

# Reciprocal Convergences: How China Might Influence Western Corporate Governance

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## ABSTRACT

*The literature on economic and corporate law convergence has largely been a conversation about the West. In particular, it focuses on the influence of Anglo-American (and principally American) norms and practices, primarily on those of Western European nations. As such, it is unidirectional in concept. It also works through a common paradigm: Although Western nations differ, they all accept Enlightenment values, making such influence more palatable and more possible.*

*The rise and possible dominance of Asian economies, principally China, suggests that we consider whether Eastern norms and practices not born of the Enlightenment might come to influence Western norms and practices and the channels through which this might happen. This is a possibility the literature has not yet addressed.*

*This Paper introduces a theory of reciprocal convergences to provide a framework for analysis. After surveying the convergence literature and describing reciprocal convergences, it introduces indigenous Chinese ideas about corporate social responsibility as the vehicle that might embody these values, analyzing the literature on what those ideas look like and how they differ from Western ideas.*

*Finally, this Paper looks at two possible channels through which these influences might be transmitted: the multinational enterprise and China's "One Belt, One Road initiative." It concludes with some tentative thoughts about future developments.*

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#### INTRODUCTION

The various literatures on economic and legal convergence have concerned themselves primarily with Western systems.<sup>1</sup> The fundamental question addressed is whether the Western world is converging on a system motivated by the ideas underlying Anglo-American neo-liberalism and its economic manifestation, a liberal market economy. Legal scholars have rarely reversed the question to ask whether the norms and values of European peoples and nations might affect Anglo-American practices.<sup>2</sup> More often, the convergence literature assumes that the consequence of non-convergence

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<sup>1</sup> See *infra* Part II. The same is true of scholars studying corporate social responsibility. Shangkun Xu & Rudai Yang, *Indigenous Characteristics of Chinese Corporate Social Responsibility Conceptual Paradigm*, 93 J. BUS. ETHICS 321, 323 (2010).

<sup>2</sup> Ruskola is an exception. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1704 (1999). There has been exploration in other fields on European policy influence on non-EU countries. Katja Biedenkopf & Claire Dupont, *A Toolbox Approach to the EU's External Climate Governance*, 1 GLOB. POWER EUR. 181, 181 (2013); Sandra Lavenex & Frank Schimmelfennig, *EU Rules Beyond EU Borders: Theorizing External Governance in European Politics*, 16 J. EUR. PUB. POL'Y 791, 791 (2009), <http://www.tandfonline.com/doi/abs/10.1080/13501760903087696>.

(persistence, in its terminology) or limited convergence will be for various European nations to retain some of their own traditions within some kind of modified liberal market system, rather than syncretic modifications in all systems. The prevailing scholarly perspective has been that convergence means the absorption of Anglo-American norms and nothing more.

I want to reverse the question. Is it possible that the corporate governance regimes and corporate cultures of other nations and regions will come to influence those of the Anglo-American world? Simply to ask this question is to provide us with a new field of vision. But to see it properly requires scholars to remove the red, white, and blue tint of Anglo-American glasses.<sup>3</sup>

To ask whether European legal and business norms can reciprocate Anglo-American influence seems, at least for the moment, like nothing more than idle sightseeing. While still in flux around the margins, the scenery is pretty well established. Europe likely won't fully Americanize (nor will America likely Europeanize), but Western norms are working toward an equilibrium that at least embraces some characteristics of liberal free markets, contractually based governance regimes, and notions of corporate governance that coordinate well with this financial structure. At the same time, European societies retain some of their own cultural norms, social practices, policies and business practices.<sup>4</sup>

The question becomes more interesting if we look from the East.<sup>5</sup> The economies of East Asia, relatively new on the world stage, have to varying degrees shown significant evidence of adopting the forms and trappings of

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<sup>3</sup> For example, Jiang and Kim note that “many papers that study China use Western theories and concepts to explain their empirical findings,” resulting in misunderstanding of Chinese thought and practice. Fuxiu Jiang & Kenneth A. Kim, *Corporate Governance in China: A Modern Perspective*, 32 J. CORP. FIN. 190, 190 (2015).

<sup>4</sup> See DANIEL A. BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* 6 (2015). Daniel Bell is among the more prominent scholars calling for the need to overcome Western perspectives in evaluating China.

<sup>5</sup> Teemu Ruskola, in a deeply insightful paper, raised the question of whether what I refer to as “reciprocal convergences” between China and the West were possible. Ruskola, *supra* note 2, at 1716, 1720. The literature, with a few recent exceptions, has yet to address the question. See also Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347, 347 (2008) (claiming Confucian influences on Western business ethics and predicting further influence); David A. Ralston et al., *The Impact of National Culture and Economic Ideology on Managerial Work Values: A Study of the United States, Russia, Japan, and China*, 39 J. INT'L BUS. STUD. 8, 21 (2008); (Robin) Hui Huang, 略论公司法一体化:中国视角及启示 (*Globalization of Company Law: A Chinese Perspective*), SOC. SCI. RESP. NETWORK (June 24, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2992027](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992027).

Western corporate governance and financial market norms.<sup>6</sup> And, to be fair, the past several centuries of Western history have brought these norms to prominence and demonstrated their ability to stimulate dramatic economic development and substantially increase human wealth.<sup>7</sup> Western, and especially Anglo-American contractual and market norms seem to continue to embed in other cultures.<sup>8</sup>

It is a very human thing to look at history and see only yesterday. It is perhaps even more human to observe the present in a historical context and proclaim it as progress. Yet the Western idea of progress is just that—a Western idea.<sup>9</sup> And that idea is, in the context of human history, quite recent.<sup>10</sup> It is important to remember the relatively brief period of human history during which modern Western ideas developed and spread in comparison to the millennial-old norms of East Asian cultures.<sup>11</sup> There is no reason to believe that these cultures understand progress in precisely the same way that the West understands it.<sup>12</sup>

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<sup>6</sup> See *infra* Part III.

<sup>7</sup> I do not, in this paper, directly address the issue of the distribution of that wealth.

<sup>8</sup> That may become increasingly difficult. In his opening speech at the 19<sup>th</sup> Party Congress of the Chinese Communist Party held in Beijing on October 19, 2017, Chairman Xi Jinping emphasized both the importance of the state-owned sector in China and signaled a retreat from free markets. See Chris Buckley & Keith Bradsher, *Xi Jinping's Marathon Speech: Five Takeaways*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/world/asia/china-xi-jinping-party-congress.html>; see also *Full Text of Xi Jinping's Report at 19th CPC National Congress*, CHINA DAILY (Apr. 11, 2017), [http://www.china-daily.com.cn/china/19thcpcnationalcongress/2017-11/04/content\\_34115212.htm](http://www.china-daily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm).

<sup>9</sup> Martin Jacques observes that we have lived with Western (especially American) dominance for so long it is hard to imagine an alternative. See MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE RISE OF THE MIDDLE KINGDOM AND THE END OF THE WESTERN WORLD* 8 (2009); see also EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* 16 (2017). But see G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 FOREIGN AFF. 23, 23 (2008) (arguing that Western openness can accommodate Chinese ambitions and encouraging the United States to be even more open to China).

<sup>10</sup> See Bell, *supra* note 4, at 6 (comparing, in a political context, China's thirteen-hundred years of meritocratic governance with only a century or less (for most countries) of democratic elections); see also E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780* 3 (2<sup>nd</sup> ed. 1990) ("The modern sense of the word [nations] is no older than the eighteenth century.").

<sup>11</sup> For example, Yan Xu has recently demonstrated some of the centuries old culturally embedded impediments to China's enforcement of its western-style tax code. See Yan Xu, *Convergence and Divergence: China's Development Path to a Modern Tax System*, 18 AUSTL. J. ASIAN L. 1, 1 (2017).

<sup>12</sup> To be more precise, progress in the sense of improved living conditions and social welfare are probably universal. But how the increased wealth that makes this possible is created and distributed, and whether there are factors that limit the drive

In Western usage, the word progress is normative.<sup>13</sup> The obvious presence of different norms in different cultures should lead us to attempt to suspend our Western understanding of progress when we study and, especially, when we try to influence these different cultures. This is no less true when studying economic institutions as in the study of governmental and social institutions.<sup>14</sup> The permanence of the liberal worldview is not a fact. The story of progress in our world is far from over.<sup>15</sup>

There is a widespread belief that, at the meta-level of government, politics, economics, and culture, the world is in flux.<sup>16</sup> And it is at this point in history that the East has ventured out, its businesses and its people sailing the world like Zheng He's enormous ships.<sup>17</sup> Perhaps the most recent direct challenge to the West's way of doing things was presented by Chairman Xi Jinping's address to the 19<sup>th</sup> National Congress of the Communist Party of China. Several important points in that speech stand out, points now embodied in the Party Constitution.

First (and included in the title of the speech) is China's emphasis on building a "moderately prosperous society in all respects."<sup>18</sup> The phrase had

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for wealth, are determined by the values and practices of particular cultures, as I discuss below. See JACQUES, *supra* note 9, at 8–9, 12, 44–45, 100, 206, 403; see also EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* 16 (2017); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INT'L. L. 359, 359–64 (1996) (describing what he calls "the modern liberal myth of an emerging common human destiny").

<sup>13</sup> This seems to be the prevailing view, although the sources and legitimacy of the idea of progress is the subject of debate. See, e.g., AMY ALLEN, *THE END OF PROGRESS: DECOLONIZING THE NORMATIVE FOUNDATIONS OF CRITICAL THEORY* 107, 108 (2017).

<sup>14</sup> Leong H. Liew, *Rethinking Economics in the Asian Century: The Market and the State in China*, in CAROL JOHNSON ET AL., *THE SOCIAL SCIENCES IN THE ASIAN CENTURY* 131, 146 (2015) ("The Chinese economy should . . . be studied for the lessons it can teach us about the problematic nature of many of the key assumptions in conventional Western economic thought . . .").

<sup>15</sup> Bell, *supra* note 4, at 56–58 (stressing the importance of harmony throughout East Asia in contrast to the often competitive destructiveness of multi-party democratic elections).

<sup>16</sup> See Maximilian Mayer, *China's Rise as Eurasian Power: The Revival of the Silk Road and its Consequences*, in *RETHINKING THE SILK ROAD: CHINA'S BELT AND ROAD INITIATIVE AND EMERGING EURASIAN RELATIONS* 8, 14 (2018) (describing the world's unsettled political condition).

<sup>17</sup> Zheng He was a Chinese mariner under the Yongle Emperor in the early Ming Dynasty. His 126 meter ships carrying hundreds of sailors throughout the seas surrounding Southeast Asia and India to Africa marked the high-water mark of Chinese maritime exploration. *Zheng He*, *NEW WORLD ENCYCLOPEDIA* (Sept. 14, 2016), [http://www.newworldencyclopedia.org/entry/Zheng\\_He](http://www.newworldencyclopedia.org/entry/Zheng_He).

<sup>18</sup> See Xi Jinping, *Address at the 19th National Congress of the Communist Party of China, Secure a Decisive Victory in Building a Moderately Prosperous Society*

earlier appeared in the Party Constitution but its re-emphasis in a time of growing income inequality is highly significant. Supporting this are clauses requiring that “[t]he people-centered philosophy of development must be upheld, the philosophy of an innovative coordinated, green, and open development that is for everyone must be upheld,” and that science and technology must be harnessed “to promote a high quality, a more effective, more equitable, a more sustainable development of the national economy,” all while embracing “the decisive role of market forces in resource allocation . . . ,” embedded in the promotion of “the creative evolution and development of fine traditional Chinese culture “and the enhancement of “our country’s cultural soft power.”<sup>19</sup> While China has long expressed a vision for itself different from the Western world,<sup>20</sup> these constitutional additions go further in presenting a Chinese version of a market economy that appears to further embrace Western-style market mechanisms grounded in Chinese values, tradition, and culture.

Significant cracks within the West’s liberal infrastructure, combined with the massive economic growth of the East, reveal the question that I ask: How, and to what extent, will the East influence the norms and practices of the West? How, and to what extent, will Eastern values find their way into Western ways of doing things? Into Western ways of governing corporations? And, if the answer is little or none, the question still remains but in a different direction. Economic growth spreads west in Asia.<sup>21</sup> India may be uniquely separate, but the countries of Southeast and Central Asia—aided perhaps by China’s One Belt One Road initiative—may also rise in

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in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era 23–25 (Oct. 18, 2017), [http://news.xinhuanet.com/english/special/2017-11/03/c\\_136725942.html](http://news.xinhuanet.com/english/special/2017-11/03/c_136725942.html); *see also* XIANFA, General Program (1982) (China).

<sup>19</sup> *See* Xi Jinping, *supra* note 18, at 23–25; *see also* XIANFA, General Program (1982) (China).

<sup>20</sup> *See* Jacques, *supra* note 9, at 90 (“This problem was compounded by the hegemony enjoyed by Confucian thought, which made it very difficult for other ways of thinking to gain ground and influence. Until around 1900 the idea of reform was virtually always articulated within a Confucian framework – with an insistence on the distinction between Chinese ‘essence’ and Western ‘method’ (or, in the famous phrase of Zhang Zhidong (1837–1909), ‘Chinese learning for the essential principles, Western learning for the practical applications.’”); *see also* Jacques at 97 (describing the rule of the PRC as an integral element of Chinese culture, tradition and history).

<sup>21</sup> *See generally* MAXIMILIAN MAYER, *supra* note 16 (discussing China’s influence on, and relationships with, the nations of Eurasia, largely in the context of the One Belt, One Road initiative).

influence.<sup>22</sup> So even if Western liberalism is, for the moment, sustained in something like its modern form in the West, we cannot discount the rise of a perhaps more powerful Eastern style economic and corporate world that has influence on the way that Western norms are practiced. How might it happen? What might it look like?<sup>23</sup>

These are big questions, and the attempt to answer them puts the scholar in the uncomfortable position of appearing to make predictions. My goal in this work is more modest. I simply want to explore the question of what I call “reciprocal convergences,” from East to West, in order to put the subject on the table and to open this line of thinking in the study of corporate governance and finance so that scholars can to begin to explore these possibilities now and in real time as they develop.<sup>24</sup>

I want to be quite clear that my approach is not normative. There is much to admire in the West and much to admire in the East. And there is much to criticize in both. Chinese business practices have often failed to live up to Chinese ideals. Corporate governance remains conceptually underdeveloped

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<sup>22</sup> While One Belt, One Road was initiated only in 2013, and its success is not yet assured, it already includes 60 countries with a combined population of 4 billion people, representing 1/3 of global GDP. See Peter Ferdinand, *Westward Ho—the China Dream and ‘One Belt, One Road’: Chinese Foreign Policy Under Xi Jinping*, 92 INT’L AFF. 941, 949–50 (2016). For further discussion of One Belt, One Road, see TOM MILLER, CHINA’S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD 31 (2017); Sit Tsui et al., *One Belt, One Road: China’s Strategy for a New Global Financial Order*, 68 MONTHLY REV. 36, 36 (2017), <https://monthlyreview.org/2017/01/01/one-belt-one-road/>; see also Phillippe Le Corre, *Chinese Investments in European Countries: Experiences and Lessons for the Belt and Road Initiative*, in Mayer, *supra* note 21, at 162; TOM MILLER, CHINA’S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD 47 (2017) (evaluating the influences—both positive and negative—of Chinese investment practices in several European countries and exploring China’s potential for further influence).

<sup>23</sup> Bindu Sharma and her colleagues ask “[A]s the second largest economy in the world, will China define the future of corporate citizenship?” BINDU SHARMA, CONTEXTUALIZING CSR IN ASIA: CORPORATE SOCIAL RESPONSIBILITY IN ASIAN ECONOMIES 9–11 (2013); Olivier Furrer et al., *Attitudes Toward Corporate Responsibilities in Western Europe and in Central and East Europe*, 50 MGMT. INT. REV. 379, 380 (2010) (“Corporate responsibility . . . relates to societal expectations regarding the social (discretionary, ethical, legal), economic, and environmental conduct of business organizations.”).

<sup>24</sup> Some early efforts in other fields point in this direction. See, e.g., Jeng Leng & Wei Shen, *The Evolution of Contract Law in China: Convergence in Law But Divergence in Enforcement?*, in PRIVATE LAW IN CHINA AND TAIWAN — LEGAL AND ECONOMIC ANALYSES 63, 68–69 (2016); Yan Xu, *Convergence and Divergence: China’s Development Path to a Modern Tax System*, 18 AUSTRALIAN J. ASIAN L. 1, 14–15 (2017) (grounding China’s modernization of its tax regime in the tenacity of millennia-old practices).

among Chinese policymakers and managers.<sup>25</sup> The manner in which Chinese values will determine governance norms in a more highly developed China is unclear.

Moreover, as Western experimentation in Russia has demonstrated, institutions must suit their cultures in order to function,<sup>26</sup> even if one perceives (or thinks one perceives) world cultural evolution toward Western cultural values. The optimal outcome, if there is one, is not at all apparent. My goal here simply is to explore the question, undertake analysis, and provide a theoretical basis for future research.<sup>27</sup>

I will enter this line of inquiry through the gate of corporate social responsibility. Ideas of corporate social responsibility as such have come from the West to Asia. In Asia, as in the West, the *language* of these norms is, for the most part, imposed.<sup>28</sup> In the West—especially in the Anglo-American context—the substance of these norms is in fact imposed.<sup>29</sup> They do not arise naturally or easily out of liberal corporate, economic, or social structures.<sup>30</sup> But while the Western forms and language of corporate social responsibility (“CSR”) might be imposed from West to East, as is also the case of corporate governance rules and financial regulation, the ideas expressed by CSR are, at least to some extent, indigenous.<sup>31</sup> They arise from several millennia of

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<sup>25</sup> See *infra* Part II. There is obvious normativity in my acceptance of at least some degree of cultural relativism. What I mean in the text is simply that I express no preference for Eastern or Western values in corporate governance.

<sup>26</sup> See Bernard Black & Reinier Kraakman, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1739–40 (2000).

<sup>27</sup> I often think that papers that present themselves explicitly as setting an agenda for future research fall back on this to avoid engaging in the hard work. That is not my intention. While I hope my approach will stimulate others, I mean for this construct to guide my own future research as well.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> While the embrace of CSR in the West is volitional, I view it as imposed because norms and codes of CSR have been developed largely by non-governmental organizations and because market conditions over time have made CSR an important marketing strategy. See, e.g., Andrew Crane et al., *Corporate Social Responsibility in a Global Context*, in CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT 3, 6–7, 14–15 (2nd ed. 2013); Dirk Matten & Jeremy Moon, “Implicit” and “Explicit” CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 ACAD. MGMT. REV. 404, 405 (2008); Robert B. Reich, *The Case Against Corporate Social Responsibility*, (Goldman Sch. of Pub. Policy, Working Paper No. GSPP08-003, 2018), <http://ssrn.com/abstract=1213129>.

<sup>30</sup> Western economic thinking has long since abandoned its original embeddedness in the moral philosophy. See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 139 (1759).

<sup>31</sup> The language of CSR is not universal, even in the West. Matten and Moon find that American (explicit) expressions of CSR and European (implicit) expressions



the structures, values, and practices of Eastern culture and society.<sup>32</sup> They arise from the dramatically different cultural and social norms that influence, to varying extents, almost all the nations of East Asia. So, for the moment, while the forms of CSR may look familiar, it is possible that they will transform over time.

Why corporate social responsibility? It is in the realm of CSR, embedded as it apparently is within some of our most contractual and impersonal market institutions, that the core values of a culture and a nation most explicitly can influence its business, governance, and financial practices. CSR is, after all, an expression of some of these core values of power and responsibility, duty and accountability, justice, and fairness.<sup>33</sup> Law in practice, as is well known, may differ considerably from law on the books. It is through practice, not transcription, that these norms become embedded in a legal system.<sup>34</sup> It is through practice that CSR matters.

China in particular lacks a tradition of the strict application of law, preferring to deal with legal issues within their particular contexts and within the boundaries of the relationships among the parties.<sup>35</sup> Indeed, as some scholars have found, compliance with Chinese law is, in general, so difficult that recognized compliance with CSR often consists of nothing more than compliance with the law.<sup>36</sup> One can then see CSR as something of a gap-filler that provides substance within the formal structure of the law.

Many scholars have long been skeptical of CSR. But CSR has endured

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are quite different. *See* Matten & Moon, *supra* note 29, at 410, 415–17 (although they observe and explain a trend towards the adoption of explicit CSR in Europe as a product of institutional changes); *see also* Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 435 (2009) (describing a 2,500 year old Chinese tradition of responsible business practice grounded in Confucianism).

<sup>32</sup> *See infra* Part II.

<sup>33</sup> *See* Furrer et al., *supra* note 23, at 380 (“Corporate responsibility . . . relates to societal expectations regarding the social (discretionary, ethical, legal), economic, and environmental conduct of business organizations.”).

<sup>34</sup> For an analysis of extra-legal norms operating in a legal context, *see generally* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

<sup>35</sup> Randall Peerenboom, *Let One Hundreded Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471, 482 (2002) (“China has historically favored substantive justice over procedural justice and, in the clash between morals and law, morals have often won out. The tendency has been to favor particular justice at the expense of generality and rationality.”); *see also* Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT’L & COMP. L. 35, 89 (2007); Jianfu Chen, *The Transformation of Chinese Law: From Formal to Substantial*, 37 H. K. L.J. 689, 724–27 (2007); Junwu Pan, *Chinese Philosophy and International Law*, 1 ASIAN J. INT’L L. 233, 248 (2010).

<sup>36</sup> *See infra* Part II.

and prospered since its origins in the 1990s.<sup>37</sup> As it has evolved from rhetoric to concrete (and thus observable) practice, it has become a significant scholarly and practical industry, which shows no signs of diminishing in importance. The pervasiveness of the conversation and the press of world events have made CSR important. I argue that the norms and practices of CSR are the most likely substance through which reciprocal convergences in corporate governance are likely, if at all, to occur.

This Paper proceeds as follows: Part I develops a theory of reciprocal convergences by surveying and building upon the varieties of approaches generally understood as convergence and persistence theory. The legal and economic literature focuses almost exclusively, and for understandable reasons, on the institutions and rules of corporate governance, generally omitting any discussion of CSR (again, for understandable reasons). I argue that a more complete understanding of convergence and divergence must address CSR as a values transmitter within its rubric.

Part II begins by taking a deep look at the values underlying Eastern CSR. After a brief introduction to the topic, I briefly survey CSR in Asia generally, and then in China, focusing on its differences from the West in underlying philosophy and application. It appears that CSR in China, despite its real difficulties, is more indigenous, and its emergence more organic, than the constructed and imposed systems of CSR prevalent in the West. In this sense, it is more permanent.<sup>38</sup> This alone suggests the unlikelihood of Chinese practices conforming to Western expectations, but leaves open the possibility of a reciprocal process.<sup>39</sup>

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<sup>37</sup> Matten and Moon note the “vast and growing body of literature on CSR.” Matten & Moon, *supra* note 29, at 3. Perhaps even more important, they note the growing trend for its inclusion (and increasingly as a requirement) in business school curricula. *Id.* at 412; see also Mercedes Garia-French & Lana Olup, *Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company’s Corporate Social Responsibility Policy?*, 8 *UTRECHT L. REV.* 51, 52 (2012) (noting the contemporary importance of CSR to multinational enterprises).

<sup>38</sup> I recognize that this statement is challenging—especially in light of well-known Chinese business practices that have been far from admirable. See, e.g., Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 *BERKELEY J. INT’L L.* 64, 65 (2010) (“China seems an awkward case in terms of CSR development because of notably bad business behavior.”) (noting that Lin also argues that CSR might develop more fully in China in the long term).

<sup>39</sup> David Ralston and his colleagues present some interesting theoretical and empirical work suggesting what they call “crossvergence” is occurring between younger generations of Chinese and American managers. Carolyn P. Egri & David A. Ralston, *Generation Cohorts and Personal Values: A Comparison of China and the United States*, 15 *ORG. SCI.* 210, 214 (2004); David A. Ralston et al., *Doing Business in the 21<sup>st</sup> Century with the New Generation of Chinese Managers: A Study of Generational Shifts in Work Values*, 30 *J. INT’L BUS. STUD.* 415, 419, 425 (1999).

With CSR as the substance, the next subject for examination is the possible channels through which these values might be transmitted to other systems. Part III looks at two possibilities: (i) multinational enterprises (MNEs),<sup>40</sup> and (ii) China's One Belt, One Road initiative. While it is probably unreasonable to expect that Chinese values and practices will soon have significant effects on Western practices,<sup>41</sup> the trajectory of economic development and world influence is such that it is reasonable to anticipate some impact in the foreseeable future.

#### I. THEORIES OF CONVERGENCE (DIVERGENCE) IN CORPORATE GOVERNANCE AND FINANCE

The literature on convergence, which took root in legal academia largely in the late 1990s, is substantial.<sup>42</sup> "Convergence" is probably something of a misnomer. While the bare definition of the word points to ultimate

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<sup>40</sup> As of 2013, eighty-nine Chinese corporations were listed in the Forbes 500—a number which grew rapidly. Panos Mourdoukoutos, *World's Largest 500 Corporations in 2013: The Chinese are Rising*, FORBES (July 17, 2013), <https://www.forbes.com/sites/panosmourdoukoutos/2013/07/17/worlds-500-largest-corporations-in-2013-the-chinese-are-rising/#41d00a9341e2>. There is no reason to expect that this number will not grow substantially. The business literature tends to refer to multinational corporations. To a lawyer this is a misnomer, as corporate entities are grounded in the states of their incorporation.

<sup>41</sup> Although the Japan craze of the late 1980s and 1990s suggests that Westerners (or at least Americans) are open to considering (sometimes enthusiastically) systems that seem to outperform American ways of doing things. See Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 331 (2000) (noting that before the Japanese bubble burst in the 1990s, scholars treated the Japanese main bank system as the future of the global economy).

<sup>42</sup> See generally ALAN DIGNAM & MICHAEL GALANIS, *THE GLOBALIZATION OF CORPORATE GOVERNANCE* (2009); CURTIS J. MILHAUPT & KATHERINA PISTOR, *LAW AND CAPITALISM, WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008); Peter A. Hall & David Soskice, *Preface* to *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1* (Peter A. Hall & David Soskice eds., Oxford Univ. Press 2001); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) [hereinafter La Porta, *Law and Finance*]; Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) [hereinafter La Porta, *Legal Determinants of External Finance*]; JEFFREY N. GORDON & MARK J. ROE, *Convergence and Persistence* in *Corporate Governance in OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE* (Jeffrey Gordon & Georg Ringe, eds.) (forthcoming). Other fields—notably cultural studies in the business area—engaged these questions considerably earlier than did the legal literature. See, e.g., GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 1–3* (1980).

uniformity, its implication is that uniformity arises from mutual contributions.<sup>43</sup> The various convergence literatures in law, economics, and political science do not contemplate such mutuality. They are instead about the uni-directional adaptation of (primarily) American norms by other nations. Rather than the image of several rivers coming together to form one, each pouring its waters into the common result, the convergence literature envisions American laws, norms, and practices as a mighty deluge, dominating all in its path.

This observation is not trivial. Seen this way, the literature as it exists largely obscures the ability to see bi-directional or multi-directional influences. It makes it difficult even to see the possibilities of reciprocal convergences. Nevertheless, I will use the term as it has come down, cautioning the reader to understand it in the context of the specific literatures.

Three leading theories predominate, with several other interesting theories evolving. These are (a) legal origins theory; (b) varieties of capitalism; and (c) path dependence. For my purposes, the most interesting and important of the remaining theories is one that has received no attention in legal scholarship, (d) the theory of crossvergence, largely developed in the management literature. After discussing these theories in full, I will introduce my own theory of (e) reciprocal convergences.

#### A. *Legal Origins*

The legal origins thesis is not so much a theory of convergence as a theory of persistence. Associated principally with Rafael LaPorta and his colleagues (“LLSV”) and grounded in theories of finance, the legal origins thesis centers on the hypothesis that the origins of a nation’s legal system heavily influences the quality of its corporate governance regime—and ultimately the path of economic development.<sup>44</sup> Although criticized as reductionist and deterministic,<sup>45</sup> this groundbreaking work suggests that nations

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<sup>43</sup> Merriam-Webster’s Dictionary uses an illustration of several rivers combining into one. *Convergence*, MERRIAM-WEBSTER DICTIONARY (2016) (defining convergence as “the act of converging and especially moving toward union or uniformity”).

<sup>44</sup> See generally La Porta et al., *Law and Finance*, *supra* note 42; Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (surveying research since their earlier work) [hereinafter La Porta, *The Economic Consequences of Legal Origins*].

<sup>45</sup> For a nice summary of the principal critiques, see Robert Schmidbauer, *On the Fallacy of LLSV Revisited—Further Evidence About Shareholder Protection in Austria and the United Kingdom*, SOC. SCI. RESP. NETWORK 10–19 (Nov. 8, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=913968); see also Udo C. Brandel, *Shareholder Protection in the USA and Germany—On the Fallacy of LLSV*, SOC. SCI. RESP. NETWORK 5–6 (May 11, 2005), <http://ssrn.com/abstract=728403>.

with legal systems originating in the Anglo-American context have stronger legal shareholder protections, more effective enforcement of these laws, and consequently more highly dispersed shareholding, leading (arguably) to greater wealth than in systems originating in continental European traditions.

While the data are interesting, the stark simplicity of LLSV's conclusions is challenged and deeply enriched by Curtis Milhaupt and Katherina Pistor, among others.<sup>46</sup> Observing that the standard (LLSV) view takes protection of property rights as law's function, leading to the conclusion that better property protection means better economic results, they adopt a more nuanced and multi-functional framework for analyzing the relationship between legal systems and economic growth.<sup>47</sup> In particular, they describe what they call a "rolling relationship" between law and markets, observing that each reacts to the other in what they call a "highly iterative process." Legal systems should be understood in terms of their organization, the functions of law "in support of market activity," and the manner in which a given political economy produces law. Thus they understand a legal-economic system as consisting of dynamic interactions between two of its principal institutions—law and markets. This opens up legal system analysis beyond the bi-polar civil law-common law divide employed by LLSV, allowing for the examination of law systems that do not fit comfortably into those boxes, an openness they demonstrate in performing their institutional autopsies on crisis moments in Chinese, Russian, Korean, and Japanese firms. While clearly a response to the limitations of LLSV, their work appears also to be inspired by political economic theory, the varieties of capitalism approach.<sup>48</sup>

### B. *Varieties of Capitalism*

The second principal approach, the varieties of capitalism approach, departs from law, or at least from law alone. Associated with Peter Hall and David Soskice, the varieties of capitalism approach originates in political economy and focuses on the differences among types of capitalisms and the reasons they differ.<sup>49</sup> Grounded in a broader sense of institutionalism than a

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<sup>46</sup> See Milhaupt & Pistor, *supra* note 42, at 18.

<sup>47</sup> I do not in this paper challenge the notion that markets are necessary for economic growth, but it is worth observing that this is a (perhaps) contestable assumption that lies at the heart of Milhaupt's and Pistor's work. See Ezra Wasserman Mitchell, *Finance and Growth: The Legal and Regulatory Implications of the Role of the Public Equity Market in the United States*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 155, 155 (2017) (arguing the market's role in economic growth is highly limited).

<sup>48</sup> See also Katharina Pistor et al., *Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L L. 791, 805 (2002).

<sup>49</sup> See Hall & Soskice, *supra* note 43, at vi. For earlier important work, see generally MICHEL ALBERT, CAPITALISM AGAINST CAPITALISM (1991); Ronald Dore, William

nation's legal origins, the theory's principal contribution is to suggest that the driving causes of differences among capitalisms can be significantly attributed not only to institutions (with corporations as a focus) but also to the mechanisms available in a given society for coordination within and among institutions. Institutions, organizations, and culture help to coordinate relationships among firms. This approach thus provides a richer understanding for the possibilities of economic growth than the theory developed by LaPorta and his colleagues.<sup>50</sup>

Similarly focused on Europe and the Anglo-American world, Hall and Soskice broadly identify two types of capitalism that employ somewhat different coordinating institutions, liberal market economies and coordinated market economies, each arising from the norms, history, and culture of a nation. In their understanding, neither a particular set of institutions nor the formal structure of the political economy matters to economic outcomes as much as the efforts to coordinate among institutions and the mechanisms that facilitate such coordination.<sup>51</sup> No single equilibrium is to be expected. Rather, multiple equilibria are possible, each arising from "a set of shared understandings about what other actors are likely to do, often rooted in a sense of what is appropriate to do in such circumstances."<sup>52</sup> As I will discuss, the shared understandings of propriety are quite different in Chinese culture and among Chinese institutions from those in the Western world in general and the Anglo-American world in particular.

Alan Dignam and Michael Galanis also accuse the convergence debate of oversimplicity, employing institutional analysis in place of neoclassical equilibria. Institutional structures form the foundations of, and heavily influence, corporate governance forms and practices. Formal and intentional convergences can result in different practices and economic results even if convergence is the goal.<sup>53</sup> As an example, exogenous shocks worked similar

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Lazonick & Mary O'Sullivan, *Varieties of Capitalism in the Twentieth Century*, 15 OXFORD REV. ECON. POL'Y 102 (1999). For the prominence of Hall & Soskice's contribution, see Michael Carney et al., *Varieties of Asian Capitalism: Toward an Institutional Theory of Asian Enterprise*, 26 ASIA PAC. J. MGMT. 361, 363 (2009) (noting that Hall & Soskice's contribution toward progress in the area is greatest but noting that the varieties of capitalism approach ignores Asia); Gordon Redding & Michael A. Witt, *China's Business System and its Future Trajectory*, 26 ASIA PAC. J. MGMT. 381, 381 (2009).

<sup>50</sup> See Hall & Soskice, *supra* note 42, at 9.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Id.* at 13.

<sup>53</sup> But see Martin Gelter, *EU Company Law Harmonization between Convergence and Varieties of Capitalism*, in RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE LAW 323, 347 (Harwell Wells ed., 2018) (arguing that even superficial convergence has had some substantive impact).

changes in the United States and United Kingdom who share institutional structures, but not in Germany with a different set of institutions.<sup>54</sup>

Carney, Gedajlovic and Yang explore the applicability of the varieties of capitalism approach to the Asian context.<sup>55</sup> They identify three limitations of this approach in studying Asia. First, while varieties of capitalism argues that particular types of capitalism produce particular types of firms, it is not at all clear that an emblematic Asian type of firm exists. Although the “diversified, family-controlled business group” appears to be emblematic, they report on the existence of a greater diversity of firm forms than would be predicted by varieties of capitalism.<sup>56</sup>

Second, while the varieties of capitalism approach centers on a dichotomy between liberal market economies and coordinated market economies, they find that other varieties of capitalism exist in the Asian context.<sup>57</sup>

Finally, they note the theory’s over-determinism with respect to institutional structures and behavior, reducing the firm (and especially the individual actor) to little importance.<sup>58</sup> They address these shortcomings by proposing a “co-evolutionary theory” that lifts the role of firms in influencing the institutional environment in which they are embedded.<sup>59</sup> As they note, the literature on Asia, both then and now, is significantly under-developed, leaving much for future research.

### C. *Path Dependence*

The third theory is path dependence. In an important application of the concept to the convergence literature, Lucian Bebchuk and Mark Roe show how the corporate structures of any given nation are the product of earlier corporate structures and earlier corporate governance rules within the same

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<sup>54</sup> Janice Dean provides an interesting argument that different understandings of the meaning of a “well-functioning organization” helps to account for differences in corporate governance among the larger European economies and cautions that market models are shared by “few other cultures” beyond Britain. See Janice Dean, *Ideal Type Organizations and Company Law in Europe*, 23 EUR. BUS. L. REV. 461, 476 (2012); see also Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 147 (2001) (developing a theoretical framework for rigorous evaluation of the role of cultural norms in determining national treatment of corporate governance and securities regulation).

<sup>55</sup> Carney et al., *supra* note 49, at 366.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; see also Redding & Witt, *supra* note 49, at 4 (arguing that while convergence tends to be overstated, China will likely form its own distinct form of capitalism, which they predict will be similar to—although not identical with—that of Korea).

economy.<sup>60</sup> They seek to explain why different (inefficient) corporate structures persist in a given economy, resisting convergence, when so many other economic characteristics appear to have converged. Previous structures, vested interests, and previous rules<sup>61</sup> determine contemporary forms that resist change, largely as a result of historically-grounded efficiencies or of interests established under the former regime.<sup>62</sup>

### 1. A Brief Evaluation

The convergence literature has evolved from the static understanding of legal origins to dynamic theories that work to place national and global developments in richer contexts. Institutional theory nonetheless has its limitations. Legal and economic institutions may *appear* to be quite similar. After all, there are only so many ways one can structure the governance of a corporation. But, as the legal realists observed in the context of American law, appearances can be deceiving. Research shows that the political, social, and cultural contexts in which institutions exist is terribly important and can have significant and even transformative effects on the way institutions operate and rules are shaped in practice.<sup>63</sup> One should not expect to see the American system practiced universally, at least the way it is practiced in America, especially noting that almost all of the cultures into which the American system has infiltrated are considerably older and arguably more coherent than American culture.<sup>64</sup> It is fair to say that while, in the beginning, convergence was predicted,<sup>65</sup> there is good reason to believe that it is and will be more limited

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<sup>60</sup> See Lucian Ayre Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 127 (1999).

<sup>61</sup> Bebchuk and Roe understand rules broadly, including “all the rules that govern the relations between the corporation and all of its investors, stakeholders, and managers as well as among these players.” See Bebchuk & Roe, *supra* note 60, at 155. CSR rules can certainly be included within this broad classification.

<sup>62</sup> Of particular importance to the question of reciprocal convergence from China is Bebchuk and Roe’s explanation of why capital market pressures may not be sufficient to induce convergence (or, in their context, produce efficient ownership structures). See *id.* at 152.

<sup>63</sup> See Gunther Teubner, *Legal Irritants: How Unifying Law Ends up in New Divergences*, in HALL & SOSKICE, *supra* note 42, at 417 (providing an excellent analysis of this issue).

<sup>64</sup> What I mean by “more coherent” is that the individualism of American culture—while often overstated and with a history as a nation absorbing immigrants from around the world with different cultures and values—is obviously different from the culture of a society that has grown indigenously and in place over the course of centuries and millennia. As is the case with all generalizations, my statement in the text is a gross simplification, but it is grounded in history and contemporary reality and is handy for purposes of discussion.

<sup>65</sup> Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001).



than perhaps once thought.

The convergence literature is interesting, well-developed, and important. It helps us understand some of the channels through which globalization and institutional change work together. As it has developed, the literature has had the salubrious effect of introducing a strong dose of much needed humility in both scholarship and practice. Understood this way, it has the potential to enhance the cooperative potential of business and finance in a manner that stimulates economic growth across nations. But, as I will later discuss, the recent scholarly pivot to Asia brings into the conversation a previously neglected but large portion of the world's population and resources.

The convergence conversation comes up against certain limits. It is largely limited to a focus on why legal and economic institutions are structured as they are and change as they do, and their possible effects within national economies. This is unsurprising in light of the fact that the principal scholars of this phenomenon are lawyers, economists, and political theorists necessarily working at a relatively high level of abstraction and within existing structures and forms. This is, of course, important work. But it focuses on the boxes, not what is in them. While values can be expressed through the architecture of a box, that expression may be more limited and less consequential than what occurs inside.<sup>66</sup>

There are many reasons for these limitations, including the types of tools available to each discipline, the lesser susceptibility of softer phenomena to empirical study, and the desire to model institutional behavior. Just as economics requires assumptions for modeling, so, too does the study of law and political economies require the discipline and empiricism of structure to organize research and produce results. Nonetheless, these approaches abstract and limit the types of institutional behaviors we generally are capable of studying.

#### D. *Crossvergence*

Crossvergence theory goes beyond the boundaries of traditional institutions to explore the interactions of cultures and economic systems on the more micro level of managerial attitudes and behavior.<sup>67</sup> Managers operate

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<sup>66</sup> EDGAR KAUFMANN, LOUIS SULLIVAN AND THE RISE OF ARCHITECTURE OF FREE ENTERPRISE 17 (1956) ("Form ever follows function."); Alice Rawsthorn, *The Demise of 'Form Follows Function'*, N.Y. TIMES (May 30, 2009), <http://www.ny-times.com/2009/06/01/arts/01iht-DESIGN1.html>.

<sup>67</sup> Crossvergence was introduced in David A. Ralston et al., *Differences in Managerial Values: A Study of US, Hong Kong and PRC Managers*, 24 J. INT'L BUS. STUD. 249, 257 (1993) and developed over a series of articles including its first empirical application in Ralston. See Holt et al., *supra* note 5, at 8. Ralston summarizes his research to date in David A. Ralston, *The Crossvergence Perspective:*

institutions. A focus on managerial behavior by itself is an important contribution to a richer understanding of the interactions of national systems.

David Ralston and his colleagues are interested in whether multinational corporations can develop universal corporate cultures, or whether the “diverse work values of the various local operations” might inhibit or prevent such development.<sup>68</sup> In order to explore this question empirically, they develop a theoretical foundation that rejects the stark dichotomy of convergence/divergence and introduces the possibility of the ultimate blending of values. Crossvergence asks whether “there will be an integration of cultural and ideological influences that results in a unique value system that borrows from both national culture and economic ideology.”<sup>69</sup> The theory “advocates that the combination of sociocultural influences and business ideology influences is the driving force that precipitates the development of new and unique values systems among individuals in a society owing to the dynamic interaction of these influences.”<sup>70</sup> Crossvergence, as a theory, predicts synergy between cultural values and economic ideology to form a unique value system that is different from the cultures and economic thought of the recipient nations.<sup>71</sup>

To begin to develop data from which to evaluate this question, they tested managerial work values in the U.S., China, Russia, and Japan using 24 individual dimensions, arising from a matrix situating each in terms of Western and Eastern culture, capitalism, and socialism. Their hypothesis, significantly supported by their data, is that national cultures of individualism versus collectivism will dominate questions of crossvergence. The data correlated strongly with the location of each nation along an individualism/collectivism axis. Perhaps most interesting for the question of reciprocal convergences (a question they raise in passing),<sup>72</sup> is the surprising correlation between the scores of American managers and Chinese managers on the

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*Reflections and Projections*, 39 J. INT’L BUS. STUD. 27, 27 (2008). Their work is, in turn, structured along the lines of the cultural difference theory developed in GEERT HOFSTEDE, *supra* note 42, at 48–50 (analyzing survey data from employees of a US multinational (IBM) in subsidiaries in sixty-seven countries (later reduced to fifty because of a paucity of data). Schwartz values developed as a more refined means of empirically studying value systems beyond individual values. For an explanation, see Julie Anne Lee et al., *Schwartz Value Clusters in the United States and China*, 42 J. CROSS-CULTURAL PSYCHOL. 234, 234–36 (2011).

<sup>68</sup> See Ralston et al., *supra* note 5, at 9.

<sup>69</sup> *Id.* at 11.

<sup>70</sup> See Ralston, *supra* note 68, at 29.

<sup>71</sup> See Ralston et al., *supra* note 5, at 12. I believe the word “syncretic” to be more appropriate than synergy.

<sup>72</sup> *Id.* at 21.

variables of power and benevolence.<sup>73</sup> Power, in their analysis, is a value associated with individualistic societies, and benevolence with collective societies. The observation regarding benevolence is especially important when considering CSR as a vehicle for value transmission, since it is in the area of CSR that benevolence, at least in the West, is translated into action.<sup>74</sup>

Crossvergence theory, then, appears to move the literature away from its largely bipolar presumptions and posits that, at least on some dimensions, national mutual contributions to the development of distinct managerial work ethics may affect the management cultures of multinational enterprises.<sup>75</sup> Rather than convergence upon a single standard, or even persistence in the maintenance of national styles and institutions, crossvergence suggests the possibility of a blending of ideas into something more syncretic, although Ralston and his colleagues commendably avoid strong predictions. Indeed, some of the dimensions of work ethics they examine (change resistance, for example) suggest that blending, at least in the case of China, is less likely than Chinese influence on more flexible nations.<sup>76</sup>

#### *E. Reciprocal Convergences*

Crossvergence theory enriches our understanding of the influence of different cultural norms on the attitudes and behavior of actors within economic institutions and ultimately upon the behavior of those institutions themselves. Nevertheless, it shares with the convergence literature the shortcoming of examining those influences in a West to East context. Despite its assertions of mutual influence, a careful study of the theory and the literature reveals that it almost exclusively focuses on syncretism in recipient cultures (China, for example) without considering whether the contributing culture is influenced by mutual interaction. In other words, crossvergence theory has thus far mostly focused on the extent to which Western norms and practices have interacted with Eastern (and sometimes European) practices and molded the latter into something different from their original state. Largely ignored is the possibility of the reverse, that Eastern practices might interact with and mold Western practices into something different.

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<sup>73</sup> *Id.* at 18, 20.

<sup>74</sup> They also note that among the four nations studies, Chinese managers were most resistant to change and American managers most open. *Id.* at 18. This suggests that convergence from West to East is less likely than Eastern influence on the West.

<sup>75</sup> In his extensive literature review, Ignatius Odongo discusses the manner in which MNE syncretically develop their own distinct cultures. See Ignatius Odongo, *The Influence of Culture on Judgment and Decision Making*, 6 INT'L J. ADVANCED LEGAL STUD. & GOV'T 1, 9–11 (2016).

<sup>76</sup> They do articulate their belief that, if China develops a capitalist system, it will look distinctly different from other capitalisms and consistent with Chinese culture. See Ralston et al., *supra* note 5, at 20.

This omission is understandable. The rise of Asian economic powers is relatively new, and has occurred in an economic and financial world in which Western institutions, norms, and practices dominate. To various degrees, Asian economies have attempted to model their own on those of the West. One would, therefore, expect that observable changes in the West, if any, would be few and far between. But in light of Asia's dramatic rise and its potential for eventual economic dominance,<sup>77</sup> scholars would be remiss in failing to create a framework within which to observe the possibilities of Eastern influences on the West.

This is the purpose of the theory of reciprocal convergences. Reciprocal convergences posits that the kinds of syncretism disregarded by the convergence literature but predicted by the crossvergence literature can be multidirectional or, at least, bidirectional. The economic rise of Asia in general, and China, specifically, could over time come to change the ways Western norms are practiced.<sup>78</sup> This could be volitional—for example, Western interest in Japanese business practices in the 1980s and 1990s demonstrated an explicit interest in potential improvements that would result from adopting Japanese methods.<sup>79</sup> More likely the change will be subtle, particularly because of long-standing Western hostility to Asian, and especially Chinese, forms of government and political practices.

Reciprocal convergences is also offered to enrich the convergence debate more generally. Understanding institutional behavior is obviously important. But institutions are motivated not only by law, regulations, economic systems, and history. Institutional behavior is also importantly determined by the people who make up the institution. Obviously these people have been raised and acculturated within the institutional structures and systems of their own nations, and have absorbed the values and practices that have created these structures. Perhaps institutional structures already embody the important cultural values of their societies. But one suspects that the driving importance of institutional functioning, which requires institutions to be structured, ordered, and comprehensible, causes the reduction of some values and the omission of others. The gaps are likely to be filled by the richer and more complex behavior of institutional managers. Thus, a deeper look into the drivers of this behavior will help to complete the stories told by convergence theory.

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<sup>77</sup> See *infra* Part IV.

<sup>78</sup> See *infra* Part IV.

<sup>79</sup> See Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 *YALE L.J.* 871, 872–74 (1993) (noting widespread American legal and business interest in learning from Japan).

An attempt to understand the possibilities of reciprocal convergences from the perspective of the existing literature seems rather silly. For more than a century, the adoption by non-Western nations of Western legal and economic institutions and rules has been clear and unidirectional. China's corporate law is German based, Japan's draws on both Germany and America, and Hong Kong and India are British. We have not (at least not yet) seen the nations of Central or Southeast Asia adopt Chinese or Japanese law, much less have we seen the West do so (although the Japan craze of the 1990s, before Japan's precipitous fall, contained suggestions that Americans could learn much from the structure of Japanese institutions).<sup>80</sup> If we are to look for the possibilities of reciprocal convergences, it will not be found in law on the books.<sup>81</sup> And since law as practiced begins with law on the books, it is unlikely that we will find it in written law at all (although I will argue that we might find it in specific jurisprudential concepts). Instead, we must look to the practices that develop under the cover of law, and perhaps beyond the law itself. CSR, which has developed into a significant scholarly and practical enterprise, provides a useful avenue of inquiry. What follows, then, explores the possibility of reciprocal convergences in the specific context of corporate governance.

## II. THE PRACTICAL AND THEORETICAL IMPORTANCE OF CSR

The legal convergence debate centers upon corporate law and governance.<sup>82</sup> As traditionally understood, corporate governance comprises the institutions, structures, and rules that order the relationships among managers, directors, and shareholders.<sup>83</sup> Questions of director independence, shareholder rights and protection, executive compensation, and the market for corporate control are objects of study.<sup>84</sup>

This approach to corporate governance leaves out corporate social responsibility, except to the extent that such notions underlie the shareholder-stakeholder debate.<sup>85</sup> There is nothing especially surprising about this. CSR first gained prominence in the 1990s as a series of imprecations by various

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<sup>80</sup> *Id.* at 872–74.

<sup>81</sup> Lin describes the Chinese legal system as “notorious for the gap between the law on the books and the law in practice.” *See* Lin, *supra* note 38, at 96.

<sup>82</sup> As the following discussion makes clear, it also exists in the management literature, but this has not found its way into legal and economic discussions of these issues.

<sup>83</sup> No generally accepted definition of corporate governance exists. *See* Maria Pargendler, *The Corporate Governance Obsession*, 4 J. CORP. L. 359, 361–62 (2016).

<sup>84</sup> *Id.* at 362.

<sup>85</sup> There is a growing body of literature studying CSR convergence in the fields of management and business ethics. Matten & Moon, *supra* note 29, at 406.

non-governmental organizations (“NGOs”), private actors, and a limited number of investment funds.<sup>86</sup> It was not (and largely is not) recognized as hard law, nor do the principles of CSR suggest any particular institutional structure.<sup>87</sup> Perhaps most damaging from a scholarly perspective, it was (and sometimes remains) non-specific, non-detailed, and aspirational with little rigor. This made it difficult to study as a phenomenon.

But matters have changed quite considerably. Ideas about CSR have proliferated and, indeed, CSR has become something of a significant industry in its own right, with cadres of consultants and advisors available to guide business behavior.<sup>88</sup> More important, consumer demand has led at least some types of businesses to recognize that socially responsible behavior (or at least the appearance of socially responsible behavior) sometimes provides a competitive advantage in consumer and investment markets.<sup>89</sup> As CSR has become institutionally embedded, as general propositions and broad norms are engaged in producing institutional structures, business behavior, and tangible results, it has transformed from theory to fact, from abstract to more

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<sup>86</sup> C.A. Harwell Wells traces corporate social responsibility to the Berle-Dodd debate of the early 1930s, with another flowering in the 1960s and 70s and a third around 1990. See Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78–79 (2002). While this is certainly true as to the debate over the objects of corporate responsibility generally, the modern CSR movement began in the later period. See Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 L. & SOC. REV. 313, 313 (2011) (attributing rise in CSR to latter period).

<sup>87</sup> A wide variety of institutional and managerial structures have developed over time. See, e.g., Larry Cata Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 INT’L L. SCH. ASS’N J. INT’L & COMP. L. 499, 509 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092167](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092167) (providing an interesting and detailed evaluation of supply chain management at the GAP, Inc.).

<sup>88</sup> Shamir, *supra* note 86, at 314 (noting the importance of CSR education at business schools and its development into a “scientifically validated form of corporate risk management”).

<sup>89</sup> Chinese consumers, for example, are increasingly insisting on socially responsible behavior from Chinese corporations. See generally Bala Ramasamy & Matthew Yeung, *Chinese Consumers’ Perception of Corporate Social Responsibility (CSR)*, 88 J. BUS. ETHICS 119, 119, 127–28 (2009). However, much of the CSR literature also focuses on the behavior of extractive and other business to business industries rather than on the more obviously affected consumer products industries. See e.g., Roel Nieuwenkamp, *The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 4 DOVENSCHMIDT Q. 171, 174 (2014) (noting difficulties of extractive industries with socially responsible behavior); see also Adefolake Adeyeye, *The Role of Global Governance in CSR*, 9 SANTA CLARA J. INT’L L. 147, 160 (detailing special CSR principles developed to deal with problems in extractive industries).

concrete, permitting for at least some rigor in the study of the phenomenon and its effects on corporate behavior.<sup>90</sup>

It would appear, then, that the legal corporate governance literature overlooks CSR at its peril.<sup>91</sup> For an increasing number of nations, and an increasing number of corporations, CSR has become embedded as policy and practice. Questions of the convergence of corporate governance and even the convergence of capitalisms thus should be attentive to the role of CSR.

#### A. *CSR in Asia: An Overview*

I focus on China because it is the leading candidate for global economic and business influence. But it is worth paying attention to the development of CSR in Asia more generally. Even if China falters or, unexpectedly at the moment, is economically overtaken by another country, the rapid rise of Asian economic influence in general, appears to be beyond dispute. If global business and economics does not become China-dominated, it seems at least reasonable to believe that it will become Asia-dominated, or at least heavily influenced.

I begin by examining the influence of Confucianism in contemporary Chinese business thinking, in part because Confucian ideas and practices ground many Asian societies and form an indigenous foundation for CSR. With that background, I provide a brief description of the state of CSR in some of the leading Asian economies in order to create a more well-rounded global context than the convergence literature typically addresses. This overview is useful for establishing the basic values framework within which reciprocal convergences might take place, at least in East Asia.<sup>92</sup>

##### 1. The Confucian Influence in Chinese Business Attitudes

To begin with the obvious—many societies in East Asia are either Confucian or heavily influenced by Confucian thought.<sup>93</sup> China is, of course, the

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<sup>90</sup> See Nieuwenkamp, *supra* note 89, at 175 (noting the migration of OECD multinational guidelines from “soft law” to “hard law”).

<sup>91</sup> Peer Zumbansen’s work takes CSR seriously in the context of overall corporate governance. See, e.g., Peer Zumbansen, *The Evolution of the Corporation: Organization, Finance, Knowledge and Corporate Social Responsibility*, 5 COMP. RES. L. & POL. ECON. 1, 1, 24–25, 28 (2009). Dignam and Galanis provide a richer definition of corporate governance, describing it as “an institutional balancing process whereby the sometimes conflicting interests of a corporations stakeholders . . . are accounted for and/or prioritized in order to produce benefit for society.” Dignam & Galanis, *supra* note 43, at Preface n.2.

<sup>92</sup> See generally Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT’L L. 64, 85–86 (2010).

<sup>93</sup> See Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT’L L.J. 1, 9–10 (2016); see also Angus

source of Confucianism.<sup>94</sup> Patterns of decision-making are grounded in family, community, and consensus. Family is the primary structure—family over self, followed by community over self. Emerging from these more organic forms, the state is seen to be the ultimate *pater familias* and it should not be surprising to see that CSR in China largely is state driven.<sup>95</sup> Consensus is the indigenous method of decision-making, in contrast to Western practices of competitive democracy.<sup>96</sup> Chinese ideas about CSR are embedded in this context.<sup>97</sup>

That said, one must be cautious in attributing too much to Confucian values in China.<sup>98</sup> Upon taking power in 1949, Mao and the Communist Party explicitly rejected Confucianism, to be replaced by Communist ideology, a rejection rigorously enforced during the Great Cultural Revolution of 1966–76.<sup>99</sup> Unsurprisingly, Ralston and his colleagues, in developing

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Young, *Corporate Governance in China and Hong Kong: Reconciling Traditional Chinese Values, Regulatory Innovation and Accountability*, SOC. SCI. RESP. NETWORK 9, 15, 23, 29 (Jan. 10, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1533904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533904); see also Wang & Juslin, *supra* note 31, at 435. But again, I follow Ruskola's cautions: "To call China 'Confucian' without further qualification, is of course a rather vacuous generalization," Ruskola, *supra* note 2, at 1607 n.18, and "[T]o label certain aspects of Chinese legal and economic culture 'Confucian' or 'traditional' verges on tautology." *Id.* at 1715. But it's a starting point.

<sup>94</sup> For the fundamental importance of Confucianism in China, see WILLIAM THEODORE DE BARRY, IRENE BLOOM & JOSEPH ADLER, *SOURCES OF THE CHINESE TRADITION: FROM EARLIEST TIMES TO 1600*, 42 (2000); see also Jin Long, *What Virtues and Formalities Can Do for Corporate Social Responsibility and the Rule of Law in China*, 14 EUR. J.L. REFORM 414, 432 (2012) (suggesting that Confucianism remains so pervasive in China that it is helpful to "recognize that it is very much a constitution, albeit a semi-legal one, of the Chinese society itself").

<sup>95</sup> For example, in his October 19 speech, Chairman Xi emphasized environmental protection as a top priority. See Xi Jinping, *supra* note 18, at 20, 45.

<sup>96</sup> To say that consensus decision-making dominates is, however, to oversimplify. Ruskola presents a subtle exploration of Confucian concepts of family and community in which individual severability is difficult if not impossible but locates the ultimate (and unappealable) source of decision making in the family head. Ruskola, *supra* note 2, at 1675.

<sup>97</sup> See Carney et al., *supra* note 49, at 371 (discussing the different issue of institutional reform, the author notes the greater variety of business forms and thus practices among Chinese businessmen in Southeast Asia, although nevertheless grounded in traditional Chinese family values).

<sup>98</sup> Long, *supra* note 94, at 430–31. Long writes that Confucianism—along with Daoism and Buddhism—was considered inappropriate even in the early modernization of Chinese law, but enough ritual was retained to fuel corrupt practices based on hospitality, gift giving, and bestowing honor in the absence of the deeper morality while at the same time exploring deep synergies between Confucian business ethics and CSR. See *id.* at 429.

<sup>99</sup> Mao was much more attracted to the very different ancient Chinese concept of Legalism. See Aris Teon, *Mao Zedong, Legalism, and Confucianism: Similarities*



crossvergence theory, find a diminution of Confucian values among Chinese business managers who came of age during this period.<sup>100</sup> They also find that younger Chinese managers are more individualistic and more open to change than their post-Imperial predecessors, while at the same time cautioning that their findings are focused on inter-generational change within China rather than convergence with American values.<sup>101</sup> In other words, these changes have occurred within a still-relevant context of Confucian and collective values. Perhaps most interesting for my discussion of CSR, Ralston and his colleagues found younger Chinese managers to be less benevolent than their American cohort, and also increasing in their universalism.<sup>102</sup>

Song Yang and Bruce Stening, following this work, find support for the concept of crossversion in the syncretic thinking of Mao and, in a later and different way, Deng Xiaoping. Despite Mao's disavowal of Confucianism, they find no diminution of Confucianism in Chinese thinking but understand Mao to have been combining socialist theory with traditional characteristics.<sup>103</sup> Placing more significance on traditional Chinese values than Ralston and his colleagues, they explain the individualism that traditionally has characterized Chinese culture (along with community) as being of a very different nature than Western individualism,<sup>104</sup> a conclusion that calls into question Ralston's conclusions from his test of this variable. They understand Deng Xiaoping Theory (which is how it is designated in the Party

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*and Differences*, GREATER CHINA J., May 16, 2016, <https://china-journal.org/2016/05/16/mao-zedong-legalism-confucianism-similarities-differences/>.

<sup>100</sup> See Egri & Ralston, *supra* note 39, at 214; Ralston et al., *supra* note 39, at 423; see also Barbara Marshall Matthews, *The Chinese Value Survey: An Interpretation of Value Scales and Consideration of Some Preliminary Results*, 1 INT'L EDUC. J. 117, 117 (2000) (noting that while this work is early, it continues to be cited as influential). *But see* The Chinese Culture Connection, *Chinese Values and the Search for Culture-Free Dimensions of Culture*, 18 J. CROSS-CULTURAL PSYCH. 143, 143 (1987) (finding strong Confucian values among Chinese university students and suggesting that Confucianism which characterizes East Asian cultures is an important component in China's economic success.).

<sup>101</sup> See Egri & Ralston, *supra* note 39, at 210.

<sup>102</sup> See *id.* at 214–18 (suggesting that the decline in benevolence may be as a result of the influence of Communism).

<sup>103</sup> See Song Yang & Bruce W. Stening, *Mao Meets the Market: Reconciling Ideology and Pragmatism in China*, 53 MGMT. INT'L R. 419, 423 (2013).

<sup>104</sup> See *id.* at 423; see generally HERBERT FINGARETTE, *CONFUCIUS: THE SECULAR AS SACRED* (1972) (discussing the specific context of Confucius' thought and an excellent exposition of Chinese pragmatism); FEI XIAOTONG & XIANGTU ZHONGGUO, *FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY* (1992) (offering an extended study of the meaning of individualism in Chinese contexts).

Constitution, implying that it occupies a lower level than Mao Zedong Thought),<sup>105</sup> as conflicting with traditional Chinese values. This tension between Chinese humanism and the quite contradictory values of capitalism as it had begun to be practiced in China, arose because of the need to achieve some concordance between mutually contradictory systems, a necessary tool for social survival.<sup>106</sup> The success of Deng Xiaoping Theory was in leaving room for the expression of traditional values and characteristics in the new environment. It is too early to predict, but Xi Jinping's recent speech at the 19<sup>th</sup> Party Congress and the incorporation of "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" (implicitly elevating it over Deng Xiaoping Theory and closer to Mao Zedong Thought)<sup>107</sup> suggests a more concerted attempt to reintegrate traditional Chinese values with a vibrant market economy.<sup>108</sup>

All of this should be tempered with broader national trends. Ronald Inglehart, following generational cohorts across advanced industrial economies (primarily Western Europe and the United States) from 1970 to 2008 demonstrates a significant shift from what he refers to as "materialist values" to "post-materialist values" (focusing on "autonomy, self-expression, and the quality of life.").<sup>109</sup> He observes the data to suggest that the shift reflects actual changes in values within generations as they age, not simply a shift in values over the course of a life-cycle.<sup>110</sup> His principle explanation is that, over this period, increased economic prosperity has led to greater existential security among the younger cohorts, so that their concerns and values have been able to evolve from accumulation for the sake of survival to a faith in survival that permits the flourishing of what one might call universalist values.<sup>111</sup> This shift leads to diminished emphasis on "traditional cultural norms, especially those that limit self-expression,"<sup>112</sup> and a shift away from

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<sup>105</sup> See *Xi Jinping's Thinking is Ranked alongside Mao's*, ECONOMIST (Oct. 24, 2017), <https://www.economist.com/news/china/21730590-does-mean-no-one-can-challenge-him-xi-jinpings-thinking-ranked-alongside-maos>.

<sup>106</sup> See Song & Stening, *supra* note 103, at 435.

<sup>107</sup> See Jinping, *supra* note 105.

<sup>108</sup> Very little empirical work has been done in crossvergence beyond that of Ralston and his colleagues.

<sup>109</sup> See Ronald F. Inglehart, *Changing Values among Western Publics from 1970 to 2006*, 31 WEST EUR. POL. 130, 131 (2008); see also Furrer et al., *supra* note 23, at 391 (finding "significant differences" between European managers and business students with respect to the importance of social, economic, and environmental concerns, and differences between Western and Central and European countries possibly reflecting different stages of economic development).

<sup>110</sup> See Inglehart, *supra* note 109, at 131.

<sup>111</sup> See *id.* at 141.

<sup>112</sup> *Id.* at 138.

deference to external authority.<sup>113</sup>

The implications for the evolution of Chinese business values and Chinese influence seem mixed. On the one hand, they confirm Ralston's findings that Chinese work values appear to be shifting to what one might consider to be Western values, or so-called universalist values. If China were to follow the Western patterns identified by Inglehart, the rejection of external authority might lead to some diminution in Confucian influences, although, it must be stated that Confucian practice, properly understood, is as much a function of internal discipline as it is of external pressure.<sup>114</sup>

Second, and perhaps more important, culture matters.<sup>115</sup> Intergenerational shifts in values take place within particular cultural contexts. Inglehart's conclusions derive from his study of Western European and American attitudes. While nobody would debate the point that all of these nations have significant cultural differences, it is also beyond debate that they share the basic values of the Western Enlightenment (which is the source of what we call "universalist values").<sup>116</sup> More refined data might identify, even within this grouping, different understandings of what these post-materialist values really mean in any given society, especially the focus on quality of life identified by Inglehart as the primary concern of younger cohorts.<sup>117</sup>

The Chinese context is quite different. While the outline of the general trends of Chinese work attitudes is toward greater openness and individuality, these shifts are occurring in the context of a culture that has dominated

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<sup>113</sup> *Id.* at 140.

<sup>114</sup> See generally Fingarette, *supra* note 104; see also Jane K. Giacobbe-Miller et al., *Country and Organizational-Level Adaptation to Foreign Workplace Ideologies: A Comparative Study of Distributive Justice Values in China, Russia, and the United States*, 34 J. INT'L BUS. STUD. 389, 389 (2003) (noting that researchers found that Chinese managers retained their collectivist values in both SOEs and private foreign joint ventures, in contrast to Russian managers who were somewhat more open to individualistic values, suggesting that Chinese culture retains its importance even in the face of industrialization and globalization).

<sup>115</sup> See Chris Robertson & Paul A. Fadil, *Ethical Decision Making in Multinational Organizations: A Culture-Based Model*, 19 BUS. ETHICS 385, 385 (1999).

<sup>116</sup> See generally Bell, *supra* note 4; Jacques, *supra* note 9.

<sup>117</sup> Inglehart, *supra* note 110, at 142; see also Terence Jackson, *From Cultural Values to Cross-cultural Interfaces: Hofstede Goes to Africa*, 24 J. ORG. CHANGE MGMT. 532, 532 (2011) (criticizing the theoretical underpinnings of all of crossvergence while accepting the utility of crossvergence grounded in Hofstede's categorizations as insufficiently practical and—despite its admirable critique of arguments supporting the uni-directionality of Western norms—is unable to adopt the non-Western perspectives which those norms are said to influence). Jackson sees the value of crossvergence theory as understanding culture "as an interface between or interfaces among different cultural influences" producing "hybrid organizational forms" and cultural identities. Jackson, *supra* note 115, at 538, 541.

Chinese thought for two thousand years.<sup>118</sup> Changes in generational values evolve slowly.<sup>119</sup> But it is worth observing that the roughly hundred years of human life Inglehart's study encompasses was, for the most part, born into, educated, and acculturated within the Western Enlightenment tradition. One might infer from this that the generational value shift he observes simply reflects the liberation from survival needs, providing the opportunity to actualize this deeper acculturation, an opportunity less available when survival is at stake.

As prosperity increases in China, what are the values we might expect to see evolve?<sup>120</sup> As I previously noted, evidence suggests a trend toward greater individuality and openness. But are these the universalist values (or do they lead to the universalist values) of Western understanding, or perhaps to something different?<sup>121</sup> For example, Chinese individualism is quite different from Western individualism.<sup>122</sup> It seems at least as likely that a Chinese manifestation of these values, while superficially similar, might in practice embody some of the nation's long Confucian tradition, a tradition so strong that it survived its intended destruction after 1949. An example of this tenacity might be in the Party's goals of a "moderately prosperous society" and a "harmonious society."<sup>123</sup> The quality of life issues these imply—more equitable economic distribution and greater overall social equality—might

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<sup>118</sup> See generally WILLIAM THEODORE DE BARY, *SOURCES OF CHINESE TRADITION VOLUME I: FROM EARLIEST TIMES TO 1600* (1971); see also Richard L. Priem et al., *Industrialization and Values Evolution: The Case of Hong Kong and Guangzhou, China*, 17 *ASIA PAC. J. MGMT.* 473, 473 (2000) (comparing Hong Kong, Guangzhou, and the United States to evaluate the impact of industrialization and culture on value changes in the former two locations and finding influences of both, but that business students in the considerably more industrialized (at the time) Hong Kong had values more similar to Western values than those in Guangzhou). It is important to note, however, that their study took place before the rise of Shenzhen and relatively early in the economic growth of the Mainland. One suspects that, were they to repeat their tests today, they would find similar transformations in the values of Guangzhou business students.

<sup>119</sup> Inglehart, *supra* note 110, at 131.

<sup>120</sup> See Xiaohua Yang & Cheryl Rivers, *Antecedents of CSR Practices in MNCs' Subsidiaries: A Stakeholder and Institutional Perspective*, 86 *J. BUS. ETHICS* 155, 157 (2009) (noting that some researchers have attributed different levels of CSR to different levels of economic development).

<sup>121</sup> See Gordon Redding & Michael A. Witt, *China's Business System and its Future Trajectory*, *ASIA PAC. J. MGMT.* 381, 392 (2009) (arguing that the propriety of behavior under given circumstances derives from shared understandings and expectations).

<sup>122</sup> See Fingarette, *supra* note 105, at viii, ix. It is, in particular, far more selfish. Again, I emphasize that my perspective in this paper is not normative. The influence of Eastern norms and practices on Western may not be wholly positive.

<sup>123</sup> XIANFA General Program, 4, 6 (2017) (China).

be very different from a Western notion of quality of life as an individual choice and centered upon the individual.

It is far too early in China's modern interactions with the West to reach any meaningful conclusion. An important point to remember when evaluating this research, however, is that understanding the data from a Western perspective (something cultural difference scholars have been at great pains to avoid)<sup>124</sup> could lead to misinterpretation in a way that directs future research away from some deeply important factors.

Having taken a look at the Confucian tradition within contemporary Chinese business attitudes and practices in anticipation of my later discussion of Chinese CSR, it is time to broaden the context for an overall survey of CSR in Asia.

## 2. CSR and Influences on Business Attitudes in Other Asian Economies

This paper is focused on China, so the remaining discussion in this section will be brief, providing an overall survey of other important Asian economies which may, singly or together, influence Western practices over time. Given China's important and growing economic relationships with these economies, this discussion also suggests that they are ripe to absorb Chinese influence.

Taiwan has not advanced as far as mainland China or many other East Asian countries as far as CSR is concerned, but both Confucianism and *guanxi*<sup>125</sup> are central values that help to explain the development of the

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<sup>124</sup> See, e.g., Ralston et al., *supra* note 67, at 254. See generally Julie Anne Lee et al., *Schwartz Values Clusters in the United States and China*, 42 J. CROSS-CULTURAL PSYCHOL. 234 (2011), for an interesting study of Chinese and American tourists and young adults. As tourists, Chinese displayed far more of what we might call Western values than might have been expected. An interesting dimension of their analysis is the observable differences in emphasis on more refined analyses of values within each group. Interesting too, are the results that show people within the examined groups have values that are somewhat different from their respective country's norms. Yet they concluded (with qualifications) that, despite the striking correlation of values, culture and background matter even in a context removed from home, supporting Schwartz' own observations.

<sup>125</sup> The literal meaning of *guanxi* is relationship (among other things), Andrew Keay & Jingchen Zhao, *Accountability in Corporate Governance in China and the Impact of Guanxi as a Double-Edged Sword*, 11 BROOK. J. CORP. FIN. & COM. L. 377, 381 (2017), but its implications for the nature and depth of relationships is far more subtle. As a matter of personal experience, I have observed the embeddedness of relationships in Chinese business practices from the comments of my Chinese students in my American contracts law classes. Needless to say, perhaps, they find the (relative) impersonality and rigidity of American contract law to be puzzling and troubling.

concept.<sup>126</sup> The Confucian influence in Taiwan appears to have been somewhat overtaken by a perhaps excessive notion of *guanxi* that has led to significant corruption in business transactions. Whatever form CSR takes in Taiwan, it will ultimately be embedded in Confucian values, especially since the strongest pressure on Taiwan to develop its CSR principles comes from across the straits, mainland China, as a result of the extensive trading relationships between the two economies.<sup>127</sup>

Japan, sharing the Confucian tradition, saw merchants establish a Confucian-based notion of merchants' responsibilities as early as the 17<sup>th</sup> century, which found new expression during the Meiji Restoration, also explicitly grounded in Confucian thought. This history has found further reiteration and re-expression as Japan developed its industrial economy, leading to what Bindu Sharma describes as a "rich cultural history" of CSR in Japan<sup>128</sup> grounded in a deeply hierarchical structure.<sup>129</sup> Korean development of CSR is rather recent by comparison, but South Korea also is deeply grounded in the Confucian tradition, and the hierarchical communal structures of its *chaebol* similarly reflect this. As one pair of scholars put it: "Indeed, it has been argued that Korea is the 'most Confucian society' in the world."<sup>130</sup>

Other major developing Asian economies, while not Confucian, exist in societies that also embed more communal and hierarchical values. Indian business has a long philanthropic tradition, and perhaps what might be called a sense of noblesse oblige, from the wealthy to the disadvantaged.<sup>131</sup> The history of its modern corporate structure, especially in the realm of big corporations, is grounded in a history of responsibility and philanthropy flowing largely from family-held corporations, developed at first by Jamseti Nusserwanji Tata during the middle 19<sup>th</sup> century.<sup>132</sup> Malaysia, a majority

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<sup>126</sup> See Ma & Mel Marquis, *supra* note 93, at 11–13.

<sup>127</sup> Sharma, *supra* note 23, at 224.

<sup>128</sup> *Id.* at 129; Ma & Marquis, *supra* note 93, at 13 (noting that Japanese society is also influenced by various strains of Buddhism, Shintoism, and Daoism). We can also add Vietnam to the list of Asian countries grounded in Confucianism. See Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, 41 FORDHAM INT'L L.J. 135, 137 (2017).

<sup>129</sup> Ma & Marquis, *supra* note 93, at 28 ("There is no doubt that hierarchy, rank, and seniority are important in Japanese companies; indeed, Japan has been called a 'vertical society,' and . . . hierarchical relationships may be observed in innumerable social settings.").

<sup>130</sup> *Id.* at 16.

<sup>131</sup> See Sharma, *supra* note 23, at 87.

<sup>132</sup> See Ariya B. Majumdar & Ganesh Viswanathan, *Convergence in Corporate Governance: The Case of China and India*, J. BUS. ENTREPRENEURSHIP & L., SOC. SCI. RESP. NETWORK 2 (Dec. 13, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2883998](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883998); see also N. Sivakumar, *The Business Ethics of*

Muslim country, draws its sense of corporate responsibility from the laws of Sharia, extended by the government's embrace of moral and equitable values as suffusing Malaysian society. The case of Indonesia, also a majority Muslim country, is less clear, having suffered from decades of kleptocracy in which a business culture of deep corruption developed.<sup>133</sup> Finally in Thailand, with its rich Buddhist history and its status as the only nation in East Asia that did not suffer under Western colonialism, the importance to business of the complete range of stakeholders is pervasive, grounded in a feudal notion of patron-client relationships tracing deep into Thailand's history.<sup>134</sup> And this in a nation that expressly adopted a liberal market economy following the Second World War.<sup>135</sup>

Several themes appear from this survey. First, and most important from a jurisprudential perspective, is that all of these cultures are grounded in concepts of authority and responsibility based in status. Whether the Confucian ideal of leader as father, the somewhat similar role of the king and aristocracy in Thailand, or family responsibilities toward society in India, the top-down direction of both command and values is unmistakable and deeply grounded in culture. This presents a contrast with the far more horizontal social structures of the West, where obligation is volitional and expressed through contract. While the West is not without hierarchy (although consensually and contractually based) and the East is not without some horizontality (at the level of community), the underlying structures, values, and enforcement mechanisms are quite different.

Second, it appears that, at least to some extent, ideas of obligatory CSR (or at least the ideas underlying CSR) are indigenous, arising from centuries if not millennia of values and practice.<sup>136</sup> While values of responsibility and accountability certainly exist in the West, it remains to the individual to determine whether, and the extent to which, these values are practiced, at least in the Anglo-American tradition. This practice is not only volitional, but

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*Jamsetji Nusserwanji Tata—A Forerunner in Promoting Stakeholder Welfare*, 83 J. BUS. ETHICS 353, 353 (2008).

<sup>133</sup> See Sharma, *supra*, note 23, at 111; Dalilawati Zainal et al., *Corporate Social Responsibility Reporting in Malaysia: A Comparison Between Shariah and Non-Sharia Approved Firms*, 15 MIDDLE E.J. SCI. RES. 1035, 1036–37 (2013).

<sup>134</sup> Sharma, *supra* note 23, at 239–40.

<sup>135</sup> *Id.* at 241.

<sup>136</sup> See *id.* at 19, 20 (explaining that Sharma's work makes it quite clear that culture matters, as a result of which Asian CSR manifests itself quite differently from the West); see also Dan V. Caprar & Benjamin A. Neville, "Norming" and "Con-forming": Integration of Cultural and Institutional Explanations for Sustainability Adoption in Business, 110 J. BUS. ETHICS 231, 236 (2012) (concluding from their review of several literatures that it is clear that culture matters in identifying which nations' businesses will adopt sustainability values).

expressed largely through contract. In the East, practices that are encouraged by CSR have long been interwoven into the business fabric where it is understood as a matter of course.<sup>137</sup> CSR appears to be more natural in the East, and more constructed in the West.

Third, as I will particularly emphasize in the case of China, political systems matter. Leaving aside India—and to some extent, Singapore—the governance systems of East Asia are generally autocratic (or share a recent history of being autocratic),<sup>138</sup> in obvious contrast with the recent history of those of the West. Autocracy itself can be seen as consistent with the cultural norms I've described, even in China whose Communist Party quite clearly and explicitly rejected the Confucian tradition at the founding of the state (substituting a new autocracy that mimics Confucian practice and into which Confucian ideals have slowly reintegrated). This heritage of autocracy suggests that not only are the obligations of status non-volitional, but also that practices are mandated from above. This is certainly the case with CSR in China, which, as we will see, is heavily state-driven.<sup>139</sup>

This is not to suggest that the East has perfected CSR. Far from it. As the following discussion of CSR in China shows, it is often taken as the same kind of self-serving window dressing that is common in Western perceptions of CSR.<sup>140</sup> It is also clear that CSR is often perceived as necessary to maintaining competitive business and to satisfy consumer demands rather than from self-consciously observed values and rituals. Nonetheless, the differences between East and West are striking, and imply that the more organic nature of CSR (or at least the ideas underlying CSR) may, over time, manifest different practices that could influence practices in the West.<sup>141</sup>

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<sup>137</sup> Wang & Juslin, *supra* note 31, at 435.

<sup>138</sup> Yung-Myung Kim, *Asian Style Democracy: A critique from East Asia*, 37 U. CAL. PRESS 1119, 1133 (1997). Taiwan—a previously autocratic state—first adopted popular voting in [1996], Japan (which retains its Emperor) in [1890], and Korea in [1948].

<sup>139</sup> Sharma, *supra* note 23, at 29 (noting the absence of NGOs in China, and that NGOs have played a big role in the development of CSR in the West). *But see* Li-Wen Lin, *supra* note 38, at 95 (noting the significant rise in Chinese NGOs but observing government control over their formation and noting greater governmental tolerance for environmental NGOs over other types).

<sup>140</sup> For arguments that CSR in China is real and indigenous, although slowly evolving, *cf.* Caprar & Neville, *supra* note 136, at 240 (suggesting that the adoption of sustainability principles in China but poor enforcement lead to a possible conclusion that such adoption is based in the desire for legitimacy and that sustainability principles may not in fact be compatible with local culture); Lin, *supra* note 38, at 65; Wang & Juslin, *supra* note 31, at 435.

<sup>141</sup> *See also* Jingchen Zhao, *Promoting a More Efficient Corporate Governance Model in Emerging Markets Through Corporate Law*, 15 WASH. U. GLOB. STUD. L. REV. 447, 489 (2016) (noting the potential for “non-business elements” of the



The development of CSR *as* CSR in China has been recent. This is unsurprising in light of the recency of China's economic development, its privatization of portions of state-owned enterprises, and its adoption of the forms of western-style corporate governance regulations. State Owned Enterprises ("SOEs") have become principal drivers of Chinese CSR, with the stock markets in Shanghai and Shenzhen also playing leading roles. Yet it appears from the evidence that CSR is very much indigenous to Chinese business practices.

Earlier, I suggested that Chinese CSR can be seen as something of a gap-filler, given the uncertainties of corporate law meaning and practice. In order to set the framework within which this gap-filler operates, I now turn to a brief overview of Chinese Company Law and China's institutions of corporate governance.

#### B. *Corporate Law in China: An Overview*

Yong Kang and his colleagues identify four stages in the development of modern Chinese corporate governance: (i) 1949–83; (ii) 1984–93; (iii) 1994–2005; and (iv) 2006–present.<sup>142</sup> The first stage was one of virtually complete state control. SOEs were the overwhelmingly dominant business form, they were fully-owned by the state, and they were managed by the government bureaucracies in whose regulatory areas the SOEs operated.<sup>143</sup>

The second period began as part of the reform agenda articulated by Deng Xiaoping, with the state slowly disengaging from at least some aspects of corporate management. The Shanghai Stock Exchange was opened in 1990 and the Shenzhen Exchange rapidly followed, with their regulator, the Chinese Securities Regulatory Commission ("CSRC"), established the following year.<sup>144</sup> China's first Company Law was passed in 1993, marking the start of the third phase in which corporate governance and the Chinese economy were heavily influenced by the new law, although state ownership

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developing world. corporate governance to influence the West); *see generally* (Robin) Hui Huang, *supra* note 5.

<sup>142</sup> YONG KANG, LU SHI & ELIZABETH D. BROWN, CHINESE CORPORATE GOVERNANCE: HISTORY AND INSTITUTIONAL FRAMEWORK iii, ix–x (2008). Their study was published in 2008. I make adjustments in the text for subsequent relevant changes. Despite the discontinuities among the late Qing Dynasty, the warlord and republican periods, and the birth of the PRC in 1949, Ruskola traces formal Chinese corporate law to 1904 and finds continuity of themes and principles. Ruskola, *supra* note 2, at 1677.

<sup>143</sup> Kang et al., *supra* note 142, at ix.

<sup>144</sup> The CSRC acquired much more power as a result of the passage of the 1998 Securities Law. *Id.* at 8.

continued to be preferentially treated.<sup>145</sup> From 2006 on (including the CSRC's promulgation of its 2002 Code of Corporate Governance for Listed Companies and a revision of the Company Law in 2005),<sup>146</sup> corporate governance in China has sought to address the interests of minority, non-state shareholders, particularly important as Western investment has continued to increase.<sup>147</sup> Indeed, Chinese Company Law mandates the inclusion of social responsibility in corporate practice.<sup>148</sup>

A fifth period may well have begun, as Xi Jinping signaled a re-emphasis on SOEs in his speech to the 19<sup>th</sup> Party Congress held in October 2017.<sup>149</sup> Xi emphasized the need to improve market systems as well as the importance of "dynamic micro-entities."<sup>150</sup> In particular, Xi called for the enhancement of property rights and the more efficient market allocation of resources, as well as business success determined by competition and enhanced market regulation. But, at the same time, he called for improvements in the state-owned sector and increased support for SOEs.<sup>151</sup> While it is too early to predict the specific forms these exhortations will take, it appears that Xi's emphasis on the state-owned system may represent some retrenchment of the

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<sup>145</sup> *Id.* at 7 ("[T]he maximization of owners' interests" was the primary goal and that, "more importantly, it was the first major business law in China that did not differentiate legislation for companies based on their ownership structures."). It is of course worth noting that the primary owner whose interest was to be maximized was the state, although the partial privatization of SOEs was also a major goal. *See Id.* at 7–8.

<sup>146</sup> *Id.* at 8. The governance code was the joint product of the CSRC and the State Economic and Trade Commission.

<sup>147</sup> Chinese law has traditionally been weak in the area of investment protection and the protection of private property. *Id.* at 21. For the statistical data on the foreign investment in Chinese companies, *see* WANEY M. MORRISON, CONG. RES. SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, IMPLICATIONS FOR THE UNITED STATES 14–17 (2017); *China: Foreign Investment*, SANTANDER TRADE PORTAL, <https://en.portal.santandertrade.com/establish-overseas/china/foreign-investment> (last visited Sept. 16, 2018); *see also* U.N. Conference on Trade and Dev., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY, 55–56 (2017).

<sup>148</sup> *See* Zhonghua Renmin Gongheguo Gongsifa (中华人民共和国公司法(2013修正)) [Company Law of the People's Republic of China (2013 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014), art. 5; *see* Lin, *supra* note 38, at 65; *see also* *Guidelines to the State-owned Enterprises Directly under the Central Government*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N OF THE STATE COUNCIL (SASAC) (2011), [http://en.sasac.gov.cn/2011/12/06/c\\_313.htm](http://en.sasac.gov.cn/2011/12/06/c_313.htm).

<sup>149</sup> Xi Jinping, *supra* note 18, at 29.

<sup>150</sup> *Id.* at 26.

<sup>151</sup> *See id.* at 29.

reforms of the fourth era.<sup>152</sup> That said, the focus of my attention will be on this fourth era, from the 2005 amendments of the Company Law to the present.

As I noted earlier, there are only so many ways to structure corporate governance.<sup>153</sup> China's governance structure is based upon the German model, employing both a supervisory board and a management board.<sup>154</sup> While for most of this period there was no requirement of independent directors, China has recently insisted on the inclusion of independent directors, principally through stock exchange pressure.<sup>155</sup> There are also rules mandating financial disclosure.<sup>156</sup> A shareholders' general meeting undergirds the

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<sup>152</sup> Milhaupt and Zheng interestingly analyze the structural similarities of SOEs and privately-owned enterprises at a deep level of state involvement in both. See Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 668 (2015).

<sup>153</sup> For an extended, relatively early analysis of the troubled relationship between Chinese corporate governance and the Chinese stock markets, see generally Jing Leng, *The Interaction Between Domestic and Overseas and Capital Markets and Corporate Governance of Chinese Listed Companies*, 7 STUD. INT'L FIN. ECON. & TECH. L. 273 (2005).

<sup>154</sup> See Kang et al., *supra* note 114, at 13. The authors observe that, in practice, China's board operates more closely to the way an American board is operated than a German board. The Chinese supervisory board is considerably smaller than the German model, and it cannot dismiss board members or managers. The supervisory board's role thus may be an illusion. See also Cindy A. Schipani & Junhai Liu, *Corporate Governance in China: Then and Now*, COLUM. BUS. L. REV. 1, 15–16 (2002).

<sup>155</sup> The CSRC in 2001 required that at least one-third of the trustee boards of listed companies consist of independent directors. This became a legal mandate with the 2005 revision of the Company Law (Article 122). See *Zhonghua Renmin Gongheguo Gongsifa* (中华人民共和国公司法(2013修正)) [Company Law of the People's Republic of China (2005 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 122; see also Press Release, China Secs. Reg. Comm'n, Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies (August 16, 2001), [http://www.csrc.gov.cn/pub/csrc\\_en/newsfacts/release/200708/t20070810\\_69191.html](http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69191.html) ("All domestically listed companies shall make necessary amendments to the articles of association . . . and appoint qualified persons to be independent directors. At least one of the independent directors should be an accounting professional (refers to personnel with senior professional title or certified public accountants). By June 30th, 2002, at least two members of the board of directors shall be independent directors; and by June 30th, 2003, at least one third of board shall be independent directors."). *Id.*

<sup>156</sup> Kang et al., *supra* note 142, at 31; see generally ORG. FOR ECON. COOPERATION AND DEV., CORPORATE GOVERNANCE OF LISTED COMPANIES IN CHINA: SELF-ASSESSMENT BY THE CHINA SECURITIES REGULATORY COMMISSION 66 (2011); Thomas Myers & Laurence A. Steckman, *Financial Transparency and Disclosure: China Progress on Corporate Governance*, J. INT. BUS. ETHICS, 1, 7 (2014); Xie

corporate structure.<sup>157</sup> Institutional investors exist in significant numbers, although with block shareholding typically far smaller than in the West.<sup>158</sup> All of this looks quite familiar to corporate governance scholars.

As familiar as this structure may appear, its practice is quite different.<sup>159</sup> Boards are not especially powerful in China, especially with respect to SOEs and, as might be expected in a Confucian society, top management is more powerful than the board.<sup>160</sup> While the term “independent directors” exists and has a mandate, the Chinese concept of independence is far less rigorous than it is in Western corporate governance systems.<sup>161</sup> A director’s duty of loyalty exists, and a duty of care recently was added.<sup>162</sup> The board of directors appoints senior managers who, in SOEs, are significantly influenced by

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Wang & Min Wu, *The Quality of Financial Reporting in China: An Examination from an Accounting Restatement Perspective*, 4 CHINA J. OF ACCT. RES. 167, 172 (2011); Jennifer Wu Tucker & Xinmin Zhang, *Corporate Disclosure and Research Opportunities in China*, 4 CHINA J. ACCT. STUD. 1, 8 (2016).

<sup>157</sup> Kang et al., *supra* note 142, at 11.

<sup>158</sup> *Id.* at 24; *see generally* BO GONG, UNDERSTANDING INSTITUTIONAL SHAREHOLDER ACTIVISM (2015); *see also* Jongmoo Jay Choi et al., *The Impacts of State Ownership on Information Asymmetry: Evidence from an Emerging Market*, 3 CHINA J. OF ACCT. RES. 13, 21–23 (2010).

<sup>159</sup> China has fared quite poorly on measures of the quality of corporate governance but appears to be rapidly improving. *See* ORG. FOR ECON. COOPERATION AND DEV., *supra* note 156, at 66; Kang et al., *supra* note 142, at 3; *New Rankings from Institutional Investor Show Chinese Corporations Committed to Corporate Governance*, INSTITUTIONAL INV. (July 12, 2017), <http://www.marketwired.com/press-release/new-rankings-from-institutional-investor-show-chinese-corporations-committed-to-corporate-2225771.htm>; *See also* Chung Ming Lau et al., *Corporate Social Responsibility in China: A Corporate Governance Approach*, 136 BUS. ETHICS 73, 76 (2016) (noting that “It is not wise to say corporate governance in general is effective or ineffective in China,” relying on a literature review suggesting the wisdom of a more “holistic” approach).

<sup>160</sup> Kang et al., *supra* note 142, at 29–30; Jiangyu Wang, *The Political Logic of Corporate Governance in China’s State-Owned Enterprises*, 47 CORNELL INT. L.J. 631, 666 (2014).

<sup>161</sup> ORG. FOR ECON. COOPERATION AND DEV., *supra* note 156, at 89; Kang et al., *supra* note 142; *see also* Daniele Marchesani, *The Concept of Autonomy and the Independent Director of Public Corporations*, 2 BERKELEY BUS. L.J. 315, 317–18 (2005).

<sup>162</sup> ORG. FOR ECON. COOPERATION AND DEV., *supra* note 156, at 77 (“In 2006, the Company Law was revised for the first time and clearly presented the primary function of the board: ‘to abide by the law, administrative laws and regulations, and articles of incorporation and have the duty of loyalty and diligence to companies.’ The meaning of the duty of loyalty and diligence indicates that Chinese law and regulations are designed to protect the benefits of companies and shareholders.”); Kang et al., *supra* note 142, at 14.

the Party.<sup>163</sup> Financial disclosure is developing, again prodded by stock exchange (and capital market) pressures, but it is far from attaining the level practiced in Western systems.<sup>164</sup> While the shareholders' meeting has significant statutory power, and while cumulative and proxy voting are permitted, in practice, control rests with the chairman of the board, especially in SOEs where state ownership can structurally overpower the voice of minority shareholders.<sup>165</sup> Law, including corporate law, is sufficiently fluid in China that many multinational enterprises ("MNEs") see simple compliance with the law as a form of CSR itself.<sup>166</sup> This suggests that perhaps CSR in China serves as a kind of gap-filler. What does it look like and how successful is it?

### C. CSR in China

CSR by other names is indigenous to China,<sup>167</sup> although as a distinct concept of business management, it is relatively new.<sup>168</sup> The clan-centered businesses that dominated the economy throughout much of Chinese history intrinsically embraced the commonality of business property to the clan, with norms of distribution and norms of responsible behavior from top to bottom (and, importantly, from bottom to top). Teemu Ruskola describes the integral relationship of clan and property such that the notion of individual ownership by any particular member of the clan corporation was non-existent. A strong fiduciary understanding existed, not least because the clan corporation (at least initially) was a corporation composed of blood relations, and "management" was motivated by family-feeling and respect for ancestral tradition.

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<sup>163</sup> Kang et al., *supra* note 142, at 15.

<sup>164</sup> Joseph D. Piotroski & T.J. Wong, *Institutions and Information Environment of Chinese Listed Firms*, in CAPITALIZING CHINA 201, 202, 204-05, 209-11, 234 (Joseph P.H. Fan & Randall Morck eds., 2013); Kang et al., *supra* note 142, at 31; Xia Wang & Min Wu, *supra* note 156, at 172.

<sup>165</sup> Kang et al., *supra* note 142, at 14 (identifying the protection of minority investors as seriously problematic and a "central theme" of academic work on Chinese corporate governance); *id.* at 2 (noting that perhaps Xi's emphasis on the need to improve the protection of property rights will further influence corporate governance development); *see generally* Jinping, *supra* note 18.

<sup>166</sup> *See* Nadira Lamrad, *Transnational Business, CSR and Governance in China*, 45 U.B.C. L. REV. 691, 708 (2012).

<sup>167</sup> *See supra* Part II(a).

<sup>168</sup> *See* Juelin Yin & Yuli Zhang, *Institutional Dynamics and Corporate Social Responsibility (CSR) in an Emerging Country Context: Evidence from China*, 111 J. BUS. ETHICS 301, 303 (2012) (noting that foreign multinationals and buyers introduced CSR as a concept in China in the late 1990s); *see also* Lin, *supra* note 38, at 65 (explaining that CSR in China is also rather different than in the West (Lin dates serious academic and policy discussions over Chinese CSR to 2004)); Xu & Yang, *supra* note 1, at 322.

Business necessity often revealed the inadequacy of a true bloodline corporate structure, and the clan corporation began to legally “construct” clan members from outside the original bloodlines.<sup>169</sup> Yet broad managerial responsibility to the collective continued to dominate the way business decisions were made.<sup>170</sup>

When the Communist Party attained power in 1949, Mao completely rejected Confucianism which nonetheless maintained a tenacious hold on Chinese practices.<sup>171</sup> Indeed, the Confucian structure of father and Emperor as dominant was replaced with the dominance of the Great Helmsman and the Communist Party, which continued in different language and formed the ideology of communal responsibility above all else. In Confucian thought and practice this ultimately meant responsibility to the father (whose responsibility was both to ancestors and descendants) and to take care of those of subordinate status.<sup>172</sup> In Communist ideology, this meant responsibility to the state.

It is perhaps unsurprising that, from the beginning, formal Chinese corporate law embedded the rights of stakeholders as full participants in the enterprise.<sup>173</sup> And since, at the beginning, the state owned all enterprises (each of which was managed by a corresponding government ministry), the boundary between the collective of the state and the collective of the enterprise was at best blurry. It is no surprise, then, that the stakeholder orientation of Chinese corporate law has been sustained through its several formal iterations. Nor is it surprising that CSR, while foreign in language and in its form of imposition, seems natural in China as a matter for state imposition and that it manifests quite differently in China than in the West.<sup>174</sup>

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<sup>169</sup> Ruskola, *supra* note 2, at 1638.

<sup>170</sup> *Id.*

<sup>171</sup> Long, *supra* note 94, at 424. Long describes the embeddedness of Confucianism in Chinese thought: “[C]onfucianism is the grammar and the vocabulary, literally and metaphorically, of Chinese culture and language,” although also noting a “moral vacuum” created by Mao’s denunciation of Confucian morality (but not ritual) and the “synergy” between Confucian thought and CSR.” *Id.* at 429. For a study of the linkages between morality and ritual in Confucian thought, *see generally* Fingarette, *supra* note 104.

<sup>172</sup> Jacques, *supra* note 9, at 209 (emphasizing this dimension of Chinese leadership).

<sup>173</sup> “Rights” is perhaps too strong a word, at least in the Western sense. The “rights” embodied in Chinese corporate law were not enforceable legal entitlements but a recitation of whose interests the corporation was to serve.

<sup>174</sup> *See* Lin, *supra* note 38, at 68 (associating CSR with stakeholder theory); Long, *supra* note 94, at 428–29 (discussing the synergies between Confucianism and CSR); Sharma, *supra* note 23, at 26 (noting state-driven nature of Chinese CSR as well as its different forms of manifestation in Chinese context).

Xu and Yang, writing in 2010, review the literature studying Chinese CSR and observe that the concepts used are largely grounded in Western CSR. They surveyed CSR attitudes and practices among corporate executives in China to evaluate whether there were indigenous dimensions to Chinese CSR.<sup>175</sup> A number of these dimensions of CSR were found to be held in common with their Western counterparts. These included (i) a sense of “economic responsibility,” in other words, the need to create high quality products and services and to generate profits, (ii) compliance with law (although Chinese executives treat tax payment as very important in contrast to Western counterparts), (iii) environmental protection (although Chinese executives gave far more weight than Westerners to resource conservation), (iv) interests of employees, including safety and health, (v) the quality and safety of consumer products, and (vi) philanthropy.<sup>176</sup>

Three significant dimensions of Chinese CSR practice that did not appear among Western executives stand out, as well as one dimension important to Western executives not found among Chinese executives. The first is “good faith,” by which the authors mean honoring contracts, charging fair prices, and generally acting with integrity.<sup>177</sup> The second is the obligation to provide employment and create new employment opportunities.<sup>178</sup> Xu and Yang suggest that the importance of this dimension may be a result of SOE restructuring that added a considerable number of unemployed people to a nation already confronting significant unemployment problems.<sup>179</sup>

The third uniquely Chinese dimension of CSR concepts is “social stability and progress,” a dimension they specifically attribute to China’s Confucianism.<sup>180</sup> Respondents’ statements included “ensure social stability and harmony,” “serve and repay society, promote social progress,” “support culture, science, and education,” and “patriotism, promote national prosperity.”<sup>181</sup> While these sound like slogans, they are no more so than many of the general precepts of Western CSR.

At least as interesting, and potentially significant in considering the possibility of reciprocal convergences, is the CSR dimension missing from the

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<sup>175</sup> Xu & Yang, *supra* note 1, at 322–23.

<sup>176</sup> *Id.* at 328–29.

<sup>177</sup> *Id.* at 330. The dimension of honoring contracts is especially interesting. My Chinese contracts students are genuinely disturbed by the American legal concept of efficient breach, a reaction consistent with Xu and Yang’s findings.

<sup>178</sup> *Id.* at 329. It is important to note that their data set includes both SOEs and privately-owned enterprises.

<sup>179</sup> *Id.* at 330.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* It is worth noting that the statements were spontaneously generated by survey respondents, not posed by the authors. *See id.* at 324.

Chinese responses and strongly represented in the Western responses. As Xu and Yang put it, “we failed to find trace [sic] of the important western dimensions of ‘shareholder interests’ and ‘equality’ in Chinese CSR[.]” and they suspect that this absence is due to the relative weaknesses of Chinese markets, implying that greater market efficiency might make Chinese executives more sensitive to shareholder interests.<sup>182</sup> That may be true, and Western market developments have certainly had that effect in other countries. Yet based on the evidence so far, it seems unlikely that markets will erase other dimensions of Chinese executives’ social concerns, which appear at least to some extent to be culturally embedded and resemble nothing so much as Western stakeholder theory. Abandonment of these concerns may be even more unlikely given Chairman Xi’s emphasis on SOEs (along with his emphasis on Chinese-style markets).<sup>183</sup>

Juelin Yin’s and Yuli Zhang’s research generally supports these views.<sup>184</sup> Using personal interviews with executives of sixteen firms in the business-oriented Zhejiang Province in 2009, they found fairly narrow understandings of CSR as generally ethical (treatment of employees, environmental protection, reliable products, and humanitarian and general ethical concerns),<sup>185</sup> with economic and legal issues seen as beyond the concerns of CSR.<sup>186</sup> While they find some skepticism about CSR among Chinese managers, they, like Xu and Yang, note the absence of stockholder interests from Chinese CSR concerns, an absence they also attribute to market imperfections and an under-developed legal system.<sup>187</sup> They preliminarily conclude, however, that the Chinese adoption of CSR “as an innovative management practice is mainly driven by moral leadership and institutional necessity.”<sup>188</sup> Importantly, they see CSR as used by managers to be a “legitimacy seeking strategy vis-à-vis key resource holders,” in China’s cultural, ethical, and political contexts.<sup>189</sup> In other words, stakeholders.

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<sup>182</sup> *Id.* at 330–31

<sup>183</sup> Xi Jinping, *supra* note 18, at 29.

<sup>184</sup> See Yin & Zhang, *supra* note 168, at 304, 311–12.

<sup>185</sup> *Id.* at 306.

<sup>186</sup> See also Jingchen Zhao, *The Harmonious Society, Corporate Social Responsibility and Legal Responses to Ethical Norms in Chinese Company Law*, 12 J. CORP. L. STUD. 163, 164 (2012) (explaining that Zhao sees Chinese thoughts on CSR which “has become an integral part of business management strategy and practice in China” as divided between those who believe that economic responsibilities are included within CSR and those who do not).

<sup>187</sup> Yin & Zhang, *supra* note 168, at 312.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 312–13; see also Meng Zhao, *CSR-Based Political Legitimacy Strategy: Managing the State by Doing Good in China and Russia*, 111 J. BUS. ETHICS 439,



Liangrong Zu and Lina Song's research reach quite different conclusions. Using corporate executive survey data from 2003 and 2004,<sup>190</sup> they find that obeying the law and producing good products were high on the list of Chinese executive responses but that "treating business partners with integrity" and "participating in community work" are considerably lower.<sup>191</sup> Their data lead them to suspect that managers' CSR-favorable statements and "[t]he true nature of their willingness to take on CSR activities could be more business-oriented than morally led."<sup>192</sup>

Their findings suggest some of the difficulties in both the use of survey data and perhaps the difficulties of studying a rapidly developing China in the middle stage of its contemporary growth. It is also fair to note that their data set was considerably smaller than Zu and Yang's data set and that the purpose of their survey—to determine whether CSR practice was generated by managers' values or firm economic characteristics<sup>193</sup>—was somewhat different than Xu and Yang's survey. Nonetheless, Zu and Song's work makes it clear that it is difficult to draw strong conclusions with respect to Chinese CSR attitudes (at least as articulated CSR) from the scholarship to date.

CSR in China was given a significant boost in 2002 when then-Chairman Hu Jintao announced the desirability of a "harmonious society."<sup>194</sup> The core policy underlying harmonious society is economic growth, balanced by a more equitable distribution of the fruits of that growth (and thus a broad stakeholder orientation).<sup>195</sup> The idea of a harmonious society finds its roots deep in Confucianism.<sup>196</sup> CSR has become a tool used by the government to

439–40 (2012) (examining the extent to which the state confers political legitimacy on business as a result of business behavior).

<sup>190</sup> Liangrong Zu & Lina Song, *Determinants of Managerial Values on Corporate Social Responsibility: Evidence from China*, 88 J. BUS. ETHICS 105, 106 (2009); see also Xu & Yang, *supra* note 1, at 324 (utilizing data from 2006).

<sup>191</sup> Zu & Song, *supra* note 190, at 108.

<sup>192</sup> *Id.* at 115.

<sup>193</sup> *Id.* at 106, 116 (concluding that firm economic characteristics are the primary driver); cf. Yin & Zhang, *supra* note 168, at 306 (finding that managerial discretion is the primary driver); see generally Benjamin Tan, *The Impact of National Environment on Managerial Value Systems: A Comparative Study of Chinese Managers in the United States, Singapore, and the People's Republic of China*, 42 MGMT. INT'L REV. 473, 473 (2002) (finding that industrialization tends to move managers toward Western values; based on his study of his dataset).

<sup>194</sup> Kin-Man Chan, *Harmonious Society*, in INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 821 (Helmut K. Anheier & Stefan Toepler eds., 2010).

<sup>195</sup> See Zhao, *supra* note 186, at 165; see also Nadira Lamrad, *Transnational Business, CSR and Governance in China*, 45 U.B.C. L. REV. 691, 719 (2012).

<sup>196</sup> See Zhao, *supra* note 186, at 188.

help promote and realize the goals of a harmonious society.<sup>197</sup>

Jingchen Zhao draws a direct line between the harmonious society and CSR. He describes the former as “revolutionary.” The concept of harmonious society encompasses a diminished emphasis on pure economic growth that started in the Deng Xiaoping era and a greater concern with fair economic distribution, environmental protection, and unemployment, combining Confucian thought and Taoist thought with the increasing modernization and globalization of China.<sup>198</sup> Although he acknowledges that the harmonious society principle does not explicitly refer to CSR, he writes that “it is clear that CSR was initially, and still is, considered to be instrumental in achieving the socio-economic goals of this new policy,”<sup>199</sup> and he understands both the harmonious society and CSR to be the instantiation of stakeholder theory in Chinese corporate governance.<sup>200</sup> Indeed the CSR requirement in Article 5 of the Chinese Company Law of 2005, Chinese corporate governance practice, and CSR norms generated outside the law appear to be mutually reinforcing, with significant improvements seen in Chinese corporate law and regulation since the advent of CSR in China and the influence of the harmonious society.<sup>201</sup> The relationship between state policy and corporate behavior, while still evolving, is clear and considerably more integrated than in most Western nations.

The contemporary form of Chinese CSR looks quite Western.<sup>202</sup>

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<sup>197</sup> See Lamrad, *supra* note 195, at 719; Lin, *supra* note 38, at 76, 88 (noting the relationship between CSR and “harmonious society”); Geoffrey (Kok Heng) See, *Harmonious Society and Chinese CSR: Is There Really a Link?*, 89 J. BUS. ETHICS 1, 17 (2009) (providing a framework within which to analyze the extent to which the Harmonious Society principle will stimulate the growth of CSR in China, and concluding that such stimulated growth is far more likely to occur in SOEs than in the private sector because the kinds of actions the government can take to more broadly stimulate CSR are unlikely due to significant political constraints).

<sup>198</sup> Zhao, *supra* note 186, at 168, 170.

<sup>199</sup> *Id.* at 181.

<sup>200</sup> *Id.* at 174, 183–84 (explaining Article 5 of the Chinese Company Law of 2006 specifically adopts stakeholder principles, but the ambiguities of the law and difficulties with its enforcement lead to the thought that CSR is an indirect method of implementation).

<sup>201</sup> See Lin, *supra* note 38, at 88.

<sup>202</sup> Xu & Yang, *supra* note 1, at 322 (noting that CSR is itself a Western development); May Tan-Mullins & Peter S. Hofman, *The Shaping of Chinese Corporate Social Responsibility*, 43 J. CURRENT CHINESE AFF. 1, 6 (2014); see also Dima Jamali & Ben Neville, *Convergence Versus Divergence of CSR in Developing Countries: An Embedded Multi-Layered Institutional Lens*, 102 J. BUS. ETHICS 599, 599 (2011) (describing “superficial convergence” in the language of CSR but observing significant crossvergence in a study of Lebanese CSR attitudes and practices); Dina Jamali & Ramez Mirshak, *Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context*, 72 J. BUS. ETHICS 243, 252 (2007)

Consider the following examples: industry-adopted guidelines like the Corporate Responsibility Management System adopted by the China National Textile and Apparel Council in 2005,<sup>203</sup> the 2005 amendment to the Company Law that explicitly incorporated mandatory CSR, the first SRI fund created in China in 2006 by the Bank of China,<sup>204</sup> social responsibility guidelines articulated by the Shanghai Stock Exchange and the Shenzhen Stock Exchange,<sup>205</sup> environmental compliance regulations issued by the Bank of China in 2007, the China Banking Regulatory Commission's recommended social responsibilities of banks, including compliance with the UN Global Compact, further promulgations of corporate social responsibility standards by the State Owned Asset Supervision and Administration Commission,<sup>206</sup> industrial associations,<sup>207</sup> and additional standards set forth by the exchanges<sup>208</sup> and industry groups.<sup>209</sup> Leaving aside the dominant role of the state, all of these initiatives reflect Western forms of articulating CSR. The rapid proliferation of Western forms of CSR in response to Western pressure legitimately raises the question of whether all of this is just window dressing.<sup>210</sup>

Undoubtedly, to some extent, it is. Sharma, for one, points out Chinese business understandings that well-articulated (and at least somewhat observed) CSR provides competitive advantages to Chinese companies doing business abroad and seeking to attract investment from abroad.<sup>211</sup>

But surely more than this. The deep ancient norms I've previously described didn't simply disappear although, as Ruskola illustrates, even in ancient times they were sometimes honored more in the breach.<sup>212</sup>

There is a jurisprudential underpinning to the distinctions between

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(finding lack of systematic CSR practice in 8 Lebanese companies and finding CSR there grounded in philanthropy); Matten & Moon, *supra* note 29, at 404 (differentiating American and European forms of CSR as determined by social and political context).

<sup>203</sup> Lin, *supra* note 38, at 83.

<sup>204</sup> *Id.* at 79.

<sup>205</sup> *Id.* at 76; ORG. FOR ECON. COOPERATION AND DEV., *supra* note 156, at 99–100.

<sup>206</sup> See Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANS-NAT'L L. 375, 401–03 (2013).

<sup>207</sup> Lin, *supra* note 38, at 83.

<sup>208</sup> *Id.* at 72–73.

<sup>209</sup> *Id.* at 81, 83.

<sup>210</sup> *Id.* at 99–100 (concluding that it is not).

<sup>211</sup> Sharma, *supra* note 23, at 66.

<sup>212</sup> Ruskola, *supra* note 2, at 1636 (“[C]lan corporations were seething with contracts of all sorts . . .”). Particularly interesting is Ruskola's revelations that contractual relationships were far more present in Chinese corporate governance and business practices than is generally thought.

Chinese and Western CSR practices that might embed what is generally referred to as the “soft law” regime of CSR into actual Chinese legal practice. Very broadly stated, the distinguishing jurisprudential principle dividing East and West (generalizing broadly) that arises from these underlying cultural and normative differences is the difference between status and contract.<sup>213</sup> Understanding this distinction might help explain differences in the practice of CSR. But status is far from unknown in the West. Indeed, until the onset of modernity three hundred years ago, the Western tradition was also status based, an observation that suggests that there are at least historical traditions in the West that might be receptive to some Eastern influences.<sup>214</sup>

As I have discussed, the core common trait scholars identify in Eastern societies that affects governance and business practices in a manner different from the West is the primacy of community over individual.<sup>215</sup> This observation is also true in the convergence literatures that distinguish European practices from Anglo-American practices. But in the European case, notions of community are, to varying degrees, modified by the foundational Enlightenment ideology throughout Western Europe and the influence of liberal market capitalism on more traditional European nations.<sup>216</sup>

Eastern notions of community, Eastern traditionalisms, are different. The East has never adopted nor absorbed Enlightenment values. The East is not liberal in the Western philosophical sense, despite the increasing development of liberal-style capital markets and corporate governance forms.<sup>217</sup> The meanings of community in China or Vietnam or Japan are quite distinct from their meanings in France or Italy. They are distinct from the collective and communal organizations in the US first described by Tocqueville that have proliferated ever since.<sup>218</sup> Their norms are different. Their forms and

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<sup>213</sup> See generally Fingarette, *supra* note 104; see also Ruskola, *supra* note 2, at 1609–10 (explaining that status is very important and “[t]he self-serving contrast between a stationary East of witless myrmidons and a progressive West of self-sufficient individuals has indeed generated one of the most stubborn clichés of comparative law – namely that the former are frozen in categories that delimit Status while the latter define their relationships freely through Contract,” but that it is worth heeding Ruskola’s warning to avoid reductionism).

<sup>214</sup> See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 1–31 (1921) (noting the importance of status-based relationships in the Common Law and that notions of status are not foreign to the West just as contract is not foreign to the East).

<sup>215</sup> Studies that attribute differences in governance practices to cultural differences—at least in part—include Bala Ramasamy & Mathew Yeung, *Chinese Consumers’ Perception of Corporate Social Responsibility*, 88 J. BUS. ETHICS 119, 128 (2009).

<sup>216</sup> See e.g., *id.* at 129 (noting differences in Chinese and European attitudes toward corporate social responsibility even though both cultures are “communitarian”).

<sup>217</sup> Jacques, *supra* note 9, at 430–31.

<sup>218</sup> See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840).

practices are different. And thus, we should expect these differences to be manifest in the practices—if not the forms—of corporate governance and finance, and of CSR.

The small body of literature that examines CSR in Asia naturally and rightly appreciates Eastern ideas of community.<sup>219</sup> But the ways in which CSR is coming to be adopted in Asia, and the possibility of influence in the West, lies in the more precise distinction between status and contract.<sup>220</sup>

I have earlier described the Confucian system as hierarchical. Hierarchy is, of course, about status. One should, then, expect that ideas of status would influence the integration of responsible and moral business behavior as well as the form of CSR that is taking place throughout East Asia. The West, although once grounded in traditional ideas of status has, as is well-known, followed an evolution in which the primacy of contract over status is largely unquestioned.<sup>221</sup> In the West, it is the terms of the contract, not the relationship between or among the parties, that largely determines obligation and its extent.<sup>222</sup> And in the West, at least in the United States, the scope of those contractual duties has been steadily narrowing—contractually—in the arena of corporate law.<sup>223</sup>

A contract is volitional. It is in fact the instrument that is that the core of liberal autonomous engagement.<sup>224</sup> Western doctrines protecting the freedom of contract are, in a very important way, doctrines that protect individual autonomy and individual choice. One is free to enter into or reject such contracts as one chooses. And having chosen to enter into a contract, one's obligations are, more or less strictly, defined by its terms.

Not so in the East. Status is a matter of position, not a matter of choice.<sup>225</sup>

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<sup>219</sup> See *supra* Part II(a).

<sup>220</sup> Ruskola, *supra* note 2, at 1609 (referring to the distinction as “one of the most stubborn clichés of comparative law” and much of his study demonstrates the pervasive contractualism within Chinese corporate law). Yet he shows this contractualism within the context of deeply embedded status relationships and notes the non-interchangeability of “the rhetorics of contract and kinship.” *Id.* at 1710.

<sup>221</sup> The classic statement appears in HENRY SUMNER MAINE, *ANCIENT LAW* 163–65 (1906).

<sup>222</sup> But see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55, 55–67 (1963).

<sup>223</sup> See Winnifred A. Lewis, *Waiving Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 82 *FORDHAM L. REV.* 1017, 1020–21, 1024 (2013) (discussing companies contracting out of fiduciary duties, exculpatory charter amendments, etc.).

<sup>224</sup> See David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 *YALE HUM. RTS. & DEV. L.J.* 51, 52 (2013).

<sup>225</sup> Ruskola, *supra* note 2, at 1636 (debunking this theory to some extent and demonstrating that Chinese clan membership and expansion could be, to some degree, volitional).

The family—the source of society and power throughout the East—is a consequence of social convention and biology, but the status of family members determines role and obligation in ways that cannot reduce to the terms of a Western-style contract. Family becomes village, village becomes the government. Home tailoring becomes business and business becomes corporation. Vehicles change, but notions of status and obligation remain the same.

The morality that roles embrace is determined by very different factors when one contrasts status with contract.<sup>226</sup> And it is the consequences of that choice that are perhaps the driving force behind the emerging forms of Asian CSR. Put simply, whether in family, business, or government, Eastern leaders sustain a society.<sup>227</sup> Western business leaders do their jobs.<sup>228</sup>

I have, I believe, said enough for the moment to identify the very different sources and structures of CSR in China. While some might quibble with the details, the overarching concepts are clear. The conclusion is that one should expect the persistence of Eastern norms in Chinese corporate governance and CSR practices. I now turn to the question of how, if at all, these norms might come to influence Western practices as China achieves predicted economic dominance. The task is to identify the likely channels of transmission.

### III. CHANNELS OF INFLUENCE

It is one thing to point out limitations in the convergence literature and to describe the broad foundation and contours of Chinese practices. In order to make a case for the possibility of reciprocal convergences, it is necessary to explore the channels through which these different practices might come to influence the West. The convergence literature focuses largely on capital market pressures (although more structured governance vehicles like the

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<sup>226</sup> LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* 185–86 (1995); CHARLES TAYLOR, *SOURCES OF THE SELF* 83–84 (1989); Robert Lewis & Andrew McGinty, *The China Premium—Why Western M&A Contract Won't Work in China*, 26 INT'L FIN. L. REV. 20, 22–23 (2007) (observing the differences between Western and Chinese attitudes toward contracts).

<sup>227</sup> See Jacques, *supra* note 9, at 201 (describing China as a “culture state” rather than a nation state, emphasizing the importance of cultural preservation by the leadership as a legitimating factor).

<sup>228</sup> The Chinese Cultural Connection, *supra* note 100, at 150, 153; Jacques, *supra* note 9, at 209, 258, 267, 393 (“[T]he word of the parents . . . is final and never to be challenged. In the family, children come to understand the importance of social hierarchy and their place with it. Through a combination of filial piety, on which the Chinese place greater stress than any other culture, a sense of shame, and the fear of a loss of face, children learn about self-discipline. In a shame (rather than a Christian guilt) culture, Chinese children fear, above all, such a loss of face. The Chinese family and Chinese state are complementary, the one manifestly a support for the other.”).

Organisation for Economic Co-operation and Development (“OECD”) and the European Union also have important roles).<sup>229</sup> Reliance on the demands of (currently) Western-dominated capital markets seems to point clearly in one convergence direction.

But the belief that capital markets are the dominant driver is itself embedded in Western ideology—the practice of liberal market economies that feature carefully regulated but otherwise free market systems that embody information and create incentives for certain types of behavior. Some among these, transparency and integrity, for example, seem like necessary preconditions to any functioning market, and the Chinese legal trends towards improving these aspects of its corporate governance (through mandatory disclosure, minority shareholder protections, and board structures) to satisfy market demands are, if not yet fully successful, at least clear.

The convergence literature has done an excellent job of theorizing and describing significant resistance among the institutions (including capital markets) of many, mostly European, nations to resist other kinds of pressures, including pressures to privilege shareholder-centric systems over more indigenous concerns with various types of stakeholders.<sup>230</sup> Indeed, the most interesting of the convergences literatures focus primarily on the causes of resistance.<sup>231</sup> Left as almost self-explanatory are the influences of market pressure.

It is not clear that reciprocal convergences would arise from market pressure. The influences I have been examining, especially in the CSR context, are too complex to be likely candidates for capital market transmission, even assuming that at some point capital investment abroad from China could become so significant as to influence the behavior of Western firms. Capital markets simply don’t work that way. They work because their inputs and outputs are simple, or at least can be reduced to simple metrics.<sup>232</sup> So it

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<sup>229</sup> Thomas Clarke, *The Continuing Diversity Of Corporate Governance: Theories Of Convergence And Variety*, 16 EPHEMERA: THEORY & POL. ORG. 19, 24 (2016) (“[T]he OECD, World Bank, IMF, Asian Development Bank and other international agencies, while they have recognized the existence of different governance systems and suggested they would not wish to adopt a one-size-fits-all approach, have nonetheless consistently associated the rules-based outsider mode of corporate governance with greater efficiency and capacity to attract investment capital, and relegated the relationship-based insider mode to second best, often with the implication that these systems may be irreparably flawed. The drive towards functional convergence was supported by the development of increasing numbers of international codes and standards of corporate governance.”).

<sup>230</sup> See generally Part I.

<sup>231</sup> *Id.*

<sup>232</sup> Investment decisions in capital markets are made by institutions or individuals often engaging in complex analysis. It is this inflow of information through which

is not from capital market influence, or at least market influence alone, that we can expect to see reciprocal convergences occur, no matter how dominant China and Asia become.<sup>233</sup>

If reciprocal convergences are to occur, then, they will likely arise through the influence of channels other than capital markets, carrying the communally and status-based Chinese practices of CSR with them. I will examine two of these: (i) multinational enterprises, and (ii) One Belt, One Road.

#### A. *Multinational Enterprises in the Convergence Debate*

The multinational enterprise is largely ignored in the legal convergence literature.<sup>234</sup> This makes sense. Convergence has been examined in the context of the laws and institutions of nations, and the MNE is neither a creature of law (although its components clearly are) nor a national institution. Rather, it is a transcendent institution that, at the meta-level, receives no special legal status or recognition. Yet its importance among and within nations is undeniable. To the extent that the norms and values through which it operates spread among its constituent parts, they can affect practices around the world.<sup>235</sup>

One could argue that the convergence literature already at least implicitly considers the role of multinationals because each such enterprise consists of multiple corporations, incorporated and operating under the laws of its particular state of incorporation, with the corporation at the top of the enterprise perhaps infusing its subsidiaries with the norms and values of its nation of origin as best it can within the limits of local law.<sup>236</sup> But an increasingly

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investment decisions are made that is said to make markets efficient. See Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383 (1970) (explaining, however, that the kind of analyses investors are presumed to make are those that are wealth-maximizing, and therefore can be reduced to fairly straightforward inputs – cultural norms and values are not measurable in the same manner).

<sup>233</sup> Clarke, *supra* note 229, at 46–47. That is, unless the Asian influence transforms the behavior of markets themselves, a highly unlikely and historically unprecedented scenario.

<sup>234</sup> But see Louis W. Pauly & Simon Reich, *National Structures and Multinational Corporate Behavior: Enduring Differences in the Age of Globalization*, 51 INT'L ORG. 1, 3–4 (1997) (arguing that distinct national institutions and ideologies sustain significant differences in corporate decision-making).

<sup>235</sup> Identifying the internal mechanisms by which these spread might be difficult. See, e.g., Tineke E. Lambooy et al., *The Opacity of a Multinational Company's Organization, Legal Structure and Power*, DOVENSCHMIDT Q. 121, 129–31 (2013) (discussing Dutch legal reactions to the problems of MNE opacity that make holding it accountable challenging).

<sup>236</sup> Backer, *supra* note 87, at 501–04 (noting that this entity-based understanding of corporate form has significantly hindered legal scholars' ability to study MNEs);



large number of studies seek to understand the multinational from within the black box and evaluate the influences and characteristics of its behavior.<sup>237</sup> The transmission of values within MNEs has been an important area of study.<sup>238</sup>

It is not my purpose here to develop a theory of multinationals nor, for this project, do I need to do so. The importance of recognizing the multinational is simply to introduce into the conversation an important actor that can serve as a channel through which national norms and practices can spread across borders and describe how that spread could occur.<sup>239</sup> Important because its behavior, at least potentially, permeates national norms and practices in a manner that the simple transplantation of legal forms and institutions appears unlikely to accomplish. That said, I will draw upon the existing literature on multinationals to suggest the possible extent of this influence in the context of CSR.<sup>240</sup>

I begin with the nature of the organization itself. Walter Powell, writing almost twenty years ago and surveying the decade then just passed, observed and described an entirely new logic of organization created within an economic world of decentralized capitalism.<sup>241</sup> Observing the diffusion of

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*see also* PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 168–69, 173 (Oxford Univ. Press 1993) (demonstrating the doctrinal limits of the law in dealing with MNE problems because of the local sources of corporate law).

<sup>237</sup> See Justin Tan & Liang Wang, *MNC Strategic Responses to Ethical Pressure: An Institutional Logic Perspective*, 98 J. BUS. ETHICS 373, 374, 379–80 (2011).

<sup>238</sup> *Id.* at 374–375; *see also* Rikka M. Sarala & Eero Vaara, *Cultural Differences, Convergence, and Crossvergence as Explanations of Knowledge Transfer in International Acquisitions*, 41 J. INT’L BUS. STUD. 1365, 1378 (2010) (noting “a proliferation of studies taking a cultural perspective on M&A”).

<sup>239</sup> For research finding that MNEs have shaped their own distinctive values and cultures and transmitted them throughout their global operations, *see* Nakiye Boyacigiller, *The Role of Expatriates in the Management of Interdependence, Complexity and Risk in Multinational Corporations*, 21 J. INT’L BUS. STUD. 357, 359 (1990); Birgitte Grøgaard & Helene Loe Colman, *Interpretive Frames as the Organization’s ‘Mirror’’: From Espoused Values to Social Integration in MNEs*, 56 MGMT. INT’L REV. 171, 179, 184, 186 (2016); Ignatius Odongo, *The Influence of Culture on Judgment and Decision Making*, 6 INT’L J. ADVANCED LEGAL STUD. & GOVERNANCE 1, 7–8, 11 (2016); Stephanie Slater et al., *Ethnicity and Decision Making for Internationalization*, 45 MGMT. DECISION 1622, 1632 (2007).

<sup>240</sup> See Xiaohua Yang & Cheryl Rivers, *Antecedents of CSR Practices in MNCs’ Subsidiaries: A Stakeholder and Institutional Perspective*, 86 J. BUS. ETHICS 155, 155 (2009) (“The literature on multinational corporations . . . and CSR is still embryonic.”).

<sup>241</sup> See Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in *THE TWENTY-FIRST CENTURY FIRM* 33, 35–36 (Paul DiMaggio, ed., Princeton U. Press, 2001).

knowledge within the firm from top management throughout the workforce, he described “the core competence of the firm” as “knowledge production.”<sup>242</sup> Situating this observation within the broader multinational context, he noted the increasing porousness of firm boundaries and, particularly relevant for this discussion, the phenomenon of flattened hierarchies and spreading global networks, all spurred by the almost-immediate diffusion of information made possible by modern technology.<sup>243</sup> The image this conjures is far from the single incorporated business operating solely within its home nation’s institutional structures. But that corporation, the focus of the convergence debate, does in fact exist. At some level, the entity matters, whether it simply is a holding company or it directly conducts a portion of the multinational’s business itself.

Focus on the entity helps to sustain the importance of territoriality and the difficult issues raised when corporate laws and regulatory regimes clash.<sup>244</sup> From a scholarly perspective, focus on the entity maintains a targeted examination of the traditional internal structure of corporate governance. But this severely limits the field of play, magnifying the importance of corporate law concepts even in an environment that now discusses governance<sup>245</sup> and, as a result, significantly constrains the ability of corporate scholars to imagine broader solutions.<sup>246</sup>

Convergence in operation deserves a larger canvas. The MNE provides this. As an example, Larry Cata Backer presents a fascinating study of Gap Inc. as a multinational business model that breaches the bounds of any of its

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<sup>242</sup> *Id.* at 35.

<sup>243</sup> *Id.* at 35, 58.

<sup>244</sup> See Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANS-NAT’L L. 5, 8, 13 (2003).

<sup>245</sup> Pargeldner, *supra* note 84, at 363.

<sup>246</sup> Bernard Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U.L. REV., 542, 544–45 (1990); see also Lawrence E. Mitchell, *Vulnerability and Efficiency (of What)?*, 2 BERKELEY BUS. L.J. 153, 153 (2006) (observing that corporate law does little to dictate the forms and norms of production). I do not ignore the importance on the comparative corporate governance literature. But that literature tends to focus on which system of corporate law is better for which purposes and whether such systems will converge, diverge, or combine. The highly limited nature of traditional corporate law scholarship (and corporate governance scholarship at least within the legal academy) allows for the periodic declaration of the death of the enterprise. See Henry Hansman & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Bayless Manning, *The Shareholders’ Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 233–34 (1962) (noting the breathtaking proclamation of the end of corporate law history). It is hard to imagine such statements being made about almost any other area of the law.

component entities. It does so by using its network of outputs contracts to impose quasi-legislative norms of social and economic behavior on its suppliers, integrated into a system of norm-giving, monitoring, and enforcement, embedded in a web of non-governmental organizations, consumers, the media, and a number of sovereign states.<sup>247</sup> Gap has, in effect, created its own worldwide governance apparatus achieving many of the goals aimed at by advocates of stakeholder theory.<sup>248</sup> In doing so, it has embedded within itself, at least to some extent, social values that transcend shareholder value.<sup>249</sup>

Perhaps it is these kinds of mechanisms through which the most important social and cultural influences flow through a globalizing economy, the kinds of rules and practices which, while not necessarily rising to the level of law, fulfill Bebchuk and Roe's broader understanding of corporate governance rules.<sup>250</sup> Behavior in accordance with these norms brings conformance—convergence?—among all of the enterprise's workers as well as significant classes of its business partners as well.<sup>251</sup> Practices from managerial styles to dealing with customers and competitors can flow through the enterprise, infusing it with a distinct set of values.

Where do these values originate? How are they formed, by whom, and in what context? These questions are difficult to answer, but at least to some extent they appear to be organic, in the case of China, and imposed, in the case of the West, in CSR.

### B. *Convergence, CSR, and the Multinational Enterprise*

The convergence literature recognizes the potential effects of culture and history on convergence and divergence, even from a purely legal perspective. As Bebchuk and Roe rather charmingly put it: “[W]e are not

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<sup>247</sup> THE GAP INC., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF THE GAP, INC.. The Gap is incorporated in Delaware, and it interesting to note that in Larry Cata Backer's lengthy description of its governance system, he never mentions its state of incorporation. *See generally* Backer, *supra* note 87.

<sup>248</sup> *See also* Nina Boeger, *Embedding Society in the Firm: The Role of Social and Cooperative Enterprise in Shaping Capitalism*, 50 U. NEW SOUTH WALES L. RES. SERIES 1, 6 (2017) (questioning whether society itself could be embedded within the firm in a way that helps open the firm to non-market societal incentives by internalizing them).

<sup>249</sup> *But see id.* at 6 (noting “firms whose procedural commitments to their stakeholders go beyond CSR do not structurally prioritize shareholder value” and she nonetheless notes that such firms must behave like market actors in order to survive).

<sup>250</sup> *See* Boeger, *supra* note 248, at 8, 11–12; Sharma, *supra* note 23, at 23 (identifying the MNE as a principal conduit of CSR in China).

<sup>251</sup> Backer, *supra* note 87, at 12.

complete materialists. Culture and ideology, not only value maximization and self-interest, might influence a country's choice of corporate law."<sup>252</sup> The MNE provides a potentially fruitful laboratory in which to understand cultural and ideological differences in corporate governance and business operation. And it is in this context that CSR matters.

There is a developing body of legal scholarship that focuses on values transmission throughout the multinational enterprise itself rather than on the question of convergence specifically, with particular reference to CSR.<sup>253</sup> Its importance to my analysis lies in the fact that it disengages the MNE from its legal roots and focuses on the nature of the entity, its composition (or decomposition), and its behavior in a global environment. Rather than view the corporation (or the corporate components of MNEs) as grounded within a particular legal system, it understands the MNE to be a growingly independent power structure competing with the nation-state itself in global importance, grounded in both cultural contexts and developing its own culture.<sup>254</sup> As one of the leading scholars from this perspective writes, "the large business corporation . . . has in many ways been assuming formerly public functions."<sup>255</sup> It is important to highlight the corporation in light of its

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<sup>252</sup> Bebachuk & Roe, *supra* note 60, at 168.

<sup>253</sup> Business scholarship and, especially, business ethics has been developing a body of literature for several decades. See Sarala & Vaara, *supra* note 238, at 366; Tan & Wang, *supra* note 237, at 1381. There is, for example, interesting literature on the role of the MNE in helping to foster world peace. See John Forrer, *Locating Peace Through Commerce in Good Global Governance*, 89 J. BUS. ETHICS 449, 452 (2009); Timothy Fort & Cindy Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 400 (2002); Franck, *supra* note 12, at 375 (identifying transnational corporations as a channel for establishing transnational loyalties); Charles P. Koerber, *Corporate Responsibility Standards: Current Implications and Future Possibilities for Peace Through Commerce*, 89 J. BUS. ETHICS 461, 465 (2010); Jennifer Oetzel et al., *Business and Peace: Sketching the Terrain*, 89 J. BUS. ETHICS 351, 357 (2010); Jason Miklian, *Mapping Business-Peace Interactions: Five Assertions for How Businesses Create Peace*, SOC. SCI. RESP. NETWORK 6 (2016), <https://ssrn.com/abstract=2891391>.

<sup>254</sup> See Larry Cata Backer, *Transnational Corporate Constitutionalism: The Emergence of a Constitutional Order for Economic Enterprise*, SOC. SCI. RESP. NETWORK 102, 120-21 (Apr. 11, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038081](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038081); but cf. Ruth V. Aguilera & George S. Yip, *How National Corporate Governance Systems Affect Global Integration*, ADVANCED INST. MGMT. RES. WORKING PAPER SERIES (2004) (observing the manner in which "nationally embedded institutional characteristics" continue to affect MNC behavior).

<sup>255</sup> See Peer C. Zumbansen, *The Evolution of the Corporation: Organization, Finance, Knowledge and Corporate Social Responsibility* 20 (Ctr. for Bus. Research Univ. Cambridge, Working Paper No. 373, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1346971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346971). An excellent analysis of the independence (but not dominance) of the MNE from the state and its implications for corporate social responsibility is provided in John Gerard Ruggie, *Multinationals as Global*

increasingly multiple functions in an environment in which legal analysis has “disembedded” the corporation and left it as almost a pure financial instrument. The implications for the importance of CSR are significant, as I shall discuss, but at least of equal importance is the observation that, when we turn to China and its potential normative influence abroad, we address a situation in which the large corporation traditionally has assumed state functions and, in light of Chairman Xi’s 2017 speech, appears increasingly likely to do so.<sup>256</sup> In contemporary terms, this means stakeholders, not just shareholders.<sup>257</sup>

In any event, this perspective engages with a more functional view of the corporation in contrast to the market-based and institutional legal theories and the varieties of capitalism theory I have described. It is especially useful in evaluating the norms and practices of corporations and their supporting institutions that are shaped at least in part by non-market influences.<sup>258</sup>

Tan and Wang directly confront the question of ethical conflicts between MNE home and host countries. Acknowledging what they call the “optimistic” convergence view, that firms from developed countries eventually will infuse their “universal organizational patterns and business ethical standards” into their developing country subsidiaries,<sup>259</sup> they describe a more subtle process in the context of conflicts between business ethics and ways of doing business between the MNE home country and those of its subsidiaries. In line with reciprocal convergences theory, they note that the outflow of foreign direct investment from developing country MNEs had reached

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*Institution: Power, Authority and Relative Autonomy*, 2018 REG. & GOVERNANCE 317, 325 (2017); see also Thomas Maak, *The Cosmopolitan Corporation*, 84 J. BUS. ETHICS 361, 362 (2009) (arguing for the political characteristics of MNEs giving them government-like status).

<sup>256</sup> See Jinping, *supra* note 18, at 28.

<sup>257</sup> See Yuan Yi Chen & Michael N. Young, *Cross-Border Mergers and Acquisitions by Chinese Listed Companies: A Principal-Principal Perspective*, 27 ASIA PAC. J. MGMT. 523, 523–24, 526 (2010) (evaluating Chinese SOE outbound cross-border mergers in light of potential conflicts between the state as controlling shareholder and the interests of minority shareholders). That said, Chinese companies have been relatively hands-off so far in managing their cross-border acquisitions, but according to one study, this likely is because of a scarcity of strong managers, a situation that is rapidly changing. See MCKINSEY & CO., *A POCKET GUIDE TO CHINESE CROSS-BORDER M & A* 9–10, 19, 32, 36, 44 (2017).

<sup>258</sup> Milhaupt and Pistor also introduce non-market influences in understanding the ongoing conversation between firm and market, but the conversation itself is bilateral in a way that Zumbansen’s work seeks to transcend. See Milhaupt & Pistor, *supra* note 42, at 4–8, 12.

<sup>259</sup> Tan & Wang, *supra* note 237, at 373, 378.

17% of outward flows around the world in 2006<sup>260</sup> (and had reached 26% by 2016),<sup>261</sup> creating ethical problems, especially in the developing countries where these investments land. Chinese cross-border M&A activity, while unsurprisingly modest in the early years of this century, reached \$145 billion in 2016.<sup>262</sup> While China invests heavily in developing countries, it invests more in the U.S. and Europe.<sup>263</sup> In fact, the total deal value of cross-border acquisitions by Chinese listed companies increased by 323% for a total of \$76.5 billion between 2015 and 2016.<sup>264</sup> One source reports Chinese cross-border M&A to be as high as \$101 billion in the first quarter of 2016.<sup>265</sup> Tan and Wang attempt to understand the problems of ethical conflicts arising from these activities by analyzing the ways in which MNEs “are shaped by and reshapes [sic] the institutional and ethical environments” in which they operate.<sup>266</sup>

They note that the temporal stability of what they refer to as “core” values are resisting change.<sup>267</sup> In contrast to the convergence approach, they suggest that these value differences will lead the MNE to vary its behavior to conform to the values in specific host countries.<sup>268</sup> Focusing on CSR, and noting that some MNEs in developing countries are more CSR compliant than some from developed countries, they propose that the more deeply invested in CSR a particular MNE is, the more consistently it will operate in

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<sup>260</sup> *Id.* at 373.

<sup>261</sup> U.N. Conference on Trade and Dev., *supra* note 147, at 13–14.

<sup>262</sup> See Agyenim Boateng et al., *Cross-Border M&As by Chinese Firms: An Analysis of Strategic Motives and Performance*, 50 THUNDERBIRD INT’L BUS. REV. 259, 260 (2008); U.N. Conference on Trade and Dev., *supra* note 147, at 231.

<sup>263</sup> DAVID DOLLAR, CHINA AS A GLOBAL INVESTOR 1, 3 (2016), [https://www.brookings.edu/wp-content/uploads/2016/07/China-as-a-Global-Investor\\_Asia-Working-Paper-4-2.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/China-as-a-Global-Investor_Asia-Working-Paper-4-2.pdf); Baker McKenzie, *Chinese Investment in the U.S. Tripled in 2016, Doubled in Europe*, CHINA BUS. REV. (Mar. 27, 2017), <https://www.chinabusinessreview.com/chinese-investment-tripled-in-us-in-2016-doubled-in-europe/>. China’s inflow of global FDI holds relatively steady at around 4% as China remains highly averse to receiving FDI.

<sup>264</sup> KPMG, CHINESE LISTED COMPANIES: OUTBOUND MERGER AND ACQUISITION UPDATE 3 (2017).

<sup>265</sup> Denny Thomas & Sophie Sassard, *China Shines in Lacklustre First-Quarter for M&A*, THOMSON REUTERS (Mar. 31, 2016, 10:02PM), <https://uk.reuters.com/article/uk-m-a-global/china-shines-in-lacklustre-first-quarter-for-ma-idUK-KCN0WY3AH>.

<sup>266</sup> Tan & Wang, *supra* note 237, at 374.

<sup>267</sup> *Id.* at 376 (providing, for example, a description of the core values of Americans as “support for equality of opportunity, economic individualism, and a free enterprise system” and that “peripheral components,” like free trade, derive from these core values).

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its host countries.<sup>269</sup>

Nonetheless, they observe that MNEs will alter their moral principles in given host countries. Using the example of Google's self-censorship in China before its withdrawal from that market, they suggest that while market size certainly is an influential factor inducing moral compromise, of further importance is the fact that "emerging economies with their phenomenal growth have increasingly regained confidence in their existing political, institutional, and social systems and their traditional values and beliefs" that often conflict with those in developed nations.<sup>270</sup> While their paper goes on to establish several modes by which MNEs manage value conflicts, reasonable inferences from their discussion include the stability of culturally-based ethical values and their resistance to change, as well as the possibility that reciprocal convergences can occur.

Rikka Sarala and Eero Vaara engage in an interesting study on the effect of cultural differences on knowledge transfer in acquisitions. If, as Powell noted, knowledge production is the core function of the firm,<sup>271</sup> and a significant purpose of corporate acquisitions is to obtain new knowledge for competitive advantage,<sup>272</sup> the transfer of knowledge among the units of an MNE is crucial to its success.<sup>273</sup> Cultural differences between MNE units arising from their specific national contexts have the potential to impede the successful transfer of knowledge, limiting if not damaging the firm's prospects for economic success.<sup>274</sup> Managing cultural differences to facilitate knowledge transfer thus becomes critically important.<sup>275</sup>

Sarala and Vaara ask how differences in national and organizational culture affect knowledge transfer, hypothesizing that, in contrast to the "conventional view" that national cultural differences have a negative impact, a positive impact is also possible. Engaging in an empirical analysis of various factors in the process, they conclude that while organizational cultural differences had no apparent effect on knowledge transfer, both organizational cultural convergence and organizational cultural crossvergence had

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<sup>269</sup> *Id.* at 378.

<sup>270</sup> *Id.* at 381. Xi Jinping's October speech certainly reflects this confidence and strength. See Xi Jinping, *supra* note 18, 1–2.

<sup>271</sup> Powell, *supra* note 241, at 35.

<sup>272</sup> Sarala & Vaara, *supra* note 238, at 1366.

<sup>273</sup> Sheng Chen & Zhang Li, *China's Outbound Mergers and Acquisitions in the U.S.*, 9 FRONTIERS L. CHINA 464, 476 (2014) (stating that the acquisition of knowledge appears to be a principal motivation of Chinese cross-border acquisitions).

<sup>274</sup> Sarala & Vaara, *supra* note 238, at 1369.

<sup>275</sup> Christopher King & Hubert Segain, *Cross Border Negotiated Deals: Why Culture Matters*, 4 EUR. COUNCIL FOREIGN REL. 126, 132–33 (2007) (stating it is also clearly important in the negotiation stage).

significant positive effects, especially where national cultural differences could be beneficial to the enterprise.<sup>276</sup> In other words, the process of working through cultural differences to produce shared (in the case of crossvergence) new values, is key to the successful transfer of knowledge. They found convergence to be more likely in acquisitions in which one firm absorbed another, and crossvergence (new values creation) in acquisitions in which the component corporations retain some independence yet become “increasingly interdependent.”<sup>277</sup>

Finally, and importantly, Krista Bondy, Jeremy Moon, and Dirk Matten studied CSR practice in thirty-seven different MNEs based in the United Kingdom, concluding that, far from internalizing the values of CSR, these MNEs focus on manipulating CSR opportunistically for business advantage, returning it to a tool of profit maximization.<sup>278</sup> Specifically, they found that the MNEs surveyed took longstanding “tools, frameworks, and practices” which they then altered to include CSR within their structures, often in unsuitable ways. Thus, they find MNEs to be moving CSR away from its traditional stakeholder concerns and towards traditionally conducted business.<sup>279</sup>

Traditionally conducted business in United Kingdom multinationals differs from traditionally-conducted business in MNEs originating in China. In particular, corruption of CSR by Western multinationals may well open up opportunities for Chinese MNEs (as they expand their influence in the future) to export their own varieties of CSR in the context of reciprocal convergence. Whether this will restore CSR to its original values in these powerful actors remains, of course, to be seen. By this point, however, I hope to have convinced the reader of the distinct possibility of such a process happening.

### *C. One Belt, One Road: Economic Colonization, Mutual Appreciation, or Reciprocal Convergences?*

The convergence literature recognizes the potential effects of culture and history on convergence and divergence, even from a purely legal

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<sup>276</sup> Sarala & Vaara, *supra* note 238, at 1380–82 (providing the usual caveats as to causality).

<sup>277</sup> *Id.* at 1381.

<sup>278</sup> Krista Bondy et al., *An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Form and Implications*, 111 J. BUS. ETHICS 281, 286, 293 (2012).

<sup>279</sup> *Id.* at 295; cf. Bryan W. Husted & David B. Allen, *Corporate Social Responsibility in the Multinational Enterprise: Strategic and Institutional Approaches*, 37 J. INT'L BUS. STUD. 838, 839 (2006) (concluding that “multidomestic and transnational” MNEs are more likely to use local CSR concerns compared with global MNEs that manage CSR in response to institutional pressures).



perspective. As Bebchuk and Roe rather charmingly put it: “[W]e are not complete materialists. Culture and ideology, not only value maximization and self-interest, might influence a country’s choice of corporate law.”<sup>280</sup> The MNE provides a potentially fruitful laboratory in which to understand cultural and ideological differences in corporate governance and business operation. And it is in this context that CSR matters.

There is a developing body of legal scholarship that focuses on values transmission throughout the multinational enterprise itself rather than on the question of convergence specifically, with particular reference to CSR.<sup>281</sup> Its importance to my analysis lies in the fact that it disengages the MNE from its legal roots and focuses on the nature of the entity, its composition (or decomposition), and its behavior in a global environment. Rather than view the corporation (or the corporate components of MNEs) as grounded within a particular legal system, it understands the MNE to be a growingly independent power structure competing with the nation-state itself in global importance, grounded in both cultural contexts and developing its own culture.<sup>282</sup> As one of the leading scholars from this perspective writes, “the large business corporation . . . has in many ways been assuming formerly public functions.”<sup>283</sup> It is important to highlight the corporation in light of its

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<sup>280</sup> Bebchuk & Roe, *supra* note 60, at 168.

<sup>281</sup> Business scholarship and, especially, business ethics has been developing a body of literature for several decades. See Sarala & Vaara, *supra* note 238, at 366; Tan & Wang, *supra* note 237, at 1381. There is, for example, interesting literature on the role of the MNE in helping to foster world peace. See John Forrer, *Locating Peace Through Commerce in Good Global Governance*, 89 J. BUS. ETHICS 449, 452 (2009); Timothy Fort & Cindy Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT’L L. 389, 400 (2002); Franck, *supra* note 12, at 375 (identifying transnational corporations as a channel for establishing transnational loyalties); Charles P. Koerber, *Corporate Responsibility Standards: Current Implications and Future Possibilities for Peace Through Commerce*, 89 J. BUS. ETHICS 461, 465 (2010); Jennifer Oetzel et al., *Business and Peace: Sketching the Terrain*, 89 J. BUS. ETHICS 351, 357 (2010); Jason Miklian, *Mapping Business-Peace Interactions: Five Assertions for How Businesses Create Peace*, SOC. SCI. RESP. NETWORK 6 (2016), <https://ssrn.com/abstract=2891391>.

<sup>282</sup> See Larry Cata Backer, *Transnational Corporate Constitutionalism: The Emergence of a Constitutional Order for Economic Enterprise*, SOC. SCI. RESP. NETWORK 102, 120-21 (Apr. 11, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038081](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038081); but cf. Ruth V. Aguilera & George S. Yip, *How National Corporate Governance Systems Affect Global Integration*, ADVANCED INST. MGMT. RES. WORKING PAPER SERIES (2004) (observing the manner in which “nationally embedded institutional characteristics” continue to affect MNC behavior).

<sup>283</sup> See Peer C. Zumbansen, *The Evolution of the Corporation: Organization, Finance, Knowledge and Corporate Social Responsibility* 20 (Ctr. for Bus. Research Univ. Cambridge, Working Paper No. 373, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1346971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346971). An excellent analysis of the independence (but not

increasingly multiple functions in an environment in which legal analysis has “disembedded” the corporation and left it as almost a pure financial instrument. The implications for the importance of CSR are significant, as I shall discuss, but at least of equal importance is the observation that, when we turn to China and its potential normative influence abroad, we address a situation in which the large corporation traditionally has assumed state functions and, in light of Chairman Xi’s 2017 speech, appears increasingly likely to do so.<sup>284</sup> In contemporary terms, this means stakeholders, not just shareholders.<sup>285</sup>

In any event, this perspective engages with a more functional view of the corporation in contrast to the market-based and institutional legal theories and the varieties of capitalism theory I have described. It is especially useful in evaluating the norms and practices of corporations and their supporting institutions that are shaped at least in part by non-market influences.<sup>286</sup>

Tan and Wang directly confront the question of ethical conflicts between MNE home and host countries. Acknowledging what they call the “optimistic” convergence view, that firms from developed countries eventually will infuse their “universal organizational patterns and business ethical standards” into their developing country subsidiaries,<sup>287</sup> they describe a more subtle process in the context of conflicts between business ethics and ways of doing business between the MNE home country and those of its subsidiaries. In line with reciprocal convergences theory, they note that the outflow

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dominance) of the MNE from the state and its implications for corporate social responsibility is provided in John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 2018 REG. & GOVERNANCE 317, 325 (2017); see also Thomas Maak, *The Cosmopolitan Corporation*, 84 J. BUS. ETHICS 361, 362 (2009) (arguing for the political characteristics of MNEs giving them government-like status).

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of foreign direct investment from developing country MNEs had reached 17% of outward flows around the world in 2006<sup>288</sup> (and had reached 26% by 2016),<sup>289</sup> creating ethical problems, especially in the developing countries where these investments land. Chinese cross-border M&A activity, while unsurprisingly modest in the early years of this century, reached \$145 billion in 2016.<sup>290</sup> While China invests heavily in developing countries, it invests more in the U.S. and Europe.<sup>291</sup> In fact, the total deal value of cross-border acquisitions by Chinese listed companies increased by 323% for a total of \$76.5 billion between 2015 and 2016.<sup>292</sup> One source reports Chinese cross-border M&A to be as high as \$101 billion in the first quarter of 2016.<sup>293</sup> Tan and Wang attempt to understand the problems of ethical conflicts arising from these activities by analyzing the ways in which MNEs “are shaped by and reshapes [sic] the institutional and ethical environments” in which they operate.<sup>294</sup>

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<sup>293</sup> Denny Thomas & Sophie Sassard, *China Shines in Lacklustre First-Quarter for M&A*, THOMSON REUTERS (Mar. 31, 2016, 10:02PM), <https://uk.reuters.com/article/uk-m-a-global/china-shines-in-lacklustre-first-quarter-for-ma-idUK-KCN0WY3AH>.

<sup>294</sup> Tan & Wang, *supra* note 237, at 374.

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<sup>297</sup> *Id.* at 378.

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### 1. Reflections

There are several possible channels through which reciprocal convergences could occur, if at all. The MNE seems like a very good candidate. If we see the firm as, among other things, a transmitter of information, the

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<sup>304</sup> Sarala & Vaara, *supra* note 238, at 1380–82 (providing the usual caveats as to causality).

<sup>305</sup> *Id.* at 1381.

<sup>306</sup> Krista Bondy et al., *An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Form and Implications*, 111 J. BUS. ETHICS 281, 286, 293 (2012).

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multi-component multi-national nature of the MNE seems ready made for the transmission of values, and research shows that it is already performing this function. Some types of MNEs might be more effective at value transmission than others, depending especially upon whether the components are left largely independent or whether they are more integrated. Studies of CSR in the multinational context, however, show that some value transmission is likely to occur in all MNEs because of the increasing importance of CSR to their legitimacy and the success of their businesses. But it remains the case that MNEs are observed to practice corporate social responsibility differently. Bondy and her colleagues showed that UK based MNEs resorted to characteristic Anglo-American practices in their adjustment of CSR toward their bottom line orientations. This perhaps suggests that the normative and cultural seat of the MNE has a significant effect on its approach to CSR.

If so, the possibility exists for a uniquely Chinese practice of CSR to spread throughout its multinationals as they develop and disperse and thereby influence the practices of other economies. Such development is in a relatively early stage but, as the data show, is rapidly accelerating. As I have discussed, Chinese CSR is theoretically and practically different from Western-style CSR, although the differences are not always positive (from the viewpoint of Western values). Even if China's influence on the West is modest, it may be more significant in the rest of the developing Asian world.

Further Chinese influence in Asia might be expected from OBOR, despite China's insistence that it does not want to influence the internal affairs of OBOR participants. These influences do not have to be intentional to be felt as the developing nations along OBOR might observe Chinese success and choose to adopt some of its practices (just as Japan and then China consciously learned much from the West). Perhaps more potentially influential is the growing "Beijing Consensus," backed by the development and growth of Bretton Woods-like institutions such as the Asian Infrastructure Investment Bank and the China Development Bank. Regardless of the ultimate success and influence of OBOR, these institutions provide financing within their own context and with their own agenda.

Other possible channels exist, although at the moment they seem less likely candidates to effect reciprocal convergences. China has already developed some social investment funds which, grown large enough, might influence the behavior of businesses in other cultures. Institutional investors are not nearly as prominent in China as in the West, but again the potential exists for their significant growth. And, given the Eastern preference for consensus and negotiation, it is possible that institutions of these types might have significant influence on the behavior of their portfolio companies.

## CONCLUSION

Forty years ago, few would have predicted the economic powerhouse that China has become today, and perhaps even fewer its emerging leadership on the world stage. The occurrences of these phenomena demand that we expand our imaginations further, to begin to assess their longer-term meaning. This paper is an attempt to do just that within the corporate governance context.

I have tried to set a framework for analysis by developing a theory of reciprocal convergences, the idea that a historic and presumed recipient of Western influence might influence the original contributors. There is little doubt that the United States has been the primary influence on the rest of the world, at least during the last half of the long American century, and there is little doubt that its values and practices have influenced Europe and the East. The scholarship studying this process, whether convergence, divergence, or crossvergence, all has observed significant American influence within the economic realm and its institutions, including its corporations and their governance practices.

There is no reason, in theory, why the same could not be true of a sufficiently powerful China, with a cultural tradition and value set much older and at least as deeply ingrained as America's, especially if, as some predict, American world leadership (including economic leadership) diminishes over the long run. I have explored how CSR, as a major conveyor of business values, could provide the substance of reciprocal convergence, and how MNEs and OBOR could serve as the channels through which it passes.

Whether this will happen or not is a big question. One difference between the American values in the economic sphere and Chinese values is that the former are simpler. The values of relatively free markets with corporations structured in a manner that creates incentives to be responsive to market signals and thus creates incentives for other, capital-hungry systems to adopt, are perhaps more digestible than those of consensus-driven status based multi-purpose economic institutions. But this observation itself presumes that capital markets are the only channels through which these values are conveyed. I have suggested other possibilities, and undoubtedly more exist.

Making predictions, however, is not always the province of the scholar, and is especially best avoided when the realities are so recent and developing so quickly. What I have tried to do is to build a framework within which these changes can be evaluated so far, as this world continues to develop.