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ESSAY AND BOOK REVIEW

How Does Europe Regulate Power Within Its Corporations? What Might the Answer Mean for the U.S.? An Essay and Review of *European Company Laws: A Comparative Approach*

European Company Laws: A Comparative Approach.

Robert R. Drury and Peter G. Xuereb, Editors.

Vermont: Dartmouth Publishing Co. Ltd., 1991. Pp. 283.

*Donald C. Dowling, Jr.**

Miami-based corporate mogul Victor Posner controls 47% of the shares of DWG Corporation.¹ Among the few hundred largest U.S. corporations, publicly-traded DWG is a holding company which owns

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¹ See DeGeorge & Fina, *The Posner Principle: When Goliath Controls the Company, Look Out*, Bus. WK., Oct. 29, 1990, at 34.

Arby's, R.C. Cola, and a host of other businesses.² Posner unyieldingly exercises unrestrained power over those entities he effectively controls — in the case of his 47% interest in DWG Corporation, Posner imposes a “tyranny of the near-majority.”³ During DWG's fiscal year ending in 1990, according to news reports, DWG compensated Posner with \$3.68 million in salary and benefits, plus \$7.98 million more in “management incentive” bonuses and another \$6.6 million in rent paid to a Posner trust at \$10 per square foot over market rates.⁴ That year DWG itself *lost* \$11.53 million; its share price crashed from \$16 to \$4.25.⁵

Posner long evaded having to confront his unaligned co-shareholders directly. Between 1986 and October 1990, DWG Corporation never held its “annual” shareholder meeting.⁶ When, under pressure from a federal court, DWG finally did hold a perfunctory meeting on October 12, 1990, Posner's unaligned co-shareholders finally had a chance to express their feelings:

Within minutes [of the start of] . . . Miami Beach-based DWG Corp.'s first shareholders meeting since 1986 . . . , the sea of dark suits was hooting like the cheap seats at Yankee Stadium:

“You've been doing it to shareholders for 20 years, Victor, keep it up.”

“Where do you stand on your parole, Victor?”

“Are you going to continue to rape us?”⁷

* * *

“Point of order,” yelled one shareholder as the board considered a new bonus plan for Posner and other managers. “This sucks.”⁸

Posner's control over DWG Corporation shows, rather dramatically, how vital the exercise of corporate power is to any enterprise. Many blame the U.S. recession of the early 1990s on injudicious exercises of corporate control during the 1980s: So many corporations effectively ceded power to financial advisors who engineered the borrowing of too much money, often through issuing bonds, so that these companies could exercise the ultimate power of taking over yet other corporations.⁹ By the 1990s, U.S. society blamed all sorts of social woes — including the savings and loan crisis, corporate bond defaults, and the string of Wall

² See Huber, *Posner's Cool Deal Leaves Investors Cold*, Miami Herald, Oct. 13, 1990, at 1A, col.

1.

³ DeGeorge & Fina, *supra* note 1.

⁴ *Id.*; Huber, *supra* note 2.

⁵ Huber, *supra* note 2.

⁶ *Id.*; DeGeorge & Fina, *supra* note 1.

⁷ Huber, *supra* note 2.

⁸ DeGeorge & Fina, *supra* note 1.

⁹ For an excellent lay explanation of the 1980's rise and fall of the corporate bond market, see M. LEWIS, *LIAR'S POKER* 208-28 (1989).

Street insider trading scandals — on the unrestrained exercise of corporate power.¹⁰ This blame-the-corporation attitude became pervasive. One especially hyperbolic example appears as the blurb on a dust jacket of a 1991 book on corporate “power and accountability”:

Corporations determine far more than any other institution the air we breathe, the quality of the water we drink, even where we live. Yet they are not accountable to anyone.

* * *

The corporation has now become so powerful that it has outstripped the limitations of accountability, becoming something of an externalizing machine, in the same way a shark is a killing machine — no malevolence, no intentional harm, just something designed with sublime efficiency for self-preservation. And when companies are not held accountable for the power they exercise, we all pay the price.¹¹

Stateside critics tend to focus accusations of “corporate greed” on U.S. corporations and on U.S. corporate tycoons;¹² indeed, the U.S. may be the world capital of corporate overreaching. But the United States is by no means the only battleground for corporate power conflicts. Moguls like Posner and 1980s Wall Street financiers Michael Milken and Ivan Boesky have counterparts all over the world, including Europe. While Europe’s list of corporate raiders may be shorter than Wall Street’s, European moguls’ abuses of power go back at least to the industrial revolution, to Trollope’s era in the mid-nineteenth century,¹³ and continue up to today.

One example from the late 1980s is the ultimately unsuccessful attempt of Spain’s “Albertos” (cousins Alberto Cortina and Alberto Alcocer) to parlay the fortune of their then-wives Alicia and Esther Koplowitz into the creation of Spain’s largest bank, through a merger of Banco Central and Banesto, over the objections of the Koplowitzes’ ben-

¹⁰ Books analyzing and decrying corporate overreaching were in vogue in the U.S. in the early 1990s. See, e.g., M. LEWIS, *supra* note 9; R.A.G. MONKS & N. MINOW, *POWER AND ACCOUNTABILITY* (1991); J. STEWART, *DEN OF THIEVES* (1991).

¹¹ R.A.G. MONKS & N. MINOW, *supra* note 10, at dust jacket.

¹² See, e.g., M. LEWIS, *supra* note 9; J. STEWART, *supra* note 10.

¹³ A. TROLLOPE, *THE WAY WE LIVE NOW* (1875) is a British novel centering on the rise and fall of a Boesky-like London arbitrageur of obscure origins named Augustus Melmotte, Esq. Melmotte was “directo[r]” of “three dozen companies,” and he “could make or mar any company by buying or selling stock, and could make money dear or cheap as he pleased.” A. TROLLOPE, *supra*, at vol. I p. 31 (Oxford ed. 1941). This author has, elsewhere, examined in detail several real-life incidents of nineteenth century — and even eighteenth century — British business overreaching, albeit on a smaller scale than Trollope’s Augustus Melmotte tragedy. Dowling, *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 493-501 (1986), reprinted in 35 DEFENSE L.J. 503, 510-519 (1986). On Europe’s need for efficient takeover legislation protecting minority shareholders in this modern day of increasing European takeovers, see *Takeovers á la Carte*, THE ECONOMIST, Jan. 3, 1992, at 11.

efactor.¹⁴ (The Albertos' dreams ended abruptly after the press caught Cortina in Vienna carrying on an affair with Spanish socialite Marta Chavarri; the ensuing media uproar frightened off the Albertos' financial backers, the Kuwait Investment Office.¹⁵)

An even more recent example of a European corporate power struggle is the 1990 fight between Carlo de Benedetti, Chairman of Ing. C. Olivetti & Co. S.p.A., and television magnate Silvio Berlusconi. The two Italians fought long and hard for rights to the voting stock of Italian publishing giant Mondadori Editore S.p.A.¹⁶ (De Benedetti and Berlusconi devoted so much effort to their feud and its court battles and arbitrations that they diverted themselves from their mutual interest in promoting a harmonious single European market.¹⁷)

Obviously the legal systems in both the European states and in the United States have been unsuccessful in reining in all excesses of the exercise of corporate control. But these legal systems certainly do try. The laws of both Europe and the United States contain sophisticated regulations, such as insider trading controls, expressly designed to check abuses of corporate power. The problem, of course, is that most who set out to control a corporation attempt affirmatively to use the applicable laws of corporate governance to further their own ends (or at least try to achieve control by operating within these laws). For this reason, free market legal systems face a tough problem trying to control abuses of corporate power while still adhering to laissez-faire principles.

One way for any legal system to improve how it regulates a problem is to study how other legal systems deal with the same issues, and adopt the most successful solutions.¹⁸ "The idea that no one nation has a monopoly of wisdom applies just as strongly to law as it does to any other field of human endeavour."¹⁹ Perhaps by studying how the various European states control corporate overreaching, the United States and its states, or any one European state, could improve their regimes for regu-

¹⁴ See Kandell, *Family Affairs: The Personal Lives of Business Titans Transfix a "New" Spain*, Wall St. J., Dec. 15, 1989, at 1, col. 1. The "Albertos'" financial dealings received heavy coverage in the Spanish press, including in the popular *Hola!* magazine.

¹⁵ *Id.* at A8, col. 3.

¹⁶ See Revin, *Italian Tycoons Push European Unity, Then War Over Home Turf*, Wall St. J., Apr. 3, 1990, at A1, col. 6. Elsewhere, this author has examined other corporate power issues, in the Italian context. Dowling, "L'Europa Sociale": *Il punto di vista delle imprese multinazionali USA*, INDUSTRIA E SINDACATO (Italy), June 28-July 5, 1991, at 16.

¹⁷ *Id.* at A16, col. 1.

¹⁸ EUROPEAN COMPANY LAWS: A COMPARATIVE APPROACH ix-x, 1-4 (R. Drury & P. Xuereb eds. 1991) [hereinafter EUROPEAN COMPANY LAWS].

¹⁹ *Id.* at 1.

lating the corporation.²⁰

Any discussion of “European law” in the 1990s must address the interplay between the supranational laws (or instruments) of the European Community (EC) and the national laws of the individual EC member states.²¹ Under EC jurisprudence, existing EC instruments have “primacy” over member states’ law.²² But, under the so-called principle of “subsidiarity,”²³ the EC actively attempts to defer to the member states by not regulating those areas in which the member states are most competent to govern by themselves.²⁴

“EC law” in the early 1990s has a strong gravitational pull. Its political and social importance is increasing at the direct expense of member state law. Yet most laws which regulate day-to-day life within Europe are still the laws of the member states themselves.²⁵ Many basic substantive areas of European law — including criminal law, personal injury law, and contract law — remain, in the early 1990s, purely creatures of member state law.²⁶

But not all substantive areas of EC law neatly fit into the “member-state-law-versus-EC-law” dichotomy. Several areas of European law are in transition between having been regulated by the member states and

²⁰ Such an exercise might be especially useful in the United States. If U.S. social critics are right, and abuses of corporate power are grosser stateside than they are anywhere else, perhaps the legal systems of the U.S. have the most to learn by example. Europe does not seem to have spawned quite as many “corporate raiders” as has the U.S.; this may at least partially be because Europe’s laws of corporate governance work better than the analogous U.S. corporate laws.

²¹ An explanation of the balance between EC law and member state law is beyond the scope of this article. This author has addressed this topic elsewhere, in Dowling, *Worker Rights in the Post-1992 European Communities: What “Social Europe” Means to United States-Based Multinational Employers*, 11 Nw. J. INT’L L. & Bus. 564, 574-80, 590-94 (1991).

²² See Treaty of Rome, Mar. 25, 1957, Rome, 298 U.N.T.S. 11 [hereinafter Treaty], arts. 189-92.

²³ See Dowling, *supra* note 21, at 589 n.154.

²⁴ *Id.* The topic of “European law” has effectively meant “EC law” ever since the mid-1980s, when Brussels issued the “White Paper” (which set out the blueprint for the post-1992 single European market) and the Single European Act (which made the “White Paper” program part of the EC treaty). See *id.* at 577-80. Invoking the theory that a truly single market extends beyond customs law and into many other areas (just as, in the U.S., “interstate commerce” extends into almost every area the federal government wants to regulate), Brussels has, since the mid-1980s, actively usurped power to regulate in many areas formerly left to the member states — including, for example, competition law, public procurement, and the various laws regulating product standards.

²⁵ The most common instrument, or form of law, which Brussels uses is the directive. A directive is not directly applicable within the member states; the member states must implement it under their own national law. Treaty, *supra* note 22, at art. 189. Thus, much EC law ultimately *becomes* member state law. This article uses the phrase “EC law” as including member state laws which implement EC instruments.

²⁶ The EC did, however, make substantial inroads toward usurping other areas which had been regulated by the member states, at the December 1991 Council meeting in Maastricht, the Netherlands.

becoming subjects of EC law. These are the areas where Brussels is actively stepping in to "harmonize," in order to create a single European market for goods and services. One such transitional topic is social, or employment, law. Employment law in Europe remains almost wholly a creature of member states' laws, but it is increasingly the subject of EC proposals which would "harmonize" these laws.²⁷ Another example — one which is farther down the road to pervasive EC control — is European company law.²⁸

Europe's company laws, particularly those affecting corporations operating within a single member state, still exist almost exclusively at the member state level. Yet Brussels is giving the member states some competition, proposing instruments to "harmonize" these laws. Beginning in 1968, the EC Council has been issuing some instruments regulating company law within the member states.²⁹

As one key example, a recent directive creates a unique business entity, the European Economic Interest Grouping (EEIG), under which two or more businesses founded under the laws of the member states (or even member state citizens) can link up across member state lines, creating a discrete business entity with an EC-created legal identity, which must pass any profits down to its members.³⁰ And the EC Commission³¹ has gone farther, proposing an EC-level corporate form for which no federal U.S. counterpart exists: The European corporation.³² Over the

²⁷ See, e.g., Dowling, *supra* note 21. This author has elsewhere discussed the groundbreaking social law developments at the December 1991 Maastricht Council meeting, in which the Council decided to create a "social continental Europe." Dowling, *Employment Matters and the Social Charter*, in EUROPE WITHOUT FRONTIERS: AN OVERVIEW FOR LAWYERS OUTSIDE THE COMMUNITY (1992) (forthcoming, Kluwer Publishers).

²⁸ The EC treaty explicitly requires the EC Commission and Council to "coordinat[e]" the member states' "safeguards . . . for the protection of the interests . . . of companies or firms." Treaty, *supra* note 22, at art. 54(3)(g). On the linguistic difference between "company" law and "corporate" law, see F.H. BUCKLEY, CORPORATIONS: PRINCIPLES AND POLICIES 149 (2d ed. 1988) ("the English use the word 'company' where North Americans use the word 'corporation'").

²⁹ Directive No. 68/151/EEC (Mar. 9, 1968). See discussion *infra* accompanying note 55.

³⁰ Regulation No. 2137/85/EEC (July 25, 1985) (effective July 1, 1989). For a discussion of the EEIG regulation, which includes the regulation's full text, see Murphy, *The European Economic Interest Group [sic] (EEIG): A New European Business Entity*, 23 VAND. J. TRANSNAT'L L. 65 (1990). See also EUROPEAN ECONOMIC INTEREST GROUPINGS: THE EEC REGULATION AND ITS APPLICATION TO THE MEMBER STATES OF THE EUROPEAN COMMUNITY (D. van Gerven & C. Aalders eds. 1990); F. WOOLDRIDGE, COMPANY LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY 103-17 (1991); de Bryucker, *EC Company Law — The European Company v. The European Economic Interest Grouping and the Harmonization of National Company Laws*, 21 GA. J. INT'L COMP. L. 191 (1991).

³¹ The Commission is loosely similar to the U.S. Executive branch; it proposes laws which the EC Council of Ministers approves or rejects. Treaty, *supra* note 22, at arts. 155-63 (explaining Commission's role); *id.* at arts. 145-54 (explaining Council's role).

³² Proposal for a Council Regulation on the Statute for a European Company, COM(89)268

years, the Commission has repeatedly proposed a "European company statute," attempting to make the European company format available as an optional corporate form for businesses operating across member state lines.³³ The theory is that for a European-based multinational to incorporate once, at the EC level, would obviate the need for separate incorporations in each of the member states. (So far no "European company statute" has become EC law because Brussels has insisted on adding — as a "rider" burden to the benefit of EC-wide incorporation — a duty of worker consultation and participation. European business has, to date, successfully resisted.³⁴) A similar company law proposal pending in the early 1990s, one with a better chance of getting passed, would require large enterprises operating in more than one member state to create "works-councils" for employees, mandating a voice for labor in management.³⁵

*European Company Laws: A Comparative Approach*³⁶ is a compilation of ten essays by various authors on the jurisprudence of corporate control within Europe. The book focuses on the company laws within the various member states, somewhat to the exclusion of the emerging EC-level corporate laws.³⁷ Yet while *European Company Laws* concerns

final SYN 218 (Aug. 25, 1989); Amended Proposal for a Fifth Directive Founded on Article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs, O.J. EUR. COMM. (No. C 240) (Sept. 9, 1983); see Proposal for a Council Directive Complementing the Statute for a European Company with Regard to the Involvement of Employees in the European Company, COM(89)268 final SYN 219 (Aug. 25, 1989). For a collection of the adopted company law instruments through 1990, and for citations to the case law construing these instruments, see EUROPEAN INFORMATION SERVICES, COMPENDIUM OF EC COMPANY LAW 9-229, 371-75 (1990).

³³ See *supra* note 32.

³⁴ See Dowling, *supra* note 21, at 607-08.

³⁵ Amended Proposal for a Council Directive on the Establishment of a European Works Council in Community-Scale Undertakings or Groups of Undertakings for the Purposes of Informing and Consulting Employees, COM (91)345 final (Sept. 16, 1991).

³⁶ EUROPEAN COMPANY LAWS, *supra* note 18.

³⁷ EUROPEAN COMPANY LAWS, *supra* note 18, does address certain key EC law instruments, and it also addresses the laws of some non-EC European countries. Apparently the book's editors perceive a treatment of EC law *per se* as a separate topic worthy of a wholly separate work: EUROPEAN COMPANY LAWS co-editor Peter G. Xuereb is scheduled to author a book called THE HARMONIZATION OF COMPANY LAW IN THE EUROPEAN COMMUNITY, in 1993. (Xuereb's manuscript is due in September 1992. His forthcoming book will be published by the publisher of EUROPEAN COMPANY LAWS, Dartmouth Publishing Company Limited.) For discussions already in print on EC company law harmonization, see, e.g., C. & L. BELMONT, EUROPEAN COMPANY LAW (1989); E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAW (1971); REGULATING CORPORATE GROUPS IN EUROPE (D. Sugarman & G. Teubner eds. 1990); F. WOOLDRIDGE, *supra* note 30; Bradley, 1992: *The Case of Financial Services*, 12 N.W. J. INT'L L. & BUS. 124, 140 (1991); Conard, *The European Alternative to Uniformity in Corporation Laws*, 89 MICH. L. REV. 2150 (1991); Note, *Federalism and Company Law: A "Race to the Bottom" in the European Community*, 79 GEO. L. J. 1581 (1991). For black-letter summaries of the company laws internal to the member states, see, e.g.,

itself with member states' internal company laws, the book's goal is much loftier than merely compiling the European states' corporate statutes into some sort of practitioners' guide. Rather, *European Company Laws* attempts to divine jurisprudential truths about the regulation of power within the European company by examining the European company from different substantive law perspectives. Each of the book's nine substantive chapters takes a different approach toward the same destination: Divining the nature of control within the European enterprise.

As an investigation into the sources of power within the European company, *European Company Laws* works best when it steps back and takes a general perspective, examining the forest of issues instead of dwelling on individual trees. Some (but unfortunately by no means all) of the book's chapters take an approach broad enough to advance the book's goal of adding something to the study of control within the European corporation. A prime example is the first chapter, "The Nature of the Company," by French law professor Jean Paillusseau.³⁸

Paillusseau takes the broadest possible approach, investigating the most basic concept imaginable in the comparative company law area — the identity issue, or what a European company is. Paillusseau, like Descartes, begins by assuming nothing about his subject, simply looking around and describing what he perceives.³⁹ In doing so, Paillusseau isolates three competing theories of the European corporation. These theories focus on: One, whether the European corporation is essentially a creature of contract (the old "contract theory," by which a European state's legal system views its corporations as contracts among two or more founders); two, whether the European corporation is a creature of a legislative act (the "institution theory," by which a European state views its corporations as products of the statutes under which they are incorporated); and three, whether the European corporation is most properly understood as a complex social "enterprise" transcending corporate form. This third, quasi-sociological theory holds that today's publicly-traded multinational is a complex social entity whose legal structure is subordinate to other aspects of its legal identity — including its contrac-

BREBNER & CO., SETTING UP A COMPANY IN THE EUROPEAN COMMUNITY: A COUNTRY BY COUNTRY GUIDE (1989); S.N. FROMMEL & J.H. THOMPSON, COMPANY LAW IN EUROPE (1975).

³⁸ EUROPEAN COMPANY LAWS, *supra* note 18, at 19-40.

³⁹ Descartes began his *Meditations* (1642) by rejecting everything he knew, constructing a philosophy by compiling what he could perceive afresh. DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (2d ed. 1642), reprinted in DESCARTES, *DESCARTES PHILOSOPHICAL WRITINGS* 59-150, at 61-62 (1954). This author has, elsewhere, discussed Descartes in the legal context of a "hypothesis-forming" approach. Dowling, *General Propositions and Concrete Cases: The Search for a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353, 357 n.30 (1985).

tual obligations, its titles to property, the substantive regulations (such as environmental and labor laws) which control it, and its internal laws such as its bylaws and articles.

Paillusseau ends up elevating this final theory, the “enterprise theory,” over the other two. In this, Paillusseau is not alone; three other chapters in *European Company Laws* — the introduction and the two substantive chapters written by co-editor Peter G. Xuereb — likewise champion the “enterprise theory.”⁴⁰ Ultimately, in fact, this book’s greatest contribution to company law jurisprudence is the persuasiveness of its argument for the “enterprise theory.”

The “enterprise theory” recognizes that a multinational business’ form of corporate organization is only one aspect of its legal identity. Form of organization alone does not define the organization. When a multinational business is incorporated separately under various countries’ laws, its status under any one single country’s laws — even the laws of its home-office country — do not adequately define the business, legally. For example, Abbott Laboratories is a U.S.-based multinational drug manufacturer, incorporated as an Illinois corporation.⁴¹ But each of what Abbott considers the “international subsidiaries” of its “Abbott International Ltd.” subsidiary has an independent legal identity. One of these sub-subsidiaries, “Abbott Laboratories Argentina SA,” has been a free-standing Argentine corporation in the eyes of the Argentine government since 1937.⁴² While the stock of “Abbott Laboratories Argentina SA” is held by “Abbott International Ltd.,” “Abbott Laboratories Argentina SA” is no less an Argentine corporation than is, for example, the Argentine multinational conglomerate Bunge y Born. That an Illinois corporation ultimately owns “Abbott Laboratories Argentina SA” does not alter the Argentine subsidiary corporation’s rights and obligations under Argentine law.

Thus, to consider Abbott Laboratories’ legal identity merely as a function of Illinois law is to miss a big part of the picture, because it ignores all the rights and obligations of Abbott’s many subsidiaries outside the United States (Abbott Laboratories made 35% of its 1989 sales outside the United States⁴³). Further, Abbott is “licensed to do business” in states in which it has no incorporated subsidiary, and it might be a partner in separately-incorporated joint ventures in still other

⁴⁰ EUROPEAN COMPANY LAWS, *supra* note 18, at 1-17, 141-208.

⁴¹ ABBOTT LABORATORIES, 1989 Annual Report 32 (1990).

⁴² *See, e.g.*, AMERICAN CHAMBER OF COMMERCE IN ARGENTINA, AMERICAN BUSINESS IN ARGENTINA 1987/88 DIRECTORY 51 (1987).

⁴³ ABBOTT LABORATORIES, *supra* note 41, at 19.

states. Anyone trying to define "Abbott Laboratories" from a legal perspective would have to take into account all the laws controlling all these licensures and ventures.

A proponent of the "enterprise theory" would also argue that even the sum of all these jurisdictions' corporate laws alone does not define what "Abbott Laboratories" is legally. This is because non-corporate laws — including contract, labor, financial, and bankruptcy laws — also control Abbott's fundamental rights and obligations everywhere it operates. This says nothing of "laws" internal to Abbott itself, such as its articles, its bylaws, and even its employee handbooks.

The "enterprise theory" of the corporation insists that a publicly-traded multinational business like Abbott Laboratories is more than whatever the Illinois Secretary of State would ever say it is: Under the "enterprise theory," a multinational enterprise like Abbott Laboratories is a product of all the laws, bylaws, contracts, and relationships which control it. Returning to the example of DWG Corporation, the "enterprise theory" might offer some new strategies to the minority stockholders battling Victor Posner. Realizing that the corporate laws and bylaws under which Posner invokes his power are stacked in Posner's favor, perhaps these minority stockholders could, rather than complain helplessly at stockholders' meetings, seek out doctrines from other areas of the law — such as securities regulations, racketeering, or even criminal law — which might impose viable restrictions on their nemesis.

The "enterprise theory" as a concept is probably even more practical for corporations based in Europe than it is for those like Abbott which are based in the United States, simply because of the existence of the EC and its emerging single market. While the United States in theory contains more than fifty jurisdictions each with the power to create corporations, in practice the U.S. states' jurisdictions peaceably interrelate, via the concepts of "state of incorporation," "principal place of business," and "licensure to do business." A business incorporated in one U.S. state never has to incorporate in any other state in order to do extensive business nationwide; thus, U.S. law does not give rise to the company law quagmires present in Europe.⁴⁴

Historically the EC member states were fiercely independent countries. Lacking the corporate comity which exists among U.S. states, the EC member states' legal systems have viewed entities incorporated else-

⁴⁴ On the diverse legal problems besetting European multinationals, see Z.J. CHUBBIN & P. GEROSKI, *EUROPEAN CONGLOMERATE FIRMS: A REPORT* (1990) (Commission of the European Communities); *MULTINATIONALS AND THE EUROPEAN COMMUNITY* (J. Dunning & P. Robson eds. 1988).

where in Europe as wholly foreign. To this day, the status of a Portuguese company operating in Spain is much more akin to the status of a Brazilian company operating in Chile than it is to the status of a Rhode Island company operating in Texas. Of course, a central goal of the EC single market is to change this, to give the Portuguese company access to Spain like that which the Rhode Island company enjoys in Texas.

While all European corporations are still incorporated under a single member state's laws (no "European company statute" yet exists⁴⁵), European businesses are increasingly finding themselves subject to legal forces from outside their home states of incorporation — be they EC instruments or laws of foreign jurisdictions. For example, a German corporation which is a partner in a Greek joint venture and a Danish corporation which is a member of an EEIG with a British partnership each has a legal identity larger than its mere corporate status within its home state of incorporation. As EC law extends its tentacles deeper and deeper into the member states, and as European enterprises come to do more and more business across member state lines, the "enterprise theory" will eventually become the only viable way to determine the legal rights and obligations, and the only way to isolate the legal identity, of corporations within Europe.

Because the "enterprise theory" is becoming the only accurate way to conceive of the pan-European multinational, *European Company Laws*' advancement of this theory makes the book an important contribution to European company law jurisprudence. Yet while the book's chief strength is its explication of the "enterprise theory," the book's chief weakness is the inconsistent, sporadic way in which the work advances this theory. To give the book more focus, and to improve its usefulness, the editors should have required all the contributors to examine their topics through the lens of a believer in the "enterprise theory." As it is, most of the book's authors seem never even to have heard of the "enterprise theory,"⁴⁶ and two of the book's chapters which promise to apply the theory in specific substantive law contexts fail to do so.⁴⁷

These are the two chapters by the book's co-editor, University of London law professor Peter Xuereb.⁴⁸ Judging from the book's effective

⁴⁵ See *supra* note 32 and accompanying text.

⁴⁶ The "enterprise theory" is only discussed in four chapters. See *supra* note 40 and accompanying text.

⁴⁷ Chapter 7 ("Shareholder Rights, the Interests of the Enterprise and 'Reasonable Necessity' — A Comparative Review of French, Italian, and English Law"); and Chapter 8 ("An 'Enterprise Theory' of Company Law and Judicial Control over the Exercise of General Meeting Power — A Comparative Review"), in *EUROPEAN COMPANY LAWS*, *supra* note 18, at 141-208.

⁴⁸ See *supra* note 47.

introductory chapter (which Xuereb co-wrote) and from the titles of these two chapters,⁴⁹ Xuereb is on record as a true believer in the “enterprise theory.” Yet Xuereb never fully articulates the “enterprise theory,” and he certainly never applies it successfully. The book’s revelatory explication of the theory is in the Paillusseau chapter.⁵⁰

While the book fails to exploit editor Xuereb’s own implicit promise to develop the “enterprise theory” fully, some of the chapters which do not even mention the theory do end up making important contributions to other aspects of the jurisprudence of the European company. Generally, these chapters are those which, like the Paillusseau chapter, take a broad approach. One such chapter — the most fascinating in the book — is Italian law professor Francesco Galgano’s exegesis on the war for power waged within the European company.⁵¹ Galgano describes all the armies which fight the battles for control of a corporation: He examines the potentially simultaneous struggles for control between shareholders and directors, between shareholders and management, and between majority owners and parent minority owners exercising power through the so-called “telescopic effect.”⁵² Most interestingly of all, Galgano also explores the fights for corporate power among shareholders, directors, and employees within the unique European institution of worker consultation and participation, or “co-determination.”⁵³

Another chapter which hits the mark by taking a sufficiently broad approach, and which likewise makes a real contribution to the jurisprudence of the European company, is co-editor Robert Drury’s final chapter exploring the “Nullity of Companies.”⁵⁴ The topic of corporate “nullity” may seem to be an arcane, little-used backwater of black-letter company law. But Drury proves otherwise, milking the “nullity” concept for its fullest jurisprudential possibilities by taking an almost Dadaistic approach to define what the European company is by exploring what it is not — what renders it null. Drury opens by explaining the EC’s first-ever directive in the company law area, the 1968 “First Direc-

⁴⁹ *Id.*

⁵⁰ See *supra* note 38 and accompanying text.

⁵¹ EUROPEAN COMPANY LAWS, *supra* note 18, at 85-101 (“The Allocation of Power and the Public Company in Europe”).

⁵² *Id.* Galgano describes the “telescopic effect” by example:

If Company A holds 100 per cent of the capital of Company B, which in turn holds 51 per cent of that in Company C, which in turn holds 51 per cent of that in Company D, then Company A will be in a position to dominate, through Companies B and C, the general meeting of Company D even though in terms of equity its participation in Company D amounts only to 26.01 per cent.

Id. at 92.

⁵³ *Id.* at 92-97.

⁵⁴ *Id.* at 247-78.

tive” on nullity of companies.⁵⁵ This instrument attempts to harmonize EC member states’ laws on nullity only very loosely, giving member states a list of possible corporate illegalities from which they can choose to decide which specific wrongs each state will not tolerate, rendering its offenders null.⁵⁶

Drury eloquently⁵⁷ demonstrates that vast differences still exist among the EC member states’ philosophies toward the corporation. Notwithstanding the 1968 directive, the grounds which are sufficiently objectionable to nullify a corporation still differ widely among the member states. For example, Britain recognizes only two wrongs which will render a company null, and one of these is so obscure as to be useless. A British company can be held null only if it was formed for an illegal purpose or if it is a trade union.⁵⁸ Not surprisingly, British law rarely invokes the nullity concept; “only one” British case in the recent past has involved nullity.⁵⁹ But other EC states differ radically. Italy, for example, is a nullity police state. The Italians recognize eight grounds for declaring nullity (each recognized in the 1968 directive), including such technical reasons as failure to have articles of association publicly “stipulated” and failure to include in the articles the corporation’s name, object, or amount of capital subscribed.⁶⁰

As Drury demonstrates, the extreme differences among the legal violations which various member states consider sufficiently egregious to merit nullifying a company say quite a bit about what the European states consider most important about their corporation laws. Even more basically, the fact of these differences points out that real, fundamental differences still exist not only among the substantive corporate laws in the EC member states, but also among the value systems which underlie the states’ individual corporate laws.

The Drury chapter — like the Galgano chapter on power, the Pail-lusseau chapter on the “enterprise theory,” and the book’s introduction — succeeds because it dares to view the jurisprudential “big picture.” Apart from these four contributions, however, only one other chapter in the book steps back to take the broad approach: Spanish law professor Angel Rojo’s contribution on “The Typology of Companies.”⁶¹ However, where the broad approach benefitted the other four chapters by al-

⁵⁵ Directive No. 68/151/EEC (Mar. 9, 1968).

⁵⁶ EUROPEAN COMPANY LAWS, *supra* note 18, at 250-53.

⁵⁷ Drury’s chapter is the most well written section of the book.

⁵⁸ *Id.* at 271.

⁵⁹ *Id.* at 274. German and Dutch law also take a narrow view of nullity.

⁶⁰ *Id.* at 266, 268. French and Greek law also take a broad view of nullity.

⁶¹ *Id.* at 41-59.

lowing them to draw basic jurisprudential conclusions which would not have been apparent had their scope been too narrow, the broad approach has a contrary effect on Rojo's piece. This broad approach allows him to obfuscate what otherwise would have been salient insights.

Rojo's "The Typology of Companies" is turgidly written and his ideas fail to penetrate the opaque fog of prose like: "[A] duality of models is the consequence of a predetermined legislative typological option."⁶² And the longer Rojo's sentences get, the less they say. For example:

Due to a certain lack of sufficient analysis, there has been a tendency to treat as equivalent the various legal regimes for the SA or, which is even more dangerous, there has been an endeavour to extend completely or partially the legislative regime of the *Aktiengesellschaft*⁶³ (which is considered to be technically superior) to the other legal regimes which allow the SA form to be functionally poly-valent, thereby restricting this poly-valency without addressing on precise criteria the underlying typological questions.⁶⁴

Besides the Rojo chapter and the other four "broad approach" pieces, each of the rest of the contributions in *European Company Laws*, unfortunately, takes too narrow a focus to meaningfully advance the book's search for the legal balance of power within the European corporation. These other chapters all take a strict "black-letter" approach, ultimately degenerating into mini-treatises simply listing how selected European states have historically legislated on various substantive problems of company law. Moreover, these topics are too arbitrary, and their treatments too selective, for these black-letter chapters to serve as useful practitioners' guides.

For example, German law professor Eddy Wymeersch's contribution⁶⁵ examines how member states' regulation of securities markets affects European company law. Yet Wymeersch takes the easy way out, merely listing the most basic securities laws within the member states, offering no real analysis to explain the jurisprudential significance of the differences among these laws. Another cop-out is British law professor Frank Wooldridge's chapter on, simply, "Aspects of the Regulation of Groups of Companies in European Laws."⁶⁶ Wooldridge does no more

⁶² *Id.* at 42.

⁶³ Although Rojo never says so, for the benefit of the European company law novice, *Aktiengesellschaft* (or AG) is the German public company, as contrasted with Germany's private company, the much more common *Gesellschaft mit beschränkter Haftung* (or GmbH).

⁶⁴ EUROPEAN COMPANY LAWS, *supra* note 18, at 46.

⁶⁵ *Id.* at 61-83 ("The Effects of the Regulation of Securities Markets on Company Law Within the EEC").

⁶⁶ *Id.* at 103-39.

than what his title implies: He lists selected European laws regulating groups of companies. Similar is the piece by British professor Robert R. Pennington, on how finance regulation affects European company law.⁶⁷ Pennington's chapter, although harmless, really would be useful only as an overview for someone wanting to know a little bit about corporate finance in England, France, and Germany. Like the Wymeersch and Wooldridge chapters, it adds nothing to the subject of European company law jurisprudence. Most disappointing of all are the two contributions by co-editor Xuereb, which — contrary to their titles' promises to explicate the "enterprise theory" in context⁶⁸ — turn out to be nothing more than black-letter law summaries à la Wymeersch, Wooldridge, and Pennington.⁶⁹

The goal of *European Company Laws* is not to provide the international law practitioner with a black-letter guide to company laws in the various European states. The book sets out to dig deeper, attempting to mine the jurisprudential bases of European company law for insights into how different European states use different jurisprudential approaches to regulate power within the corporation, and for insights into what these differences might mean to the transnational European enterprise. The book's editors propose that by studying these differences, any one European state might find fresh ideas for improving its internal company laws to better regulate excesses of corporate power.⁷⁰ To the book's editors, sound legal development lies in cross-breeding among different legal gene pools. When the book succeeds in its goal — as it does in its introductory chapter and in its contributions by Paillusseau, Galgano, and Drury — *European Company Laws* adds substantially to the jurisprudence of the corporate form in the international context, offering concrete teachings to states wrestling with how best to regulate corporate control. These four chapters successfully contrast alternate legal solutions to similar problems of corporate power, including the viability of the increasingly important "enterprise theory." Unfortunately, when the book fails in its stated goal — as it does in its six other chapters — the work adds little to the jurisprudence of the European company, and it makes far

⁶⁷ *Id.* at 209-46 ("The Financing of Current Transactions by Companies under English, French, and German Law").

⁶⁸ *See supra* note 47.

⁶⁹ In fact, in his two chapters Xuereb gets so far away from his promised "enterprise theory" approach that he actually perverts the very concept of the "enterprise" itself: At one point, Xuereb uses the word "enterprise" in a way directly inconsistent with the "enterprise theory" concept. However, Xuereb acknowledges this inconsistency in a footnote. EUROPEAN COMPANY LAWS, *supra* note 18, at 190, 205 n.125 ("[t]he word 'enterprise' is used in the sense of the company as a going concern").

⁷⁰ *Id.* at ix-x, 1-4.

more tedious reading.⁷¹

The lessons which *European Company Laws*'s four successful chapters teach apply broadly, well beyond western Europe. In the United States, courts continue to process corporate control disputes, including the Victor Posner debacle⁷² and other conflicts arising out of what social critics call the "corporate greed" of the "go-go 1980s."⁷³ According to these critics, U.S. jurisdictions apparently have much to learn about how to regulate corporate control. The way the United States has regulated in this area up to now has not resolved what these critics insist is the problem. In re-assessing its laws regulating the control of corporations, perhaps the United States could learn something from Europe, which managed to weather the 1980s with fewer socially unpopular cases of corporate abuse. After all, both culturally and jurisprudentially, the United States is not too different from Europe. Perhaps some of the principles which more successfully regulate corporate control in Europe could work as well in the United States.

And turning from the west to the east, the nascent market economies of eastern Europe appear to have even more fundamental lessons to learn from how western Europe regulates corporate power.⁷⁴ As the eastern European countries, especially those with an eye on future EC membership, struggle to create workable private ownership of state-owned means of production, eastern Europe cannot ignore the experiences of the west. While the western world has uniformly heralded capitalism's arrival in eastern Europe as a positive benefit for everyone, the advent of free markets in the east, to many, also means the introduction of a social evil, the "greed" manifested in abuses of corporate power. As Eastern Europe designs workable and politically-acceptable systems by which private enterprises can efficiently produce goods and services and employ people, the eastern European legal systems are necessarily going to have to regulate power within private enterprises. In doing so, these

⁷¹ With the exception of the Rojo chapter, these other chapters are essentially overviews of the black-letter European law on their various topics. To summarize black-letter European company law, however, is not one of this book's stated goals. And, of course, straight black-letter law summaries tend to make tough reading. These chapters are no exception.

⁷² See *supra* notes 1-8 and accompanying text.

⁷³ See *supra* notes 9-12 and accompanying text.

⁷⁴ Eastern Europeans themselves, having taken the teachings of Karl Marx so seriously for so many years, must fear the prospect of "corporate greed" entering their societies along with free markets. While Marx never used so faddish a term as "corporate greed," he did decry private ownership of capital in part because "[t]he concept of capital contains the capitalist." K. MARX, *THE GRUNDRISSE* § E (final sentence) (1858), reprinted in K. MARX & F. ENGELS, *THE MARX-ENGELS READER* 221, 276 (R.C. Tucker 2d ed. 1978).

countries will have to confront directly all the corporate control issues central to *European Company Laws*.

