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The Next Generation: Milhaupt and West on Japanese Economic Law

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REVIEW ESSAY

THE NEXT GENERATION: MILHAUPT AND WEST ON JAPANESE ECONOMIC LAW

CURTIS MILHAUPT & MARK WEST, ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES. Oxford University Press, 2004, 262 pages.

*Reviewed by Kent Anderson**

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I. INTRODUCTION

We are hesitant to point out generational shifts.[1] Most troubling, it forces us to acknowledge our own aging and perhaps unfulfilled ambitions. Moreover, the line between one generation and the next is always murky, and making the demarcation risks upsetting individuals by placing them on one side of the divide or the other (or, even worse, on neither side). The exercise, however, can be useful—for example, the issues of the "Baby Boomers" are fundamentally different from those of "Generation X," and it is beneficial to treat them separately.[2] Against my better judgment, therefore, I begin this Review Essay with an assertion about generational change. Curtis Milhaupt and Mark West's book, *Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules*, marks a new era in the field of

* The Australian National University. I appreciate Luke Nottage and Trevor Ryan's comments and suggestions, though of course I remain responsible for all errors and opinions.

1. Much more hubristic than my declaration of a so-called "changing of the guards" in a narrow academic discipline was Tom Brokaw's declaration that those people, mostly men, who fought in World War II for the United States comprised the greatest generation ever. *See* TOM BROKAW: THE GREATEST GENERATION (Random House 1998).

2. Among others, demographers, social scientists, and marketers find it useful to identify generational eras. *See generally* WILLIAM STRAUSS & NEIL HOWE, GENERATIONS: THE HISTORY OF AMERICA'S FUTURE (1991) (interpreting U.S. history by identifying generations and their characteristics).

comparative Japanese law and cements the two authors as the doyens of this "Next Generation."[3]

Despite a few claims to the contrary,[4] the book does not hold itself out to be generational or paradigm shifting. It is generally a straightforward account of economic legal ordering in Japan, achieved though a series of well-researched, insightfully considered, and eloquently described case studies. The subject matter is not new; rather, as the authors confess, it has been well covered by a number of other scholars from economics, business, sociology, area studies, and law.[5] This study is unique, nonetheless, in its application of a methodology of combined institutional and empirical approaches to this subject matter. While this is the new knife with which Milhaupt and West cut the old cake, it is the skill of the practitioners that makes the exercise most worth consuming. This in itself does not suggest the shift that I propose the book and its authors represent; the change only becomes evident when contrasting the study with scholarship of the immediately prior era.

This Review Essay proceeds as follows. In Part II, I discuss the methodology of the book, which, while being the strong point of the endeavor, also gives rise to a few perfunctory criticisms. Part III reviews the book's content or message, including its overarching themes, its numerous discrete theoretical points, and its understated descriptive value. In Part IV, I return to my perhaps hasty declaration that this work marks a generational baton-pass and suggest the importance of the shift. I conclude, without the typical caveats paragraph, in a resounding recommendation of this new book and what it represents.

II. THE METHODOLOGY

The authors assert that it is the methodology itself that distinguishes their book from others.[6] By this they mean they are the first to apply their theoretical framework and empiricism to the subject matter. I agree with

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3. I like to include at least one reference to a film or television series—thus, this reference to the "Next Generation" from the Star Trek television and film series. *See Star Trek: The Next Generation* (CBS television broadcast, 1987–1994).

4. Thankfully, and uncommonly in current U.S. legal literature, claims of "our approach . . . [being] novel in studies of Japan" are limited to a few asides presumably necessary to satisfy skeptical publishers. CURTIS J. MILHAUPT & MARK D. WEST, ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES 2 (2004).

5. *See, e.g.*, TAKEO HOSHI & ANIL K. KASHYAP, CORPORATE FINANCING AND GOVERNANCE IN JAPAN: THE ROAD TO THE FUTURE (2001); DAVID FLATH, THE JAPANESE ECONOMY (2000); FINANCE, GOVERNANCE, AND COMPETITIVENESS IN JAPAN (MASAHIKO AOKI & GARY R. SAXONHOUSE EDS., 2000).

6. *See* MILHAUPT & WEST, *supra* note 4, at 1–3.

the authors in their claims about the originality of the approach and the success with which it produces important results. This book gives more insight into the actual economic institutions and corporate governance in Japan than any other I have read. Indeed, I understand some of the chapters have been translated into Japanese and read by Japanese individuals curious to know how their economic institutions operate.[7] Without detracting from the significant accomplishments of this book, however, I would like to probe into the precise nature of the book's methodology and its application, as I find the answer less obvious than the book's introductory and concluding chapters contend.

The first part of the confusion regards the precise theoretical framework on which the book operates. The introduction clearly establishes Douglass North's "new economic institutional analysis" as applied to Japan by Masahiko Aoki as the book's starting point.[8] Given Aoki's work, the distinguishing factor for this study seems to be its focus on *legal* institutions.[9] Furthermore, Milhaupt and West employ an important second theoretical thread within their framework: a serious treatment of informal norms such as business and social customs. As best argued by Milhaupt in an essay not included in this volume, developing a full and accurate image of economic institutions in Japan—as well as anywhere else—requires consideration of both formal legal rules and informal norms.[10] This seems a fairly obvious conclusion, but the authors' full embracement of this approach is part of what distinguishes them as the leaders of the next generation of scholars. The difficulty of this theoretical framework is not necessarily in the ideas, but in the fact that its dual strands are applied implicitly rather than explicitly for much of the book, particularly in the earlier chapters. To strengthen the overarching themes of the book, I would have appreciated more identification and explanation of the specific institutions, subinstitutions, rules, and norms in play—and how they interacted—within each chapter.

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7. *See* Hiroo Sono, *The Multiple Worlds of "Nihon-hō,"* *in* THE MULTIPLE WORLDS OF JAPANESE LAW: DISJUNCTIONS AND CONJUNCTIONS (Thomas Ginsburg et al. eds., 2001), *reprinted in* 12 J. JAPANESE L./ZJAPANR 50, 54 (2001) (noting the wide use in Japanese translation of Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767 (1999), *translated as Naze Sōkaiya wa nakunaranainoka? Yusuri to kabunushi Sōkai no hō to keizaigaku* [Why Don't Sokaiya Go Away? The Law and Economics of Blackmail and Shareholders' Meetings], 1145 JURISUTO 60; 1146 JURISUTO 114; 1147 JURISUTO 97 (1998) (Kenichi Osugi trans.)).

8. *See* MILHAUPT & WEST, *supra* note 4, at 2–3 (referencing DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981) and DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990)).

9. *Id.* at 3.

10. *See* Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083 (2001).

The second distinguishing element of the authors' approach is their empiricism. Without a doubt, the empirical evidence brought to this work makes it stand out. The empiricism too has two strands. The first is economic modeling and the second is sociological fieldwork techniques. To do their economic modeling, the authors' *modus operandi* is data mining the voluminous amount of statistics compiled almost savant-like by various Japanese organizations.[11] This is impressive stuff. My mouth repeatedly dropped open when I read about the discovery of collected datasets and the ability to push these numbers through interesting and relevant models to produce useful conclusions.[12] But, as we all know, numbers alone cannot paint a full picture of something as diverse, subtle, and beautiful as a society. Therefore, Milhaupt and West again impress immensely by conducting the interviews, observations, and collection that provide a nuanced qualitative view. Just some of the people consulted appear to be: ambulance-chasing lawyers, business failures, organized crime bosses, cops, high-flying corporate types, IT entrepreneurs, and so on. Occasionally, I wanted as much detail on the field study parameters as was given for the economic modeling, but this really is just a niggle. Combining these hard and soft approaches creates an extremely satisfying sense of the actual environment surrounding the various legal economic institutions covered.

Given how robustly the authors explain their subject, it would be greedy to ask for more methodologically. Nevertheless, let me suggest two additional elements that would have enhanced even further the picture they paint. The first is a closer and more detailed account of the historical development that resulted in the institutions considered. This was done on occasion—for example, with the narrative in chapter 4 on the *jusen* failures. Often, however, I thought further development of the background of certain institutions might better explain many of the identified problems, particularly given the references to path dependence theory.[13] To provide but one example, Frank Bennett has conducted a "forensic analysis" to show how there are historical reasons explaining

11. Best evidencing this national characteristic and its application is West's use of volumes of data collected on eighteenth and nineteenth century rice prices. *See* Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 MICH. L. REV. 2574 (2000). Others have noted, however, that the quality of much of the compiled Japanese sets is not as good as would normally be expected for stringent empirical testing. *See* Mary Brinton, *Fact-Rich, Data_Poor: Japan and Sociologists' Heaven and Hell*, *in* DOING FIELD WORK IN JAPAN 195 (Theodore C. Bestor et al. eds., 2003).

12. West saved some of his most interesting applications of random datasets for a subsequent book. *See* MARK D. WEST, LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES (2005).

13. *See, e.g.*, MILHAUPT & WEST, *supra* note 4, at 47 (referring W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (1994)).

why organized crime rings operate successfully as grey market service providers in Japan that seem to disprove Milhaupt and West's explanation.[14]

The second "missing element" is legal analysis. I feel a bit vulnerable in making this declaration, both in a the-king-has-no-clothes-sense and because I will mark myself as quaintly antiquated and missing the point.[15] Milhaupt and West claim to be "unabashed" lawyers,[16] yet they almost exclusively apply economic and sociological techniques to their endeavor. I suspect they would respond that good, modern legal research has moved beyond an exploration of the nature of the law to a full examination of how the law operates. The problem is that Milhaupt and West often fail to provide a deep explanation of the law.[17] Therefore, we cannot judge the strength of their arguments with regard to the operation of the law. Instead, more often than not, the authors provide only a brief description of the law, based on secondary sources or without reference, from which conclusions are drawn.

I do not have the necessary expertise in any of the specific institutions of Japanese corporate governance that Milhaupt and West explore to show this simply. I do, however, have experience in Japanese insolvency law, which plays a subsidiary role in a number of chapters,[18] and from my knowledge in that area, my concern is that, while not incorrectly stating the law per se, Milhaupt and West articulate it in a stylistic way that serves their intended conclusions at the expense of accuracy. With that seed of suspicion raised in my head, the authors' failure to

14. *See* Frank G. Bennett, Jr., *A Forensic Analysis of "The Dark Side of Private Ordering"* (2002) (unpublished manuscript on file with author).

15. I have developed elsewhere my argument in favor of respect for traditional legal scholarship. *See* Kent Anderson, *Kent's World: A Personal Approach to the Various Worlds of Japanese Law*, *in* Ginsburg, et al., *supra* note 7; Kent Anderson, *The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy*, 42 OSGOODE HALL L.J. 661 (2004).

16. MILHAUPT & WEST, *supra* note 4, at 3.

17. There are some exceptions in the book, such as chapter 5 on *sokaiya*.

18. *See, e.g.*, Kent Anderson, *Japanese Insolvency Law after a Decade of Reform*, 42 CANADIAN BUS. L. J. (forthcoming 2006); Kent Anderson, *Testing the Model Soft Law Approach to International Harmonisation: A Case-Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 23 AUSTRALIAN Y.B. INT'L L. 1 (2004) (examining Japanese insolvency law, among others); Kent Anderson & Stacey Steele, *Insolvency*, *in* JAPAN BUSINESS LAW GUIDE (Veronica Taylor ed., 2003); Kent Anderson & Makoto Ito, *Insolvency Law for a New Century: Japan's New Framework for Economic Failures*, *in* LAW IN JAPAN: INTO THE 21ST CENTURY (Dan Foote ed., 2003); Kent Anderson, *Small Business Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests*, 75 AM. BANKR. L.J. 355 (2001); Kent Anderson, *Cross-Border Insolvency: A Proposal Considering the Experiences of Various Common Law Nations*, 51 HOKKAIDO L. REV. 1633, 1870 (2001) (in Japanese); Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679 (2000).

provide support for numerous assertions and their citations to general laws, without reference to specific articles or sections, is troubling. This is not merely the pedant in me.[19] Surely we all know from experience that requiring confirmation with original sources is a distinct feature of legal research and one which "keeps us honest."[20] Put differently, if someone bought this book to learn the rules, both formal and informal, of corporate governance in Japan, they will be disappointed. On the other hand, someone in pursuit of a political-economy understanding of how the legal institutions that impact economic endeavors operate in Japan will be ecstatic—in that regard this book is the best available. I suspect the moral, in clichéd terms, is "to each his own and buyer beware."

Shifting gears from the theoretical and empirical aspects of the book to its more basic elements, a few items are noteworthy. Most obviously, this book is not a joint, single collaboration that began with a grand plan or central message. It is, in essence, a compilation of the writers' law review articles over the past decade.[21] Noting this in itself is not a criticism. Indeed, I appreciate having these authors' corpus of work brought together in one convenient location that does not require fiddling with database search engines. More importantly, for new entrants to the field, especially students, the ability to have the work assembled thematically and the overarching threads developed more explicitly than through the various articles makes the book format very valuable.

This greatest-hits approach, however, does occasionally result in a temporal lag issue, an inconsistent style, and a diffused or occasionally hidden central theme. While the temporal lag issue is the most obvious, it is also the dilemma the authors most successfully overcome. While they conducted much of their original research in the mid-1990s, tremendous changes in Japanese economic regulation occurred in the late 1990s and early 2000s.[22] Indeed, this becomes one of the book's main points in the final two chapters. It is obvious the authors have updated their materials and data, thus creating the need for reinterpretation. The negative side of this process, however, is that occasionally one wonders why Milhaupt and West present so much information and then issue cas-

19. It is nice to see pedants getting some much needed respect recently. *See, e.g.*, LYNNE TRUSS, EATS, SHOOTS & LEAVES (2003).

20. Of course, this is true of all academic disciplines, but what I refer to here—positively—is the almost excessive amount of citation characteristic of much legal scholarship.

21. *See* MILHAUPT & WEST, *supra* note 4, at ix–x (listing the eight original articles from which the seven case studies in the book originate).

22. A number of authors have or are in the process of addressing this. *See, e.g.*, JEFF KINGSTON, JAPAN'S QUIET TRANSFORMATION: SOCIAL CHANGE AND CIVIL SOCIETY IN 21ST CENTURY JAPAN (2004).

ual caveats such as "that was until 2003 when it all changed." Stated differently, if this book is partially about the change over the past periods, then the emphasis seems to be on the wrong side—focusing on what the system *was* rather than what it has become or even how it has transformed.

The differing styles of the authors have been handled impressively. The writers' voice throughout the pbook is consistent. It is obvious that both Milhaupt and West have spent a fair amount of time rereading, editing, and revising each other's work. This is particularly impressive considering that the authors not only wrote large parts individually but even co-wrote a chapter with an unrelated collaborator.[23] That being said, even without a look at the citations in the introduction,[24] it is obvious from the framing of the chapters which ones are largely the responsibility of the economics-leaning West, which are by the theory-leaning Milhaupt, and which were originally joint projects. Both individual styles have their weaknesses. West's focus on economic models sometimes leaves the rest of us bored with the modeling caveats and seemingly after-the-fact explanations for statistically significant derivations of regressional analysis.[25] On the other hand, Milhaupt's theoretical framing often causes my mind to wander rather than perform the necessary mental gymnastics and occasionally leaves me longing for Occam's famous shaving implement.[26] The best chapters, which include the introduction and conclusion, are those on which the two have worked together.[27] By reigning in each other's excessive tendencies and presenting a fuller picture of the issue, Milhaupt and West in these chapters produce truly enlightening scholarship.

The most difficult and troubling aspect that arises from the authors' serial and individualistic way of assembling the book is that the claimed central messages of the greater endeavor are not always obvious, clear, or, indeed, present. In their conclusion, Milhaupt and West tell us their central themes are: (1) both formal law and informal norms structure Japan's economy; (2) Japanese economic institutions are changing; and (3) actors are responding to the changes.[28] Each of these items is not readily apparent throughout the book, and the authors certainly do not clearly include this straightforward explanation of the theme in any of

23. Chapter 4 is based on work with Geoffrey Miller. *See* 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 (1997).

24. *See* MILHAUPT & WEST, *supra* note 4, at ix–x (listing the law review articles from which the case studies originate).

25. For example, chapters 2 and 5.

26. For example, chapters 3 and 4.

27. Namely, chapters 6–8.

28. MILHAUPT & WEST, *supra* note 4, at 241.

the preceding substantive chapters. Perhaps it is like a Pynchon novel and these are truths the reader can only divine after the fact. For myself, I appreciate the upfront nature of much modern legal scholarship that beats one over the head with its message. The authors themselves are skilled practitioners of this approach, as each of the chapters seems to address explicitly and directly a separate sub-theme. For example, the chapter on organized crime is concerned with organized crime/developing economy theory; the chapter on derivative suits is interested in corporate agency and procedure issues; the *jusen* chapter is engaged with bank regulation theory and political economy; and the venture capital chapter is involved with fostering innovation questions. Indeed, I suspect it is the individual law review development of these ideas that results in the multiple discrete sub-themes of each chapter and unwittingly circumvents the development of the larger ideas. There is likely no easy way to avoid this problem aside from setting out to write an entirely new book from scratch. Therefore, for those interested in a broad-picture overview of the present changes in Japanese economic institutions and actors' responses to those developments, I suggest concentrating only on the last 35 pages, where the authors expressly develop their central theme.

III. THE MESSAGE

As noted at the outset, the book is in essence seven case studies on various broadly defined economic institutions. The introductory chapter lays down the theoretical and empirical framework discussed in Part II. The brief three page conclusion chapter makes explicit the three unifying themes buried within the substantive chapters.

Despite the book's broad title, the seven case studies do not cover what one might typically expect from a book on Japanese corporate governance or even economic organizations. Instead, they are idiosyncratic, even quirky, which has been a successful, and entertaining, method for making mainstream points about Japanese law in the past.[29] Thus, chapters 2 to 8 investigate: derivative suits, venture capital, failed home mortgage lenders (*jusen*), professional disrupters of annual corporate general meetings (*sokaiya*), organized crime working in quasi-legal areas, mergers and acquisitions, and law students' career choices. It is worth rereading through that list of topics to appreciate fully the alley-

29. *See, e.g.*, WEST, *supra* note 12; J. MARK RAMSEYER, ODD MARKETS IN JAPANESE HISTORY: LAW AND ECONOMIC GROWTH (1996); Veronica Taylor, *Spectres of Comparison: Japanese Law and Research*, *in* Ginsburg, et al., *supra* note 7, at 15–16 ("I realized that I was looking down the alley ways of Japanese law and its enforcement rather than its tree-lined boulevards.").

ways this vehicle travels before arriving at its universal conclusions. Notably, the book does not focus on such prosaic corporate governance topics as corporate structures, directors' duties, shareholders' rights, disclosure rules, and so forth, though it sometimes mentions them. Also, the authors—thankfully—do not arrange the book around so-called uniquely Japanese corporate governance institutions such as *keiretsu* cross-shareholding, lifetime employment, the main bank system, and government guidance, though they address these subjects at various points.[30]

The order of the chapters is also not self-evident or explained. Some groupings are logical, such as placing the chapter on *sokaiya* and organized crime together or concluding with the most recent data on changes in employment choices in light of reformed economic institutions. Otherwise, the order seems to follow the publication date of the original law reviews. Given this fact, I will first address what I see as the most classical corporate governance chapters, *viz.* derivative suits and M&As; then the chapters on venture capital and *jusen*; next the two chapters on organized crime as economic institutions; and finally, the concluding chapter on actors reacting to the changes.

Finally, one of my own caveats: Milhaupt and West are extremely talented and well-trained lawyers, and as such, they couch their assertions and arguments with qualifiers and express declarations of assumptions. Readers will be impressed with their honesty, meticulousness, and prudence. Unfortunately, my summary of their arguments below, for space reasons, oversimplifies their points and insufficiently covers their qualifications. Hopefully, this will only motivate readers to purchase the book to appreciate the unfiltered message.

The book's substantive sections begin strongly with an examination of the shareholder derivative suit in Japan. This is an excellent tool with which to begin because the derivative suit is a classic element of modern corporate governance, allowing for an introduction of some of the standard vocabulary of Japanese economic institutions. Moreover, it is a powerful case study because a major change in Japan's rules on derivative suits in the mid-1990s allows for clean empirical testing and theorizing.

A large portion of the chapter introduces the business "treasures" that traditionally have explained corporate governance in Japan: *viz.*, the main bank system, *keiretsu* cross-shareholding, lifetime employment, the so-called "iron triangle" relations between government and business, and large captured boards of directors.[31] The authors do not fully explain why

30. These items are covered most significantly in chapter 2. *See* MILHAUPT & WEST, *supra* note 4, at 13–18.

31. *See id.*

they spend so much time on these shibboleths.[32] Despite the authors' comments on the importance of informal business norms, none of their broad or narrow arguments rely on these cultural claims. Moreover, their large theme—that corporate governance is changing and actors are responding to the altered legal incentives and constraints in rational ways—disproves any current explanatory value of the earlier generation concepts. Therefore, I surmise that the authors introduce the "treasures" to ensure a shared vocabulary with the reader and distinguish themselves from those who explicitly rely on or reject these concepts. This middle ground approach is consistent throughout the book and is one of its strong points, as discussed below.

The specific issues that the derivative suit chapter seeks to address are, first, the reason behind Japan's rejection of the derivative suit until 1993, and, second, the impetus for its acceptance of the mechanism since then. The first answer is, in essence, that derivative suits cost too much and the necessary information was too difficult to obtain.[33] The second answer is, in essence, that the lowering of filing fees made it economically feasible for some lawyers to pursue derivative suits.[34] Explaining why derivative suits work or do not work in Japan is in itself sufficiently important, but the real value of the message in this case study is in its simplicity: Japanese actors—like other corporate actors—respond rationally to a changed legal environment. In other words, while all of those noted cultural explanations add an important gloss to the full explanation, it is simple rational economic behavior that best explains Japanese actors' responses to legal frameworks.[35]

Mergers and acquisitions (M&As), or the market for corporate control, is another classical aspect of corporate governance. The standard line has been that hostile M&As do not happen in Japan because of cross-shareholding, main bank relationships, and so on. Chapter 7 shows that the legal and accounting reforms of the late 1990s have resulted in more activity for corporate control.[36] This is true even though mergers are still comparatively infrequent in Japan and critics have complained that the revisions do not go far enough. In the authors' words, "evidence

32. One might guess that this section is included to respond, at least in part, to Ramseyer's repeated assertions, discussed *infra*, that such institutions never existed. *See* Curtis J. Milhaupt, *On the (Fleeting) Existence of the Main Banking System and Other Japanese Economic Institutions*, 27 LAW & SOC. INQUIRY 425 (2002) (responding to Ramseyer's assertion that most, overall, Japanese economic institutions are myths).

33. *See* MILHAUPT & WEST, *supra* note 4 at 19–22.

34. *Id.* at 28–37.

35. *See id.* at 37.

36. Incidentally, the sub-theme pursued in this chapter is how organizational diversity promotes corporate health, which provides some interesting conclusions as a law review article but does not directly contribute to the overall theme of this book.

suggests a potential social norm shift, as Japanese corporate actors begin to view takeovers as a viable and enduring part of the landscape."[37] The highly visible 2005 control struggles of Rakuten for Tokyo Broadcasting Services and Livedoor for Fuji Television seem to have made this conclusion obvious to even the most skeptical.[38] Then again, the peaceful and backroom settlement of those disputes—as with the *jusen* problem—might also suggest the same old-boy networks remain unchanged underneath the new veneer.[39]

The *jusen* problem and venture capital are two of the peripheral corporate governance case studies the authors cover. Chapter 4, examining the *jusen* issue, takes a detailed historical look at the harbinger of Japan's so-called "bad debt problem" (*furyō saiken mondai*).[40] The *jusen* problem was Japan's Savings and Loan (S&L) crisis. Like S&L banks in the United States, *jusen* were special home mortgage lenders that overextended themselves when liberalization and competition pushed them into new lending areas. Unlike the S&L crisis in the United States, which was largely quarantined from the rest of the banking industry, the *jusen* appeared merely as the first victims of a disease endemic throughout the industry. Thus, the settlement of the *jusen* crisis was crucial to the resolution of the larger looming issue of bad debt throughout the industry. As chapter 4 paints in impressive detail, the old suspects of bureaucrats, businessmen, and politicians eventually brokered the 1996 resolution late at night in a smoke-filled back room, with consumers and taxpayers taking the hardest hit. Mihaupt and West argue, correctly I believe, that the resulting outcry opposed to this opaque resolution was the watershed that ushered in the increasingly "more explicit, transparent, and legally oriented rules of the game."[41] This is an important conclusion that hopefully will not be missed by Japan watchers or policymakers in general.[42]

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37. *See*, MILHAUPT & WEST, *supra* note 4 at 198.

38. *See, e.g.*, David Ibison, *Japanese Rivals Bow Out of Takeover Feud as Old Traditions Prevail*, AUSTRALIAN, Dec. 10, 2005 ("Taken together, these two hostile approaches by Japanese companies against their compatriots have helped create the impression that a more aggressive, home-grown style of capitalism is emerging in Japan."). The authors are well aware of this developing area and are already working on it. *See, e.g.*, Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005).

39. *See* Ibisen, *supra* note 38 ("There is plenty to suggest that Japan's corporate landscape is changing, particularly the recent increase in domestic M&A activity. But the way in which its two most high-profile deals this year were resolved reveals that, under pressure, Japan's new-style capitalists can look a lot like the old ones.").

40. Regarding the Japanese bad debt problem, *see, e.g.*, TOMOO TASUKU & KŌSAKU OKAUCHI, FURYŌ SAIKEN SHORI BIJINESU: ATARASHII KIN'YŪ GYŌMU TO TŌSAN HŌ [The Business of Treating Bad Debts: New Financial Administration and Insolvency Law] (1998).

41. *See* MILHAUPT & WEST, *supra* note 4, at 99.

42. The law review-specific sub-issue dealt within this chapter is something Milhaupt designates the "regulatory cartel." *Id.* at 74–81.

The joint venture study tells a different story, but also one that ends with legal reform resulting in real change, albeit not a "replica [of] the U.S. template."[43] Chapter 3 asks, first, why is there so little venture capital in Japan, and, second, have the legal changes implemented to foster entrepreneurial finance succeeded? In answering the first question, Milhaupt and West suggest that in the early 1990s: (1) Japan did not have large independent sources of funding; (2) there was less opportunity to create an exit strategy in Japan than elsewhere due to an underdeveloped IPO market; (3) corporate law did not provide an effective investment structure; (4) relative labor immobility hindered entrepreneurialism; and (5) Japan was more risk adverse than other economies in investment strategy.[44] Explained in this way, this is the chapter that relies most heavily on classical Japanese business explanations. Each of these points derives from the concepts of the main bank system, *keiretsu* cross-shareholding, or the lifetime employment ideal. Nevertheless, the chapter briefly reviews how in the 1990s, with an eye towards the U.S. venture capital environment, laws were changed to free up pension funds for investing, develop the nascent IPO market, create a new investment-friendly corporate structure, and allow stock options. The end result was a rise in venture capital funding in Japan, though Japan has not reproduced the dynamic U.S. environment, owing to the fundamentally different institutional structure within which it takes place. Milhaupt and West draw from this conclusion the very sensible advice that due to the different institutions at play in each state, reformers should not expect that transplanting legal mechanisms from one state to another will produce identical results.[45]

Milhaupt and West continue speaking largely to foreign reformers in chapters 5 and 6 on the role of organized crime in Japan's economic makeup. Their primary message is that organized crime will flourish in quasi-legal areas when legal rules create inefficient systems. This is because the Mafioso will privately order themselves to provide the missing services. Therefore, if reformers in Japan or anywhere else want to tackle organized crime, it is best to starve it at its roots by creating efficient legal institutions that allow legitimate actors to capture the markets. This is a tremendous argument because of its simplicity and easily implemented recommendations. As discussed above, however, I worry that the complexity of the data is stylized to promote the strength of the assertion. Even if this is the case, this chapter still rings true in both its argument and conclusion, as well as its worthwhile descriptions of Japan's loan sharking and

43. *Id.* at 66.
44. *Id.* at 52–64.
45. *Id.* at 64–66.

repo-man world of general meeting operators, fixers, check dodgers, dispute consultants, and other riffraff.[46]

The final substantive case study, chapter 8, examines Japanese legitimate legal actors' choices in the revised regulatory environment of the early 2000s. I believe this chapter is the book's most significant. At its essence, it concerns where graduating law students seek employment. From this, Milhaupt and West argue that the legal reforms of the 1990s are having an effect and, more significantly, that the center of power in Japan has consequently shifted from the bureaucracy to the private bar.[47] The crucial middle step in this argument is Chalmers Johnson's long-held assertion that Japan's ruling elite graduate from specific law schools and move into specific ministries, from where they direct "all major policy innovations."[48] Thus, because recent elite law graduates are now choosing the bar (i.e., private legal employment) over the bureaucracy, Japan's locus of governance has moved from the central government to private actors ordered by law.

Milhaupt and West's innovative testing of their assertion convinces me of the correctness of their conclusion and its significance. It is important, however, to identify some of the leaps of faith necessary for its making. First, the authors predominately employ data about employment options of Tokyo University undergraduate law students as a proxy for what elite legal actors view as the most influential career. Second, they argue that elite legal actors really only choose between two options: becoming a lawyer (*bengoshi*) in a major Tokyo law firm or becoming a bureaucrat in one of four central government ministries.[49] Third, though they show there is a huge disparity between wages, they suggest the choice to go into private legal practice may be used as an indicator of where the locus of governance lies.

My own contrarian suspicion is that like many of the classical myths of Japanese business and society, the idea that Tokyo University law students, upon becoming bureaucrats, were the most important actors in Japan has always been suspect. This is not merely because, as Milhaupt and West deftly show, they are now choosing to be lawyers rather than bureaucrats, but because I do not fully accept that Japan's elite: (1) came largely from Tokyo University law graduates; (2) went to work as bureaucrats of one of the four ministries; or (3) effectively directed society through government intervention. Rather, from my observation, the 130

46. *Id.* at 157–60.

47. *Id.* at 229.

48. CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 21 (1982).

49. MILHAUPT & WEST, *supra* note 4, at 209 ("Elite law students in Japan have two basic, and until very recently, mutually exclusive career options: The bureaucracy or the legal profession.").

million person milieu of Japan has always been much more diverse and dynamic.[50] The heads of the Japanese art, sports, and media scenes, not to mention the large majority of prime ministers,[51] did not graduate from Tokyo University Law Faculty. The people who made Japan the global leader in electronics, cars, and animation were the ubiquitous salaryman, not bureaucrats from Todai. And the seemingly endless stream of scandals, not to mention dealing with Kafkian government officials, always made me question whether the Japanese government was as wisely controlling as often claimed.[52] Regardless of these suspicions, this chapter is so finely crafted in balancing its argumentative approach and making explicit the book's sometimes obscure overarching theme that it would be extremely difficult to resist the persuasive pull of its assertions.

IV. THE GENERATIONAL SHIFT

It is the skill with which they describe Japanese economic institutions, combined with the empirical stringency with which they test their descriptions, that set Milhaupt and West apart. For those within the small community of comparative Japanese law scholars, my declaration of Milhaupt and West as the leaders of the next generation will not raise much surprise. Both have been productive scholars in comparative Japanese law for most of the last decade. They have both ascended to two of the only named chairs of Japanese law at any law school—the Fuyo Professor of Japanese Law and Legal Institutions at Columbia University for Milhaupt and the Nippon Life Professor of Law at the University of Michigan for West.[53]

What is necessary to set one generation apart from the next, however, is not simply personal achievement in the field. Rather, eras are defined by distinguishing them from their predecessors. The state of the discipline of comparative Japanese law was well plotted by one of its leaders in this journal a decade ago.[54] Three features differentiate the new

50. A variety of citations might be provided here, but for one I enjoy, see MULTICULTURAL JAPAN: PALAEOLITHIC TO POSTMODERN (Donald Denoon et al. eds., 1996).

51. Only one of the last 10 prime ministers was a graduate of Tokyo University and only a quarter of all the post-Occupation prime ministers were Todai graduates. See Wikipedia.org, List of Prime Ministers of Japan, http://en.wikipedia.org/wiki/List_of_Prime_Ministers_of_Japan (last visited April 5, 2006).

52. West himself is the leading expert in English on Japanese scandals. *See* Mark D. West, *Secrets, Sex, and Spectacle: The Rules of Scandal in Japan and America*, U. CHI. L. REV (forthcoming 2006).

53. *See* MILHAUPT & WEST, *supra* note 4.

54. *See* John O. Haley, *Educating Lawyers for a Global Economy*, 17 MICH. J. INT'L L. 733, 736–41 (reviewing LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS (Yukio Yanagida et al. eds., 1994)). *See also* Frank K. Upham, *The Place of Japanese Legal Studies in*

era into which Milhaupt and West are leading from that earlier phase. First, periods are defined by iconic leaders.[55] The two people from whom I suggest Milhaupt and West are receiving the field's leadership mantle are John Haley of Washington University and Mark Ramseyer of Harvard University. Milhaupt and West themselves seem to confirm this by explicitly acknowledging in their first chapter that they are standing on the shoulders of these predecessors.[56] While there are other extremely talented researchers of comparative Japanese law from the same generation, including Setsuo Miyazawa, Malcolm Smith, and Frank Upham,[57] I think most would agree that Haley and Ramseyer have stood apart in their framing of the issues of the discipline.[58]

The issue that Haley and Ramseyer have most obviously defined and which has come to represent their generation is whether law in Japan really matters at all. This issue, which has also been addressed in the context of Japan's comparatively low litigation rates, was, and indeed continues to be, hugely important. As has been well documented before,[59] Haley set the process in motion in a 1978 article that argued that the assumption of the previous generation's academics, media, government, and general public—that law was inconsequential in Japan because of unstated cultural norms—was suspect.[60] He did not state that law actually mattered in Japan so much as he asserted that it was inconsequential because it was so ineffective—not because there was a

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American Comparative Law, 1997 UTAH L. REV. 639 (reviewing the place of Japanese law studies in the United States).

55. For example, the Warren Court, Reaganomics, Thatcherism, and the New Deal were all periods defined by their iconic leaders rather than by the multitude of people involved with formulating and implementing what these eras represent.

56. MILHAUPT & WEST, *supra* note 4, at 3.

57. Like in Haley, *supra* note 54, at 736 n.5, it might be wise to provide a long list of others working in the field who deserve mention (including, *inter alia*, Harald Baum, Frank Bennett, Eric Feldman, Daniel Foote, Tom Ginsburg, David Johnson, Robert Leflar, Mark Levin, Gerald McAlinn, Luke Nottage, Kenneth Port, Dan Rosen, Veronica Taylor, and Leon Wolff), but, with apologies, I will refrain from doing so in the interest of economy.

58. The two central issues that have formed the contours of the field and which Haley and Ramseyer have framed are the legal consciousness issue, discussed below, and the issue of the independence of the Japanese judiciary. *See, e.g.*, J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003); JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW (1998). These citations are merely representative, as both writers have made their arguments frequently in other publications. One of the other potential contenders for the title of iconic leader has recently described the split between Ramseyer and Haley in detail. *See* Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421 (2005).

59. *See, e.g.*, KENNETH L. PORT, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 87–88 (1996).

60. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

cultural preference for unstated norms.[61] Ramseyer responded in 1988 that, in fact, law did matter because everyone was efficiently organizing matters in its shadow, if not in the courts.[62] Since that time, the limited number of scholars and students with the linguistic ability to operate in the field have dedicated a large amount of research to adding their two yen to this debate.[63] This effort might arguably still be justified, as the media, government, and general public occasionally appear to operate on the assumption—from two generations ago—that Japanese law is all about unstated cultural norms.[64] Given the limited number of scholars interested and capable of working in comparative Japanese law, however, the energy the present generation has dedicated to refining and recasting this question seems, at best, *mottainai* (unworthy)[65] and, at worst, *mudazukai* (wasteful).[66]

Just as iconic leaders can define an age, so too can issues.[67] This has been the case with the relevance of law debate in comparative Japanese law over the last 25 years. One of the most admirable aspects of Milhaupt and West's book is that it pushes the discussion beyond this now hackneyed question. Milhaupt and West *begin* with the assumption that

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61. *See id.*

62. J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988). *See also* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

63. West and Milhaupt themselves have contributed to this debate. *See, e.g.*, Mark D. West, *The Resolution of Karaoke Disputes: The Calculation of Institutions and Social Capital*, 28 J. JAPANESE STUD. 301 (2002); CURTIS MILHAUPT ET AL., JAPANESE LAW IN CONTEXT 107–41 (2001) (providing extracts from others' work to set up the issue).

64. In one of the better examples of this phenomenon, one writer recently commented generally about Asian justice (albeit not Japanese legal norms specifically): "You need to understand two things about Asian justice. First, it is tinged with vengeance. The system appears to acknowledge no prospect of redemption and forgiveness. Second, it is overlaid with this notion of 'face', of not wanting to be embarrassed." Andrew West, *Does Asian Justice Deserve Our Respect*, SYDNEY MORNING HERALD, Feb. 15, 2006, *available at* http://blogs.smh.com.au/thecontrarian/archives/2006/02/asian_values_do.html (last visited Mar. 21, 2006).

65. "Mottainai" became a catch-phrase of sorts in Japan in 2005 when Nobel Peace Prize winner Wangari Maathai used the word to explain her environmental philosophy of restricted consumption. *See, e.g.*, *Mottainai*, MAINICHI SHINBUN, Feb. 18, 2005, *available at* http://www.mainichi-msn.co.jp/shakai/wadai/mottainai/archive/news/2005/02/20050218org00m010999000c.html (last visited Mar. 21, 2006). It is with that connotation of being slightly unnecessary that I use the word here. I contrast it with "mudazukai," which I feel has a sharper edge of being absolutely unnecessary.

66. The late comparative Japanese law scholar Stephan Salzberg also seemed to agree that the time had come to move the debate beyond this issue. *See* Stephan M. Salzberg, Book Review, 10 LAW & POL. BOOK REV. 573 (2000) (reviewing ERIC FELDMAN, THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY (2000)).

67. For example, one could argue that the question of the appropriateness of the Vietnam War defined the 1960s.

law matters and then show how economic actors modify their behavior in light of legal rules.[68] They go beyond pure rational choice theory by also taking social norms seriously. This broader perspective of both law and culture will be the hallmark of the next generation.

A third element that distinguishes the immediately prior generation is the collaborative spirit in which Milhaupt and West work—in contrast to their more divisive and mercurial predecessors. Some have explained the nearly polemic methodological orientation of U.S. research on Japan as a uniquely American attribute, deriving more from domestic forces than any inherent quality of Japanese law.[69] Whether or not this is true, Milhaupt and West appear willing to allow for messier theoretical explanations that reflect a more complex reality, where ideas and influences overlap and bulge rather than fit into neat theoretical boxes. The authors' willingness to make a subtler and correspondingly more complex argument deprives their message of some of the power of their predecessors' straightforward arguments, but their approach satisfies more careful readers through its insight into the vastly complex world it seeks to explain.

V. CONCLUSION

In *Economic Organizations and Corporate Governance in Japan*, Milhaupt and West provide the reader with a multilayered and nuanced image of corporate governance in Japan at the beginning of the twenty-first century. The authors paint this image through an almost idiosyncratic list of case studies, but the broad lessons are clear: the Japanese economy is structured through both formal law and informal norms, the economic institutions are in noticeable flux at the moment, and it is undeniable that Japanese economic actors are responding to the new environment.

Their argument is so straightforward and well-presented, whatever small disagreements there might be around the edges, that one would be very hard pressed to disagree. Moreover, while presenting this overarching theme, the individual chapters themselves are valuable case studies describing interesting and important discrete institutions in Japan. These studies establish the value of the book alone.

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68. This is best seen in chapter 8.

69. Tom Ginsburg, Luke Nottage & Hiroo Sono, *The Worlds, Vicissitudes, and Futures of Japan's Law*, *in* Ginsburg et al., *supra* note 7, at 1; Luke Nottage, *"Japanisches Recht," Japanese Law, and Nihon-hō: Towards New Transnational Collaboration in Research and Teaching*, *in* Ginsburg et al., *supra* note 7, at 20.

Beyond simply successfully describing economic institutions in Japan and providing a thesis to make sense of those institutions, I suggest this book marks the beginning of a new era in the field of comparative Japanese law. Many will quibble with my definition of a new era and my demarcation of its lines. Nonetheless, I am confident that all knowledgeable people will agree that Milhaupt and West have made a major contribution to the field.