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## Managing the Wealth of Nations: What China and America May Have to Teach Each Other About Corporate Governance

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# MANAGING THE WEALTH OF NATIONS: WHAT CHINA AND AMERICA MAY HAVE TO TEACH EACH OTHER ABOUT CORPORATE GOVERNANCE

Daniel J. Morrissey\*

“To get rich is glorious.”

Deng Xiaoping

“The business of America is business.”

Calvin Coolidge<sup>1</sup>

## I. INTRODUCTION—HOMAGE TO PROFESSOR BROMBERG

**J**USTICE Rehnquist once called Rule 10b-5 “a judicial oak which has grown from little more than a legislative acorn.”<sup>2</sup> If that was true, no one tended that arboreal conceit better than Professor Alan Bromberg. His multi-volume treatise on 10b-5 was a scholarly tour de force that I often consulted as a young securities lawyer. And when I met Professor Bromberg, I found him as delightful personally as he was knowledgeable about corporate/securities law.

In the Professor’s erudite spirit, therefore, I offer these comments that may be helpful to the development of corporate law in our era of global engagement. China, the country with the world’s largest population,<sup>3</sup> has

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1. Strangely neither Deng nor Coolidge may have actually made those statements, which became emblematic of the eras in which they governed their countries. See Eoin O’Carroll, *Political Misquotes: The 10 Most Famous Things Never Actually Said*, CS-MONITOR (June 3, 2011), <http://www.csmonitor.com/USA/Politics/2011/0603/Political-misquotes-The-10-most-famous-things-never-actually-said/I-can-see-Russia-from-my-house!-Sarah-Palin>; *The Famous Quotations and Phrases Linked to Each Day of the Year* (Jan. 17, 2014), <http://www.thisdayinquotes.com/2010/01/business-of-america-is-business.html>.

2. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

3. China’s population as of July 1, 2014, was estimated to be nearly 1.4 billion, almost 20% of the people living on earth. *Population of China*, WORLDOMETERS, (2014), <http://www.worldometers.info/world-population/china-population/>.

undergone a remarkable transformation in the last several decades. Its economic growth has been so phenomenal that its Gross Domestic Product may soon surpass that of the United States.<sup>4</sup>

China is now organizing and running much of this extraordinary business development through joint-stock companies, its version of corporations.<sup>5</sup> That legal entity has long been the prime engine for the production and distribution of wealth in the United States. Yet in our country large corporations may not now be serving these two significant public needs. Many believe they are failing to adequately protect their investors<sup>6</sup> and are also doing a poor job in ensuring that the riches they generate are fairly shared.<sup>7</sup>

Is the emerging legal regime in China then shaping up to better further those important goals? Or is it still inferior to what America has learned about regulating its large enterprises? If the answer to both questions is uncertain, what then can China and America learn from each other to develop better forms of corporate governance? Such a shared understanding could not only safeguard the interests of the investors in those companies but also promote more socially responsible businesses.

In homage to Professor Bromberg, this Article will address those issues. To do so, it will first describe the groundbreaking social and political changes that China has undergone during the last half century. It will then discuss segments of the corporate and securities laws that China has enacted during the last several decades to support its prodigious industrial growth. It will also offer some context there with remarks about historical and cultural antecedents of China's new approach.

The Article will sum all that up with some comments comparing the structure and operation of Chinese and American corporate law. It will then conclude by offering thoughts on where the two systems might converge to better foster the interests of their investors and the public at large.<sup>8</sup>

## II. TO GET RICH IS GLORIOUS

The renowned historian and journalist Theodore H. White covered China during its war with Japan and wrote this description in 1946 of the four hundred million individuals there at that time: "Almost all of these people live by working the soil; the most important single fact about

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4. *What China Wants*, THE ECONOMIST, Aug. 23, 2014, at 9.

5. JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 814 (2014).

6. See *infra* notes 47–49 and accompanying text.

7. See *infra* notes 81–84 and accompanying text.

8. One pundit recently listed these strong ties between the two nations: "the \$600 billion in annual bilateral trade; the 275,000 Chinese studying in America, and the 25,000 Americans studying in China; the fact that China is now America's largest agricultural market and the largest foreign holder of U.S. debt; and the fact that last year Chinese investment in the United States for the first time exceeded American investment in China." Thomas L. Friedman, Op-Ed., *What's Up with You?*, N.Y. TIMES, Apr. 15, 2015, at A25.

China is that it is a land of peasants, a nation of toiling, weather-worn men and women who work in the fields each day from dawn to dusk.”<sup>9</sup> He also said this about their historic role in the country’s social order: “Upon this base rested the thinnest conceivable superstructure of a leisure class that profited by the peasants’ toil and preserved for posterity the learning and graces it had inherited from antiquity.”<sup>10</sup>

All that would soon change, however, when Mao Zedong’s communist revolution took power in 1949. Since Mao’s success was attributable in large part to his strong support among the oppressed peasants, his government immediately embarked on an aggressive program of land reform.<sup>11</sup> The country was now called “The People’s Republic of China” (PRC), and Mao also changed it dramatically with a Soviet style system of central planning.<sup>12</sup> Yet his radical social and economic experiments, The Great Leap Forward<sup>13</sup> and The Cultural Revolution,<sup>14</sup> not only caused widespread suffering, but also devastated the country.<sup>15</sup>

After Mao’s death, his successor Deng Xiaoping turned all that around by inaugurating a new system that would be called “a socialist market economy with Chinese characteristics.”<sup>16</sup> It began in the rural areas in the late 1970s where farmers were allowed to sell some of their surplus and keep the revenue. As described by one observer, that “unleashed unprecedented agricultural growth, created markets, and unlocked considerable social mobility.”<sup>17</sup> Another part of Deng’s push for prosperity was to limit the birth rate by “an often brutally enforced policy to limit child-

9. THEODORE H. WHITE & ANNALEE JACOBY, THUNDER OUT OF CHINA 20–21 (1946).

10. *Id.*

11. JOE STUDWELL, HOW ASIA WORKS 19–20 (2013).

12. Kan Zhang, *Corporate Governance in China: How Does the State Influence its own Enterprises*, 9 BYU INT’L & MGMT. REV. 111 (2013).

13. Much of the progress in agricultural productivity gained in land reform was lost during this time in the late 1950s when farms were forced to collectivize. The disruption to agricultural outputs combined with forced industrialization may have accounted for 30/40 million deaths, almost 10% of China population. STUDWELL, *supra* note 11, at 21.

14. For an interesting perspective on this tumultuous time that is surprising sympathetic to Mao’s zealous attempts to remake China into a truly egalitarian society, see HENRY KISSINGER, ON CHINA (2011).

15. As one commentator described this mammoth social experience, “Mao dismantled four million private businesses, nationalized assets, and flattened society so thoroughly that China’s income inequality fell to the lowest level in the socialist world.” EVAN OSNOS, AGE OF AMBITION, CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA 60 (2014).

All that was in pursuit of what one commentator called, “the dream of the beautiful collective. . . . People would liberate themselves from religion, hierarchy and oppression. They would build a new kind of society where equality would be the rule, where rational planning would replace cruel competition.” David Brooks, Op-Ed., *The Spiritual Recession*, INT’L N.Y. TIMES, June 27, 2014, at A29.

The political reality in the United States today appears to be just the opposite. Every leading political candidate seems to share a view held by the wealthy that government action is not a good way to deal with increasing income inequality. Noam Scheiber, *16 Hopefuls and Wealthy are Aligned on Inequality*, N.Y. TIMES, Mar. 30, 2015, at B1.

16. Clyde D. Stoltenberg, *Globalization, “Asian Values,” and Economic Reform: The Impact of Tradition and Change on Ethical Values in Chinese Business*, 33 CORNELL INT’L L. J. 711, 722 (2000).

17. STUDWELL, *supra* note 11, at 6.

bearing.”<sup>18</sup>

In addition, Deng, a longtime Communist operative, had come to believe that the government-run enterprises dominating the nation were overly bureaucratic and inefficient. If state power there was reduced and at least part of the economy was allowed to serve the market, he reasoned, that would force China’s government-operated businesses to become competitive.<sup>19</sup>

Deng also realized that any country committed to development had to engage in international trade.<sup>20</sup> He therefore supported China’s burgeoning manufacturing sector with subsidies and various protective measures until it became successful in the world market.<sup>21</sup> As Evan Osnos notes when he discusses the forces that drove this remarkable transformation, “China’s extraordinary growth relied on a combination of abundant cheap labor and a surge of investments in factories and infrastructure—a recipe that uncorked economic energy stored up during the years of turmoil under Mao.”<sup>22</sup>

Soon the country was experiencing growth rates of almost ten percent per year<sup>23</sup> with a corresponding explosion in its GDP.<sup>24</sup> As one observer summed it up, “economic reform in China has transformed a poverty-ridden, poorly educated nation into a great power that is playing an increasingly pivotal role in the globalized world.”<sup>25</sup>

Deng’s economic miracle was supported by legal reforms that began in the late 1970s legitimating contract and property rights.<sup>26</sup> The ensuing individualism was a huge alteration of the collectivist mentality promulgated by Mao, but Deng justified it by saying, “[I]et some people get rich

18. *Id.* at xxiii.

19. Stoltenberg, *supra* note 16, at 722.

20. STUDWELL, *supra* note 11, at xx.

21. *Id.* at 75.

22. OSNOS, *supra* note 15, at 39. Joshua Cooper Ramo describes the constant change he observed in China as Time’s foreign editor: “It was a sense you could also find in many people I knew in China as they struggled to build an economic and political order against the unpredictable demands of constant newness. Change is at the center of all their lives. They seek it out and, when change is proceeding too slowly, accelerate it. They operate with the self-regard and courage of people who believe that the tide of history is on their side, bringing us closer to whatever dream they find most exciting whether it is fast universal connections to data or wholly new types of government.” JOSHUA COOPER RAMO, *THE AGE OF THE UNTHINKABLE* 5 (2009).

23. Carsten A. Holtz, *China’s Economic Growth 1978-2025: What We Know Today about China’s Economic Growth Tomorrow*, 36 *WORLD DEVELOPMENT* 1665–91 (2008).

During this time, China made great progress in reducing hunger and poverty. Zhang Rui, *U.N. China has Big Role to Play in Fighting Hunger*, CHINA.ORG.CN (Jul. 11, 2014), [http://www.china.org.cn/china/2013-09/12/content\\_30007571.htm](http://www.china.org.cn/china/2013-09/12/content_30007571.htm).

24. JOHN W. HEAD, *CHINA’S LEGAL SOUL* 86 (2009).

25. Mickiko Kakutani, *An Insider Views China, Past and Future*, *N.Y. TIMES*, May 10, 2011, at C1.

26. ZIMMERMAN, *supra* note 5, at 805.

One commentator described these reforms as a “dynamic, ongoing process . . . supporting a transition to a socialist market economy.” Stoltenberg, *supra* note 16, at 724. They were part of a legislative process in China that one observer has called “an area of frenzied activity.” HEAD, *supra* note 24, at 87.

first and gradually the people should get rich together.”<sup>27</sup> The ensuing materialism not only brought with it “troublesome tensions and contradictions” in traditional Chinese culture, but also did much to “sap the moral underpinnings of state power.”<sup>28</sup>

Yet there never was, and never has been, a parallel political liberalization in modern China. Deng could never let go of his authoritarian beliefs so that “even with economic reform and a [resulting] wealthier society, China would have to be ruled solely by the [Chinese Communist Party].”<sup>29</sup> He therefore came down hard on the 1989 democratic uprising in Tiananmen Square, and to this day the Communist party still retains a monopoly on power that controls the country’s legal system. For instance, while reformers talk about developing a “rule of law,”<sup>30</sup> the party must still approve all judges.<sup>31</sup>

The state, in addition, continues to hold major ownership interests in many businesses and controls outright some industries that the party deems essential to Chinese national interests, such as energy, banking, and transportation.<sup>32</sup> The market value of these centrally owned enterprises still comprises a good portion of the worth of all listed companies

27. OSNOS, *supra* note 15, at 14.

Osnos also describes what has happened since Deng made that decision: “For some of its citizens, China’s boom has created stupendous fortune: China is the world’s fastest growing source of new billionaires. Several of the new plutocrats have been among the world’s most dedicated thieves; others have been holders of high public office . . . For most of the Chinese people, however, the boom has not produced vast wealth; it has permitted the first halting steps out of poverty . . . In 1978 the average Chinese income was \$200; by 2014, it was \$6,000.” *Id.* at 4.

28. Stoltenberg, *supra* note 16, at 723.

For instance, China’s current leader, Xi Jinping, while a provincial administrator promoted free enterprise but had to assuage the misgivings of old-line communists with statements like, “[t]he private economy has become an exotic flower in the garden of socialism with Chinese characteristics.” Evan Osnos, *Born Red*, THE NEW YORKER (Apr. 6, 2015), <http://www.newyorker.com/magazine/2015/04/06/born-red>.

29. Stoltenberg, *supra* note 16, at 722.

Deng, some say, was following the distinctly Asian wisdom of Lee Kuan Yew who took the impoverished city-state of Singapore and made it an exemplar of prosperity. His anti-democratic approach to economic development was said to have greatly influenced the elite of Beijing. Orville Schell, *The Man who Remade Asia*, WALL ST. J., Mar. 28–29, 2015, at C5.

30. As Professor Head sums this up: “Many observers, inside and outside China alike, would regard the rule of law in that country to be immature or rudimentary or fragile.” HEAD, *supra* note 24, at 188.

31. Li Hui & Megha Rajagopalan, *China Aims to Revamp Justice System but Communist Party to Retain Control*, REUTERS, June 16, 2014, <http://www.reuters.com/article/2014/06/16/us-china-justice-revamp-idUSKBN0ER0RR20140616>.

In addition, the current investigations into corruption involving Chinese government and business officials appear to be full of human rights abuses. Andrew Jacobs & Chris Buckley, *Presumed Guilty in China’s War on Corruption*, N.Y. TIMES, Oct. 20, 2014, at A1. It may be that in a country where the state is dominant, honest business people have no choice but to cultivate connections with Communist leaders, leaving them open to bribery charges. Editorial, *China’s Unhappy Rich*, WALL ST. J., Sept. 17, 2014. Such practices as using “unofficial channels” or “going through the back door” have a long history in China. See also Stoltenberg, *supra* note 16.

32. Zhang, *supra* note 12, at 120–21.

in China, and they account for a large majority of their profits.<sup>33</sup> While the investing public holds shares in some of these firms, it is fair to say that “the Chinese government . . . is an 800 pound gorilla . . . in the Chinese securities market.”<sup>34</sup>

### III. CHINESE CORPORATE LAW

Nevertheless, by the mid-1980s many non-government owned enterprises answering to the market were replacing debt-ridden and poorly run state-owned enterprises.<sup>35</sup> Correspondingly, stock exchanges grew up in Shanghai and Shenzhen in the early 1990s.<sup>36</sup> The existence of those capital markets accelerated the privatization of some state owned businesses, which were then put into the corporate form. The same momentum also led the enterprises that continued to be controlled by the state to assume corporate status.

A major development supporting that trend was the enactment of the first Company Law in 1993, amended most recently in 2005.<sup>37</sup> It created a legal structure for the establishment of “companies limited by shares,” also called “joint stock companies.”<sup>38</sup> In many ways those entities were designed similarly to U.S. corporations. They could have an unlimited number of shareholders who would be liable only for corporate debts up to the amounts they invested.<sup>39</sup>

Internal and external pressures led to rapid development of this new Chinese corporate model. The country’s exponential growth rate pushed its businesses into an operating mode that was quite different from the old state run enterprises—driving trends toward both transparency and

33. These and many other companies continue to be directly and indirectly subsidized by the government, MICHAEL E. BURKE, *CORPORATE COUNSEL’S GUIDE TO DOING BUSINESS IN CHINA*, § 1.8 (2012).

Matthew Weinstein, *The Independent Director Requirement and its Effects on the Foreign Investment Climate in China: Progress or Regress*, 4 *BUS. L. BRIEF (AM. U.)* 35, 35 (2008).

34. *Id.* (internal quotation marks omitted). The state is the dominant shareholder of almost two-thirds of the listed companies on the Shanghai and Shenzhen stock exchanges. Yu-Hsin Lin, *Do Social Ties Matter in Corporate Governance? The Missing Factor in Chinese Corporate Governance Reform*, 5 *GEO. MASON J. INT’L COM. L.* 39, 67 (2013).

This dominance may be even more pronounced today as the current General Secretary of the Chinese Communist Party, Xi Jinping, has consolidated his power. As a recent profile of Xi puts it, “he holds ultimate authority over every general, judge, editor, and state-company CEO.” Osnos, *supra* note 28.

35. See Rebecca Lee, *Fiduciary Duties without Equity: “Fiduciary Duties” of Directors under the Revised Company Law of the PRC*, 47 *V.A. J. INT’L L.* 897, 898 (2007).

36. Zhang, *supra* note 12, at 113.

37. Company Law of the PRC (Presidential Order No. 42) (1993) revised by, *inter alia*, the 18th Session of Standing Committee of the 10th National People’s Congress on Oct. 27, 2005.

Michael D. Greenberg, Yong Kang, & Elizabeth D. Brown, *Corporate Governance in China: A Tale of Rapid Change*, *CORP. FINANCE REV.*, Mar./Apr. 2009, 2009 WL 9420845; see also Zhang *supra* note 12, at 112.

38. ZIMMERMAN, *supra* note 5, at 814.

39. Company Law of the PRC, arts. 81, 126.

A corollary provision of U.S. corporate law providing limited liability for shareholders is Model Bus. Corp. Act § 6.22.

efficiency.<sup>40</sup> In addition, the country's acceptance into the World Trade Organization gave the PRC what one commentator called "no choice but to standardize its enterprise practice and . . . bring competitive mechanisms of the modern corporation into its enterprises."<sup>41</sup>

China thus borrowed many of its "standards and mechanisms for governance, finance, and securities regulation . . . from, the larger international community."<sup>42</sup> From the German model, it adopted a two-tier board of directors—one consisting of a supervisory group representing the interests of shareholders and workers and the second charged with actually running the company.<sup>43</sup> Ranking in theory over both of them as the company's ultimate authority is the shareholders' meeting/assembly. The Company Act gives this annual gathering of stockholders plenary power over key issues of the firm's business operations and policies.<sup>44</sup>

#### IV. THE CHALLENGES OF CHINESE CORPORATE GOVERNANCE

Corporate power in the United States has passed historically from shareholders, to directors, and then to an oligarchy of self-perpetuating managers.<sup>45</sup> Much of the story of American corporate law from that time on has thus been the development of fiduciary duties<sup>46</sup> and disclosure obligations<sup>47</sup> to guard against members of this ruling executive class enriching themselves at the expense of the shareholders. Yet the success of those measures has been problematic.<sup>48</sup> A succession of scandals involving various wrongful conduct by American businesses<sup>49</sup> has shown their deficiencies and resulted in further legislation to guard against such

40. Zhang, *supra* note 12, at 114.

41. *Id.* (internal quotation marks omitted).

42. Greenberg et al., *supra* note 37.

43. ZIMMERMAN, *supra* note 5, at 820–23.

44. Company Law of the PRC, arts. 38 and 103.

45. An influential study described this phenomenon in detail. ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

46. This was accomplished in large part by case law coming from the leading American jurisdiction for corporate law, Delaware. See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971).

47. Most influential here were the federal securities laws, The Securities Act of 1933, 15 U.S.C. § 77a *et seq.* and The Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* The former set up a regime for regulating the sale of securities by compelling the disclosure of all material facts of the offering. The latter was designed to compel subsequent disclosures by those public companies to safeguard the value of their securities and the markets where they were traded.

48. In discussing China's evolving efforts to enhance investor protection, an article skeptically compared them to the American model with this unfavorable comment: "It is fascinating to observe China seeking to achieve these aims at a time when American (and European) models for corporate governance institutions have, in some basic respects, systematically failed." Greenberg et al., *supra* note 37, at 2.

49. For a good discussion of the continuing wrongdoings that have rocked American business, see M. Thomas Arnold, *It's Déjà vu All Over Again: Using Bounty Hunters to Leverage Gatekeeper Duties*, 45 TULSA L. REV. 419 (2010).

One of the most egregious of these was the pervasive practice of options back-dating at many U.S. firms. See Eric Lie, *On the Timing of CEO Option Awards*, 51 MGMT. SCI. 802, 803 (2005).

fraudulent activity.<sup>50</sup>

China's initial Company Act, by contrast, lacked any explicit provision imposing fiduciary duties<sup>51</sup> beyond a vague requirement that directors "perform their duties faithfully."<sup>52</sup> While that might imply that directors had to act honestly and in good faith, the directors' broader responsibility to protect the interests of shareholders was ill defined, probably because it was a novel idea in China that corporate management had such a role.<sup>53</sup> Several reasons may account for that.

Due to the influence of continental European powers in the 19th century, such as France and Germany,<sup>54</sup> Chinese law is rooted in the civil law tradition. The concept of fiduciary duties, however, arises from the English equity system of jurisprudence, which can mean that Chinese judges will not have the legal tools to deal with issues like self-dealing.<sup>55</sup>

In addition, despite the privatization of much of the economy, the state continues to dominate and own majority share interests in a large number of important listed companies. As one commentator pointed out, given China's longstanding tradition of corruption,<sup>56</sup> this was not a positive situation for ethical governance. Rent seeking behavior and insider trading were obvious consequences that negatively impacted the minority public shareholders.<sup>57</sup>

Nevertheless, much as the passage of the federal securities laws in the 1930s pushed American corporate law in a new direction,<sup>58</sup> the development of the same legal structure in China greatly enhanced the fiduciary

Exorbitant executive compensation, the norm now in many U.S. firms, is another example of American corporate officers and directors enriching themselves at the expense of their shareholders. For the author's views, see Daniel J. Morrissey, *Executive Compensation and Income Inequality*, 4 WM. & MARY BUS. L. REV. 1 (2013). In addition, there continues to be a large number of financial frauds in American companies. See MARK S. BEASLEY ET AL., *FRAUDULENT FINANCIAL REPORTING, 1998–2007: AN ANALYSIS OF U.S. PUBLIC COMPANIES* (2010).

In very recent memory, too, is the financial meltdown that followed huge amounts of credit extended based on shaky mortgages. Massive frauds were committed there on innocent investors and a great recession ensued. See generally Paul M. Barrett, *Rational Irrationality*, N.Y. TIMES, Nov. 15, 2009, at BR18.

50. In recent times the chief pieces of such financial legislation have been the Sarbanes Oxley Act, Pub. L. 116-745 (2002) and the Dodd-Frank Wall St. Reform and Investor Protection Act, Pub. L. 111-203, H.R. 4713 (2010).

51. Norma Calcina Howson, "Quack Corporate Governance" as Traditional Chinese Medicine—The Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against Party State Political Economic Power, 37 SEATTLE U. L. REV. 667, 677-78 (2014).

52. Lee, *supra* note 35, at 989-99 (internal quotation marks omitted).

53. Greenberg, *supra* note 36, at 4.

54. Franck Chantayan, *An Examination of American and German Corporate Law Norms*, 16 ST. JOHN'S J. LEGAL COMMENT., 431, 433-34.

55. Lee, *supra* note 35, at 989-99.

56. "[I]t is no exaggeration to comment that the Chinese government functioned as a mechanism of inbuilt corruption." Stoltenberg, *supra* note 16, at 721.

For a discussion of the contemporary prosecution of this corruption by China's current leadership, see *supra* note 30.

57. Greenberg et al., *supra* note 37, at 4.

58. See *supra* note 47 and accompanying text.

duties of the Company Act. The PRC enacted its Securities Law in 1998 and, at the same time, the State Council set up a ministry-level agency, the Chinese Security Regulatory Commission (CSRC). The CSRC's mandate is to regulate and enforce all securities-related policies.<sup>59</sup> The CSRC thus has far-reaching responsibilities that in many ways parallel and even exceed those of its U.S. counterpart, the Securities and Exchange Commission (SEC).<sup>60</sup>

The CSRC was in turn partially responsible for promulgating an influential Code of Corporate Governance for Listed Companies in 2001 that set the basic structure for regulation of those companies. It requires that those firms "must be operated in an independent manner and prescribes the minimum disclosure regarding their governance."<sup>61</sup> Under its rules, listed companies must have at least two independent directors, and their boards must consist of at least one-third such members who have fiduciary duties to the shareholders.<sup>62</sup>

While this in theory may be a positive step toward better corporate governance, it has some real flaws in practice.<sup>63</sup> First, the dominance of the state in many corporations means that boards will be beholden to that one significant power.<sup>64</sup> Beyond that, "independent" in Chinese corporate law is a vague word; American listing authorities, by contrast, define it with much greater specificity—in terms of employment, familial, and business relationships.<sup>65</sup> Exacerbating that situation is the Chinese tradition, which makes such personal and social ties of paramount importance in human relations, compromising the monitoring function that directors are supposed to play.<sup>66</sup> Many board members therefore function as so-called "favor"<sup>67</sup> or "vase"<sup>68</sup> directors, a term used to indicate that the positions of these supposedly independent officials are merely decorative.

Adding to this perceived ineffectiveness is the paucity of independent directors required—at most one-third of the board. That is in sharp con-

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59. Howson, *supra* note 51, at 697. The author there states that the CSRC is the only governmental body in China's "fragmented authoritarianism" that is capable of "seeing to the institution of corporate governance norms to protect minority shareholders against exploitation by state controlling shareholders." *Id.* at 697, 710.

60. For a lengthy discussion of the broad powers that the CSRC has in overseeing public stock offerings, see ZIMMERMAN, *supra* note 6, at 810–11. For instance, the CSRC has power to control the price of a public stock offering whereas the SEC's only mandate is to compel full disclosure of all relevant facts of an offering. This author's opinion is that the SEC's power is inadequate in that regard. Daniel J. Morrissey, *The Securities Act at its Diamond Jubilee: Renewing the Case for a Robust Registration Requirement*, 11 U. PA. J. BUS. L. 749 (2009).

61. Zhang, *supra* note 12, at 116.

62. Jie Yuan, *Formal Convergence or Substantial Divergence? Evidence from Adoption of the Independent Directors in China*, 9 ASIAN-PACIFIC L. & POL'Y J. 71, 74 (2007).

63. Weinstein, *supra* note 33, at 37.

64. Yuan, *supra* note 62, at 77–78.

65. See Yuan, *supra* note 62, at 82 (detailing how the norms of independent director in China are merely geared to preventing a firm's large shareholders from serving in that capacity while in the U.S. such restrictions are broader); see also Lin, *supra* note 35, at 42.

66. Lin, *supra* note 34, at 42–43.

67. *Id.* at 68–69.

68. Yuan, *supra* note 62, at 90.

trast to the U.S. practice where independent directors must at least comprise a majority of those members.<sup>69</sup> Even beyond that, there is a lack of qualified candidates for these positions who have real knowledge about how to run a company. As a result, independent directors tend to remain passive, which only reinforces the common understanding that they are ineffective.<sup>70</sup>

Yet Chinese corporate law continues to make improvements in fleshing out the fiduciary duties of directors. The Company Law revisions in 2005 introduced the obligation of loyalty and described a number of actions that it would forbid, such as bribery, misappropriation of company funds, and usurpation of business opportunities. It also contained specific and detailed provisions against self-dealing.<sup>71</sup> The New Act, in addition, strengthened the rights of shareholders by giving them many rights that are parallel to those enjoyed in U.S. corporate codes. They included cumulative voting, access to information,<sup>72</sup> and even the ability to bring an action akin to U.S. derivative suits.<sup>73</sup>

All such rights, however, are statutory, as would be expected in a regime that traces its roots to the civil law tradition.<sup>74</sup> One therefore might question how they'd be enforced outside the flexible Anglo-American tradition of equity, where fiduciary duties were originally developed and nurtured.<sup>75</sup> Yet beyond that, an even more serious question remains. How can shareholders realistically assert such rights in a legal system of questionable independence and integrity<sup>76</sup> where the state dominates many large companies?<sup>77</sup>

## V. THE BROADER ISSUE OF CORPORATE SOCIAL RESPONSIBILITY

An even more fundamental problem exists for Chinese as well as American corporate law. The larger obligations that business owes to society is a subject that has been debated in U.S. law since at least the landmark case of *Dodge v. Ford*,<sup>78</sup> where the Court turned aside Henry Ford's contention that his hugely profitable motor company had wider duties than just making profit for its shareholders.<sup>79</sup>

Despite that precedent, the push for greater corporate social responsibility (CSR) has been gaining momentum in the United States for at least

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69. *Id.* at 80.

70. *Id.* at 88-90.

71. Lee, *supra* note 35, at 903-07, 913-14.

72. *Id.* at 902.

73. Company Law art. 153.

74. *See supra* note 54 and accompanying text.

75. Lee, *supra* note 35, at 909-11.

76. *See supra* notes 30-31 and accompanying text.

77. *See supra* note 34 and accompanying text.

78. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

79. "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of directors are to be employed for that end." *Id.* at 684.

a quarter of a century.<sup>80</sup> It is being pursued with more fervor than ever because of alarming income inequality<sup>81</sup> and wealth disparity,<sup>82</sup> both of which exist in the United States, China, and globally.<sup>83</sup> Environmental degradation by corporations is also fueling that drive<sup>84</sup> with world leaders like Pope Francis condemning those trends.<sup>85</sup>

In some ways, modern China is doing better there than former Communist countries and other developing nations. The economic reforms begun by Deng have substantially alleviated poverty in China.<sup>86</sup> In addition, “China has a more progressive income tax than Russia which it has invested in education, health, and infrastructure on a far larger scale than . . . other emerging countries such as India which China has clearly outdistance.”<sup>87</sup> Yet the gap between the country’s wealthy elite and its other citizens is no less than in the United States.<sup>88</sup> Still, there may be hope that China can evolve toward a society where its riches are more fairly shared among all its citizens, particularly those who participate in their creation.

For one thing, the Confucian ethical tradition, while hostile to law as an ineffective way to regulate human activity, promoted a highly others-centered code of behavior.<sup>89</sup> In its revised “neo” or “new” form that arose

80. See Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOKLYN L. REV. 353, 379–93 (2015).

81. A series of articles and media presentations have graphically brought this to light. Among the best are Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, Vanity Fair (May 2011), and a recent movie produced by the former Secretary of Labor Robert Reich, *Inequality for All*, (72 Productions 2013) reviewed in *Chasm Between the Very Rich and Everybody Else*, N.Y. TIMES, Sept. 26, 2013, at C16.

82. Neil Shah, *Wealth Gap between America’s Rich and Middle-Class Families Widest on Record*, WALL ST. J., Dec. 17, 2014, <http://blogs.wsj.com/economics/2014/12/17/wealth-gap-between-americas-rich-and-middle-class-families-widest-on-record/>. The article reports that while the country’s economy has come back from the Great Recession, the division between the very rich and everyone else has widened. Upper income families now have wealth that is almost 70 times that of low income households.

83. The definitive study on this is THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

84. The United Nations has held periodic conferences on this pressing problem, the most recent on Climate Change in New York City in September, 2014. There President Obama urged China to join the United States, as the world’s two largest polluters, to together reduce greenhouse gas emissions. Mark Landler & Coral Davenport, *Obama Presses Chinese to Move to Curb Warming*, N.Y. TIMES, Sept. 24, 2014, at A1.

Shortly thereafter at a summit meeting in November, 2014 the two countries did just that. Obama announced a target to cut U.S. emissions by 26 to 28% and the Chinese leader Xi Jinping pledged to cap China’s carbon emissions by 2030. David Nakamura & Steven Mufson, *China, U.S. Agree to Limit Greenhouse Gases*, WASHINGTON POST, Nov. 12, 2014.

China had made earlier commitments to U.N. sponsored policies for a sustainable environment. Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT’L L. 64, 88 (2010).

85. Francis X. Rocca, *The New Rome*, WALL ST. J., Sat.–Sun., Apr. 4–5, 2015 at C1.

86. See *supra* note 23 and accompanying text.

87. PIKETTY, *supra* note 83, at 536.

88. The International Monetary Fund has just reported that China is one of the most unequal countries in the world. The top quintile makes nearly half the income while the bottom quintile gets less than 5%. Ian Talley, *China is one of the Most Unequal Countries in the World, IMF Paper Says*, WALL ST. J., Mar. 26, 2015, <http://blogs.wsj.com/economics/2015/03/26/china-is-one-of-most-unequal-countries-in-the-world-imf-paper-says/>.

89. HEAD, *supra* note 24, at 8–15. A contrary tradition, however, emerged in China several centuries later led by a group called the “Legalists.” They held that punishment was

during the 20th century, Confucianism shed its aristocratic background and advocated an egalitarian humanism.<sup>90</sup>

And even though the Confucian outlook had disdain for business, it and the communal spirit of Chinese society historically urged mercantile and other profit making enterprises to think beyond the selfish interests of their owners to the concerns of the larger society. That altruistic attitude was reinforced not only by indigenous religions, such as Zen Buddhism and Daoism, but also by imperial decrees, such as one in 1731 urging relief and aid to the poor.<sup>91</sup> A similar biblical-based morality once served perhaps to underpin democratic capitalism in the United States.<sup>92</sup>

Mao's revolution, moreover, was specifically supported by an alliance of workers and peasants, and to this day, China's constitution speaks of its foundational philosophy of socialism.<sup>93</sup> In line with that, the most recent version of its Company Law explicitly recognizes the importance of corporate social responsibility, which apparently came about because of the forceful advocacy of many delegates to the National People's Congress that enacted the current provisions.<sup>94</sup>

In addition, the dual board structure that China borrowed from Germany has the potential to create a more equitable distribution of the wealth created by its companies. As has been noted,<sup>95</sup> China's Company Law requires two groups of directors, one that is responsible for running the company and another, a supervisory committee, to represent the interests of shareholders and employees.<sup>96</sup> Because civil law countries do not have the equitable tradition of Anglo-American jurisprudence that directly imposes fiduciary duties on directors, the supervisory board is supposed to serve that function by monitoring the regular directors' duties of loyalty.<sup>97</sup>

Yet this upper-level board is also there, at least in theory, to represent the interests of workers. Some commentators say that German supervisory boards do a poor job of fulfilling that responsibility because they are dominated by representatives of a few large banks<sup>98</sup> who outvote the members elected by labor.<sup>99</sup> Yet another respected observer of international labor relations offers a more sanguine appraisal of the impact of

an appropriate way to deter wrongful conduct and urged "a rule of law was superior to a rule of men." *Id.* at 17-18.

90. *Id.* at 166-78.

91. Lin, *supra* note 84, at 85.

92. Brooks, *supra* note 15.

93. Lin, *supra* note 84, at 68.

94. *Id.* at 71.

95. *See supra* note 43 and accompanying text.

96. ZIMMERMAN, *supra* note 5, at 822.

97. Lee, *supra* note 35, at 905-07.

One commentator, however, has called the Chinese supervisory board a "tiger without teeth" because it lacks power to effectively discipline boards and its members, therefore, tend to shirk their responsibilities. Yuan, *supra* note 62, at 79.

98. Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819, 1822 (1996).

99. *Id.* at 1826-27; Chantayan, *supra* note 54, at 442.

those directors. Citing a recent study that found that the hourly wages and benefits of German auto workers is \$66 while that of their U.S. counterparts is only \$33, he asks, “[h]ow can German workers be getting so much more? . . . It’s . . . because they’re directors of these companies. Because of the work councils and co-determined boards, they have real positions of power.”<sup>100</sup> Similar authority may then lie in the Chinese supervisory boards as well to compel companies there to treat their labor forces fairly.

Another factor that may advance that cause is the action of the workers themselves. Sweatshop conditions persist,<sup>101</sup> but resistance is mounting. In a country where all unions are state-controlled, much of this is coming from the bottom up.<sup>102</sup> In 2014 the number of strikes and labor protests in China doubled to more than 1,300, and workers were able to use these strikes to win some concessions.<sup>103</sup> In similar fashion, spontaneous rallies are occurring among American workers to demand better pay.<sup>104</sup>

## VI. CONCLUSION

China and America are the two powerhouses of the global economy, and their relationship is of supreme importance in world affairs.<sup>105</sup> Both countries, however, have serious shortcomings in their regimes of corporate governance. These can be overcome, as this Article has argued, by proactive courts and legislatures that understand how important the rule of law is to promote investor confidence. As the U.S. Supreme Court put it, “a dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts.”<sup>106</sup>

It is also crucial that the large enterprises of both nations be committed to serving not just their shareholders, but also the larger interests of their societies. Right now both the United States and China, for all the wealth they produce, are fast becoming plutocracies where the great majority of their citizens will be impoverished. The difference now is that in China,

100. THOMAS GEOGHEGAN, *ONLY ONE THING CAN SAVE US* 20–21 (2014).

101. Among the most notorious are those involving the 120,000 workers at the Foxconn factory in Chengdu where workers are paid low wages, work excessive overtime, and live in crowded dorms making parts for iPads and other Apple products. Charles Duhigg & David Barboza, *In China, the Human Costs That Are Built Into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1.

A more recent article described Chinese teens who work 12-hour days for little pay putting together electronic devices for some of the world’s largest brands: Eva Dou, *China’s Tech Factories Turn to Student Labor*, WALL ST. J., Sept. 24, 2014.

102. Han Yan Yuan, *Protests, Suicide: China Labor Unrest Leads to Reform*, CNN, Sept. 5, 2014, <http://www.cnn.com/2014/09/05/world/asia/china-labor-union-reform/>.

103. *Out Brothers, Out!*, THE ECONOMIST, Jan. 31, 2015.

104. Steven Greenhouse, *Movement to Increase McDonald’s Minimum Wage Broadens its Tactics*, N.Y. TIMES, Mar. 30, 2015.

105. Henry M. Paulson, Jr., *Rules for Dealing with a Rising China*, WALL ST. J., Apr. 11–12, 2015, at C3.

106. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 161 (2008).

the lion's share of the wealth generated goes to the dominate shareholder of its industries, the state, whereas in the United States, it is taken by a small group of the super-rich.<sup>107</sup>

Unless the leaders of both countries pay more attention to what Thomas Piketty calls "the interests of the least well off,"<sup>108</sup> there may be dire consequences. Without concerted action, one commentator has predicted that China will have another revolution in fifteen years<sup>109</sup> and a like deterioration of American society may occur. There are, however, solutions to those critical problems within the legal and cultural traditions of the two countries. By drawing on those and sharing that learning with each other, both nations can find the resolve to address these injustices and bring humankind to a better future.

#### Addendum:

As this Article was being sent to print, events called into question the stability of China's new-found prosperity. The country's stock markets declined precipitously in late summer, 2015 and the government's ill-advised attempt to prop them up only further eroded global confidence in China's economic future. That sent world markets crashing and perhaps called into question the stability of the country's leadership. In addition, the negative reaction to China's trading practices fomented by American politicians like Donald Trump highlighted the uncertain relationship of the world's two economic superpowers. All that activity, however, may just be a correction to China's temporarily unsustainable pattern of rapid growth. One may hope it will not be a permanent setback to the progress that this Article envisions in a partnership between China and the United States committed to human rights and a more equitable distribution of the world's wealth.

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107. The author has written of this as it relates to excessive executive compensation. Daniel J. Morrissey, *Executive Compensation and Income Inequality*, 4 WM. & MARY BUS. L. REV. 1 (2013).

108. PIKETTY, *supra* note 83, at 575.

109. Osnos, *supra* note 28, at 54–55.