NATURE V. NURTURE: EVOLUTION, PATH DEPENDENCE AND CORPORATE GOVERNANCE

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INTRODUCTION

In Voltaire's Candide,[1] the philosopher Dr. Pangloss,[2] who teaches "metaphysico-theologo-cosmolo-nigology,"[3] tells Candide that:

> things cannot be otherwise, for, everything being made for an end, everything is necessarily for the best end. Note that noses were made to wear spectacles, and so we have spectacles. Legs were visibly instituted to be breeched, and we have breeches. Stones were formed to be cut and to make into castles; so My Lord has a very handsome castle . . .[4]

The existence, therefore, of everything is justified merely by its actuality. We have feet, for instance, so that we may wear shoes. Since all things in existence have a distinct functional presence, we must live in the best of all possible worlds. Everything is in its place and operating as should be. In proving such, Pangloss famously validated the status quo.[5]

Panglossian philosophy even extends to social institutions. As Pangloss himself claims, his "Lady," by virtue of ruling over him, must be "the best of all possible Baronesses."[6] Undoubtedly, this philosophy could be stretched to innumerable social relationships: we have social classes so that there are people to work for the Baron, we have love so that we can reproduce, etc. While this kind of causal correspondence is comforting, even a mere cursory examination of life reveals that things are often more nuanced. Consider, for example, the effect that the invention of the chimney had on social relations in medieval Europe.

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1. *See* FRANCOIS MARIE AROUET DE VOLTAIRE, CANDIDE (Signet Classic ed., 1961).
2. Pangloss's name, translated from Greek, means "all tongue." *See id.* at 16 note 3.
3. *Id.* The "nigo" likely comes from the French word *nigaud*, which literally translates as "booby." *See* id. note 4.
4. *Id.* Volatire famously based Pangloss on the German philosopher Gottfried Wilhelm Leibniz (1646-1716), who notoriously claimed that we live in the best of all possible worlds. Leibniz's view, which holds that each individual is a bundle of possibility, and that by actualizing the individual, God makes the best of all possible worlds, is actually much more complicated than allowed for by Voltaire.
5. Later in the book, Pangloss even proclaims that the venereal disease he has contracted is "an indispensable thing in the best of worlds." *Id.* at 23.
6. *Id.* at 16.

"At the start of the thirteenth century, Europe entered into what is now called The Little Ice Age."[7] This sudden onset of frigid weather prompted a number of changes in the social patterns of Europeans.[8] Up until that time, houses were heated by a central hearth, around which everyone would sleep together.[9] Smoke from the fire simply escaped through a hole in the roof. However, with the onset of the Little Ice Age, this kind of arrangement proved inefficient, too much heat escaped through the hole.[10] The solution to this problem was the invention of the fireplace and the chimney, which could keep heat in the house and channel smoke out of it.[11]

As masonry techniques became more advanced, medieval builders recognized the chimney's potential as a spine for the house upon which the building of additional rooms could be supported.[12] The social effect of these new rooms, each of which could now be separately heated, was tremendous. New rooms meant that social classes could be separated.[13] The first chimneys in royal residences were in rooms to where the royal family could withdraw.[14] Once people were able to retire to different rooms, the whole notion of privacy changed.[15] Rather than sleeping in a group around the hearth, people could sleep away from the general community. This, in turn changed the nature of love, which became a personal and private activity.[16] Courtly love poems flourished and the Church was prompted to issue a censure condemning the "licentious behaviour" that chimneys ultimately encouraged.[17]

Thus, while Pangloss may argue that we have love so that we may reproduce, a more refined scholar, realizing that historical events may have unforeseen consequences, would argue that we have love because we have chimneys. Were Pangloss and a sophisticated historian of masonry to debate one another, the form of their argument would be very similar to an ongoing debate in corporate law. Specifically, the debate is over what determines corporate governance structures. One side, the Panglossian one, believes that corporate structure is driven by economics, and that efficiency considerations will eventually force corporate structures worldwide into a similar pattern. The other side believes that corporate structures are driven more by political and economic

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7. JAMES BURKE, CONNECTIONS 157 (1978).
8. *See id.* at 157.
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 159. The English Privy Council, for instance, only appeared at this time when there was a place to meet in private.
14. *See id.*
15. *See id.*
16. *See id.*
17. *Id.* Chimneys also had an effect on the commercial life of Europe. With warmth through the winter people were able to work year round.

considerations and therefore holds that structures in various countries will continue to differ. This note examines each of these positions.

Corporate governance is the study of the formal mechanisms of corporate decision making and of power allocation among the corporate players, namely the directors, shareholders and managers.[18] This Note examines the last seventy years of corporate governance scholarship, evaluates two of the theories that this scholarship has produced, and attempts to determine where corporate governance and corporate law scholarship is headed. Part I discusses the first major theory of corporate governance structure, the Berle and Means conception of the corporation (the evolutionary, or Panglossian view of corporate governance),[19] and the ways in which this view affected corporate law and corporate law scholarship. Part II of this Note examines what has been called the "comparativist turn"[20] in corporate law scholarship, which began in the 1990s when scholars began to compare the governance structure of U.S. corporations with that of European and Japanese corporations. This comparativist turn gave rise to the notion of path dependence in corporate governance scholarship, which has had a profound effect on the way that scholars viewed corporate law. Part III evaluates the explanatory strength of each of these theories by examining trends in corporate governance in Europe, Asia and the United States. In addition, Part III attempts to determine which theory, the Berle and Means evolutionary view or Mark Roe's path dependent theory, will be the focus of corporate governance scholars in the future.

I. BERLE AND MEANS AND THE EVOLUTIONARY VIEW

A. Economics and Corporate Law

Adolph Berle and Gardiner Means's seminal work, The Modern Corporation and Private Property,[21] is the starting place for anyone interested in 20th century corporate law scholarship. Written during the Great Depression, Berle and Means's book has proven to be one of the most influential works from the Legal

18. *See* Mark Roe, *Comparative Corporate Governance*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 339, 339-40 (Peter Newman ed., 1998). Roe also states that the traditional study of corporate governance was limited to "matters akin to the interest of a stamp collector in classifying and mounting tiny items of limited general interest." *Id.* Fortunately, the subject is no longer quite so dry. However, as a former stamp collector, there is the distinct possibility that the author is deluded in believing so.

19. *See id.*

20. Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 368 (1996).

21. *See generally* ADOLPH A. BERLE AND GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

Realist movement.[22] Berle and Means set out to describe what they saw as the major trend of modern publicly held corporations, namely the separation of ownership and control.[23] In the first part of their book, they documented the massive concentration of economic power in large corporations and the shift in control of these corporations from shareholders to managers.[24] They argued that technological economies ultimately produced, "a fragmentation of shareholding and a shift in power from shareholders to senior managers with specialized skills."[25] This shift developed because the technological needs of large corporations were so enormous that they could only raise capital by selling stock to vastly dispersed shareholders.[26] For instance, the technology and capital required to build a transcontinental railroad during the late 19th century far exceeded the means of any single individual. Thus, railroad companies were forced to raise capital through a large number of small shareholders and needed to hire specialized officers to manage their far-reaching operations. Because individual investors were too small and scattered to exert control over the firm, power over corporate affairs shifted to management.[27] In the second part of their book, Berle and Means demonstrated how this shift in control was occurring in the United States with the lessening of legal restrictions on management, such as the elimination of state regulation of capital contributions, and the lessening of restrictions on dividends.[28]

Berle and Means influenced corporate legal theory in two important ways. First, they identified the central problem of corporate law, namely the separation of ownership and control.[29] The shift in power to management gave managers control over property that was, in fact, owned by someone else. After Berle and Means, the biggest problem faced by corporate law was how to protect shareholders' interests.[30] Second, Berle and Means implicitly claimed that it is economics that drives corporate law.[31] They argued for this in the second part of their book by showing that the concentration of economic power in a corporation conjoined with the separation of ownership and control actually led to a decline in legal control over managers.[32] Economic considerations of the corporation's role in the market influences corporate law. This claim has important normative

22. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 166 (1992).

23. *See* Rock, *supra* note 20, at 368.

24. *See id.*

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

26. *See id.*

27. *See id.*

28. *See* Rock, *supra* note 20, at 369.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

implications. If it is truly economics that drives corporate law, then large, technological economies should eventually develop similar corporate legal structures. Corporate governance structures should "progress" towards achieving a vibrant stock market and diffuse ownership of large companies, with strong managers and weak financiers.[33] This is how the Berle and Means theory of corporate law is evolutionary. Economics should inevitably create a corporate structure with strong managers, weak shareholders, and few legal controls over the managers. Berle and Means's theory that corporate governing structures would evolve until managers held all the power endured for sixty years. The governance structures of U.S. corporations is the best evidence for the validity of this evolutionary theory.

B. The Evolutionary Paradigm and U.S. Corporate Law

Berle and Means' have influenced corporate law such that "American corporate law academics can hardly conceive of alternative approaches."[34] Berle and Means's observations and predictions still, for the most part, hold true today. Although ownership has become slightly more concentrated since Berle and Means's time,[35] corporations in the U.S. are characterized by widely diffuse stock ownership and are controlled by managers who are relatively unhindered by legal restrictions. A survey of U.S. corporate law reveals that managers have the power to make the vast majority of corporate decisions, and that shareholders have almost no power to initiate corporate action and very little authority to approve of corporate decisions.[36]

1. Strong Managers

Generally, corporate governance structure in the U.S. is set up so that shareholders elect directors, who are charged with managing the corporation, and the directors delegate their authority to managers, who run the corporation day to day.[37] U.S. corporate statutes give directors, and therefore their delegees and managers very broad discretion. The language of § 8.01(b) of the Model Business Corporation Act (RMBCA) is typical of most statutes. It states that, "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of

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33. *See* Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227, 241 (1998).

34. Rock, *supra* note 20, at 369.

35. *See id.* at 375.

36. *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 674 (1995).

37. *See* LEWIS D. SOLOMON, DONALD E. SCHWARTZ, JEFFREY D. BAUMAN AND ELLIOT J. WEISS, CORPORATIONS LAW AND POLICY 348 (4th ed. 1998).

directors. . .."[38] This statute clearly vests the board and it managers with control of the corporation.

Directors and managers not only have the authority to make decisions for the corporation, they are essentially protected from any liability that results from their decisions. U.S. law does recognize that managers owe certain fiduciary duties to the corporation, namely a duty of care[39] and a duty of loyalty.[40] The duty of care is a duty to use reasonable care and diligence in handling corporate affairs.[41] The duty of loyalty requires managers to maximize shareholder profits instead of their own and to deal fairly with the corporation in self-interested transactions.[42] Despite these fiduciary duties, directors and managers' decisions are protected by a common law principle called the business judgment rule.[43] This rule shields directors and managers from liability for losses that are the result of management's business decisions.[44] When applied, the rule acts to prevent courts from second guessing management.[45] The rationale behind the rule is that "directors are better equipped than the courts to make business judgments."[46]

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38. MODEL BUS. CORP. ACT § 8.01(b) (2000). The Delaware Code is very similar. It states that, "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors. . . ." DEL. CODE ANN. tit. 8 § 141 (2000).

39. Although the duty of care traditionally was a common law standard, it has been codified by some corporation statutes. *See generally* MODEL BUS. CORP. ACT §§ 8.30 and 8.31(a)(2)(iii) (2000).

40. Procedural requirements for the duty of loyalty used to be codified by MODEL BUS. CORP. ACT § 8.31. This section was recently replaced by subchapter F of chapter 8 of the Model Act. The implications of subchapter F would be a worthy and fascinating topic for another whole law journal article, thus it is sufficient only to say that the new subchapter F attempts to set out a procedure to follow in conflict of interest situations. If the procedure is followed, the decision will only be judged by the business judgment rule and not the more stringent fairness standards. *See* MODEL BUS. CORP. Act ch. 8, subch. F, Introductory Comment (2000).

41. *See* Bernd Singhof & Oliver Seiler, *Shareholder Participation in Corporate Decisionmaking Under German Law: A Comparative Analysis*, 24 BROOK. J. INT'L L. 493, 545 (1998).

42. *See id.*

43. *See* SOLOMON ET AL., *supra* note 37, at 685. While business judgment rule standards are applied to duty of care situations, modern corporation statutes split on applying the business judgment rule to situations involving a conflict of interest. *See id.* at 786. As stated above, subchapter F of the RMBCA extends the business judgment rule to self-interested transactions. *See* MODEL BUS. CORP ACT § 8.31, *supra* note 40. However, the American Law Institute declines to extend the business judgment rule this far. Rather, the ALI still maintains the traditional, and more stringent, fairness test for self-interested transactions. *See* ALI, PRINCIPLES OF CORP. GOVERNANCE § 5.02 cmt. (1994).

44. *See* SOLOMON ET AL., *supra* note 37, at 685..

45. *See* Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 963 (Ohio 1986).

46. *Id.*

This means that courts will generally defer to management's decision. Thus, the bar is set very high for any shareholder wishing to challenge a business decision. The rebuttable presumption of the business judgment rule acts to safeguard the broad discretion given to managers under corporate statutes.[47]

Finally, even if they are found liable for losses resulting from their business decisions, directors and managers are further protected by exculpatory statutes.[48] Over two-thirds of state corporate codes allow for some kind of provision to limit directors liability.[49] A good example of this is the RMBCA § 2.02(b)(4), which states that the articles of incorporation may include "a provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action . . ."[50] In summary, corporate statutes vest managers and directors with almost exclusive control of the corporation. Shareholders do have the right to challenge management's decisions, however, this power is greatly weakened by the protections afforded by the business judgment rule. Even in the event that management is found liable for their business decisions, they are further shielded by exculpatory statutes. Together, these laws create a corporate governing structure with very strong managers.

2. Weak Shareholders

The only real power that shareholders possess in the U.S. corporate governance structure is the right to vote. Shareholders use this right to elect members of the board of directors and to approve certain fundamental transactions like mergers or sale of corporate assets.[51] These matters are typically conducted at an annual shareholders' meeting. However, given the diffuse ownership of U.S. corporations, it is nearly impossible to have all the shareholders meet. To ensure that a majority of shares are voted at the annual meeting, managers and other shareholders can solicit proxies, that is authorizations to vote the shares of a non-attending shareholder.[52] Before the passage of the Securities Exchange Act in the 1930s, the proxy solicitation system was susceptible to abuse by managers.[53] With the passage of the Act, the proxy solicitation process became regulated by federal law. Ironically, however, the Securities Exchange Acts has actually had the unfortunate effect of discouraging active investors. Thus, although shareholders do have the right to vote their shares, the way that the proxy solicitation system is regulated lessens the actual control that shareholders can

47. *See id.*

48. *See* SOLOMON ET AL., *supra* note 37, at 723.

49. *See id.* at 724.

50. MODEL BUS. CORP. ACT § 2.02(b)(4) (2000). *See also* GEN. CORP. LAW OF DEL. § 102(b)(7) (2000).

51. *See* SOLOMON ET AL., *supra* note 37, at 348.

52. *See* Singhof & Seiler, *supra* note 41, at 500.

53. *See id.* at 500-01.

have over the corporation. An examination of the SEC's proxy rules reveals how weak U.S. shareholders really are.

Under SEC Rule 14a-1(l)(iii), a solicitation is broadly defined as any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[54] Rule 14a-6(a) requires that all proxy solicitations be filed with the SEC ten days before they will be sent to security holders.[55] The SEC then reviews the proxy solicitation to make sure that it conforms with the proxy rules.[56] Together these two rules were intended to ensure that communications between management and the shareholders were not misleading. However, these rules have in fact discouraged many shareholders from communicating with each other. Shareholders who do speak with each other about corporate events run the risk of violating proxy rules if they do not file their communications with the SEC.[57] Thus, these proxy rules have the effect of discouraging any kind of active investment. Merely communicating with other investors, much less actually soliciting proxies, requires costly and timely filing with the SEC.

In addition, Rule 14a-8 has the effect of discouraging active investment. This rule allows some shareholder proposals to be included in the companies' proxy statement.[58] However, a number of important proposals, such as director nominations and solicitations in opposition to management proposals are excluded.[59] Thus, it is very difficult for a shareholder to get anything meaningfully related to corporate business on the firm's proxy statement. A shareholder that wants to communicate with other shareholders on important corporate issues is better off sending their own proxy statement. However, as stated above, this is a costly and onerous process. The U.S. proxy system does not facilitate active investment. A shareholder does have the right to vote, but under the SEC's proxy rules, that shareholder will likely decide to remain passive. As a result of these rules, management still controls the proxy system and shareholders tend to vote overwhelmingly for management's recommendations.[60] The U.S. proxy system truly demonstrates how weak shareholders really are under U.S. law.

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54. Rules under the Securities Exchange Act of 1934, Rule 14a-1(e)(l)(iii) (2000). *See also* Long Island Lighting Co. v. Barbash, 779 F.2d 793 (2d Cir. 1985) (holding that an add in a newspaper was reasonably calculated to influence a shareholder and was therefore a proxy solicitation).

55. *See* Rules Under the Securities Exchange Act of 1934, Rule 14a-6(a) (2000).

56. *See* Singhof & Seiler, *supra* note 41, at 501.

57. *See* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1957 (1993).

58. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 824 (1992).

59. *See id.*

60. *See* Singhof and Seiler, *supra* note 41, at 502.

3. The Hegemony of U.S. Corporate Governance

As stated above, one of the major themes of Berle and Means's book was that economics drives corporate law. The law, because of efficiency considerations, lessens the restrictions on managers thereby creating a governing structure with strong managers and weak shareholders.[61] No system represents this theory more than the U.S. corporate governance structure. Therefore, according to the Darwinian overtones of the Berle and Means paradigm, corporate structures in other countries would inevitably evolve into something similar to the U.S. system. The study of corporate governance, "if pursued at all, would merely show how other nations ought to organize the financing and governance of large firms, or... how other nations had imitated American institutions and how foreign firms had developed toward the American type as their industrial systems advanced."[62] In fact, "governance systems differing from the American paradigm were dismissed as mere intermediate steps on the path to perfection, or as evolutionary dead-ends,

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61. *See* Bainbridge, *supra* note 36, at 674. Berle and Means believed that the separation of ownership and control was the biggest problem in corporate law. *See id.* at 675. However, there has been work done in organizational theory that demonstrates that the separation of ownership control is actually an efficient solution to decision-making problems. *See id.* The most important work in this area is by Kenneth Arrow. He writes that there are two basic types of decision-making structures, "consensus" and "authority." *Id.* A consensus decision making structure is used when each member of the organization has identical information and interests. *See id.* This allows for easy collective decision making. *See id.* However, an authority based decision-making structure is useful when members of the organization have different interests and different levels of information. *See id.* Because the players in U.S. corporations have very different interests and different levels of information, an authority based system, with strong managers calling the shots, is actually the most efficient way to deal with corporate decisions. *See generally* KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 68-70 (1974). It is worth noting, however, that some scholars have criticized the authority based model as means of perpetuating patriarchy. *See* GARETH MORGAN, IMAGES OF ORGANIZATION, 226-27 (1997). The critique holds that the authority based model of organization has its roots in the patriarchal family, which is the "factory for authoritarian ideologies." *Id.* at 227. In many organizations, one person defers to authority much the same way a child defers to parental rule. *See id.* The extended dependency of the child on the parent ultimately promotes the institutionalized dependence we see in formal organizations. *See id.* Members of the organization, thus enabled by their childhood dependencies, look to others, like managers, to initiate action. *See id.* An authority-based model seemingly cuts both ways. In Arrow's theory it is an efficient means for making collective decisions, and thus serves as a way to justify the Berle and Means corporation. However, in a more psychoanalytic framework, the authority-based model is merely way in which we end up perpetuating patriarchal dependencies.

62. Roe, *supra* note 18, at 340.

the Neanderthals of corporate governance."[63] There was little reason to believe otherwise given that since World War II, the U.S. economy led the world.[64]

Thus was the Berle and Means evolutionary view of corporate governance Panglossian. Corporations are made to create wealth for the shareholders. The U.S. corporate structure generated the most wealth and therefore was the best of all possible corporate worlds. For sixty years the corporate governance question seemed settled and corporate law scholars could focus their efforts on more pressing questions. Like Pangloss in thinking that his Lady, by virtue of being his Lady, was the best possible Baroness, so corporate scholars thought that the U.S. structure, by virtue of being the structure of the U.S., was the best possible governance system. However, in the early 1990s all of this changed.

II. MARK ROE AND THE PATH DEPENDENT PARADIGM

Until the early 1990s the "American system was thought to represent the evolutionary pinnacle of corporate governance."[65] However, with the emergence of global competition during the 1980s and 90s, many corporate law scholars began to question the efficiency of the U.S. system.[66] Japanese and German corporations made huge gains with corporate governance structures very different from the U.S. standard.[67] Mark Roe, a professor of law at Columbia University, began to closely examine Japanese and German corporate governance structures in addition to the political roots of American corporate law.[68] In a series of influential articles[69] and a book,[70] Roe refuted one of the major tenets of Berle and Means theory, namely the proposition that economics drove corporate governance structures. If economics determined corporate structure, then corporations in other countries should exhibit the same characteristics of U.S. corporations, as the U.S. economy routinely outperformed all others. Despite the prevailing view, by the 1990s, there were a number of successful German and Japanese corporations with comparatively strong shareholders.[71] In comparing U.S. corporate structure

63. Ronald J. Gilson and Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 873 (1993).

64. *See* Roe, *supra* note 18, at 340.

65. Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When do Institutions Matter?* 74 WASH. U.L.Q. 327, 331 (1996).

66. *See id.*

67. *See id.*

68. *See* Rock, *supra* note 20, at 376.

69. *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991), and Mark J Roe, *Foundations of Corporate Finance: The 1906 Pacification of the Insurance Industry*, 93 COLUM. L. REV, 639 (1993).

70. *See* ROE, *supra* note 25.

71. Mainly in the form of large banks. *See* Rock, *supra* note 20, at 376.

to that of Germany and Japan, Roe found that economics did not play as large a role in corporate governance as previously believed. Rather, Roe found, politics and culture play an equally important role in determining corporate structure. The Berle and Means paradigm ignored the fact that different corporate governance systems emerge in distinct political environments. The U.S. system is the way it is partly because of economics and partly because it arose within U.S. politics and culture. This lead Roe to claim that corporate structure is path dependent;[72] the corporate structure that a particular country has now depends greatly on initial, sometimes accidental conditions.[73]

Roe's work ultimately dismantled the notion that the U.S. system of corporate governance was somehow evolutionarily inevitable. By comparing the U.S. structure to Germany and Japan, and by showing how corporate structures depend on the political conditions in which they arose, Mark Roe was able to account for why large scale economies in technologically advanced countries had different corporate governance structures. The notion of path dependence marshaled in the comparativist turn in corporate law scholarship. The gaze of corporate academics turned to countries besides the United States and suddenly the study of corporate law had a distinctively international flavor.

A. What is Path Dependence?

Undoubtedly, "[t]he borrowing and sharing of ideas is a common phenomenon in academic circles."[74] This is definitely true for corporate law scholarship, which has borrowed ideas from disciplines as diverse as economics, chaos theory,[75] and especially evolutionary biology.[76] The extent to which corporate law scholars rely on biological models is quite striking. This likely stems from the Berle and Means paradigm, which connects economics, evolution and corporate law. Since corporate law was viewed as evolutionary for so many years, corporate law scholars evidently believed that they could learn more about their subject by actually studying biological evolution. Undoubtedly biology often provides a potent metaphor for describing economic and social systems.

Consider, for instance, the notion of punctuated equilibrium. Generally, evolution moves at an extremely slow pace.[77] However, occasionally there is sudden environmental change that rapidly changes the structure of the biological

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72. *See* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 644 (1996).

73. *See id.* at 641.

74. James E. Herget and Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 399 (1987).

75. *See* Roe, *supra* note 72, at 641,

76. To see an example of how all of these tie in, *see* Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137 (1998).

77. *See id.* at 138.

system.[78] A species may rapidly advance or just as rapidly die out. The best known example is that of the dinosaurs who dominated then earth for millions of years, and then, in an instance of punctuated equilibrium, abruptly disappeared. Punctuated equilibrium can also be applied to instances in history and economics. Consider how the economic era of agriculture, which was thousands of years old, was replaced by the industrial age in less than one hundred years.[79] Indeed, biology often provides such a good metaphor in economics that it hardly seems unusual when applied to law, especially by those that espouse an economic basis for law.[80]

Path dependence, which has its origin in mathematics, physics, and biology, and came to the law through economics,[81] is an idea that has been copiously borrowed from other subjects. Path dependence is a euphemism for the idea that "history matters."[82] Basically, the idea is that "where we are today is a result of what has happened in the past."[83] Path dependence in economics attempts to show how current economic circumstances are contingent on the accidents of history.[84] What truly makes path dependence interesting is that this contingency can be perverse.[85] The present we inherit, or, for that matter, the future we wish to construct, may not result from our actual preferences, but rather from little quirks that we might have corrected if we had only realized their future effect.[86]

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78. *See id.*

79. *See id.* at 217.

80. This interdisciplinary grouping of biology, economics, and law reaches its apogee in the work of Richard Posner, *see generally* RICHARD POSNER, SEX AND REASON (1997). Posner writes that "there are illuminating parallels between the biological and the economic approaches, and that the two approaches are mutually reinforcing and may in combination constitute a more powerful theory than either by itself." *See id.* at 88. Mark Roe, however, warns about relying too much on the analogies between evolutionary biology and corporate law: "Natural selection works without consciousness. It propels a species to the top of the local evolutionary mountain – and there the species will remain, absent cataclysmic change or genetic drift, even though the next much higher and better mountain would be attainable if the species could backtrack a bit down the current mountain. We human beings are, in contrast, conscious of our business and legal institutions . . . Because we can consciously move ourselves from one mountain to another, pure analogies to natural selection are inapt." Roe, supra note 72, at 665.

81. *See* Stephen J. Margolis and S.J. Leibowitz, Path Dependence, in 3 NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 17 (Peter Newman ed., 1998). Path dependence is really what we call a phenomenon from non-linear models of chaos theory where potential outcomes depend on initial conditions and may be further determined by small insignificant events. *See id* For a scientific popularization of chaos theory, *see* J. GLIECK, CHAOS: MAKING A NEW SCIENCE (1987).

82. *Id.*

83. *Id.*

84. *See id.* at 18.

85. *See id.*

86. *See id.*

Consider the following example used by Mark Roe.[87] Hundreds of years ago, a fur trader, intent on avoiding wolves, cuts a path through the woods. To avoid known wolves' dens, the trader's path winds indirectly through the woods. Sometime later, other travelers with wagons use the old fur trader's path. Along the way they deepen grooves in the path and clear trees out of the way. Years pass and further travelers broaden the path into a road, even after the danger of wolves has long subsided. Over time, industries come and settle at the road's bends and other houses are built along the road. Eventually the road is paved and made suitable for modern automobiles. Suppose it is now time to repave the road. The question Roe asks, is whether the authorities should straighten the road out at the same time.[88] After all, it would certainly make travel on the road more efficient. The answer, of course, is no. Factories and housing developments along the winds in the road would have to be destroyed. "Today's road, dependent on the path taken by the trader decades ago, is not the one that the authorities would lay down if they were choosing their road today. But society, having invested in the path . . . is better off keeping the winding road in its current path than paying to build another."[89]

An instance of path dependence that economists seem particularly obsessed with is the story of the QWERTY typewriter.[90] In 1868, Christopher Latham Sholes patented a typewriter that he had invented.[91] However, jammed keys were a serious problem for Sholes's model. He addressed this by rearranging the keys in order to slow down typists.[92] The arrangement he came up with is the QWERTY format that we are familiar with today. In 1873, Sholes sold his design to Remington and they soon began to manufacture and sell the QWERTY keyboard.[93] Alternative keyboards were developed as the typewriter market grew.[94] However, in 1888, at a fateful typing competition in Cincinnati, Francis McGuirrin, who used a QWERTY style Remington, won every phase of the contest with a stunning display of typing proficiency.[95] His victory enshrined the QWERTY keyboard as the typewriter standard.[96] Years later, in 1936, August Dvorak patented the Dvorak Simplified Keyboard (DSK). This typewriter, with its ergonomic design, was easier to learn and twenty to forty percent faster than

87. *See* Roe, *supra* note 72, at 643-4.
88. *See id.*
89. *Id.*
90. *See* Margolis and Liebowitz, *supra* note 81, at 21. Economists and others that study path dependence are also very interested in the story of Sony's Beta formatted VCR's. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*

the QWERTY.[97] However, the DSK never caught on.[98] The triumph of the QWERTY typewriter illustrates path dependence. The early start for the QWERTY, and McGurrin's win in Cincinnati, enshrined the QWERTY as the standard while superior typewriters have never really met with wide acceptance.[99] Our present use of the QWERTY typewriter was determined by McGurrin's victory. Were we to choose keyboards now, we would probably adopt a more efficient style.

As stated above, the novelty of Mark Roe's scholarship is that he applied path dependence to the study of corporate governance and corporate law. He demonstrated that the corporate governance system, and the corporate law, of different countries are dependent on initial conditions, specifically the political and cultural environment of each country. This greatly affected the Berle and Means based notion that other countries would eventually develop the U.S. corporate structure.

B. Path Dependence and Japanese Corporations

Mark Roe's work, and the subsequent study of comparative corporate governance that it engendered, has generated a tremendous amount of interest in Japanese and German corporate structure. [100] Due to time and space considerations, and sympathy for the reader's attention span, this Note will only address Japanese corporate structure.[101]

1. Japanese Corporate Structure

As stated above, for Berle and Means, the central problem for corporate law was the separation of ownership and control.[102] Managers, not shareholders, controlled corporate property. Thus, the goal for corporate governance, and for

97. *See id.*

98. *See id.*

99. *See id.* at 22. There is some debate as to whether the QWERTY's entrenchment actually occurred this way. First, recent ergonomic studies have demonstrated that the DSK's advantage over the QWERTY was negligible. *See id.* In addition, there were other typing contests in 1888 other than the one in Cincinnati. Some of these contests were won by people using non-QWERTY typewriters. *See id.* Thus, it is not at all clear that McGurrin's Cincinnati victory was solely responsible for the QWERTY standard. In spite of this, the QWERTY story merits a retelling if only to give a model of path dependence.

100. The comparison of different countries' corporate structures suddenly became a hot law review and conference topic. *See* Rock, *supra* note 20, at 367.

101. A review of the literature in this area reveals that there has probably been more work on German corporate structure anyway. For an exhaustive comparison of German and U.S. corporate structure, *see* Susan Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structure*, 17 ARIZ. JRNL. OF INT'L AND COMP. L. 555 (2000).

102. *See infra* p. 4.

corporate law, was the monitoring of managers. Japanese companies deal with the separation of ownership and control by having large banks, called main banks, monitor managers. These banks hold concentrated blocks of voting stock in large corporations.[103] Thus, corporate power is shared between the firm and its financiers.[104] Managers are held accountable to bankers, and therefore, overseen.[105]

a. Concentrated Blocks

In Japan, the stock of large companies is held in concentrated voting blocks.[106] The largest Japanese firms belong to a type of conglomerate called a keiretsu.[107] A keiretsu is a group of corporations in which the individual firms each own some of the stock of the other member firms.[108] Generally, the aggregate ownership of the keiretsu will amount to fifty percent of each member firm's stock.[109] On top of this, banks and insurers will own blocks of stock in the keirestu's firms equal to another five percent each, thus creating a voting block which controls over 20 percent of the keiretsu's stock.[110] This banking group will choose one bank to which the others will delegate monitoring responsibilities.[111] This bank, charged with monitoring the corporation's managers, is what is called the "main bank."[112]

Thus, managers of Japanese corporations are accountable to two large, concentrated voting blocks, namely the other member firms of the keiretsu and the shareholding banks. Each of these groups acts to monitor Japanese managers.

b. Interaction Between Managers and Banks

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103. *See* Roe, *supra* note 57, at 1929.

104. *See id.*

105. *See id.*

106. *See id.* at 1936.

107. *See id.* at 1939.

108. *See id.* Were a Japanese keiretsu to exist in the United States, it would include corporations the size of GM, GE, US Steel, and Microsoft. The companies would tend to conduct a lot of business with each other. For instance, a company like US Steel would sell its steel to GM for the production of cars. Each company would exist separately but through cross-ownership, they would tend to blend together at the margins. *See* Gilson and Roe, *supra* note 63, at 883.

109. *See* Roe, *supra* note 57, at 1939.

110. *See id.* For instance, in 1993, large blocks of Toyota stock were held by the following banks in descending order: Sakura Bank, 4.9%; Sanwa Bank, 4.9%; Tokai Bank, 4.9%; Nippon Life 3.8% and Long Term Credit Bank, 3.1%. *See id.* at 1937.

111. *See id.* at 1944.

112. *Id.*

The keiretsu and the main bank do much of their monitoring at a monthly meeting of the keiretsu's President's Council.[113] The President's Council is essentially a second board on which the presidents of the keiretsu's member boards sit.[114] Banks will also attend these meetings. Although the members of the President's Council do not vote and do not direct each other, members of the board are usually constrained from acting against the Council's opinion. This is because the members of the Council, and the banks attending the meetings, collectively control most of the stock in the companies represented.[115] The President's Council is typically consulted when one of the keiretsu's firms is about to make a major decision, like choosing a new CEO.[116]

Although the President's Council is essentially a forum for communication,[117] criticism of the Council by banks or other members may shape corporate action in a culture, like Japan's, that values harmony.[118] When serious problems arise with the corporation, or if performance seriously weakens, bankers may send in their own set of directors.[119] In such a situation, the CEO may stay in place, however, his/her power will be greatly reduced.[120] If this kind of informal nudge to resign fails to work, banks may simply dismiss the CEO.[121]

The keiretsu and Japanese banks are able to wield a tremendous amount of power over managers. So much so in fact that very few people ever resort to Japanese corporate and securities law.[122]

2. Japanese Corporate Law

Interestingly, the law that governs corporate governance in Japan is almost entirely imported.[123] The Japanese Commercial Code,[124] which supplies the basic rules for corporate formation and conduct, was originally based on Germany's model.[125] However, the Code was extensively modified by U.S. authorities during the occupation of Japan after World War II.[126] In addition, as a result of U.S.

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113. *See id.* at 1943.

114. *See id.* In a way, this is similar to the German supervisory board, the Aufsichstrat.

115. *See id.*

116. *See id.*

117. *See id.* at 1944.

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. *See* Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture and the Rule of Law*, 37 HARV. INT'L L.J. 3, 8 (1996).

123. *See id.* at 15.

124. *See generally,* Shoho (Commercial Code), Law No. 48 (1899).

125. *See* Milhaupt, *supra* note 122, at 15.

126. *See id.*

occupation, Japanese securities law[127] is modeled after the federal securities law of the United States.[128]

As in the United States, managers and directors of Japanese corporations are governed by fiduciary duties, and shareholders have access to the courts to enforce these duties.[129] The Commercial Code provides for a board of directors elected by the shareholders to serve as the governing unit of the corporation.[130] Also, like U.S. corporate law, there are rules that give shareholders a voice in the corporation,[131] require disclosure of reliable financial information[132] and protect the integrity of the voting process.[133] In addition, the Japanese Securities and Exchange Law, like U.S. law, contains many rules concerning conflicts of interest.[134] Officers, agents and employees of the corporation are prohibited from trading the corporation's securities on the basis of inside information,[135] and tender offers are regulated in much the same manner they are in the United States.[136]

However, despite the similarities between Japanese and U.S. corporate law, the actual practice of corporate law in Japan differs remarkably from U.S. practice. As one commentator has put it, the Berle and Means corporation "is largely irrelevant in Japan."[137] For instance, shareholders rarely seek judicial enforcement of fiduciary duties.[138] Independent directors, who play a prominent role in corporate governance in the U.S., are extremely rare in Japan.[139] Statutes governing takeovers and proxies are seldom used.[140] In addition, regulators are permissive and informal in their enforcement of Japanese securities laws, while private enforcement of these laws is nonexistent.[141] As a result, corporate

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127. *See* Shokentorihikiho, Law No. 25 (1948). (Securities and Exchange Law).

128. *See* Milhaupt, *supra* note 122, at 15.

129. *See id.*

130. *See id.* at 16 (citing Shoho art. 245(1)).

131. *See id.* (citing Shoho art. 232-2).

132. *See id.* (citing Shokentorihikiho arts. 24 and 24-5).

133. *See id.* at n.65 (stating "Securities Exchange Law art. 194 Kabushiki kaishu no kansa nado ni kansuru shoho no tokurie ni kansuru horitsu [Law for Special Exceptions to the Commercial Code Concerning Audits, etc. of Joint Stock Companies] and Law No. 22 of 1974, art. 21-2 and 21-3 Daikaisha no kabushiki sokai no shoshutsushi ni tempusubeki sanko shorui nado ni kansuru ("Regulation on Reference Documents, etc. to be Included in the Notice of Shareholder Meetings of Large Corporations").

134. *See id.* (citing Shokentorihikiho art. 1).

135. *See id.* (citing Shokentorihikiho art. 166).

136. *See id.*

137. *Id.* at 20.

138. *See id.*

139. *See id.*

140. *See id.* at 21.

141. *See id.*

attorneys in Japan number only in the hundreds, which seems paltry when compared to the hundreds of thousands practicing corporate law in the U.S.[142]

Thus, corporate actors in Japan simply do not resort to the judicial system to monitor managers and enforce their duties. Rather, managers are controlled quietly and informally through the corporation's relationship with the keiretsu and the main bank. Pressure is exerted through the President's Council or, in extraordinary situations, when the main bank appoints its own board.[143] The conduct of business in Japan, therefore, does not rely on or generate much formal corporate law.[144] In fact, in Japan, a premium is placed on avoiding the law.[145]

3. The Roots of Japanese Corporate Governance

How does one account for the structure of Japanese corporate governance? Why is it that large banks play such an important role in Japanese corporations? The answers are relatively simple. Japanese corporate structure is path dependent on Japanese history, politics, and culture.

First, Japanese culture values harmony and consensus.[146] This would explain why corporate actors in Japan handle company matters informally and discretely rather than with litigation. No one wants to risk the vexation of others.[147] In addition to its emphasis on harmony, Japanese culture, only emerging from feudalism during the Meiji period during the late 19th century,[148] has long been at ease with powerful and centralized institutions.[149] This would account for the existence of large, concentrated, block-holding institutions like the keiretsu and the banks. It would also explain why Japan is at ease in allowing these large, centralized institutions to do most of the work in the governing structure.

Finally, political history has played an important role in determining corporate structure in Japan. Prior to World War II, the largest corporations in Japan, called zaibatsu,[150] were primarily owned by a single family.[151] These corporations were tightly connected with banks, which in most cases, were owned by the same family that owned the corporation.[152] Thus, banks have long been associated with Japanese corporations. During World War II, however, the Japanese military changed the system slightly. Under a military directive in 1943, managers at munitions plants were directed to follow bureaucratic orders, rather

142. *See id.*
143. *See infra* p. 19.
144. *See* Milhaupt, supra note 122, at 21.
145. *See id.*
146. *See* Roe, *supra* note 57, at 1944.
147. *See id.* at 1943.
148. *See* MILTON W. MEYER, JAPAN: A CONCISE HISTORY 136 (3d ed. 1992).
149. *See* Roe, *supra* note 72, at 647.
150. *See* Roe, *supra* note 57, at 1972.
151. *See id.*
152. *See id.*

than orders issued by the family that owned them. The directive also commanded that firms were to choose a main bank to help with the financing of wartime production.[153] As a result of this change, banks have provided most of the capital that has driven Japan's industrial economy.[154] Indeed, given that many military orders were, in part, motivated by an anti-capitalist ideology,[155] it should come as no surprise that Japanese corporate structure differs from the U.S.

Due to Japan's history and culture, Japanese corporate structure did not evolve according to the Berle and Means paradigm. In showing that corporate structure was path dependent, Mark Roe demonstrated that the Berle and Means paradigm was not a given. However, if the Berle and Means corporate structure is contingent, then corporate structure in the United States is a mere coincidence.

C. Path Dependence and U.S. Corporate Structure

As stated above, U.S. public companies are held by a large number of scattered shareholders, each owning only a relatively small stake.[156] U.S. companies have dealt with the separation of ownership and control differently than Japan. The United States does not have large financial intermediaries, like banks, to monitor management. Rather, managers are controlled through the market.[157] If U.S. managers are performing poorly, their performance will be reflected in the market price of their stock.[158] Bad decisions and poor performance will result in a low stock price. A low stock price will attract a bidder who, through tender offers and proxy contests, will seek to gain control of the company, replace the managers, and attempt to raise the price of the stock.[159] Thus, U.S. management is controlled by the threat of a takeover.

It would be patently illegal for a financial intermediary in the United States to act like a Japanese main bank. The reason for these restrictions is based, in part, on U.S. culture and history. Thus, this Note briefly examines one area of the law that prohibits active institutional involvement, namely banking regulation, and

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153. *See id.*

154. *See* Milhaupt, supra note 122, at 19.

155. *See* Roe, supra note 57, at 1972.

156. Individuals own directly half of all the stock in U.S. corporations. *See* ROE, *supra* note 25, at 6. There are, however, exceptions. At one time, Ross Perot owned a six percent share of GM. Through his shares he was able to get onto the GM board. However, before long, managers at GM decided that Perot was an insufferable carp and they forced him off the board. Unfortunately for him, Perot was unable to form a voting alliance with other large stockholders because there were none. *See* ROE, *supra* note 57, at 1988 note 174. In order to get rid of Perot, the directors of GM repurchased Perot's stock for $742 million. This astounding sum ultimately triggered a derivative suit against GM for corporate waste. *See* Grobow v. Perot, 526 A.2d 914 (Del.Ch.1987).

157. *See* Rock, *supra* note 20, at 374.

158. *See* SOLOMON ET AL., *supra* note 37, at 1178.

159. *See id.*

will also look at one of the cultural reasons behind these restrictions, namely populism.

1. U.S. Banking Regulation

Institutions have traditionally been kept out of corporate governance by the federal regulation of U.S. banks.[160] For a bank to own and control a large amount of stock it must be large. However, the National Bank Act of 1863 restricted national banks to a single geographical location.[161] The McFadden Act of 1927 slightly loosened the confines imposed by the National Bank Act by allowing banks to branch out within a city or a town if state law permitted it.[162] By 1933, banks were permitted to branch out within a state but not nationwide.[163] Today, while there is some interstate banking through regional banking pacts, there is still no national bank in the United States.[164] Mark Roe writes that, "this was the key historical bar to powerful American banks in corporate governance."[165]

The Glass-Steagall Act,[166] passed in 1933, was a further impediment to investing by U.S. banks. This act prevented commercial banks from owning and dealing in securities.[167] The Glass-Steagall Act was refined somewhat in 1956 with the passage of the Bank Company Holding Act,[168] which permitted banks to act as passive investors of no more than five percent of a non-bank's stock.[169] However, passive ownership of five percent of stock clearly precludes any bank control over managers. The Glass-Steagall Act was recently repealed.[170] This Note addresses the possible implications of this repeal in a later section. It is enough at this time that one is only aware of the historical bar to investing that the Glass-Steagall Act created. Traditionally, if U.S. banks attempted to imitate Japanese banks they would likely run afoul of a number of U.S. regulations.

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160. *See* Roe, *supra* note 57, at 1948.

161. *See id.*, at 1948 n. 49 (citing National Bank Act of 1863, ch. 106 § 44, 13 Stat. 99 (1863) (codified as amended at 12 U.S.C. § 38 (1988)).

162. *See* McFadden Act, ch. 191 Sec. 7(a), 44 Stat. 1224 (1927) (codified as amended at 12 U.S.C. § 36 (1988)).

163. *See* ROE, *supra* note 25, at 94.

164. *See id.* at 95.

165. *Id.*

166. *See* Glass-Steagall Act, ch. 98, 48 Stat. 184 (1933)(codified as amended at 15 U.S.C. §§ 24, 78, 377, 378 (1990) repealed by Gramm-Leach-Bliley Financial Modernization Act, PL 106-102, 106 Stat. 1338 (1999). The repeal of this act will likely have a significant impact on the future of corporate governance in the United States. *See infra* Part III.

167. *See* ROE, *supra* note 25, at 95.

168 *See* Bank Holding Company Act of 1956, ch. 240 § 4(c)(6), 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. § 1843 (c)(6) (1988).

169. *See* Roe, *supra* note 57, at 1949.

170. *See* Glass-Steagall Act, *supra* note 166.

2. The Effects of Populism on U.S. Corporate Governance

Corporate governance in the United States is characterized by strong managers and weak financiers. This type of system, emerged due to a distinctly American political movement, namely populism.[171]

Populism can be defined as the belief that large institutions and centralized accumulation of wealth and power are inherently bad.[172] It has been an undercurrent in U.S. politics since at least the time of Jefferson, and, as a political movement, enjoyed its greatest success in 1890's with the passage of the Sherman Antitrust Act.[173] Populist sentiment still manifests itself today in the distrust that many in the United States feel toward the federal government.[174] Polls show that people in the United States generally distrust private and governmental concentrations of power.[175] It is this distrust of concentrated power that has historically precluded strong financial institutions from investing in U.S. corporations.[176]

As stated above, the United States has a number of laws that prevent banks from becoming truly national. This was not always the case. During the first part of the nineteenth century the Bank of the United States was a national bank.[177] By the 1830's, however, people in the U.S. had become distrustful of the bank.[178] Andrew Jackson ran for President in 1832 on a promise that he would not renew the bank's charter.[179] His campaign rhetoric summed up the populist sentiment of the time: "It is easy to conceive that great evils to our country and its institutions might flow from such a concentration of power in the hands of a few men

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171. *See* Roe, *supra* note 72, at 647.

172. *See* Roe, *supra* note 69, at 33.

173. *See id*

174. *See id.*

175. *See id.* Alexis de Tocqueville attributes distrust of centralized power, historically, to the absence of a class system in the United States. He writes, "social power is always stronger and individuals weaker in a democracy which has reached equality after a long and painful social struggle than in where the citizens have been equal from the beginning." What de Tocqueville has in mind is the class struggle of the French revolution. The American Revolution was not so much about class as it was throwing off the yoke of a colonial power whose citizens were the social equals of the Americans. De Tocqueville continues by writing that the United States has "never known the mutual relationship between master and servant, and as such they neither fear nor hate each other, they have never felt the need to call in the state to manage the details of their affairs." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence trans., Harper Perennial 1988).

176. *See id.*

177. *See* MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 128 (1991).

178. *See id.*

179. *See id.* at 229.

irresponsible to the people . . .."[180] Jackson was re-elected and the bank charter was not renewed. In line with this populist sentiment, subsequent laws, like the Glass-Steagall Act, would ensure that banks in the U.S. would never be large enough to play a role in corporate governance.

Banks, however, were not the only institution that could have played a role in U.S. corporate governance. At the beginning of the twentieth century, insurance companies were the largest financial institutions in the United States.[181] They had grown large enough to virtually control railroads and industry through investment in stocks.[182] The sheer size of insurance companies around the turn of the century inflamed populist sentiment.[183] By 1905, populist fears prompted the New York legislature to begin an investigation on corruption in the insurance industry called the Armstrong Investigation.[184] The Investigation's chief investigator, Charles Evans Hughes,[185] submitted a report of his findings to the New York Legislature. The language of the report is emblematic of turn of the century populist rhetoric. He stated that insurance companies "had resources so vast that their magnitude, if permitted to grow, will soon become a serious menace to the community."[186] The Investigation found that there was widespread corruption in the insurance industry including nepotism and bribery of legislators.[187] The legislature responded by passing laws that prevented insurance companies from owning stock, controlling banks and insuring securities.[188] Despite the fact that these laws were only passed in New York, they had a drastic effect on the insurance industry. In 1905, New York domiciled insurers accounted for sixty percent of the premiums paid throughout the entire country.[189] These laws, eventually copied by other states, prevented insurance companies from owning stock well into the 1980s.[190] By that time, however, U.S. corporate governance systems as we know it had become entrenched and insurance companies did not play a role in them.

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180. ROE, *supra* note 25, at 58 (citing EDWARD L. SYMONS, JR. & JAMES WHITE, BANKING LAW: TEACHING MATERIALS 13-16 (1991)). For an excellent discussion of Jackson's war against the United States Bank, *see* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 76-82 (1945).

181. *See* Mark J. Roe, *Foundations of Corporate Finance: The 1906 Pacification of the Insurance Industry*, 93 COLUM. L. REV. 639, 639 (1993).

182. *See id.* at 662.

183. *See id.* at 661.

184. *See id.* at 639.

185. Hughes investigation of insurance companies was so successful that it catapulted him onto the national scene. In 1916, Hughes ran as the Republican nominee for President against Woodrow Wilson.

186. Roe, *supra* note 181, at 662 (citing 7 Joint Comm. Of the Senate and Assembly of the State of New York to Investigate and Examine Business Affairs of Life Insurance Companies Doing Business in the State of New York, Exhibits, Report and Index, 298).

187. *See id.* at 639.

188. *See id.*

189. *See id.* at 666.

190. *See* ROE, *supra* note 25, at 60.

Consider again the example of the fur trader. To avoid wolves, the fur trader blazed a winding and indirect path through the woods. Like the trader, U.S. business had its own path to blaze and its own wolves to avoid. American populism placed obstacles like the Glass-Steagall Act along the path for U.S. corporations. Large financial intermediaries like banks and insurance companies could not participate in corporate governance. So, the road that U.S. corporate governance took, like the trader's, was winding and indirect. The structure we ended up with, namely small, scattered owners and an active securities market, is merely the system that best avoided the obstacles, or wolves, of populism.

D. Architectural History, Path Dependence and the Persistent Divergence of Corporate Structure

Mark Roe demonstrated that scholars who accepted the notion of the U.S. corporation as the evolutionary apex of corporate structure had omitted the powerful role that politics and history had played in its creation. Like the chimney's effect on medieval Europe, American populism and the value of harmony in Japan had affected the structure of corporate governance in each country. Ironically, the debate that Roe's scholarship caused is somewhat analogous to an actual debate from evolutionary biology.

Since the 1970s biologists have been debating the extent to which human and animal behavior can be explained by evolution. The proponents of the evolutionary basis for behavior, called sociobiolgists or evolutionary psychologists, believe that the basis for behavior can be found in one's genes.[191] The opponents of sociobiology, on the other hand, believe that behavior is influenced more by social environment, and that sociobiology merely acts as a validation of ideological prejudices.[192] In 1979, the two greatest critics of sociobiology, Stephen Jay Gould and Richard Lewontin, wrote a revolutionary paper that eloquently refuted sociobiology entitled "The Spandrels of San Marco."[193]

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191. The seminal work on sociobiology is EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975). Wilson's recent research has become more messianic, *see* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE (1998), where Wilson tries synthesize science, social science, humanities and art into a kind of grand unified theory of knowledge. He even gives an evolutionary basis for art. For a popular account of sociobiology, *see* JARED DIAMOND, THE THIRD CHIMPANZEE (1992). *See also* STEVEN PINKER, HOW THE MIND WORKS (1997) for a popular account of evolutionary psychology.

192. *See generally* R.C. LEWONTIN, BIOLOGY AS IDEOLOGY (1991).

193. *See* Stephen Jay Gould and Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, in CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY, 252-70 (Eliot Sober ed. 1984). Gould and Lewontin's paper has now assumed mythic status. There exists an entire body of work applying postmodern literary theory to analyze the paper as scientific rhetoric. *See* James Schwartz, *Oh My Darwin*, 9 LINGUA FRANCA (1999).

In trying to show that the physiological design of animals often comes about as the result of accidents, Gould and Lewontin relied on an example from art history. The cathedral of San Marco in Venice contains several triangular spaces called spandrels that were unintentionally created when the cathedral's dome was built on four rounded arches.[194] The spandrels are lavishly decorated,[195] in fact, as Gould and Lewontin write, "[T]he design is so elaborate, harmonious, and purposeful that we are tempted to view it as the starting point of any analysis, as the cause in some sense of the surrounding architecture."[196] However, as beautiful as the spandrels are, they were not intended by the architect's design.[197] Rather, they were the accidental result of the building of the dome.

Gould and Lewontin argue by analogy that like the casual observer that assumes that the spandrels are the cause of the architecture, sociobiologists have mistakenly assumed that human behavioral traits are genuine evolutionary adaptations. The same analogy can be made in the corporate governance context. After World War II, when U.S. corporations were reaping huge profits, scholars were tempted to view U.S. corporate structure as "harmonious and purposeful," as the cause of the success. However, as Gould and Lewontin write, this view "inverts the proper path of analysis."[198] The cathedral of San Marco began with architectural constraint: the necessity of the spandrels to support the dome.[199] U.S. corporate governance also had a constraint: populism and the laws that it spawned like the Glass-Steagall Act. Since the spandrels were needed to support the dome, mosaicists utilized the extra space with paintings.[200] American populism prohibited banks and insurance companies from playing a role in corporate governance, however, corporate law scholars filled the void with evolutionary inevitability. They made the mistake of a casual observer of the spandrels; they assumed that the local adaptations made by U.S. corporations were actually evolutionarily necessary adaptations that all corporate structures worldwide would eventually make.

The question that remains is whether the differences in corporate structure among different countries are as immutable as the frescos in San Marco. Will corporate structures continue to differ? Under the Mark Roe's path

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194. *See* Schwartz, *supra* note 193.

195. In describing one of the spandrels Gould and Lewontin write "An evangelist sits in the upper part flanked by the heavenly cities. Below, a man representing one of the four biblical rivers (Tigris, Euphrates, Indus and Nile) pours water from a pitcher in the narrowing space below his feet." Gould and Lewontin, *supra* note 193, at 253.

196. *Id.*

197. *See* Schwartz, *supra* note 193.

198. Gould and Lewontin, *supra* note 193, at 253.

199. *See id.*

200. *See id.*

dependent paradigm the answer appears to be yes.[201] Since corporate governance is path dependent on politics, history, and culture, it is unlikely that countries will change their corporate governing structure any time soon. The descriptive power of Roe's path dependence paradigm in undeniable. However, will its success continue? Will there be persistent divergence in the 21st century?

III. INTERNATIONAL CONVERGENCE OF CORPORATE GOVERNANCE

Despite Mark Roe's compelling scholarship, there still is a great deal of debate as to where corporate governance is headed. Like many current legal debates, the argument is between neoclassical economists and others using a more interdisciplinary approach.[202] Those on the pure economics side believe that efficiency considerations will ultimately force corporate structure to evolve into the Berle and Means corporation.[203] Corporations that adopt inferior governing structures will wither on the vine in the product and capital markets and thus will be forced to either adapt or disappear.[204] On the other side of the debate there are those, like Mark Roe, who argue that corporate structure is constrained by politics and culture. Because corporate structures in other countries emerged in distinct political and cultural environments, corporate structures will persistently differ. The whole discussion has devolved into a nature vs. nurture argument. The question that remains is which paradigm will ultimately triumph? Have we reached an "end of history" in the corporate world,[205] or is corporate structure all relative?

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201. *See* Lucien Arye Bebchuk and Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 170 (1999). Although Roe insists here that difference only "might persist in the future." *Id.*

202. *See* John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 646 (1999).

203. *See id.*

204. *See id.*

205. *Id.* (quoting Henry Hansmann and Reiner Kraakman, The End of History for Corporate Law (Nov, 19, 1997) (unpublished manuscript, prepared for a Sloan Conference at Columbia Law School)). The "end of history" refers to the work of Francis Fukuyama, *see* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN, 1992. Relying on neo-Hegelian philosophy, Fukuyama celebrates the triumph of liberal democracy and capitalism at the end of the Cold War. In Hegleian philosophy, history is viewed as progress towards freedom. The end of history arrives when humankind's deepest longings are satisfied. Fukuyama proclaims that we have reached this point of liberation with the triumph of the free market economy over Communism. Our deepest longings have been satisfied and thus history has ended. Interestingly, Fukuyuama's use of Hegelian philosophy is the antithesis of what Marx intended. Hansmann and Kraakman, neoclassical economists arguing for the Berle and Means paradigm, have provocatively co-opted Fukuyyama's idea and applied it

A survey of recent trends reveals that neither view is entirely correct. Undoubtedly, governing structures are evolving. However, while structures in Europe and Asia are becoming more like those in the U.S.,[206] recent trends in the U.S. demonstrate that financial intermediaries may play a larger role in corporate governance. Thus, corporate structures appear to be converging. While this may refute parts of Roe's argument, it does not completely vindicate the Berle and Means paradigm. The evolution that we are witnessing is by no means complete and no one can be sure how corporations will eventually be structured. The final section of this Note will review some of the recent trends in the U.S. and Japan[207] in order to demonstrate at least some of the ways that governance structures are converging.

A. Recent Trends in Japan

During the latter half of 1997, the Asian economy endured a rather severe economic crisis.[208] Japan, in addition to Thailand, Korea, Indonesia, Malaysia, and the Philippines, suffered through a devaluation of currency, plummeting stock markets, unemployment and a banking crisis.[209] As a result of this, many commentators began to reassess corporate governance in Japan.[210] Suddenly, the kieretsu-main bank interactive system that was so compelling earlier in the decade now seemed to be part of the problem. Instead of adequately balancing corporate power, the Japanese system now looked anachronistic and enabling of cronyism.[211]

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to corporate governance. Thus, the triumph of the market economy also means the triumph of the free market's institutions, like the U.S. corporate structure. Apparently, the U.S. corporate structure is the only one that will ultimately fulfill our deepest, fundamental longings.

206. *See* Lawrence A. Cunningham, *Commonalities and Prescription in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1147 (1999).

207. Japan is not the only country that is moving towards the U.S. model. Many European countries are also adopting pieces of the U.S. corporate governance structure. For instance, in the United Kingdom, the Committee on Finance's 1998 Report on Corporate Governance, called the Hampel Report, advocated identifying the "best practices" of global corporations. This included adopting some of the U.S. innovations in regulatory corporate governance. *See* Michael Bradley, Cindy A. Schipani, Anant K. Sundaram and James P. Walsh, The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads, 62 LAW & CONTEMP. PROBS. 9, 72 (1999). In addition, corporate structure in Germany is also undergoing change. German banks, who exert their control over corporations in much the same way Japanese main banks do, are losing some of their influence with the growth of the capital market in Germany. *See id*

208. *See id.* at 75.

209. *See id.*

210. *See id.*

211. *See id.*

In response, the Corporate Governance Committee of the Corporate Governance Forum of Japan issued a report on Japanese corporate structure. The report stated that Japanese corporations needed to adopt some of the characteristics of U.S. corporate structure.[212] The report notes that the boards of directors and managers in Japanese firms need to become more powerful, somewhat like managers in U.S. corporations.[213] It states that in the Japanese corporations directors and managers have not been "equipped with sufficient governance authority."[214] Notably, the report indicates that the Japanese system of cross-shareholding between kieretsu members and banks may begin to unravel.[215] Because this is a possibility, the report urges that Japanese corporations should, like the U.S., make better use of independent and external directors.[216] Finally, it argues that Japanese law ought to adopt a more rigorous U.S.-style concept of fiduciary duty to shareholders, given that the Japanese concept of such duties is rather opaque.[217]

From this report it is clear that there are forces in Japan urging the adoption of a corporate governance system similar to the United States. While few direct steps have been taken these changes could be on the horizon.

B. Recent Trends in the United States: The Gramm-Leach-Bliley Act

The greatest example of possible corporate convergence in the U.S. is the 1999 passage of the Financial Services Modernization Act, or the Gramm-Leach-Bliley Act.[218] The Act amends the Banking Act of 1933 in order to revise the regulations of the financial services industry. It tears down many legal barriers in order to promote affiliation among banks, securities firms and insurance

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212. *See id.* at 76.

213. *See id.*

214. *Id.* (quoting Corporate Governance Committee, *Corporate Governance Forum of Japan, Governance Principles: A Japanese View* (Final Report) (May 26, 1998) at 37.)

215. *See id.* A recent Wall Street Journal article stated that, due to Japan's long recession, the close relationship between banks and corporations is beginning to unravel. *See* Phred Dvorak, Robert A. Guth, Jason Singer and Todd Zaun, *Frayed By Recession Japan's Corporate Ties Are Coming Unraveled*, WALL ST. JRNL., March 2, 2000, at A1. Companies that are tied to each other through kieratsu are now selling the stock that they own in one another. *See id.* The article goes on to state that "[t]his great unraveling is a moment of truth for Japan that could alter the way its economy and society work. Will cross-holdings recede so much that Japanese businesses, like American and European ones, are subject to hostile takeovers? Will executives have to kowtow to new shareholders who care little for the tradition of preserving jobs at the cost of profit?" *Id.*

216. *See id.*

217. *See id.*

218. *See* Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No 106-102, 113 Stat. 1338 (1999).

companies.[219] Most important, the act repeals the Glass-Steagall Act,[220] which prohibited banks from owning securities.[221]

The Gramm-Leach-Bliley Act allows financial institutions, like banks and insurance companies, to create a holding company, or financial subsidiary, which can offer a full range of financial services together with banking.[222] This act represents the most comprehensive reforms in financial services regulation since the Great Depression,[223] and could conceivably have a great impact on U.S. corporate governance. The holding companies created under the Act are permitted to engage in securities underwriting, merchant banking and insurance company portfolio investment activities.[224] Through their insuring of securities, banking activities and portfolio management, these companies may be able, like Japanese main banks, to have a strong voice in U.S. corporate governance.

It is too early to tell whether these holding companies will really be able to play a role in U.S. corporate governance. These companies, might for instance, be limited by the populist tradition in the U.S. and thus remain outside of real corporate governance. However, the power that they obtain from both insuring securities and their own investments may give them a voice that could ultimately act as a constraint on powerful U.S. managers.

C. Evolution and Corporate Convergence

The Japanese report on corporate governance and the Gramm-Leach-Blilely Act are two examples of how corporate governance appears to be evolving towards convergence. However, are corporate structures evolving in accordance with the Berle and Means paradigm? At least right now, the answer is no.[225] The

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219. *See* CIS, Congressional Universe, Legislative History of: P.L. 106-102 (visited Oct. 14, 2000) <http://web.lexis-nexis.com/congcom>.

220. *See id.*

221. *See* infra p. 25.

222. *See* James Hamilton, Gramm-Leach-Bliley Act Creates Financial Dynamism for the Next Century (visited Jan. 12, 2001) <http://www.bankinfo.com/compliance/reform.html>.

223. *See id.*

224. *See* Financial Services Modernization Act, Gramm-Leach-Bliley, Summary of Provisions (visited Jan. 12, 2001) <http://www.senate.gov/~banking/conf/grmleach.htm>.

225. Many commentators, however, do believe that there is a strong international trend towards the Berle and Means paradigm. *See* Bradley et al., *supra* note 207. *See also* Coffee, *supra* note 202. Coffee is especially adamant in his belief that corporate structures worldwide are becoming more and more like the U.S. His theory is that the strong managers, characteristic of the U.S. structure, actually provide superior protection to shareholders, than for instance a block holding bank does. This is because he believes that the greatest danger facing small shareholders is the lessening of their share value that occurs when there is a large shareholding block. Strong managers, in conjunction with many securities regulations that discourage concentrated blocks, have acted to keep large controlling blocks from forming and thus have kept U.S. stock value high. *See id.* at 698.

Berle and Means paradigm holds that the U.S. governing structure is the pinnacle of corporate governance and that structures in other countries should either emulate it or disappear. Since the U.S. structure is already perfectly adapted, the Berle and Means paradigm tacitly entails that it cannot evolve anymore. Yet, the passage of the Gramm-Leach-Bliley Act reveals that this is not necessarily the case. As stated above, this Act could affect corporate governance in the U.S.

As stated earlier, the Berle and Means paradigm is Darwinian.[226] This means that mutations emerge which are better adapted to their environment. Through natural selection, the best-adapted mutation will thrive and inferior adaptations will be wiped out. By this standard, U.S. corporate structure should be wiping other structures out. This, however, has not happened yet. German and Japanese corporate structures are still distinct and successful. While U.S. firms have enjoyed unprecedented success over the last decade, many economists are now predicting a downturn in the U.S. economy.[227] If this does happen, we may once again see a reevaluation of U.S. corporate structure. Rather than a Darwinian struggle between competing international governing structures, what we appear to have is more Lamarckian. The zoologist Jean Baptiste Pierre Antoine de Monet de Lamarck posited his own theory of evolution fifty years before Darwin.[228] While Lamarck's theory of evolution was proven incorrect years ago,[229] it is appropriate to consider it in the corporate governance context.

Lamarck believed that evolution occurred through the use or disuse of organs.[230] As the environment changes, the physical needs of different organisms require that they take on new activities to adapt to their new environment.[231] In order to adapt, the organism may begin to use some of its organs or limbs more than others, or may need to develop entirely new organs.[232] The continued use and strengthening of the organ can then pass down through generations, and over time, with continued use of different organs, a completely new species will emerge.[233] This is applicable to what is happening currently in corporate

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226. *See infra* Part I.

227. *See e.g.* Robert J. Samuelson, *It's Now Time for a Tax Cut*, NEWSWEEK, Jan. 15, 2001, at 25 (stating "By now, it's clear that most commentators missed the economy's emerging weakness. Indeed, a recession may already have started).

228. *See* ROBERT JURMAIN AND HARRY NELSON, INTRODUCTION TO PHYSICAL ANTHROPOLOGY, 81 (1994). For Lamarck's quintessential work, *see* JEAN BAPTISTE LAMARCK, ZOOLOGICAL PHILOSOPHY (1984).

229. *See id.* at 82.

230. *See id.* at 81.

231. *See id.* at 82.

232. *See id.*

233. *See id.* Under a Lamarckian system of evolution, I could conceivably introduce a number of new mutations into the human species. For instance, if I wanted to reintroduce prehensile toes into the population I could simply begin eating, writing and doing a number of other activities with my toes. This would strengthen and develop them. I could then pass my prodigiously powerful digits on to my children and encourage them to also do everything possible with their toes. My children would then encourage their children to do

governance. The international business environment is changing. In order to deal with this new global environment, corporate structures in different countries have had to adapt various aspects of their structure (organs). For instance, Japan may in the future have a more vibrant securities market and a dismantling of the cross-holding system, while the U.S. may have holding companies, under the Gramm-Leach-Bliley Act, involved in governance. Over time, like organs in the Lamarckian system, different organs of the various international governance systems will adapt, strengthen and endure. Systemic change may not necessarily occur. For instance, at least for now, the main bank/kieretsu system is intact in Japan, and the managers in the U.S. are still strong while the shareholders are still weak.

How then does the notion of path dependence fit into this system? After all, given that there is some convergence in corporate structures it would appear that the notion of path dependence has lost its explanatory power. This, however, is not the case. Undoubtedly, the systems of international corporate governance are adapting their structural organs to deal with the new global environment. Indeed, some of these adaptations are leading to observable convergence, yet different systems have yet to fundamentally change. The reason for this can be explained by path dependence. The adaptations are occurring in local environments. Adaptations in Japanese corporate structure are still occurring in the environment of Japanese politics and culture, likewise for the U.S. Since, as Mark Roe proved, corporate governance is path dependent on its political and cultural setting, it is unlikely that we will see complete convergence of corporate structures in the near future.

Thus, various countries have adapted their corporate governance systems differently to solve uniquely local problems. These adaptations are, at this point, incremental. Rather than a worldwide, Darwinian competition between governing systems, we are witnessing a Lamarckian adaptation to globalization with different structural organs changing, instead of the entire system. We are unlikely to see big changes anytime soon, because corporate governance systems are bound by the culture and politics in which they emerged. As some commentators have put it, different economies all "have the essential elements of a good governance system, [and] the available evidence does not tell us which one of the governance systems is the best."[234]

Therefore, to answer the question initially posed, neither the Berle and Means paradigm, nor the path dependent paradigm can, by themselves, account for all of the changes in international corporate governance. Corporate structures are evolving, as the Berle and Means paradigm predicts; however, this evolution is

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the same and over time we would have a segment of the human population as adept as any simian in using their toes. The fact that this has not happened with toes or with anything else (like the offspring of bodybuilders having similarly muscular bodies) is evidence enough that Lamarck was wrong.

234. BRADLEY ET AL., *supra* note 207, at 77 (quoting Andrei Shliefer & Robert W. Vishney, *A Survey of Corporate Governance*, 52 J. FIN. 737, 739 (1997)).

not strictly driven by economics toward the U.S. model. Pure economic evolution is constrained by politics and history. Thus, the Berle and Means paradigm has taught us the importance of economics in corporate structure and goes a long way toward explaining some of the convergence in structures that we are currently witnessing. However, path dependence, in conjunction with a Lamarckian analysis, explains why we have not seen, and are unlikely to witness, large systemic change. Both notions are needed to account for what we are now observing in international corporate governance.

CONCLUSION

Until the 1990s, corporate law scholars believed that the Berle and Means paradigm of corporate governance was the evolutionary apogee of corporate governance. This paradigm predicted that economics would eventually force corporate structures in other countries to adapt into something similar to the U.S. system with strong managers and weak shareholders. Mark Roe's scholarship introduced the notion of path dependence into corporate scholarship and demonstrated that corporate structure was also dependent on politics and culture. The differences between U.S. and Japanese corporate structure illustrate this point. The path dependent paradigm predicts that corporate structures will continue to diverge. Currently, however, there is observable convergence in corporate structures. Yet, this convergence is occurring only at the margins. The large systematic change that the Berle and Means paradigm predicts through an almost Darwinian struggle between governing structures has not occurred. The only way to account for this limited convergence is through a combination of the Berle and Means and path dependent paradigm.

The reader, at this point, is likely wondering why any of this is important. Admittedly, it is difficult to see how an esoteric subject like corporate governance theory has an important bearing on one's life. However, it is patently obvious, especially since the end of the Cold War, that, like them or not, large publicly held corporations are here to stay and are playing an increasingly important role in the global economy. As one commentator has noted:

> "[h]uge concentrations of private capital continue to wield extraordinary power over decisions crucial to the lives of all Americans, decisions on rates and directions of investment, the harvest and use of resources, the development and deployment of technology, and the control and management or work and workplaces, to name a few."[235]

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235. Mark M.Harper, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 639 (1989).

Organization matters.[236] One commentator, in contemplating the end of the Roman Empire and the onset of the Dark Ages, noted that organization was vital to the success of the Romans. One of the keys to Roman success was their organizational ability to produce and distribute fertilizer, an ability that later Europeans lost.[237] If organizations are important, then *a fortiori* the governing of organizations is important. A recent survey in the McKinsey Quarterly noted that over eighty percent of investors stated that they would pay more for the shares of a well governed company than for a poorly governed firm of comparable financial worth.[238] Thus, capable corporate governance structures have the ability to generate a great deal of wealth. As one scholar noted, "Effective governance is essential to the healthy growth of capitalism in a democracy."[239] The subject of corporate governance, therefore, has important implications for the global economy and should have enduring interest for years to come.

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236. Organizations, like corporations, seem important and particularly fascinating when one examines them in a Freudian framework. Many scholars have noted a connection between the rise of organizations and the control of sexuality. *See* MORGAN, *supra* note 61, at 224. For instance, some have theorized that the formation of monasteries (one of the earliest types of organizations) in the Middle Ages was really just an attempt to control what many at the time saw as on overly libidinous society. *See id.* Indeed, the theorist Michel Foucault has noted that the connection between organization and sexuality is unsurprising given that control of the body is essential for mastery of social and political life. *See id.* (citing MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1979)).

237. *See* Geu, *supra* note 76, at 221 (quoting LESTER C.THUROW, THE FUTURE OF CAPITALISM: HOW TODAY'S ECONOMIC FORCES SHAPE TOMORROW'S WORLD 262 (1996)). As a member of the ancient Roman military put it: "The Romans were less prolific than the Gauls, shorter than the Germans, weaker than the Spanish, not as rich or astute as the Africans, inferior to the Greeks in technology and in reason applied to human affairs. What they had was the ability to get organized." *Id.* (quoting THUROW at 13).

238. *See* Paul Coombes and Mark Watson, *Three Surveys on Corporate Governance* 4 MCKINSEY QUARTERLY 74, 75 (2000).

239. A.G. Monks, The American Corporation at the End of the Twentieth Century A Speech given at Cambridge University, July, 1996 (visited Jan. 16, 2001) <http://www.lens-library.com/info/cambridge.html>.