsumi, *Kaisei Shōhō ha Saikaisei o Hitsuyō to Suru ka* [Does the Revised Commercial Code Need to Be Re-Revised?], 26 SANGYŌ KEIRI 50 (May 1951). For a discussion of the article's impact, see SHŌHŌ KAISEI NO DŌKŌ TO KIHON MONDAI [TRENDS AND BASIC PROBLEMS OF THE COMMERCIAL CODE REVISIONS] 152 (Kaisha Jitsumu Kyōkai ed., 1961).

257).<sup>136</sup> Other academic criticism followed, most focusing on the “problem” of giving shareholders an extensive list of rights that would interfere with firm management.<sup>137</sup>

Not surprisingly, the business community voiced agreement with these criticisms.<sup>138</sup> The Tokyo Chamber of Commerce, along with *Keidanren*, the Japan Shipbuilders’ Association, and other groups, advocated restoring directors’ terms to three years instead of the 1950 mandate of two years and the elimination of mandatory cumulative voting.<sup>139</sup> The Tokyo Chamber of Commerce additionally advocated the elimination of derivative suits and preemptive rights restrictions, and supported an exception for small transactions from the general rule that directors cannot enter into transactions with the company without approval.<sup>140</sup> A Keio University group went so far as to propose the elimination of directors’ duty of loyalty.<sup>141</sup>

In response to the criticisms, the Code was revised. In August of 1954, the Commercial Law Subcommittee submitted a proposed plan to revise the Code, and the Diet passed it in 1955. The most major substantive changes of the new law were (1) to reverse the 1950 policy of requiring preemptive rights provisions to be in the articles instead by allowing the board to specify (in the absence of a provision in the articles) whether such rights would be granted with each new stock issuance,<sup>142</sup> and (2) to require a three-percent shareholder to wait thirty days (formerly two weeks) without receiving notice of a meeting that she had proposed before taking such matter to the court.<sup>143</sup>

The next changes to the Commercial Code were the 1962 changes in accounting rules.<sup>144</sup> The primary impetus for the relatively minor

<sup>136</sup> Ōsumi, *supra* note 135, at 9.

<sup>137</sup> See, e.g., Teruhisa Ishii, *Shōhō Kaiseitei ni Nokosareta Mondai* [*The Problems That Remain After the Commercial Code Revisions*], 26 SANGYŌ KEIRI 8, 9 (Aug. 1951); SHŌHŌ KAISEI NO DŌKŌ TO KIHON MONDAI, *supra* note 135, at 158.

<sup>138</sup> See generally SHŌHŌ KAISEI NI KANSURU IKENSHŪ [COLLECTION OF OPINIONS ABOUT THE REVISED COMMERCIAL CODE] (Hōmusho Minjikyoku ed., 1952) (documenting growing resentment of shareholders’ rights).

<sup>139</sup> TOKYO SHŌKŌKAIGIJŌ, KABUSHIKI KAISHAHŌ KAISEI IKEN CHŌSA [SURVEY OF OPINIONS REGARDING COMPANY LAW REVISIONS] 27-28 (1952), *reprinted in* SHŌHŌ KAISEI NO DŌKŌ TO KIHON MONDAI, *supra* note 135, at 198-99.

<sup>140</sup> *Id.*

<sup>141</sup> SHŌHŌ KAISEI NO DŌKŌ TO KIHON MONDAI, *supra* note 135, at 202, 249-52.

<sup>142</sup> SHŌHŌ, arts. 166, 347, 280-2; see also Masahiro Kitazawa, *Kabushiki Kaisha no Shoyū Kei Shihai* [*Ownership, Management, and Rules of Corporations*], in 9 GENDAI HŌ: GENDAI HŌ TO KIGYŌ 58, 84-85 (Makoto Yazawa ed., 1966) (discussing policy change).

<sup>143</sup> SHŌHŌ, art. 257.

<sup>144</sup> See Kitazawa, *supra* note 142, at 85-86 (describing the accounting rule changes

1962 revisions was changes to the Securities Act in 1957 regarding the inspection of financial affairs of public corporations by certified public accountants. Relevant Commercial Code provisions were revised to iron out contradictions in accounting standards between the Code and the Securities Act. The changes were changes only in form, and none directly affected governance.<sup>145</sup>

In 1966, two factors led to change; one international, one domestic. Internationally, many Japanese companies needed to get financing from abroad (through American and European Depository Rights (ADRs and EDRs)),<sup>146</sup> which required changes to provisions regarding multiple proxies for shareholders, conversion period for convertible debt, and transfers and issuances of new shares. Corporate practitioners pressed strongly for such changes.<sup>147</sup> Domestically, more practical problems with the 1950 Code such as share transfer restrictions, transfer method provisions, mergers, and issues pertaining to the conversion of no par stock made transactions difficult.<sup>148</sup> Accordingly, in 1966, the Diet, continuing the postwar trend of financial deregulation, enacted provisions permitting stock transfer restrictions in order to allow a close company to prevent an outsider from coming in and "abusing" her rights, says a member of the committee.<sup>149</sup>

The next revision began as a result of the 1965 collapse of Sanyo Special Steel Company, leaving what at the time was the largest debt in Japanese history (forty-two billion yen, or, at the 1965 exchange rate of 360¥ to the dollar, about \$117 million).<sup>150</sup> Subsequent investigation revealed a failure of the statutory auditor system to uncover

---

of 1962).

<sup>145</sup> See MAROTO YAZAWA & TSUNEO ŌTORI, KAISHAHŌ NO TENKAI TO KADAI [THE DEVELOPMENT AND THEMES OF COMPANY LAW] 41-42 (1968) (describing changes). Interestingly, these changes were the first in seven years, the longest streak in the postwar era. From 1954 to 1955, the Commercial Code Subcommittee of the Legislative Advisory Committee met five times on the issue of subscriptions for new shares (provisions not enacted), three times on auditors and public accountants, and five times on raising par value, one time in 1955 on minimum capital requirements, and from 1955 to 1956, met four times on organization of stock companies. From 1954 to 1957, the Subcommittee met three times on international maritime shipments of goods. From 1958 to 1962, they met thirty-seven times, and from 1962 to 1964, they met fourteen times for 1962 and 1966 revisions, respectively. *Id.*

<sup>146</sup> See YŪZŌ NIYAMA, KAISHAHŌ NO SHIKUMI NO HATARAKI [FORM AND FUNCTION OF COMPANY LAW] 45 (1996) (describing finance process).

<sup>147</sup> Mimura et al., *supra* note 93, at 1229 SHŌJI HŌMU 17, 30.

<sup>148</sup> YAZAWA & ŌTORI, *supra* note 145, at 55-62.

<sup>149</sup> *Id.* at 59.

<sup>150</sup> ICHIRŌ KAWAMOTO ET AL., NIHON NO KAISHAHŌ [JAPANESE COMPANY LAW] 50 (2d ed. 1998); SUZUKI, *supra* note 50, at 480.

questionable accounting practices by directors.<sup>151</sup> As a result of this and other similar scandals, a movement arose to strengthen the statutory auditor's role and the auditing of accounts in large companies.<sup>152</sup> Although the work of the Commercial Law Subcommittee until now had been focused largely on financial deregulation, it now was forced to turn its attention to the issue of how to strengthen corporate governance mechanisms.

The Subcommittee focused on two areas. First, it increased the financial auditing power of statutory auditors, requiring them, among other things, to audit balance sheets.<sup>153</sup> Second, the 1974 Subcommit-

---

<sup>151</sup> See Malcolm D.H. Smith, *The 1974 Revision of the Commercial Code and Related Legislation*, 7 LAW JAPAN 113, 118-21 (1974) (detailing the changes promulgated as a reaction to inefficient corporate auditing).

<sup>152</sup> *Id.*

<sup>153</sup> SHŌHŌ, art. 281. The measure passed over the opposition of tax attorneys. SUZUKI, *supra* note 50, at 493-99. The Subcommittee was faced with four plans for strengthening the role of the internal (statutory) auditor, an office appointed by shareholders to supervise directors. See Mimura et al., *supra* note 93, at 1230 SHŌJI HŌMU 9-11 (providing statements of Osamu Mimura and Shigeyuki Maeda); Junko Ueda, *Nihon teki Kikan Kōsei e no Ketsudan [Deciding Toward a Japanese Organizational Structure]*, in NIHON KAISHA RIPPŌ NO REKISHITEKI TENKAI [THE HISTORICAL DEVELOPMENT OF JAPANESE CORPORATE LEGISLATION] 369, 376 (Michiyo Hamada ed., 1999). An analogue in the United States is Michigan's independent director. See Cyril Moscow et al., *Michigan's Independent Director*, 46 BUS. LAW. 57 (1990) (analyzing a statutory change in Michigan prompted by the need to combat abuse of the corporate process). Under Plan A, the basic corporate governance structure would not be altered, but the financial auditing powers of auditors would be increased. Mimura et al., *supra* note 93, at 1230 SHŌJI HŌMU 10-11 (providing statements of Osamu Mimura and Shigeyuki Maeda). Under Plan B, following the pre-1950 Code pattern, the management supervisory powers of auditors would be increased, slightly altering the corporate governance calculus. *Id.* Plan C was dubbed the "German plan," as it followed the German model of establishing a board of auditors that would have not only management supervisory powers, but also the power to hire and fire directors. *Id.* Finally, Plan D was the so-called "American plan" of eliminating auditors altogether and instead strengthening the auditing function of the board of directors itself. *Id.* In the end, Plan A was passed. *Id.* According to Osamu Mimura, one of the drafters of the 1974 revisions, the failure of Plans C and D was inevitable, as the two plans split the opinions of those who would have favored adopting any sort of foreign system. *Id.* Moreover, he explains, Plan D would have required a reconfiguration of Japanese corporate governance to separate management responsibility from directorial oversight, as both functions are currently played by employee-directors. *Id.* In the end, therefore, the choice was between two plans: A and B. Plan B, which involved little systemic borrowing, if any, emerged victorious, partially as a result of Plan A's potential redundancy in light of the auditing functions of public accountants proscribed by the Securities and Exchange Law. *Id.* *Keidanren* initially favored Plan D, but flip-flopped to support Plan B, according to some sources, out of a realization that Plan D would require a complete reconstruction of employment and promotion policies in many corporations. See Mimura et al., *supra* note 93, at 1229 SHŌJI HŌMU 21-22 (providing a statement of Takeo Inaba).

tee once again tackled cumulative voting. The pre-1974 Code had required cumulative voting if demanded by *any* shareholder. A corporation could prohibit cumulative voting in its articles of incorporation, but the articles could be overridden by shareholders holding one-fourth or more of the issued shares.<sup>154</sup> Shareholders seldom demanded cumulative voting,<sup>155</sup> but fears remained. In a rough tradeoff for the strengthening of auditors imposed on corporations, the 1974 revisions allowed corporations to opt out of the rule in their articles of incorporation.<sup>156</sup>

Following the 1974 revisions, Japan made a rare—and ultimately unsuccessful—attempt of systematic reform *not* guided by exogenous shock but by endogenous momentum. The Civil Affairs Division of the Ministry of Justice distributed an extensive questionnaire to the legal and business community in Japan, soliciting opinions on nothing less than:

the advisability of amending the existing provisions relating to social responsibility of the corporation, the role of the general meeting of shareholders, the structure of the board of directors, the value of each share, and whether to institute provisions designed to make a distinction between large and small corporations in the application of the statutory corporate system.<sup>157</sup>

Based in part on the results of the questionnaire, in 1977 that office compiled three sets of draft revisions—one related to the stock system, one related to governance, and one related to accounting and disclosure.<sup>158</sup> The initial plan was to ground all future Code revisions

<sup>154</sup> SHŌHŌ, art. 256-3 (amended 1974).

<sup>155</sup> See, e.g., DAN FENNO HENDERSON, FOREIGN ENTERPRISE IN JAPAN 260 (1973) (“[Five hundred eighty-eight] out of five hundred eighty-nine companies [surveyed] have provisions against cumulative voting in their articles of incorporation.”); Christopher Lee Heftel, Note, *Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations*, 5 U. HAW. L. REV. 135, 163 n.182 (1983) (“Cumulative voting is possible for the election of directors, but in practice is rarely, if ever, used.”).

<sup>156</sup> SHŌHŌ, art. 256-3.

<sup>157</sup> Councillor’s Office, Civil Affairs Bureau, Japanese Ministry of Justice, English Cover Letter to June 12, 1975, Commercial Law Questionnaire, *reprinted in* Comment, *Commercial Law Reform in Japan: The Current Debate*, 11 LAWJAPAN 102, 102 (1978).

<sup>158</sup> Hōmusho Minjikyoku Sanjikanshitsu, *Kabushiki seido ni kansuru kaisei Shian* [Draft Revised Provisions Relating to Stock System], May 26, 1977, in TAKEO SUZUKI & AKIO TAKEUCHI, KAISHAHŌ [COMPANY LAW] 459 (1981); Hōmusho Minjikyoku Sanjikanshitsu, *Kabushiki kaisha no kikan ni kansuru kaisei Shian* [Draft Revised Provisions Relating to Corporate Organs], Dec. 25, 1978, in SUZUKI & TAKEUCHI, *supra*, at 465; Hōmusho Minjikyoku Sanjikanshitsu, *Kabushiki kaisha no keisan, kōkai ni kansuru kaisei Shian* [Draft Revised Provisions Relating to Corporate Accounting and Disclosure], Dec. 25, 1979, in SUZUKI & TAKEUCHI, *supra*, at 475. After discussion, these

in that document. However, in practice, as a Ministry of Justice official explains, the revisions listed in the document only occurred when they became “urgent matters as determined by basic governmental strategies and needs of the economic world,”<sup>159</sup> each as influenced by exogenous factors—as exemplified by the next set of reforms.

## 2. Scandal and Reform (1980-1989)

Change in the 1980s began, as it often did, with Takeo Suzuki (1905-1995), who symbolizes the postwar development of Japanese corporate law more than any other individual. Suzuki, whose family founded the giant Ajinomoto food company,<sup>160</sup> taught at the University of Tokyo from 1931 until his retirement in 1986 (and subsequently at Sophia University) and was dean of the law school from 1957 to 1959. He was formally involved in six postwar revisions of the Code, often a leader of the Commercial Code Subcommittee,<sup>161</sup> and his scholarship greatly influenced Japanese commercial caselaw and legislation.<sup>162</sup> As Suzuki writes of the events leading up to the 1981 revisions:

I was at a party [in 1975] when Yoshimi Furui, who was then the Minister of Justice, said he wanted to speak with me. He said, “Lots of people feel strongly that to keep companies and the financial world from misbehaving, the government is eventually going to have to be the one to do some sort of auditing. But whether auditing is to be done by the Ministry of Justice or the Ministry of Finance, I think that sort of thing should be done not by the government, but by the companies themselves.” When I answered, “Of course,” he said, “Well then, why don’t you revise the Commercial Code? When can you have it completed?” I said, “Several years,” and he said, “That’s a real problem. Can’t you do something

---

drafts were combined and released in May 1986 as a document called “Draft Revised Commercial Code and Limited Liability Company Law.” Hōmusho Minjikyoku Sanjikkanshitsu, *Shōhō Yūgengaisahō Kaisei Shian*, in three parts: 865 JURISUTO 10, 12, 19-25; 866 JURISUTO 86, 88-99; 867 JURISUTO 88, 92-109 (1986) (sidebar to Akio Takeuchi et al., *Chūsho Kaisha Rippō*, 865 JURISUTO 10, 866 JURISUTO 88, 867 JURISUTO 88 (1986)).

<sup>159</sup> Kōji Harada, *Kaishahōsei no Kadai to Tenbō* [*The Prospects for and Issues of the Company Law System*], 1514 SHŌJI HŌMU 46, 47 (1999).

<sup>160</sup> SUZUKI, *supra* note 50, at 567-68.

<sup>161</sup> See generally Hitoshi Maeda et al., *Zadankai, Shōhō Kaisei Shinbi ni Okeru Suzuki Sensei* [Roundtable, Professor Suzuki and Commercial Law Reform], 1422 SHŌJI HŌMU 20 (1996) [hereinafter *Professor Suzuki and Commercial Law Reform*] (detailing Suzuki’s contributions to the Commercial Code debate); Hitoshi Maeda et al., *Zadankai, Suzuki Takeo Sensei no Ningen to Gakumon* [Roundtable, The Personality and Studies of Professor Takeo Suzuki], 1102 SHŌJI HŌMU 12 (1994) (same).

<sup>162</sup> See Shigeyuki Maeda, *Suzuki Gakusetsu no Hanrei e no Eikyō* [*The Influence of Suzuki’s Scholarship on Caselaw*], 1422 SHŌJI HŌMU 48 (1996) (arguing that Suzuki’s scholarship greatly influenced the development of Japanese corporate caselaw).

faster? Even if you just do it piece by piece, please do it quickly." The first half of the complete revision was the 1981 revisions.<sup>163</sup>

The 1981 revisions, proposed by the Legislative Council on December 24, 1980, passed by the Diet in 1981, and made effective in 1982,<sup>164</sup> constituted the most complete revision of the Code since 1950. On the surface, the revisions—the most important of which can be grouped into six categories—appear to be an odd hodgepodge of unrelated provisions:

- *Statutory auditor.* A statutory auditor may call for the convening of a meeting of the board if she determines that a director has violated the law or the corporation's articles of association.<sup>165</sup>

- *Directors.* A board of directors may not defer to a single director to decide such matters as the disposition of material property, material loans, appointments, and dismissal of important employees, or establishment of a branch office.<sup>166</sup> Each director must report to the full board at least four times per year on "conditions of administration of affairs."<sup>167</sup> The transactions of directors that compete with the company must be approved by a majority board vote (formerly a two-thirds shareholder vote).<sup>168</sup>

- *Stock ownership rights.* A corporation may not give any of its property to shareholders as remuneration for the exercise or non-exercise of their rights of stock ownership.<sup>169</sup>

- *Shareholders' meetings.* Shareholders were given the right to make proposals,<sup>170</sup> directors and auditors have a duty to explain relevant matters,<sup>171</sup> and the chairman has the authority to expedite proceedings.<sup>172</sup>

- *Share value.* All shares, whether par or no-par, must have a value of at least ¥50,000 (approximately \$200 in 1982) per share.<sup>173</sup>

<sup>163</sup> SUZUKI, *supra* note 50, at 62-63.

<sup>164</sup> Shōhō nado no ichibu o kaisei suru hōritsu [Law to Revise a Portion of the Commercial Code], Law No. 74 of 1981.

<sup>165</sup> SHŌHŌ, art. 260-3, para. 2-3.

<sup>166</sup> *Id.* at art. 260, para 2.

<sup>167</sup> *Id.* at art. 260, para 3.

<sup>168</sup> *Id.* at art. 264.

<sup>169</sup> *Id.* at art. 294-2.

<sup>170</sup> *Id.* at art. 232-2.

<sup>171</sup> *Id.* at art. 237-3.

<sup>172</sup> *Id.* at art. 237-4, para. 2; see also Akio Takeuchi, *Kaisei shōhōka no kabushiki sōkai* [Shareholders' Meetings Under the Revised Commercial Code], 994 SHŌJI HŌMU 864 (1983) (describing revisions).

<sup>173</sup> SHŌHŌ, arts. 166(2), 168-3.



• *Voting.* As a general rule, a subsidiary cannot hold shares in its parent. If Corporation A holds more than one-quarter of Corporation B's issued shares, Corporation B cannot vote any shares it holds in Corporation A.<sup>174</sup>

Upon close examination, these six seemingly unrelated changes are tied to three related phenomena that required tinkering with corporate governance mechanisms: scandal, *sokaiya*, and intercorporate shareholdings.

a. *Political and Corporate Scandal.* As Suzuki's anecdote suggests, many of the 1981 revisions grew out of scandal.<sup>175</sup> The Lockheed scandal began as a result of 1976 testimony by Lockheed president A. Carl Kotchian before a subcommittee of the U.S. Senate Foreign Relations Committee that Prime Minister Kakuei Tanaka and other high-ranking Japanese government and business leaders had accepted bribes to promote sales of Lockheed planes to All Nippon Airways.<sup>176</sup> This revelation led to an uncovering of massive illicit corporate activities, to indictments in 1976 of the Prime Minister, and to a trial that stretched from January 1977 to January 1983 and ended in a guilty verdict that surprised no one (one newspaper poll of the Japanese public showed that only four percent believed Tanaka's denials; eighty percent thought him guilty).<sup>177</sup>

Scandals such as Lockheed did not necessarily point to corporate governance problems; in fact, especially given heavy regulation and the relatively small chance of detection, bribing politicians could have been a profit-maximizing strategy. Still, as a result of the scandal, calls for reform increased. Many voices urged external regulation through some government body, but the Subcommittee, chaired by Suzuki, preferred self-regulation.<sup>178</sup> Accordingly, it countered with accounting

---

<sup>174</sup> *Id.* at art. 211-2, para. 1; *id.* at art. 241, para. 3.

<sup>175</sup> See Ichirō Kawamoto, *Kabunushi Sōkai no Genjō to Hōkaisei no Hitsuyō* [*The Current State of Shareholders' Meetings and the Need for Legal Revision*], HŌGAKU SEMINAA, June 1979, at 64, 64-65 (showing that before Suzuki's party, corporate scandal was a hot topic of Diet debate).

<sup>176</sup> Also accused were the President of All Nippon Airways, the Secretary General of the Liberal Democratic Party (LDP), the MITI Minister, the Chief Cabinet Secretary, the Minister of Transportation, the Chairman of the LDP's Special Committee on Aviation, and both the current and former parliamentary vice ministers of transportation. JACOB M. SCHLESINGER, *SHADOW SHOGUNS: THE RISE AND FALL OF JAPAN'S POSTWAR POLITICAL MACHINE* 82-90 (1997).

<sup>177</sup> *Id.* at 147-52.

<sup>178</sup> See Takeo Suzuki, *Shōwa gojūrokunen kaishahō kaisei no seiritsu* [*The Establishment of the 1981 Company Law Amendments*], 747 JURISUTO 22 (1981) (arguing for self-regulation of corporate governance).

disclosure and checks on the board, such as the first two revisions listed above.<sup>179</sup>

b. *Sokaiya Scandal*. The next three listed 1981 revisions were aimed specifically at the *sokaiya*,<sup>180</sup> whose blackmail activities were seen as a potential international embarrassment after the Lockheed bribery scandal. Most directly, the stock ownership rights provision prohibits a company from purchasing a *sokaiya*'s silence. The other two provisions were intended to chill *sokaiya* activity indirectly. By giving legitimate shareholders rights at shareholders' meetings, it was hoped that the nondisclosure of information on which *sokaiya* prey could be remedied. And by raising the price of stock, the aim was to limit the ability of a *sokaiya* to purchase a nominal share in a corporation for the purpose of disrupting the shareholders' meeting.<sup>181</sup> Less significant 1981 revisions not listed above—such as allowing a court to refuse a shareholder's request to view board minutes if such viewing would cause damages to the corporation,<sup>182</sup> or reviving a 1938 Code provision allowing a court to dismiss a procedural challenge of a shareholder resolution if the alleged procedural violation is immaterial<sup>183</sup>—were also aimed squarely at *sokaiya*'s abusive tactics.<sup>184</sup>

c. *Intercorporate Shareholdings*. Some of the blame for political, corporate, and *sokaiya* scandals fell on the stable cross-shareholding system, which some thought undermined corporate responsibility. Although Occupation efforts toward widely dispersed shareholdings had

<sup>179</sup> At the same time as the Commercial Code revisions, auditing rules were revised to require large companies to be audited by a CPA. Law Regarding Exceptional Rules of the Commercial Code Concerning Auditing, etc., of Corporations, as amended by Law No. 74, art. 2, June 9, 1981.

<sup>180</sup> West, *Sokaiya Racketeers*, *supra* note 122, at 776 (explaining that, effective October 1982, prosecutors need only prove that a benefit was offered with respect to the exercise of shareholder rights, and that upon this proof, the courts could impose civil and criminal penalties on both *sokaiya* and management).

<sup>181</sup> *Sokaiya*, of course, knew the real purpose of the provisions. Shin Motoki, head of the 1981 Subcommittee, recounts the time he was approached by *sokaiya*:

I had just heard that annual *sokaiya* income was an average of 10 million yen [about \$50,000 in 1981]. A *sokaiya* came to me and said, "how are we supposed to make a living [after the revisions]?" I said, "you guys make an average of 10 million a year, right? That's far too much money."

Maeda et al., *Professor Suzuki and Commercial Law Reform*, *supra* note 161, at 1422 SHŌJI HŌMU 20, 33 (statement of Shin Motoki).

<sup>182</sup> SHŌHŌ, art. 260-4, para. 5.

<sup>183</sup> *Id.* at art. 251.

<sup>184</sup> Ironically, the anti-*sokaiya* rules that were the thrust of Suzuki's efforts were used successfully in 1997 to prosecute executives of the Ajinomoto Corporation, which was founded by Suzuki's family.

seen early success, the individual investor share of corporate equity fell from over 60% in 1950 to 28.4% in 1982.<sup>185</sup> By itself, the increase in corporate shareholding does not necessarily imply strong need for reform; it simply reflects an additional corporate tier between human investors and capital ownership. But some observers predicted dangers of collusion among corporate shareholders. Accordingly, to prevent future scandals and invigorate capital markets, individual shareholding was encouraged as an alternative. The subsidiary-parent and cross-shareholding voting provisions listed above prompted companies to reduce their shareholdings in subsidiaries below twenty-five percent.

### 3. Post-Bubble (1990-Present)

The 1990s brought more separate corporate law revisions than any other time in Japanese history. The first meaningful revisions after the 1981 overhaul came in 1993.<sup>186</sup> The Japanese economic situation in 1993 was quite different than that of 1981. With the bursting of the bubble in 1990, both small and big business interests were fractured. Big business, which was internationally competitive and highly profitable, saw its primary political goal as the reduction of regulation and taxation. Small business, which was neither competitive nor profitable, sought the maintenance of such regulation and tax benefits that protected it from competition. Large and small businesses split not only on the basic issues of deregulation and taxation, but also on utility and bank protection, the legality of holding companies, exchange rate policies, and government procurement policies.<sup>187</sup> Internally, *Keidanren* had also grown divided, and in 1993 halted its automatic contributions to the Liberal Democratic Party (LDP). By July 1993, the socioeconomic divisions—and another LDP bribery scandal—led

---

<sup>185</sup> Daiwa Shōken Keizai Kenkyūjo, *1982 Kabunushi Sōkai Hakusho* [White Paper on Shareholders' Meetings], 956 SHŌJI HŌMU 12, 14 (1982).

<sup>186</sup> A less complete revision after the 1981 overhaul came in 1990, as drafters attempted to distinguish between large and small corporations, ostensibly to help creditors. NIYAMA, *supra* note 146, at 46; Misao Tatsuta, *Heisei Ninen Kaisei Shōhō no Kentō* [An Examination of the 1990 Commercial Code Revision], 1222 SHŌJI HŌMU 7-8 (1990). The 1990 revisions eliminated the requirement of seven incorporators, SHŌHŌ, art. 165, and imposed a minimum capitalization requirement of 10 million yen, SHŌHŌ, art. 168-4.

<sup>187</sup> PEMPEL, *supra* note 111, at 166 (chronicling how the remnants of the LDP began to solidify a rural base of support around a program of pork-barrel politics, whereas the conservative opposition became ever more urban, internationalist, and opposed to regulation).

to the split of the LDP, ending thirty-eight years of single-party dominance.<sup>188</sup>

Complicating this scenario further was Japan's international reputation. The 1989 failure of U.S. raider T. Boone Pickens to receive a seat on the board of Koike Manufacturing Co., a Toyota-affiliated corporation in which his firm held a twenty-percent interest, raised eyebrows in the United States about Japan's "closed markets."<sup>189</sup> Tensions were fueled further by a growing trade surplus with the United States. In 1989, the United States Trade Representative named Japan as a target of Super 301, and at the same time, proposed the Structural Impediments Initiatives (SII) talks. The talks began for the United States with the broad aims of changing Japan's savings-investment balance, distribution system, land policy, exclusionary business practices, and *keiretsu* business groups.<sup>190</sup>

In the Commercial Code revision context in particular, the waning influence of business on the drafting process was evident. As one participant put it in 1990, "In the 1950s, *Keidanren* and other business groups set forth extremely assertive positions on revisions in opinion papers, but now it seems that they don't do so as much."<sup>191</sup> Exogenous pressures increased domestic pressures, leading to revisions of the Commercial Code that attempted to strengthen corporate governance through an avenue never before seriously attempted: shareholders.<sup>192</sup>

<sup>188</sup> See SCHLESINGER, *supra* note 176, at 245-51 (discussing the socioeconomic division in Japan that led to the split of the LDP).

<sup>189</sup> See, e.g., Takao Matsuura, *How a Japanese Firm Foiled T. Boone Pickens*, S.F. CHRON., Jan. 8, 1990 (recounting how, from the perspective of Koito's president, raider Pickens had no right to demand such a seat, and in fact only owned the shares so long as they were not repurchased pursuant to an agreement with their "actual" owner, Kitaro Watanabe), reprinted in LAW AND INVESTMENT IN JAPAN 507-10 (Yukio Yanagida et al. eds., 1994).

<sup>190</sup> Not that the United States necessarily cared about Japanese corporate governance per se; it was simply responding largely to domestic "level playing-field" demands.

<sup>191</sup> Mimura et al., *supra* note 93, at 1229 SHŌJI HŌMU 8, 18 (providing a statement by Mitsuo Suzuki).

<sup>192</sup> Some long-time observers of Japan may note that corporate law is not the only arena in which Japan appears to require foreign pressure (*gaiatsu*) to produce change, see *supra* note 120 and accompanying text, suggesting that an institutional explanation may be incomplete. But that charge is most often, if not always, raised in economic and political contexts in which Japan lacks internal competition such as the legendary lack of competition generated by Japan's electoral and legislative institutions. See, e.g., RAMSEYER & ROSENBLUTH, *supra* note 112, at 8-10 (discussing the nearly fifty-year control the LDP has maintained over the Diet by manipulating the electorate). That lack of competition drives exogenous stimuli is precisely my point here. Moreover, foreign pressure is only one exogenous factor that influences corporate law development, further suggesting that foreign pressure alone is an inadequate explanation.

a. 1993. On some SII issues, the United States was highly successful in effecting change in areas that benefited not only the U.S. but Japan as well.<sup>193</sup> In the corporate arena, although U.S. negotiators did not get everything on their list,<sup>194</sup> one particular success stands out: the facilitation of shareholder derivative actions.<sup>195</sup> Although the pre-1993 Commercial Code included a derivative suit mechanism, it remained largely unused because it was simply too expensive for shareholders to use.<sup>196</sup> The 1993 Commercial Code amendments<sup>197</sup> altered

---

<sup>193</sup> See SCHOPPA, *supra* note 121, at 144-45 (illustrating how U.S. focus on social infrastructure deficiencies in Japan led to increased public investment, which, for example, resulted in a cleaner environment in Japan and perhaps marginally lower trade deficits in the future).

<sup>194</sup> Additional U.S. demands included outside directors and "more flexible exercise of shareholders' rights and cumulative voting." *Japan Vows to Review Commercial Code*, JIJI PRESS TICKER SERVICE, May 22, 1991, available at LEXIS.

<sup>195</sup> The SII measures that pertained to the Commercial Code do not appear to have faced particularly strong opposition from either the Ministry of Justice (MoJ) or members of the Company Law Subcommittee. See Shigeru Morimoto, *Nichibei Kōzō Mondai Kyōgi to Kabushiki Kaishahō no Kaisei* [*The SII Talks and the Revision of the Stock Corporation Law*], 1309 SHŌJI HŌMU 38, 38, 43 (1993) (presenting a Subcommittee member's discussion of impact); Shūichi Yoshikai, *Kaishahō Kaisei Sagyō no Genhyō ni Tsuite* [*On the Current Status of the Task of Revising the Company Law*], 1299 SHŌJI HŌMU 12, 12-13 (1992) (presenting arguments from an MoJ official that reforms are necessary to appeal to international investors). In fact, according to the MoJ official in charge of the process, the Subcommittee "did not have sufficient time to consider all the issues involved," and accordingly appears to have deferred much of its decision making to a nongovernmental group—the Commercial Law Revision Research Group—chaired by none other than Takeo Suzuki, then nearly ninety years old, and for once not a member of the Subcommittee. KABUNUSHI NO HANRAN [SHAREHOLDER REVOLT] 203 (Nihon Keizai Shinbunsha ed., 1993). In this sense, the SII talks may have been most effective in raising the issue for consumer interest groups and foreign corporations.

<sup>196</sup> See West, *Derivative Actions*, *supra* note 5, at 1499-500 ("[T]he U.S.-Japan Structural Impediments Initiative negotiations that began in 1990, in which shareholders' rights in general and derivative actions in particular were a focus of discussion, may also have contributed to the increase in derivative litigation.").

<sup>197</sup> The 1993 amendments also included changes easing restrictions on bond issuance. These changes are codified in and described by SHŌHŌ, arts. 297, 309, 311, 313-14, 17, 320-22, 324 and Kenjirō Egashira, *Shasaihō no Kaisei* [*Revision of Bond Law*], 1027 JURISUTO 34 (1993). On strengthening the role of the internal auditor (SHŌHŌ, art. 273), see Hitoshi Maeda, *Kansayaku Seido* [*Auditor System*], 1027 JURISUTO 27 (1993) and Kabushikikaishia no Kansa tō ni kansuru Shōhō no tokurei ni kansuru Hōritsu [Law Concerning Special Case of Commercial Law Regarding Audits], Law No. 22 of 1974, as amended in 1993, requiring large companies to have three auditors. On the lowering of the percentage of stock ownership required to allow access to corporate books from ten to three percent (SHŌHŌ, art. 293-6), see Hideki Kanda, *Kaikei Chōbo Tō no Etsuran Tōshyōken* [*The Right to Inspect and Copy Corporate Books*], 1027 JURISUTO 24 (1993). For background on all of these revisions, see generally Shūichi Yoshikai, *Heisei Gonen Kaisei Shōhō no Gaiyō* [*An Outline of the 1993 Revisions of the Commercial*

the derivative suit mechanism in two specific ways. First, unlike the old rule that allowed only a reward of attorneys' fees, the new Code allowed successful plaintiffs to recover damages for time and money expended in bringing the suit as well.<sup>198</sup> Second, it lowered the amount of required filing fees from a percentage of damages claimed to a flat ¥8,200.<sup>199</sup> Many companies opposed the change, arguing that it would bring a flood of frivolous derivative suits.<sup>200</sup> Some Japanese academics opposed it as well, arguing that it was "a failure" that raised worries because it "followed the American strategy," prompting some to ask, "where the hell was the *Keidanren*?"<sup>201</sup> To some extent the doomsayers proved to be correct, as the number of derivative suits has substantially increased.<sup>202</sup> Today, the derivative suit mechanism remains one of the more controversial aspects of Japanese corporate law.<sup>203</sup>

---

Code], 1027 JURISUTO 8 (1993).

<sup>198</sup> SHŌHŌ, art. 268-2.

<sup>199</sup> SHŌHŌ, art. 267; see also Minji Soshō Hiyō Tō ni Kansuru Hōritsu [Law Concerning Civil Litigation Costs, Etc.], Law No. 40 of 1971, art. 4(2) (providing for filing fees in cases of indeterminate damages). The revised filing fee system codified the decision reached by the Tokyo High Court some ten weeks earlier, see *Asai v. Iwasaki*, 109 SHIRYŌBAN SHŌJI HŌMU 70 (Tokyo H. Ct., Mar. 30, 1993), which was made in anticipation of the statutory change. See also West, *Derivative Actions*, *supra* note 5, at 1464-65, 1504-05 (discussing the change in remedies available in derivative suits following the Nikkō Securities Case and the 1993 Commercial Code Reform). Draft revisions usually circulate among various interest groups in order to elicit comments, a process that often takes consistently longer than ten weeks. See Akio Takeuchi & Yasuo Hamasaki, *Shōhō Kaisei Sagyō no Dōhō to Kōgō no Taiō* [Trends in the Work of Revising the Commercial Code and Future Developments], 1169 SHŌJI HŌMU 9, 16-17 (1989) (discussing circulation and revision timetable).

<sup>200</sup> See *Keidanren Gives Mixed Reaction to Revised Law*, KYODO NEWS SERVICE, June 4, 1993; *Revision of Commercial Code Rapped*, JIJI PRESS TICKER SERVICE, May 22, 1991 ("[I]mplementation of these proposals could lead to undue use of lawsuits against Japanese companies."), available at LEXIS.

<sup>201</sup> Mitsugu Kawamura et al., *Zadankai, Nihon no Kaisha no Kooporeeto Gabanansu* [Roundtable, Japanese Corporate Governance], 1050 JURISUTO 6, 26 (1994).

<sup>202</sup> West, *Why Shareholders Sue*, *supra* note 125, at 352. In early 1997, business groups pressed for amendments to the Code that would lessen the scope of shareholders eligible to bring suits or limit director liability. See *Business Sector Seeks Commercial Code Revision*, JIJI PRESS TICKER SERVICE, Feb. 13, 1997 (reporting on calls in Japan's business community for modifications to the shareholder lawsuit system), available at LEXIS. By the end of 1997, the plan had become concrete; groups wanted amendments to empower a company auditor to ask a court to order a shareholder to withdraw a derivative suit. Though endorsed by the LDP, the plan was staunchly opposed by academics, and failed. *Academics Oppose LDP Plan to Limit Shareholders' Suits*, JAPAN WKLY. MONITOR, Nov. 17, 1997.

<sup>203</sup> The resulting changes in rules regarding derivative actions may be at least a partial explanation for recent changes in Japanese governance structure. Many corpo-

b. 1994. Potentially larger programs loomed. In the two-year period after the bubble burst in 1990, the Nikkei 225 index lost over sixty percent of its value.<sup>204</sup> By March 1992, businesses pleaded for some measure to invigorate the market:<sup>205</sup> namely, share repurchases, a move that they had supported for several years<sup>206</sup> and that is frequently used in the United States and other developed markets as a signaling device (if nothing else).<sup>207</sup> For fear of weak capitalization and manipulation, the Commercial Code allowed share repurchases in only a few narrow circumstances, such as when the shares were to be retired, or pursuant to a merger.<sup>208</sup> In 1994, the Legislative Council recommended a revision of the treasury share provisions, allowing companies to purchase, upon a shareholder majority vote, up to ten percent of their shares if those shares were to be sold to directors of employee shareholders.<sup>209</sup> The amendment was passed by the Diet in 1994 and came into force within six months of its enforcement date of

---

rations have reduced the size of their boards dramatically, while others have instituted a system of "executive officers" who have decision-making power but are not subject to derivative suit liability. See Shōji Hōmu Kenkyūkai, *Shikkō Yakuin Saido ni Kansuru Anke-to Shūkei Kekka* [Composite Results of Poll Regarding Executive Officer System], 182 SHIRYŌBAN SHŌJI HŌMU 26, 26 (1999) (finding adoption by forty-five of sixty-three responding companies of 140 polled); *Shikkō Yakuin Dōnyū Kasoku* [Acceleration of Introduction of Executive Officer System], NIHON KEIZAI SHINBUN, June 25, 1999, at 3 (finding that 179 companies had adopted the Executive Officer System); see also Hiroyuki Takahashi, *Corporate Governance in Japan: Reform of Top Corporate Management Structure*, 28 JAPAN ECON. INST. REP., July 23, 1999. While such officers are not formally authorized by the Code, the executive officer designation appears to be unproblematic so long as that officer is not assigned sole responsibility for acts that the Code does not allow the board to delegate. See SHŌHŌ, art. 260, para. 2 (enumerating the duties a board of directors is not allowed to assign to a director).

<sup>204</sup> Geoffrey P. Miller, *The Role of a Central Bank in a Bubble Economy*, 18 CARDOZO L. REV. 1053, 1056 (1996).

<sup>205</sup> See *Corporate Share Buybacks Favored in Keidanren Report*, NIKKEI WKLY., Mar. 7, 1992, at 3 ("Securities firms and members of the ruling Liberal Democratic Party have suggested that the ban in Japan on share buybacks be removed to resuscitate the slumping stock market.").

<sup>206</sup> See *Mizuno v. Ariyoshi*, 1188 SHŌJI HŌMU 36, 39 (Tokyo H. Ct., July 3, 1989) (noting that the "business world" had made "frequent requests" to relax article 210); *Dōyukai Proposes Easing Stock Holding Rules*, JAPAN ECON. J., Mar. 5, 1988, at 15.

<sup>207</sup> See Robert Comment & Gregg A. Jarrell, *The Relative Signalling Power of Dutch-Auction and Fixed-Price Self-Tender Offers and Open-Market Share Repurchases*, 46 J. FIN. 1243, 1253-59 (1991) (reporting positive share returns for firms engaging in stock buybacks); George W. Fenn & Nellie Liang, *Good News and Bad News About Share Repurchases* (Fin. and Econ. Discussion Series, Working Paper 1998-4, 1998) (reporting that forty-one percent of U.S. firms repurchase shares).

<sup>208</sup> SHŌHŌ, art. 210.

<sup>209</sup> SHŌHŌ, art. 210-2.

October 1, 1994.<sup>210</sup>

c. 1997. By 1997, business and government interests were once again more closely aligned. Largely as a result of *Keidanren* and MITI support, the Commercial Code was revised three times in 1997.<sup>211</sup> First, the May revisions largely concerned stock options. Before 1997, stock options were prohibited, and would have been impossible in any event because of the Code restrictions on treasury shares<sup>212</sup> and the requirement that an issuance date of new shares be designated upon the decision to issue such shares.<sup>213</sup> Occasionally, a company bypassed the restrictions—Sony, for instance, did so in 1995 by creating bonds with detachable warrants, issuing the ex-warrant bonds to institutional investors, and issuing the warrants to its managers<sup>214</sup>—but, by and large, the lack of stock options as incentives for managerial performance was seen as an insurmountable corporate governance defect.

In response to global competition concerns and increasing corporate demands, particularly from *foreign* institutional investors,<sup>215</sup> the Diet, acting without advisory committee input,<sup>216</sup> passed a second 1997

<sup>210</sup> Law No. 66 of 1994. Initially, few companies utilized the procedure, in part because the retirement of treasury shares results in a tax on shareholders for the theoretically increased share value, regardless of whether the stock price actually rises. See Kaoru Morishita, *Dividend Tax Called Obstacle to Stock Buybacks*, NIKKEI WKLY., June 12, 1995, at 15 (positing that, although the amended commercial code allows companies to repurchase their own shares, only one listed company announced a buyback in the first nine months after the change). A freeze on such taxes from November 1995 resulted in dramatic increases in buybacks. *Stock Buybacks Increasing Among Japanese Companies*, NIKKEI WKLY., July 6, 1998, at 11.

<sup>211</sup> See Kōji Harada, *Kaishahōsei no Kadai to Tenbō* [*The Prospects for and Issues of the Company Law System*], 1514 SHŌJI HŌMU 46, 47 (1999) (discussing 1997 revisions and causes). On the increased role of business in recent revisions, see Shinsaku Iwahara, *Kaishahō Kaisei no Kaiko to Tenbō* [*Reflections on and Prospects for Company Law Revision*], 1569 SHŌJI HŌMU 4, 5 (2000).

<sup>212</sup> SHŌHŌ, art. 210.

<sup>213</sup> SHŌHŌ, art. 280-2, para. 1, no. 2.

<sup>214</sup> *Waranto wo Tsukatta Insentibu Fuyo* [*Creating Incentives Through Warrants*], 1416 SHŌJI HŌMU 51 (1996).

<sup>215</sup> CalPERS had requested a stock option system in its Corporate Governance Market Principles, Japan document. For the news story, see Yasushi Watanabe, *Foreign Investors Turn Up the Heat*, NIKKEI WKLY., June 15, 1998, at 12.

<sup>216</sup> For the first time in the postwar era, the ruling Liberal Democratic Party, in conjunction with business groups and bureaucrats, constructed the 1997 proposal without submitting it to the Legislative Council or airing it publicly. Scholars, normally included in the process, were outraged. Shortly before the bill's passage, 225 commercial law scholars issued a statement in which they criticized the LDP for not following protocol, arguing that before introducing stock options, more open discussions should have been held on such issues as manipulation, compensation disclosure, and insider trading. *Hirakareta Shōhō Kaisei Tetsuzuki o Motomeru Shōhō Gakusha Shōmei* [*Commercial*



bill, revising the 1994 treasury share provisions to allow options to be issued to directors. This bill altered section 210-2 to allow purchases of up to ten percent of a company's stock (as opposed to the previous three percent) if those shares are issued to directors or employees (instead of just employees) within ten years (instead of six months). The following month, the Code was amended to simplify mergers, including the allowance of a modified short-form merger system for small-scale and simplified required disclosures to shareholders in a merger situation, removing a potential merger obstacle in the form of a requirement that two shareholders' meetings be required (one on the contractual terms of the merger, one after the merger) to approve a merger.<sup>217</sup>

A third set of 1997 reforms came in direct response to scandal. In 1997, prosecutors uncovered the largest *sokaiya* scandal to date, involving scores of executives at major corporations such as Dai-Ichi Kangyo Bank and each of the "Big Four" securities brokerages for payments to *sokaiya* of more than \$100 million in aggregate.<sup>218</sup> In response, the Commercial Code was amended to provide stronger penalties for corporate payments to *sokaiya*.<sup>219</sup> Although many in the business community opposed the measures on the grounds that the law should punish *sokaiya* and not those who pay them, the scandal this time was of sufficient severity to muffle their voices.<sup>220</sup>

*Law Scholars' Plea for Open Commercial Law Revision Process*], 1457 SHŌJI HŌMU 76 (1997) (document dated May 12, 1997, first endorsed by University of Tokyo Professor Kenjiro Egashira). For similar complaints, see *Scholars Rap Bill to Allow Stock Options*, JAPAN ECON. NEWSWIRE, May 12, 1997. The scholars' problem was not substance, but process. As a group of three professors explained, "[The signatories] were seeking greater openness in the legislative process. If the problem had been the content of the legislation, there is no way all those commercial law scholars would have agreed on it as a group in the first place." Shigemitsu Kobayashi et al., *Shōhō*, HŌRITSU JIHŌ, No. 69-13, at 98, 98 (Dec. 1997); see also *Zadankai, Shōhō Kaisei to Kigyō Keiei, Jitsumu no Arikata* [Roundtable, Corporate Management and Practice and Commercial Code Revision], 1479 SHŌJI HŌMU 12, 13 (1998) (containing the comments of Kenjiro Egashira, first endorser of the document, that endorser neither opposed Diet-led legislation nor were angry at being left out of the process).

<sup>217</sup> SHŌHŌ, art. 413; Law No. 71 of 1997.

<sup>218</sup> See West, *Sokaiya Racketeers*, *supra* note 122, at 767-68 (discussing the scandal, the roles played by the corporations, and the consequences of the scandal's exposure).

<sup>219</sup> SHŌHŌ, arts. 294-2, 494; Law No. 107 of 1997.

<sup>220</sup> See *Zadankai, Shōhō Kaisei to Kigyō Keiei, Jitsumu no Arikata* [Roundtable, Corporate Management and Practice and Commercial Code Revision], 1479 SHŌJI HŌMU 12, 23-24 (1998) (describing interest group sentiments). On changes in the nature of scandals and the enforcement environment, see Hideaki Kubori, *Kaisha Jiken no Shosō to Hensen* [Changes and Various Aspects of Corporate Incidents], 1229 SHŌJI HŌMU 43, 43 (1990) and Sakuo Namba, *Hōhankyō no Henka to Kigyō Hōmu* [Changes in the Legal Environment and

d. *1999-Present*. Two issues dominated the end of the millennium: mergers and corporate spin-offs. The timing of each was largely the product of a political concession to big business. In early 1999, then-Prime Minister Keizo Obuchi formed the Industrial Competitiveness Council, a group modeled after Ronald Reagan's Commission on Industrial Competitiveness and composed of cabinet ministers and industry leaders, including the presidents of *Keidanren*, Sony, Toyota, and Asahi Beer.<sup>221</sup> The Council, with a direct line to policymakers, was able to shorten greatly the time normally taken for deliberation by the Commercial Code Subcommittee.

Although the timing and policymaking process changed, the impetus for change differed little: Japanese companies needed to restructure largely in response to *external* competition. As for mergers, in an increasingly international climate, Japan's firms, despite being quite profitable, are actually relatively small. One roadblock to mergers has been the lack of a share exchange system, which ensured that a single hold-out shareholder could prevent one firm from making another its wholly-owned subsidiary. In 1999, the Diet passed a plan allowing compulsory share exchange if endorsed by a two-thirds majority of shares represented at a shareholders' meeting, along with provisions requiring parent companies to disclose subsidiary information, have subsidiaries examined by auditors, and give appraisal rights to dissenters.<sup>222</sup>

Second, Japanese corporate law historically contains no provisions regarding corporate spin-off, in which a corporation divides itself into two or more independent companies. Although similar effects can be had with asset purchase transactions, the absence of such provisions (with favorable tax consequences) is said to be a major roadblock to companies attempting to restructure. The lack of spin-off provisions became a pressing issue in the late 1990s, as Japan attempted broad deregulation in the midst of a stagnating economy and foreign capital influx. The Diet, following the recommendation of the Industrial Competitiveness Council, approved spin-off revisions to the Code in

---

*the Practice of Corporate Law*], 1514 SHŌJI HŌMU 72, 72 (1999).

<sup>221</sup> See Naikaku Sōri Daijin [Prime Minister], *Sangyō Kyōsōryoku Kaigi no Kaisai ni Tsuite* [Regarding the Formation of the Industrial Competitiveness Council], Mar. 19, 1999, available at <http://www.kantei.go.jp/jp/singi/sangyo/990421kesai.html>; Kaoru Morishita, *Elite Council to Tackle Supply-Side Issues*, NIKKEI WKLY., Mar. 15, 1999, at 3 (describing the objectives of the council and the supply-side tactics it is anticipated to recommend).

<sup>222</sup> Law No. 125 of 1999.

May 2000.<sup>223</sup>

Reforms continue in the twenty-first century, spurred on in part by the broader reforms proposed by the popular Koizumi cabinet. The Commercial Code historically has allowed treasury shares only for the purpose of retiring shares or, post-1997, for stock options. In June 2001, in response to the same sorts of pressures that led to the 1999 revisions, the Diet revised the Code to allow companies to hold treasury shares for virtually any purpose and any length of time,<sup>224</sup> and to ease rules on minimum trading units.<sup>225</sup>

One final issue, which arose in spring 2000, is still under debate. In the name of “globalization” and “international competition,”<sup>226</sup> the Ministry of Justice announced plans to overhaul completely the company law provisions of the Commercial Code by 2002. The ambitious overhaul, which is said to be the most comprehensive since 1950 and is part of a broader trend of legal reform, will primarily address corporate governance issues such as control, accountability, and strengthening of boards through the introduction of outsiders, but will also attempt to modernize the language of the Code, which still retains much of its 1899 literary flavor.<sup>227</sup>

---

<sup>223</sup> Law No. 90 of 2000; see *Diet Passes Bills to Promote Corporate Reorganizations*, NIKKEI WKLY., May 29, 2000, at 4 (describing the revised law and the benefits it is expected to bring companies).

<sup>224</sup> Law No. 80 of 2001 (effective Oct. 1, 2001). The bill was submitted not by the Ministry of Justice, but by individual Diet members. Although this process allows for greater speed, one commentator notes that the lack of administrative commentary that normally accompanies Ministry-formulated bills greatly hinders legal practice. *Shōhō Kaisei to Giin Rippō* [Commercial Code Revision and Legislator-Introduced Legislation], 720 NEW BUS. L. 86 (2001).

<sup>225</sup> A related bill authorizing the issuance of stock options to third parties was submitted by the Cabinet to the Diet in October 2001. See Henshūbu, *Shōhōtōno Ichibu wo Kaisei sura Hōritsuan tō no kokkai Teishutsu* [Law to Revise Commercial Code Submitted to Diet], 1608 SHOJI HŌMU 4 (2001). The bill also authorizes the conducting of shareholders' meetings on the Internet.

<sup>226</sup> On the role of these forces, see, for example, Hideki Kanda, *Kaishahō Kaisei no Kokusaiteki Haikei* [The International Background of the Company Law Revision], 1574 SHŌJI HŌMU 11 (2000); *Zadankai, Kaishahō Daikaisei no Igi* [Roundtable, The Significance of the Large-Scale Company Law Reform], 1206 JURISUTO 6, 8 (2001); and Hōmusho, *2nengo medo, Kaishahō Seido Kokusai Kjun ni—Shōhō, 50nen buri Bappōn Kaisei* [Ministry of Finance Plans to Bring Corporate System up to International Standard in Two Years: Most Dramatic Reform of Commercial Code in Fifty Years], NIHON KEIZAI SHINBUN, Apr. 12, 2000, at 1.

<sup>227</sup> For a report on the anticipated revisions of the Commercial Code released in April 2001, see *Shōhō tō no Ichibu o Kaisei suru Hōritsu Yōkō Chūkan Shian* [Outline of Interim Report of Revisions to the Commercial Code], available at <http://www.moj.go.jp>. A minor but nontrivial revision to the derivative suit system was passed in December 2001. After a lengthy and contentious debate, policymakers agreed to allow corporations to

#### D. Summary

The forgoing suggests that while Japanese developments before 1950 closely mimic those of Illinois and the MBCA, innovation after 1950 in Japan has been relatively slow and generally occurs in response to scandals, sudden events, or forces outside of Japan, which I label as “exogenous” to the corporate legislative process. Table 4 lists the major post-1950 corporate law changes and the apparent primary motivation for each.

---

amend their articles of incorporation to limit the amount for which directors may be liable in derivative suits. Representative directors' liability may be capped at an amount equal to six years of compensation, inside directors' liability at four years of compensation, and outside directors' liability at two years of compensation. See *Kakoku na Yakuin Baishō ni Hadome* [Putting the Brakes on Arduous Executive Liability Payments], NIPPON KEIZAI SHINBUN, Dec. 5, 2001, at 3. The revisions came in response to the Osaka District Court's finding in September 2000 of \$775 million in liability for eleven directors of Daiwa Bank, a huge amount by Japanese standards. Both sides appealed, and in December 2001, the Osaka High Court approved a settlement of about \$2 million for all forty-nine defendants. See *2000man en de Wakai* [250 Million Yen Settlement], ASAHI SHINBUN, Dec. 12, 2001, at 1.

**Table 4: Summary of Major Japanese Corporate Law Developments**

| Year  | Change  | Primary Motivations   |
|-------|---|---|
| 1955  | Reversal of 1950 policies (preemptive rights)       | Backlash  |
| 1962  | Piecemeal accounting changes                        | Securities Act reform   |
| 1966  | Loosening of share transfer restrictions            | Globalization   |
| 1974  | Strengthening of auditors                           | Scandal   |
| 1981  | Strengthening of shareholder monitoring             | Scandal/globalization   |
| 1993  | Strengthening derivative suit mechanism             | U.S. pressure, foreign investor demands                         |
| 1994  | Limited allowance of share repurchases              | Stock market crash  |
| 1997  | Allowance of issuance of stock options to employees | Foreign competition, foreign investor demands                   |
| 1997  | Simplification of mergers                           | Foreign competition   |
| 1997  | Increased <i>sokaiya</i> penalties                  | Scandal   |
| 1999  | Mergers   | Foreign competition, economic downturn                          |
| 2000  | Spin-offs   | Foreign competition, economic downturn                          |
| 2001  | Treasury stock                                      | Foreign competition, economic downturn                          |
| 2002? | Overhaul: governance, syntax                        | Globalization, international competition, and foreign investors |

The data suggest three points. The first point is not that Japanese corporate law does not change. As the above chart suggests, clearly it does. The point is that the *types* of changes undertaken in the Japanese system are different from the changes seen in the U.S. system despite the convergence forces of international competition. Just as Japan has adopted few MBCA solutions, several of the specific reforms listed above, such as *sokaiya* penalties, do not have direct analogues in the U.S. system, or at least did not occur contemporaneously with Japanese revisions.

Second, in each of the reforms listed above, corporate law development proceeded not in accordance with a broad plan, either of government, managers, investors, or any other interest group. Nor did it follow a model of rapid change toward efficient evolution. Instead, development in Japan is best described as slow and reactionary

to various exogenous phenomena. Because changes drafted solely in response to exogenous stimuli differ from other changes, this systemic characteristic helps explain why differences in corporate law development persist despite a common starting point.

Third, the data do not necessarily indicate that international competition will lead to convergence, even in the long run. Note that of the seven revisions enacted in 1997 or later, five respond to international competition issues, a shift related both to the increasingly global economy and the increased role of industry in the Japanese corporate law revision process.<sup>228</sup> Noting this trend, proponents of the convergence thesis might argue that this Article is premature. If I would just wait another fifty years or so, they might argue, this international competition would lead to convergence.

Maybe so. I have little doubt that limited convergence may occur, especially if the recent pace of reforms continue. But the available evidence suggests that complete convergence in the near future is unlikely, for three reasons. First, although Japan's institutional and social structure differed from that of the United States in 1950, its corporate law began in the same place and nevertheless diverged. Starting the convergence process in 2002, in which the legislative systems are not in the same place as they were in 1950, might be even less likely to lead to convergence, at least in the absence of massive and perhaps comparatively more difficult changes to background institutional and social structures (which may indeed come). Second, although global competition has increased in recent years, the evidence suggests that fifty years of Japanese interaction and competition with the United States have not led to statutory convergence. Finally, because Japan's corporate law system appears to respond *only* to exogenous shocks such as international competition, convergence may come on some limited issues, but more systemic convergence that follows from other sorts of forces, as in the United States, appears unlikely.

#### IV. WHY EXOGENOUS SHOCKS?

The previous Part described Japan's reliance on exogenous shocks as a possible explanation for differing patterns of corporate law development between Japan and the United States. But what accounts for the greater influence of exogenous shocks in Japan? Given that the

---

<sup>228</sup> See Iwahara, *supra* note 211, at 5, 6 (noting an increased role of industry in the "Americanization" of Japanese corporate law).

economic activity levels and corporate legal structures are relatively similar in both countries, one obvious place to look for differences is in institutional structures.

### A. *Jurisdictional Competition*

The merits of regulatory arbitrage, the ability of jurisdictions to compete for corporate charters based on differing corporate laws, have been well debated in the literature.<sup>229</sup> No such debate occurs in Japan. Although Japan is administratively divided into prefectures, only one system of incorporation and corporate rules exists, with three primary results. First, inefficient arrangements in Japan are often exacerbated by the absence of regulatory competition.<sup>230</sup> Second, the development of corporate law in Japan, as in most systems outside of the United States, proceeds unhampered by state interest groups, corporate service companies, and general revenue recipients from incorporation.<sup>231</sup>

Third and more centrally, the lack of competition in Japan means that the rate of change of corporate law often requires exogenous shocks for change. In competitive jurisdictions, change proceeds with relative speed, often led by rent-seeking endogenous actors. In the United States, as the several states compete for franchise tax revenues, led by corporate attorneys and interested managers, changes in one jurisdiction are often rapidly copied in others.<sup>232</sup> Examples in the lit-

<sup>229</sup> See, e.g., Carney, *Political Economy*, *supra* note 27, at 318-27 (arguing that lack of competition for corporate charters can result in inefficient provisions and more restrictive rules); cf. Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1437 (1992) (contending that "state competition is likely to fail with respect to certain important issues that state corporate law has traditionally governed" and advocating "a substantial expansion of the role of federal law in shaping corporate law rules"); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1170 (1999) (asserting that "competition among states is . . . likely to produce troubling results with respect to some critical aspects of corporate law").

<sup>230</sup> See Carney, *Political Economy*, *supra* note 27, at 329 (comparing American and European corporate law and concluding that the presence of jurisdictional competition in the American system has led to less regulation and greater mobility and choices for corporations in the United States).

<sup>231</sup> To incorporate, incorporators must pay a registration fee of 0.7% of capital, with a minimum fee of ¥150,000 (about \$1,200). *Toroku Menkyo Zeihō* [Registration and Licensing Tax], outlined in 2002 MOHAN ROPPŌ [MODEL CODE] 3029, 3030 (Haneri Roppō Henshū Inkai ed., 2001).

<sup>232</sup> See, e.g., Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY

erature abound. Delaware's major 1967 revision was undertaken in direct response to state competition,<sup>233</sup> and its 1988 adoption of an anti-takeover statute came in response to both state competition and attempted takeovers of Delaware corporations.<sup>234</sup> Illinois responded similarly to state competition in the early 1980s and the subsequent takeover boom, as seen in Figure 2, above.<sup>235</sup> Occasionally exogenous shocks matter in the United States as well, especially in response to what drafters regard as misguided judicial decisions, such as Delaware's legislative limitation of director liability in the aftermath of *Smith v. Van Gorkom*.<sup>236</sup> But the predominant force is competition-fostered endogenous pressure.

By contrast, in internally noncompetitive systems such as Japan, because relatively few endogenous incentives exist, policy is more heavily determined by exogenous events. In Japan, exogenous forces such as foreign pressure, domestic scandal, and global competition are almost always necessary to induce change. Although an endogenous political economy story can still be told, endogenous actors often have fewer incentives to push for change in a unitary system, relying instead on exogenous shocks to jump-start the process.

In such noncompetitive systems, finding the appropriate response to exogenous shocks may take precedence over careful examination of institutional complementarities and substitutes. Competitive system reformers, precisely because of competitive concerns, attempt to

464, 465 (1996) (analyzing the causes of uniformity of state statutory provisions relating to limited liability companies).

<sup>233</sup> See S. Samuel Arshat, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 14-15 (1976) (discussing the objectives of the 1967 Delaware Corporation Law Revision Committee); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 862 (1969) ("Delaware from time to time redesigns and improves its product to keep ahead of the competition.").

<sup>234</sup> See, e.g., Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 905 (1990) ("Almost immediately after the Supreme Court decision in *CTS Corp. v. Dynamics Corp.*, in April 1987, upholding Indiana's second generation takeover statute, the council of the Corporate Law Section began considering recommending a similar statute to the General Assembly.").

<sup>235</sup> See Thomas J. Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporation Act*, 27 LOY. U. CHI. L.J. 1, 1 (1995) (noting that Illinois adopted its "corporate constituency" provision in response to corporate takeover activity).

<sup>236</sup> 488 A.2d 858 (Del. 1985); see DEL. CODE ANN. tit. 8, § 102(b)(7) (1991) (permitting a certificate of incorporation, under certain circumstances, to eliminate or limit the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty). For a similar case in Japan, see the Daiwa Bank derivative suit discussed *supra* note 227.



create laws that are consistent with existing structures in a deliberative process over time. But noncompetitive system reformers may be more focused on finding solutions to shocks, leaving untouched areas that might be prime candidates for legal reform in competitive systems. In noncompetitive systems, only those areas of corporate law directly implicated by exogenous shocks are likely to be reformed.<sup>237</sup>

One lesson suggested here is that among the potentially infinite range of factors that leads to differing patterns of legal development (including, for instance, business and political institutions and behavioral norms), differing degrees of competition in corporate law systems may play an important role. Along the continuum of competition, Japan's unitary jurisdiction (on an island, no less) may be at the extreme of noncompetition,<sup>238</sup> and the United States federal system may be at the other extreme. Somewhere in between lies the European system—currently in the midst of debate between the real seat rule, which states that the corporate law of the corporation's principal place of business governs, and the recent *Centros* decision by the European Court of Justice,<sup>239</sup> which allows limited forum shopping for newly formed corporations.<sup>240</sup> The continuum suggests that the lesser the degree of competition, the greater the chances that corporate law changes will be responsive primarily to outside stimuli. Differing degrees of competition thus may help explain not only rates of change, but also persistent substantive divergence in corporate law.<sup>241</sup>

---

<sup>237</sup> Even wide-scale reforms such as those undertaken in 1981 often are rooted in rather small responses to external phenomena. University of Tokyo Professor Hideki Kanda recently noted (in a symposium on corporate law reform) that foreign investment trusts operating in Japan may be disadvantaged by the Commercial Code provision requiring notice for shareholders' meetings to be sent fourteen days in advance of the meeting. Hitoshi Maeda et al., *Kongo no Kaishahō Kaisei ni Kansuru Kihonteki na Shiten* [Basic Views on the Next Company Law Reform], 1548 SHŌJI HŌMU 8, 19 (2000) (statement of Hideki Kanda); see also SHŌHŌ, art. 232 ("In convening a general meeting, notice shall be sent to each shareholder at least two weeks prior to the day set for such meeting."). But as Kanda noted, changing the requirement to at least one month's notice might cascade into a large-scale Code reform, as provisions regarding record dates and dividends would have to be drastically altered.

<sup>238</sup> South Korean corporate law development has followed a similar pattern. See Joongi Kim, *Recent Amendments to the Korean Commercial Code and Their Effects on International Competition*, 21 U. PA. J. INT'L ECON. L. 273, 278 (2000) (explaining how Korean corporate structure has hindered the competitiveness of that nation's industry).

<sup>239</sup> Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1484, 2000 CEC (CCH) 290 (1999).

<sup>240</sup> See GILSON, *supra* note 18, at 27-33 (discussing how the European Court of Justice chose to protect forum shopping by decoupling the decision of where to incorporate from the decision of where to physically locate the business).

<sup>241</sup> The relationship between jurisdictional competition rules and substantive dif-

### B. Other Institutions: Policymaking and Capital Markets

In Japan, the difficulties of a noncompetitive chartering system are exacerbated by other institutional constraints that restrict internal change. For instance, the advisory committee, a creation of Occupation authorities, has clear analogues in the United States: standing committees on corporate law. But the Japanese advisory committee seems especially built for slowness and lack of innovation, as its agenda is determined solely by the government, and its internal procedures are those of a sub-optimal private legislature, with no formal endogenous mechanism for resolving debates.<sup>242</sup> As such, it tends to generate little internal change.

Nor do the Japanese courts encourage considerable change. Although recent decisions suggest a more active role for the judiciary in corporate affairs,<sup>243</sup> the judiciary historically has not prompted the sort of change often seen in the United States, a trend that may also be based at least in part on a lack of jurisdictional competition.<sup>244</sup>

The lack of serious input from attorneys, or indeed in many cases from any private group other than business interests (or indirectly by *sokaiya*), also engenders a reliance on exogenous forces. Most prominent by omission is the lack of a plaintiffs' bar in Japan.<sup>245</sup> In the United States, by contrast, a variety of actors contribute to the corporate lawmaking process, including judges, academics, and perhaps most prominently, attorneys who serve on standing committees of a state's bar. One result of the Japanese system is that changes are

ferences in corporate law is not new. See Carney, *Political Economy*, *supra* note 27, at 309-29 (concluding that the main reason American and European corporate law has followed different paths is the early creation of a common market in the United States). My approach merely proposes a precise explanation of the way in which such rules might function and focuses the inquiry on jurisdictions in which the state completely monopolizes corporate law in a unitary system.

<sup>242</sup> See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 648-52 (1995) (positing that when interest groups conflict, private legislatures will likely adopt vague rules or none at all).

<sup>243</sup> See *supra* text accompanying notes 107-13; see also Curtis J. Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals*, in *GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS* (Curtis J. Milhaupt ed., forthcoming) (noting the recent shift in the balance of power from the bureaucracy to the Japanese courts in the context of mergers and acquisitions).

<sup>244</sup> See, e.g., Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1927-35 (1998) (analyzing how legal indeterminacy as a competitive feature unique to Delaware's corporate law jurisdiction leads to a greater role for Delaware's judiciary).

<sup>245</sup> See *supra* text accompanying note 124-25.

largely driven by politicians, bureaucrats, and business leaders, with other parties having relatively less input through the advisory committee system.<sup>246</sup> This institutional arrangement tends to generate a system of change that relies heavily on exogenous forces and less on internal competition.

Finally, perhaps the differing patterns of corporate law development in Japan and the United States can also be explained by the differing roles of capital markets in the two systems. Specifically, perhaps there is relatively little pressure on corporate law in Japan because such a large percentage of Japanese stock is in corporate hands. If this is so, we might expect corporate law changes to come in response only to severe shocks, and, without jurisdictional competition, those shocks are likely to be exogenous.<sup>247</sup>

On the other hand, the increase in reforms post-1990 may reflect other political and economic factors. One easy explanation is that exogenous events were simply more plentiful. Moreover, as the Industrial Competitiveness Council's creation suggests,<sup>248</sup> the increase in corporate law changes may be a reflection not of increased individual shareholdings, but of renewed corporate power. Foreign shareholding may also be a factor. Since 1950, the percentage of shares held by non-Japanese shareholders has risen dramatically, especially since 1990. In 1990 non-Japanese entities held 4.2% of Japanese shares, in 1995 they held 9.4%, and by 1998 they held over 10%.<sup>249</sup> Although non-Japanese shareholders are not necessarily active participants in the Japanese policymaking process, the numbers at least suggest a

---

<sup>246</sup> Normative conclusions do not necessarily follow from the lack of jurisdictional competition in Japan. Lucian Arye Bebchuk and Allen Ferrell argue that at least with respect to takeover law, states have enacted rules that excessively protect incumbent managers. Bebchuk & Ferrell, *supra* note 229, at 1173-90. If Bebchuk and Ferrell are correct, Japan can at least proudly claim to have avoided this pitfall.

<sup>247</sup> To test this conjecture, consider the percentage of Japanese individual shareholdings over time. From 1950 to 1988, individual shareholdings steadily declined, from 61.3% in 1950 to 39.9% in 1970, to 29.2% in 1980, and to 23% in 1988. After 1988, the percentage of individual shareholding rose slightly each year, from 23.6% in 1995 to 25.4% in 1998. TOKYO SHŌKEN TORIHIKIJO, SHŌKEN TŌKEI NENPŌ [SECURITY STATISTICS YEARBOOK] (various years). Accordingly, there might be more pressure on corporate law after 1988, and we might expect more corporate law changes after that date. In fact, that is exactly the trend that occurred—as the previous Part shows, the pace of corporate law revisions increased in the 1990s. The correlation between decreased corporate shareholding and increased corporate law changes might suggest that corporate law is needed to replace capital markets arrangements.

<sup>248</sup> Morishita, *supra* note 221 (discussing the role of the Industry Competitiveness Council in reviving Japan's economic might).

<sup>249</sup> TOKYO SHŌKEN TORIHIKIJO, *supra* note 247.

growing exogenous force that correlates with the increased number of post-1990 corporate law changes.

In short, it is difficult to draw precise conclusions from capital market trends. The correlation between the decline in corporate shares and the increase in corporate law changes could be indicative of increased reliance and need for corporate law, an increase in exogenous power from foreign shareholders, or some other force. Given all the other evidence, I find the jurisdictional competition and policymaking institutions to be the most powerful forces in determining the overall pattern of corporate law development, but capital markets and other institutions may play important supporting roles.

## V. EXTENSIONS AND IMPLICATIONS

Beyond the unexpected finding of divergence, the story of corporate law development described in the preceding two Parts has three implications for the comparative corporate law and governance debate. First, although substantial statutory convergence is unlikely, a limited form of convergence in the form of increased common enabling rules may occur. Second, while convergence tends to occur rapidly, divergence appears to be a rather lengthy process. Third, without a thorough understanding of the institutional framework in which corporate law functions, the efforts of modern foreign legal advisors, like their counterparts in the 1950 Occupation, may not necessarily lead to expected results.

### A. *Convergence and Divergence*

Consider the results of this Article's empirical project in light of a recent study by Katharina Pistor.<sup>250</sup> Pistor undertook an empirical examination of corporate law statutes in twenty-four transition economies. She found a "high level of statutory convergence," which she attributes largely to direct influence: a combination of "foreign technical assistance programs as well as of harmonization requirements for countries wishing to join the European Union."<sup>251</sup> The convergence that Pistor observes is interesting in light of the Japanese experience. In Japan, the role of foreign legal assistance—in the form of the Allied Occupation—certainly was important, and accounts for the 1950 convergence that we see among systems, including Japan.

---

<sup>250</sup> Pistor, *Patterns*, *supra* note 28.

<sup>251</sup> *Id.* at 2-3.

But the harmonization requirements of the European Union suggest the existence of strong external forces not seen in the decidedly unitary Japanese system, and may account for the differing results between Pistor's study and mine.<sup>252</sup>

To examine ways in which my results may be compatible with Pistor's, I return to the statutory database. I begin with the assumption that some corporate law provisions are more important than others. Recall that the list of 569 total MBCA provisions has already been reduced by three-quarters to the 142 important provisions by Carney.<sup>253</sup> To classify the "most important" provisions of the 142 "important" provisions, I assume that, in general, mandatory provisions may be more central to code development than other provisions.<sup>254</sup> Accordingly, I divide the sample into mandatory rules and enabling rules, following MacKerron's typology.<sup>255</sup>

"Mandatory" does not necessarily mean "important" in all cases, and accordingly more meaningful insights may result from the initial investigation of the database of 142 provisions. But looking at the mandatory/enabling division should at least provide the same sorts of insights that Pistor gains from her use of the provisions initially used by La Porta and others,<sup>256</sup> while avoiding the pitfalls of an arbitrary or particularized assignation of weight. Figure 3 shows the relationship of mandatory to enabling rules over the past fifty years for the three comparable jurisdictions, as well as Delaware. As seen in the figure, the percentage of mandatory corporate law provisions passed relative to all corporate law provisions adopted has declined over time for each of the four jurisdictions.

---

<sup>252</sup> A further factor may distinguish this Article from Pistor's work. The corporate law variables that Pistor examines are primarily mandatory corporate law provisions such as cumulative voting and preemptive rights provisions. Pistor, *Patterns*, *supra* note 28, at 10. This Article explores a much broader range of corporate law, encompassing the entire scope of the MBCA.

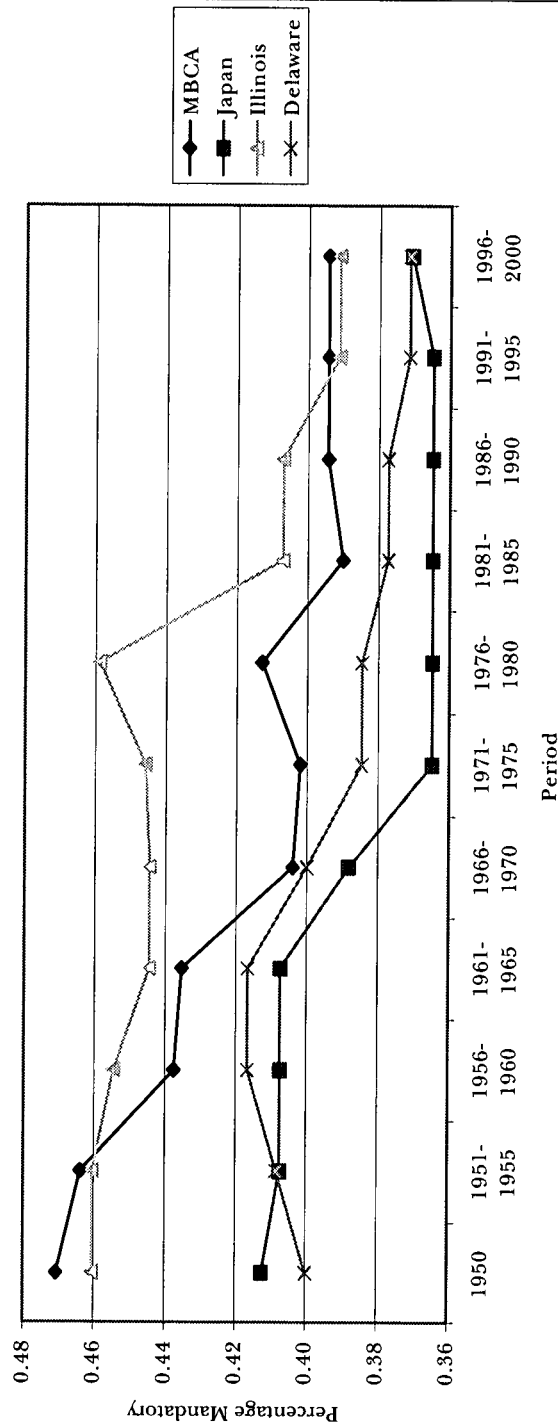
<sup>253</sup> See *supra* note 2 (identifying provisions in the MBCA adopted by the vast majority of the states to illustrate the trends toward uniform state laws in a competitive market).

<sup>254</sup> On the importance of mandatory rules in public corporations, see Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1485 (1989); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1554 (1989).

<sup>255</sup> Enabling rules encompass three of MacKerron's categories (pure enabling, enabling/empowerment, and default opt-out), mandatory rules encompass two (pure mandatory and mandatory constraints on enabling rules). The division effectively separates true mandatory rules from rules that a corporation may ignore without legal penalty. MacKerron, *supra* note 74, at 670-86.

<sup>256</sup> *Supra* note 28.

Figure 3. Mandatory Provisions Adopted as a Percentage of Total Provisions Adopted



The relative increase in enabling rules might be attributable to competition for corporate charters. States compete for corporate charters by offering attractive corporate codes. Market forces will thus ensure that efficient code provisions survive. Because mandatory provisions are increasingly seen as inefficient restrictions on freedom of contract,<sup>257</sup> it should not be surprising that an increasingly greater percentage of enabling provisions are adopted and remain over time.

But such a jurisdictional competition argument would not explain why Japan, where jurisdictional competition does not exist, has a percentage of enabling provisions equal to that of Delaware. A better explanation for the low percentage of mandatory provisions in Delaware and Japan might be the ability of interest groups to influence regulators in those jurisdictions. In short, Delaware is different. In Delaware, as in Japan, business-related interest groups have been relatively successful in reducing the percentage of provisions that require mandatory performance by corporations. Although Delaware is subject to state competition like any other state, its status as the leading corporate jurisdiction might in some areas create pseudo-monopolistic qualities similar to those of Japan.<sup>258</sup> Because the MBCA has historically been (arguably) less susceptible to serious interest group influence, it has a higher percentage of mandatory provisions. Illinois, perhaps like all other non-Delaware states, is somewhere in between.

The general divergence in corporate law seen between Japan and the United States might indicate that the corporate law demands of corporations in Japan are not being met to the same extent as in the competitive system of the United States. But such a "frustrated corporate demand" theory is generally inapposite to the standard Japanese political economy story, which assumes that business exerts a heavy hand in revisions through such organizations as *Keidanren* and its political ties. Figure 3 is not inconsistent with the supposition that Japanese corporations have been quite successful—indeed, over time, more successful than Delaware corporations—in preventing the passage of new restrictive mandatory corporate law provisions relative to

---

<sup>257</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) ("The corporation is a complex set of explicit and implicit contracts, and corporate law enables participants to select the optimal arrangement . . . in a large economy. No one set of terms will be best for all; hence the 'enabling' structure of corporate law.").

<sup>258</sup> See Kamar, *supra* note 244, at 1954 ("Delaware utilizes its market power to enhance its competitive position . . . by the indeterminate nature of its law . . . secur[ing] barriers to entry—such as network externalities, judicial advantage, and credible commitment—that protect Delaware.").

enabling provisions. Within the context of corporate law divergence, it may be that corporate demands are being met at a certain basic level that reflects corporate influence.<sup>259</sup>

The general increase in enabling provisions across jurisdictions may have significant implications for convergence. I measured the percentage for each five-year period since 1950 of common enabling provisions relative to all common provisions.<sup>260</sup> From 1950 to 2000, the proportion of mandatory provisions as a percentage of common provisions has fallen from about 47% to about 39%. This is a relatively small change, and any conclusions based on it are tentative at best. That caveat stated, these data tentatively suggest that if a limited form of “convergence” in the form of increased common provisions is occurring, it is occurring not on “important” mandatory corporate rules that are said to be a source of path dependence,<sup>261</sup> but on enabling rules.<sup>262</sup>

The increase in *enabling* rules might account for some variation in corporate structure. Enabling rules may allow for greater diversity in corporate structure to suit the needs of different industries, locations, complementarities, regulatory schemes, and constituencies. Enabling rules may thus encourage particularized solutions to individual problems, or multiple optimum solutions to common problems, which may help explain why structural divergence may continue to occur despite legal change.

The phenomenon observed in 1950 Japan, and again in 1990s Eastern Europe, points to a second possible trend in convergence and divergence of corporate systems. Had the period of comparison be-

<sup>259</sup> Note, however, that the lack of jurisdictional competition also leads to a multitude of inefficient Japanese corporate law provisions. See J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 110 (1999) (“Because [Japanese corporate law] faces less [competitive] pressure, it retains—for all its basic appropriateness—a substantial variety of oddly inefficient minor rules.”); see also Carney, *Political Economy*, *supra* note 27, at 304 (“[J]urisdictional competition within a federal system plays a constructive role by inhibiting the rent-seeking activities of interest groups.”).

<sup>260</sup> For an illustration of the number of common provisions across jurisdictions, see *supra* Figure 1.

<sup>261</sup> See Bebchuk & Roe, *supra* note 13, at 138 (introducing the idea of rule-driven path dependence).

<sup>262</sup> Saul Levmore has argued that divergence among legal systems “often arises in rules that either (a) do not matter or (b) raise issues about which reasonable people . . . could disagree.” Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 44 (1987). Perhaps in this case it could be said that corporate lawmakers agree that adaptation is the central problem of organization, but simply disagree on the details.



tween Japan and the United States been 1945-1950 and not 1950-2000, we would have observed a tremendous convergence of corporate laws, much like that seen in the 1990-1998 Eastern European experience. Even the period 1995-2000 shows relatively more convergence than the fifty-year period. Thus, a tentative conclusion is that while convergence tends to take place rapidly, divergence may be a phenomenon that tends to occur over lengthy periods of time. Although a complete empirical elaboration of this idea in a broad cross-national context is beyond the scope of this Article, this is not an unexpected result—convergence may occur due to regulatory reasons such as harmonization requirements, because of foreign technical assistance, or because one system is identified as a superior model for mimicry. These sorts of forces are likely to lead to rapid change. Divergence, by contrast, is centered in differences in institutional and political structures, which may lead to less rapid change.

#### B. *Foreign Legal Advisors*

In recent years, foreign legal advisors have played a significant role in aiding corporate law reform in transition economies. From Russia to South Korea and across Eastern Europe,<sup>263</sup> corporate law often has its substantive origins in the offices of U.S. universities and agencies. As Pistor's study suggests, the influence of such foreign advisors may bring about broad statutory convergence across jurisdictions.<sup>264</sup>

Although the postwar occupation of Japan obviously occurred under somewhat unique circumstances, the influence of foreign legal advisors on that occasion parallels nicely with modern developments. In 1950, as in more modern reform efforts, foreign advisors were confronted with an antiquated system that paid little attention to minority shareholders. In 1950, as in many developing economies today, foreign advisors recommended and established a slightly modified version of the American system.

The Japanese experience suggests that corporate legal reform may

---

<sup>263</sup> See, e.g., Gainan Avilov et al., *General Principles of Company Law for Transition Economies*, 24 J. CORP. L. 190 (1999) (setting out policy guidelines for transitional economies); Black & Kraakman, *supra* note 11 (basing an analysis of corporate law on a case study of Russian corporate law, which was developed with the aid of American professors); Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 J. CORP. L. 199 (2001) (providing a guide for privatization of North Korean state-owned enterprises).

<sup>264</sup> Pistor, *Patterns*, *supra* note 28.

not necessarily proceed as path dependence logic might predict. After the task of foreign advisors was completed in 1950, future generations of Japanese reformers were guided not by overarching efficiency concerns, but by exogenous system shocks. Areas of corporate law not directly affected by specific shocks were not revised.

Amy Chua cautions that “Western lawyers involved in the developing world” should not overlook entrenched ethnic divisions in the processes of marketization and democratization.<sup>265</sup> The data presented in this Article suggest a similar normative claim even in the absence of such ethnic divisions: corporate law reform should proceed with a detailed knowledge of institutional dynamics, particularly of the competitive nature of the system. This is not to suggest that Japan has gone wrong—either because of or despite its corporate law, the Japanese economy in the long run has been a success. The point is that even in the absence of backlash, legal advisors should note that the results of their statutory tinkering may not necessarily be what some theory might predict. If change by endogenous means is desired, advisors should consider implementing jurisdictional competition institutions or other devices to encourage legal change.

Of course, such institutional tinkering is easier said than done. The relatively simple establishment of competing corporate chartering systems is unlikely to be a complete solution. In fact, without the simultaneous creation of complementary institutions such as franchise-tax incentives and separate bodies of corporate law on which states or other political divisions can compete, such a system standing alone may only result in increased transaction costs.<sup>266</sup> The point is simply that advisors should not expect corporate law reforms to have the same effect in differing systems.

#### CONCLUSION

The use of Illinois corporate law as a precedent for both the

---

<sup>265</sup> Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 8 (1998) (“Proponents of marketization and democratization must start confronting these questions, however awkward or unsettling.”).

<sup>266</sup> See Douglas J. Cumming & Jeffrey G. MacIntosh, *The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law*, 20 INT’L REV. L. & ECON. 141, 158 (2000) (arguing that one reason legislatures may pursue uniformity in provincial corporate law is the possibility of lowering transaction costs); see also Timothy W. Guinane, *A Failed Institutional Transplant: Raiffeisen’s Credit Cooperatives in Ireland, 1894-1914*, 31 EXPLORATIONS ECON. HIST. 38, 49-58 (1994) (noting the difficulty of institutional transplants in light of institutional complementarities).

Model Business Corporation Act and the Japanese Commercial Code provides an interesting baseline from which to compare corporate law systems and their development over time. The divergence of those statutes—despite a “separated-at-birth” common beginning and frequent subsequent interaction—presents a bit of a puzzle. In this Article, I have suggested that one possible explanation for the divergence may lie in the reliance on exogenous stimuli to spark corporate law change in Japan. The reliance on exogenous shocks to determine the direction and substance of reform leads Japanese law down a path different from U.S. law. Shock provokes revisions, and no shock means no revision. I have posited that one possible explanation for this reliance in Japan, among a myriad of economic, social, and other factors that affect legal development, is institutional; reliance on shocks is primarily due to institutions that eliminate jurisdictional competition, but also to those that limit lawyer participation in the Japanese decision-making process.

In his study of legal transplants, Alan Watson states that “A successful legal transplant—like that of a human organ—will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.”<sup>267</sup> The Japanese corporate law experience tends to confirm what comparative law experts like Watson might have suspected all along: once transplanted, the organ was not rejected; rather, it took on a life of its own. Modern foreign legal advisors aiding developing systems would do well to note the potentially transient nature of convergence even in the face of evolution-toward-efficiency theory and globalization pressures.

---

<sup>267</sup> WATSON, *supra* note 23, at 27.

\* \* \* \* \*