

THE POLITICAL ECONOMY OF CORPORATE LAW AND
GOVERNANCE: AMERICAN AND KOREAN RULES
UNDER DIFFERENT ENDOGENOUS CONDITIONS
AND FORMS OF CAPITALISM

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Advanced economies operate under different forms of capitalism and social order. Corporate law is fixed only insofar as a country's political economy and social organization are static. This article explains why an advanced economy may choose inefficient rules. Korean rules are the product of past industrial development policies and current social-political-economic conditions; endogenous conditions align corporate law with nationalistic sentiments and the public interest. The cost of this policy is diminution of firm value. The benefit is the erection of a plausible distinction between rule- and fact-based control of key corporate groups. This system maintains de facto national control of major firms despite the legal structure of liberal foreign investment rules that are expected of an advanced economy and democracy. Contrary to the assumption of past critiques, enacting a more efficient corporate law is not the

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problem. From the perspective of Korean policymakers, the problem is the weighing of priority public interests and attendant costs given endogenous conditions, as neither the calculus of cost-benefit nor the conditions are fixed in time.

Unique corporate rules and governance are products of each country's political economy. Their determinants are the meta-dynamics of the endogenous forms of capitalism and social order. This idea is generalizable to American corporate law and governance. There is no exceptional reason why American law would be immune from shifting forces of social, political, and cultural change. If the form of American capitalism or social order has not reached an "end of history" and, in fact, endogenous conditions change in some fundamental way, the axiomatic conceptions that have governed the past forty years of the neoliberal consensus may give way to new models of corporate law and governance. At a time of much uncertainty and upheaval in American political, economic, and social conditions, we see a glimmer of this possibility in similar pronouncements on fundamental conceptions of American corporate law and governance that have been in place since the Reagan era by two ideological antipodes today, Senator Elizabeth Warren and the Business Roundtable.

TABLE OF CONTENTS

I.	INTRODUCTION	651
II.	A PRIMER ON KOREAN CAPITALISM AND CHAEBOLS	656
III.	A COMPARATIVE ANALYSIS OF FUNDAMENTAL RULES	668
	A. <i>Fiduciary Duties and Liability</i>	669
	B. <i>Board Independence and Shareholder Actions</i>	674
	C. <i>Shareholder Primacy</i>	678
IV.	THE COSTS OF INEFFICIENCY.....	681
	A. <i>Primary Cost: The "Korean Discount"</i>	681
	B. <i>Secondary Cost: Economic Ossification</i>	683
V.	CORPORATE LAW AS MIRROR OF ENDOGENOUS INTERESTS ...	685
	A. <i>Public Benefit of Control</i>	687
	B. <i>Culture and Corporate Governance</i>	698
VI.	TOWARD EFFICIENCY WITH KOREAN CHARACTERISTICS	704
	A. <i>Enforcement as Catalyst for Culture Change</i>	704
	B. <i>Enforcement with Korean Characteristics</i>	708
VII.	A LESSON FOR AMERICAN CORPORATE LAW AND GOVERNANCE	710
VIII.	CONCLUSION	716

I. INTRODUCTION

Although the corporate law of the Republic of Korea (“Korea”) borrows much from American law,¹ the two differ. The linchpin of American law is the principle that managers who control the corporation owe fiduciary duties.² These duties are key legal doctrines that mitigate agency cost.³ They ensure that managers act in good faith and run the business for the benefit of the corporation and all shareholders. This end is served by devices such as derivative suits and independent directors.⁴ As written, Korean law mimics certain aspects of American law on duties.⁵ As applied, it diverges because, as a matter of law and fact, Korean rules and its legal system structurally inhibit private enforcement and accountability of directors and controlling shareholders.⁶

Scholars, policymakers, and capital markets have known about the fundamental problem: that is control by heirs and families of founding entrepreneurs.⁷ The largest Korean companies are public corporations, mostly owned by foreign and domestic shareholders, and operate on a global scale; yet, they are still managed like their progenitors, small closely-held family businesses, even though families now own relatively little equity.⁸ This situation presents a unique Korean twist on the classic problem of the separation of ownership and control.⁹ Absent effective monitoring, abuses by managers and controlling shareholders go unchecked.¹⁰ The application of American rules on fiduciary duties and their enforcement, if feasible and adopted, would improve Korean corporate

1. HAKSOO KO, AN ECONOMIC APPROACH TO KOREAN CORPORATE STRUCTURE AND CORPORATE LAW 9 (2007).

2. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1074 (2000) (“[T]he interpretation and application of these fiduciary principles is the heart of corporate law . . .”).

3. See *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) (Posner, J.); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706 (2013)

4. See Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 MINN. L. REV. 561, 588–89 n.142 (2015); Martin Petrin, *Corporate Management in the Age of AI*, 2019 COLUM. BUS. L. REV. 965, 1000–01 (2019).

5. See Hwa-Jin Kim & Sung-Joon Park, *Directors’ Duties and Liabilities in Korean Companies*, in KOREAN BUSINESS LAW 4 n.11 (Hwa-Jin Kim ed., 2012).

6. See *infra* Subparts II.A. and IV.B.

7. See *infra* Subparts IV.B.

8. See *infra* notes 27, 82.

9. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 5–6 (1932).

10. See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (suggesting that fiduciary duties arise as a result of “public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives”).

governance.¹¹ Yet the problem of control has persisted throughout the era of modern Korean industry and corporations.¹²

It is axiomatic that the policy end of American corporate law is efficiency.¹³ The American market enjoys higher valuations than the Korean market, and some portion of this premium is attributable to rules that better mitigate managerial agency cost.¹⁴ Compliance with duties and accountability of controlling shareholders would increase firm value.¹⁵ Firms suffer from the infamous “Korean discount” in which capital markets systematically discount their values.¹⁶ Criticism of Korean law and governance is legion.¹⁷ Policymakers are surely aware of the fundamental problems,¹⁸ and proposed solutions are not lost on them.¹⁹ Yet Korean law has not instituted effective solutions. An accountability system to thwart controlling shareholder abuse has been elusive. The gaps in law and instances of abuse are so apparent that they must be the product of deliberate, albeit resigned, choice. This article does not critique Korean corporate law based on a normative argument for efficiency. That exercise would be meaningless because nations may choose to opt out of efficient policies given their unique priorities. This article answers a less explored, more interesting question: why choose inefficient rules?

11. See *infra* Subpart VI.A. (noting that the wholesale transplantation of American rules and system to Korea would be infeasible).

12. Bernard Black et al., *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness*, 26 J. CORP. L. 537, 558–59 (2001).

13. NAF Holdings, LLC v. Li & Fung (Trading) Ltd., 118 A.3d 175, 181 (Del. 2015).

14. See ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, *Chapter 4: The Theory of the Market for Corporate Control and the Current State of the Market for Corporate Control in China*, <https://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/31601011.pdf> (last visited July 28, 2020).

15. See *id.*

16. See *infra* Subpart IV.A.

17. E.g., Joongi Kim, *A Forensic Study of Daewoo’s Corporate Governance: Does Responsibility for the Meltdown Solely Lie with the Chaebol and Korea?*, 28 NW. J. INT’L L. & BUS. 273, 296–315 (2008). See generally Black et al., *supra* note 12 (discussing issues with corporate governance and recommending various reforms through amendments to the Korean Commercial Code); Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 BERKELEY J. INT’L L. 61 (1999) (discussing problems with the traditional “Korean institution,” including problems with chaebols and corporate governance in Korea).

18. See Black et al., *supra* note 12, at 541 (presenting legal reform recommendations to the Korean Ministry of Justice as a part of a World Bank funded project).

19. See Bryan Harris, *President Moon’s Tricky Mission to Tame Korea Inc.*, FIN. TIMES (Sept. 12, 2017), <https://www.ft.com/content/fa1e3e00-947b-11e7-bdfa-eda243196c2c>; Kenichi Yamada, *Samsung Torn Over Moon’s Push to Break up Chaebol*, NIKKEI ASIAN REV. (Dec. 04, 2018, 6:32 JST), <https://asia.nikkei.com/Business/Companies/Samsung-torn-over-Moon-s-push-to-break-up-chaebol>.

In the case of Korea, there are two potential answers. The most obvious is that business elites have captured policymakers and the rule of law.²⁰ This answer is substantially true and supported by much evidence—a long, infamous history of public corruption between business elites and the highest level of government.²¹ Clearly, this rationale is illegitimate and cannot rationally justify the system. Corruption, albeit real, is a convenient culprit, but ultimately an incomplete answer.²² Korea is a robust democracy where popular will is strong in the political process,²³ and the economy is highly advanced. Corruption stands alongside rational, legitimate prioritization to prop up inefficient law and governance.²⁴ Control by governing families is a public choice ultimately based on national interest.²⁵ Like many difficult decisions, this choice produces a mixed bag of costs and benefits that is ultimately a social calculus.²⁶ This article examines these rational, legitimate reasons for the choice of inefficiency.

Corporate law and governance reflect each nation's political economy and legal system.²⁷ Large determinants are the macrostructures of political order (e.g., liberal versus social

20. See Joongi Kim, *The Formation of the Rule of Law in Corporate Governance*, in *THE RULE OF LAW IN SOUTH KOREA* 119–23 (Jungryn Mo & David W. Brady eds., 2009) (describing Korean corporate governance as “largely revolved around rule of man in lieu of rule of law” and that authoritarian tendencies sometimes led to corruption and distorted incentives).

21. See *infra* note 104; see *infra* note 119 (describing the convictions of prior Korean presidents for corruption). In terms of transparency, the following is one ranking of Asia-Pacific countries and the United States: New Zealand (2), Singapore (3), Australia (13), Hong Kong (14), Japan (18), United States (22), Taiwan (31), Korea (45), Malaysia (61), India (78), China (87), Indonesia (89). TRANSPARENCY INT’L CORRUPTION PERCEPTIONS INDEX, 2018 2–3 (2019).

22. Simon Denyer & Min Joo Kim, *Another Former South Korea President Jailed for Corruption*, WASH. POST (Oct. 5, 2018, 3:11 AM), https://www.washingtonpost.com/world/asia_pacific/another-former-south-korea-president-jailed-for-corruption/2018/10/05/7e216cc6-c866-11e8-9158-09630a6d8725_story.html.

23. See *infra* note 323.

24. Denyer & Kim, *supra* note 22.

25. RACHEL PREMACK, SAGE BUSINESS RESEARCH, *SOUTH KOREA’S CONGLOMERATES* 2–3 (2017).

26. See Joongi Kim, *supra* note 17, at 286–87 (2008).

27. See Kim, *supra* note 20, at 119–20 (describing corporate governance as based on a political economy centered on the “authoritarian state [which] served as the primary guardian overseeing controlling-shareholders’ and the public’s interests”). See *generally* MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (2003) (discussing corporate law and governance among common and civil law nations and different democratic systems); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (examining rules protecting shareholders among common law and civil law nations).

democracy) and legal system (e.g., common versus civil law).²⁸ A comparative analysis must also consider unique features of internal conditions, including history, culture, social order, economy, and industrial policy.²⁹ An analysis of these granular details reveals that Korean law and governance are the product of two priority interests resulting in a duopoly of control: firstly, controlling shareholders desire dynastic corporate governance; secondly, the government seeks a say in corporate governance in furtherance of economic planning in a state-corporate form of capitalism.³⁰ These interests converge to preserve control of corporate groups in the hands of controlling families at the first instance, subject to the government's influence as a monitor and a key shareholder.³¹ This article does not critique the Korean system on the ground that wealth maximization is a self-evident end.³² Each country chooses its values, which in a democracy are products of compromise inherent in a social compact. Inefficient outcomes may serve other legitimate policy ends, such as employee welfare and equitable wealth distribution in social democracies.³³

The critique of Korean law and governance here is based on present and future downstream effects of inefficiency on the broader society since time and social conditions are not fixed. In the twenty-first century, Korea's corporate law and economy confront defining challenges. Filial corporate governance means that control of the corporate system passes along patrilineal lines.³⁴ This system imposes tremendous costs and elicits populist opposition.³⁵ The costs test the efficacy of the government's role in intermediating these social tensions and managing the economy.³⁶ They raise important questions. Is Korea best served when a few plutocratic families control a large portion of its economy? With an open market and increasing investor pressure, how much longer can control be maintained? Is the third or fourth generation of families capable of

28. See ROE, *supra* note 27, at 3–5 (noting that politics and political organization of nations, such as social democracies, are significant determinants of corporate law and governance).

29. See generally Joongi Kim, *supra* note 17 (taking into account history, culture, social order, economy, and industrial policy in a comparative analysis).

30. See Hwa-Jin Kim, *supra* note 17, at 68.

31. See Joongi Kim, *supra* note 17, at 284.

32. Compare Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 192 (1980), with Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 243 (1980).

33. Mark J. Roe, *Introduction: Political vs. Corporate Institutions as Explaining Western Securities Markets?*, in CORPORATE GOVERNANCE: POLITICAL AND LEGAL PERSPECTIVES 1, 2, 4–5 (Mark J. Roe ed., 2005).

34. See generally Joongi Kim, *supra* note 17, at 284 (discussing the patriarchic management style of chaebols).

35. Cf. MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 28–29 (1994) (discussing the role of populism in the structure of corporate ownership and capital markets).

36. *Id.*

directing Korea Inc.? The past is lore, the present fades, the future becomes. The answers to these questions cannot be viewed just through the lens of an American rule- and property-centric prism.

This article has two audiences. The first is non-Korean policymakers, scholars, and foreign market actors, such as American activist shareholders and hedge funds. The value here is an explanation of the uniqueness of the system, the rational choice of inefficiency, and the challenges facing reform. This article broadens the analysis beyond the American prism of law and economics.³⁷ It analyzes the unique bundle of endogenous conditions. Determinants are the nation's politics, history, culture, institutions, and social order. This article explains how corporate governance is connected to societal characteristics, such as Korea's strong embrace of Confucian social philosophy and sense of collective stake in the national economy.

The second audience is Korean policymakers and scholars. The value here is a critique from outside the box of an internally coherent, accepted conception of their corporate law and governance. This audience must be painfully aware of the obvious costs of maintaining an inefficient system. This article identifies another social problem, one that may be less apparent, but no less significant: that is the link between poor corporate governance and the current problem of social and economic inequity in Korea.³⁸ This article proposes reforms that would enhance efficiency and consider the country's unique endogenous conditions, i.e., reforms with Korean characteristics.

This article is organized into eight parts. Part II provides a primer on aspects of Korean capitalism. A concentration of a few corporate groups account for the bulk of the country's Gross Domestic Product ("GDP").³⁹ The largest firms are public but are controlled by a few families who own little equity.⁴⁰ This situation begets the most significant problem of law and governance.

Part III conducts a comparative analysis of fundamental rules. Korean law mimics American rules on fiduciary duties in some respects, but in important ways they diverge. Korean law fails to

37. See generally FRANK H. EASTERBOOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (arguing American corporate law serves as an low-cost enforcement mechanism that emulates the agreements corporate investors and managers would reach if they could bargain over every contingency).

38. See *infra* Part IV.

39. PREMACK, *supra* note 25, at 4.

40. See Eugene Kim & Kim Ah-jeong, *Reforming Chaebol Boards Is a Big Job. Here's How It Can Happen*, KOREA HERALD (Feb. 13, 2018, 5:43 PM), <http://www.koreaherald.com/view.php?ud=20180213000346>.

enforce duties.⁴¹ This failure facilitates control by families of the founders.⁴² This outcome is the core flaw in Korean law.

Part IV analyzes the social costs of the policy choice of inefficient rules. The primary cost is lower firm valuations.⁴³ A secondary effect is wealth inequity and lack of social mobility in a society where the initial distribution of wealth occurred rapidly and fortuitously.⁴⁴ An underperforming corporate market ossifies economic classes in Korean society.⁴⁵

Part V explains the rational choice of lax laws and attendant social costs.⁴⁶ The policy aligns the common interests of the state and families. Given control of vital economic assets as a priority interest, the most consequential policy issue today is whether the costs of dynastic succession to the third and fourth generation will continue to be acceptable.

Part VI proposes reforms. Legal transplantation of an American-style private litigation model and robust conception of independent directors is infeasible because of insurmountable institutional and cultural differences. American endogenous conditions cannot be assumed. Enforcement is the key, but reform toward efficiency must have Korean characteristics.

Part VII argues that the meta-dynamics of political economy are generalizable to the American situation. Law and governance are not fixed, not even in the United States where efficiency and wealth maximization have been axiomatic since the neoliberal turn. Rather, they are subject to internal conditions. This idea is illustrated by similar proposals for fundamental changes to corporate law made by two ideological bookends, Senator Elizabeth Warren and the Business Roundtable.

Part VIII concludes that corporate law serves endogenous political economy and social order. Given a set of conditions, an advanced economy may choose inefficient rules in favor of priority interests. In the course of history, in any given country, the bundle of conditions may change, and such change may bring about a reordering of priorities.

II. A PRIMER ON KOREAN CAPITALISM AND CHAEBOLS

A comparative legal analysis requires an accounting of the historical, social, political, and economic conditions.⁴⁷ Korea's

41. Kim, *supra* note 20, at 130.

42. *See id.* at 131.

43. *The Korea Discount: Corporate Governance Explains South Korea's Low Stockmarket Ratings*, *ECONOMIST* (Feb. 11, 2012), <https://www.economist.com/finance-and-economics/2012/02/11/minority-report>.

44. *See infra* Subpart IV.B.

45. *See infra* Subpart IV.B.

46. *See infra* Part V.

47. Bliss Burdett Pak, *Corporate Governance*, in *KOREAN BUSINESS LAW: THE LEGAL LANDSCAPE AND BEYOND* 94 (Jasper Kim ed., 2010).

political economy is democratic capitalism, a written constitution-based political system, and an advanced market economy.⁴⁸ Little needs to be said about the importance of Korea in international economy and geopolitics. It is a longtime political and military ally of the United States and a major trading partner.⁴⁹ Positioned between China and Japan, the second and third largest economies in the world and historical adversaries, and bordering North Korea, a totalitarian rogue nuclear state, Korea occupies a strategic geopolitical position.⁵⁰ Belied by its small geographic size and lack of natural resources, it is a major advanced economy in East Asia and a global economic power.⁵¹ It is a member of the G-20 and the Organization for Economic Cooperation and Development (“OECD”).⁵² It ranks twelfth globally in terms of GDP, on par with Canada and Russia.⁵³ The

48. DAEHANMINGUK HUNBEOB arts. 1(1), 119(2) (S. Kor.) [hereinafter “KOREAN CONSTITUTION”] (English translation available at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG). “Daehanminguk hunbeob” means “Korean constitution.” The Korean Legislation Research Institute provides English translations of all Korean statutes and regulations.

49. American and Korean political and military alliances date back to the Korean War (1950-1953) and the start of the Cold War (1945-1991). Under American economic sponsorship, Korean industrial modernization benefitted from mercantilist policies of subsidization of industry, protection of domestic markets, and the development of an export economy, which ultimately resulted in the attainment of an advanced economy. BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* 310–11, 314–18 (updated ed. 2005). See Jaymin Lee, *A Half Century of Korean Economic Development: 1952-2002*, in *KOREAN SOCIETY: AN INTRODUCTION* 523 (Andrew Eungi Kim ed., 2017) (noting that Korea enjoyed an “asymmetrical relationship” with the United States under neo-mercantilist policies); Chung-in Moon & Byung-joon Jun, *Modernization Strategy: Ideas and Influence*, in *THE PARK CHUNG HEE ERA: THE TRANSFORMATION OF SOUTH KOREA* 127 (Byung-kook Kim & Ezra F. Vogel eds., 2013) (noting a strategy of “economic nationalism and mercantilism” that “was in essence illiberal in nature . . . implemented from the top down by the state”).

50. See generally TIM MARSHALL, *PRISONERS OF GEOGRAPHY: TEN MAPS THAT EXPLAIN EVERYTHING ABOUT THE WORLD* 208–29 (2016) (discussing the strategic position of Korea).

51. In some ways, Korean economic development is an enigma, but human capital was an important factor in the country’s rapid rise. See CUMINGS, *supra* note 49, at 300–01 (“There you have it: no capitalists, no Protestants, no merchants, no money, no market, no resources, no get-up-and-go, let alone no discernible history of commerce, foreign trade, or industrial development, so on and so forth—and yet there it is . . . [Due to compulsory education] the broad Korean work force was better suited to industrial tasks than was the population of many other countries. The long tradition of bureaucratic governance by scholar-officials, reaching preindustrial peaks as high as anywhere else, was excellent background for a state-led development program.”).

52. *International Relations*, KOREA.NET, <http://korea.net> (last visited July 28, 2020) (click the dropdown menu, follow the “Government” link, follow the link for “Constitution and Government,” and then select “International Relations.”).

53. The following are country rankings by GDP (in \$ trillion): United States \$20.4, China \$14.1, Japan \$5.2, Germany \$4.2, U.K. \$2.9, France \$2.9, India \$2.8,

capitalization of the Korean equity market ranks fourteenth in the world, constituting about 2 percent of global capitalization.⁵⁴ Major companies include Samsung, Hyundai, Kia, LG, SK, Lotte, Hanjin, and Korean Air. Its corporate law and governance are important because its markets are open to foreign investors under liberal investment rules.⁵⁵

Two aspects of the Korean corporate market are significant. First, the economy is concentrated in a handful of corporate groups controlled by a small group of families.⁵⁶ The fate of the entire economy—quite literally—rests in the managerial hands of a few plutocrats.⁵⁷ Second, Korea leans toward a strong model of state-corporate capitalism in which the state plays a large role in managing the economy and monitoring the internal and external affairs of corporations.⁵⁸ The state's role in the economy is formally recognized

Italy \$2.2, Brazil \$2.1, Canada \$1.8, Russia \$1.7, Korea \$1.7. *World Economic Outlook Database*, INT'L MONETARY FUND, <https://www.imf.org/external/pubs/ft/weo/2020/01/weodata/index.asp> (last updated July 2018).

54. Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 176, 179 (Dan W. Puchniak et al. eds., 2017).

55. See Foreign Investment Promotion Act, Act No. 5557, Sept. 16, 1998, amended by Act No. 13854, Jan. 27, 2016, art. 3–4 (S. Kor.) (providing legal protections to foreign investors and permitting foreign investment,) translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=49546&lang=ENG. Foreigners own 34 percent of the market capitalization of the Korea Composite Stock Price Index (“KOSPI”) and 11 percent of the Korean Securities Dealers Automated Quotation (“KOSDAQ”) as of July 2017. Yoon Jung Sil, *Foreign Stock Ownership Surpasses 620 Trillion Won*, KOREABUSINESS (July 24, 2017, 01:45 AM), <http://www.businesskorea.co.kr/news/articleView.html?idxno=18740>.

56. PREMACK, *supra* note 25, at 3; A.C. Pritchard, *Monitoring of Corporate Groups by Independent Directors*, in KOREAN BUSINESS LAW, *supra* note 5, at 77, 80.

57. See CUMINGS, *supra* note 49, at 330 (noting that by the mid-1990s ten families controlled 60 percent of the economy); Kwon Eun-jung, *Top Ten Chaebol Now Almost 80% of Korean Economy*, HANKYOREH (Aug. 28, 2012, 12:15 KST), http://english.hani.co.kr/arti_english_edition/e_business/549028.html; Koichi Kato, *Top Four Chaebol Generate 90% of South Korean Conglomerate Profits*, NIKKEI ASIAN REV. (April 10, 2014, 0:00 JST), <https://asia.nikkei.com/Business/Top-four-chaebol-generate-90-of-South-Korean-conglomerate-profits>; Sotaro Suzuki, *South Korea's Corporate Giants Face Reckoning Over Outsize Influence: Top Five Business Groups Control 60% of Country's Economy*, NIKKEI ASIAN REV. (Dec. 6, 2017, 11:30 JST), <https://asia.nikkei.com/Business/South-Korea-s-corporate-giants-face-reckoning-over-outsize-influence>.

58. See Jongcheol Kim, *Constitutional Law*, in INTRODUCTION TO KOREAN LAW 31, 79 (Korea Legislation Research Institute ed., 2013) (characterizing the Korean economy “as a kind of mixed-economy or a ‘social market economy’”); see also MICHAEL BREEN, *THE STORY OF A NATION: THE NEW KOREANS* 218 (2017) (“Korea appeared capitalist on the surface, but socialist in practice and attitude in terms of the strength of central control.”); CUMINGS, *supra* note 49, at 331

in the Korean Constitution.⁵⁹ These public and private facets of corporate law and governance are rooted in history.⁶⁰

Korea was not always wealthy. The twentieth century was a period of profound tragedies and ultimate triumph. Korea was colonized by imperial Japan from 1910 to 1945.⁶¹ In the twilight of World War II, Korea was divided between the North and the South by the United States and Russia,⁶² a fateful legacy that still reverberates today. After the Korean War (1950-1953), South Korea was destitute and war-torn: no capital, commerce, infrastructure, institutions, or natural resources.⁶³ The story of its economic miracle, from the tragedies of the first half of the twentieth century to the riches and triumph of the second half, is well-known.⁶⁴ A short recital provides the necessary orientation.

Under American sponsorship in the midst of Cold War geopolitics,⁶⁵ economic modernization and business enterprise began in the 1960s under the regime of Chung Hee Park,⁶⁶ a dictator who took power in a military coup in 1961 and ruled until his assassination in 1979.⁶⁷ His government strategically directed public

(characterizing the roots of Korean industrialization as an “Asian developmental state” and a “state-led neomercantilist program”).

59. See KOREAN CONSTITUTION, art. 119(2) (S. Kor.) (“The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.”); *id.* arts. 123(2)–(3) (“The State shall have the duty to foster regional economies to ensure the balanced development of all regions. The State shall protect and foster small and medium enterprises.”); see also *infra* note 240.

60. See CUMINGS, *supra* note 49, at 317 (“[E]ach favored *chaeböl*, ‘for all practical purposes, was a private agency of public purpose.’”).

61. *Id.* at 145, 148. This history still reverberates today. Korea and Japan are currently engaged in a trade war that originates from historical grievances. See Youkyung Lee & Sohee Kim, *Why Japan and South Korea Have Their Own Trade War*, WASH. POST (Nov. 25, 2019, 7:24 PM), https://www.washingtonpost.com/business/why-japan-and-south-korea-have-their-own-trade-war/2019/11/25/106fe348-0f54-11ea-924c-b34d09bbc948_story.html.

62. CUMINGS, *supra* note 49, at 187.

63. See Liam Stack, *Korean War, a ‘Forgotten’ Conflict That Shaped the Modern World*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/world/asia/korean-war-history.html>.

64. See Richard W. Rahn, *Korea’s Economic Miracle*, WASH. TIMES (May 8, 2017), <https://www.washingtontimes.com/news/2017/may/8/south-korea-has-undergone-an-economic-miracle/>.

65. See *supra* note 49.

66. In Korean, the surname is presented first and the given name second, the opposite of the Anglo-American convention. The American convention is used here so that non-Korean readers do not confuse the names.

67. See Yong-Sup Han, *The May Sixteenth Military Coup, in THE PARK CHUNG HEE ERA: THE TRANSFORMATION OF SOUTH KOREA* 35, 482 (Byung-Kook

resources, much of which were American development aid, toward specific industrial sectors, firms, and entrepreneurs.⁶⁸ The government picked winners and losers in private enterprise with the idea that the winners would drive economic growth and national revival.⁶⁹ The winners were certain families. The policy was a strong form of state-based capitalism, which is rooted in the constitutional scheme of government.⁷⁰ Government-sponsored industrialization modernized the economy, but also brought about attendant policy problems.⁷¹

Over time, these family-led businesses, called *chaebols*, consolidated their grip on the economy through continued state-supported expansion.⁷² Unlike North Korea and China, South Korea was never a communist state that broadly owned or controlled the means of production.⁷³ Firms were privately owned, but the state played a major role in their internal and external affairs, including such matters as asset allocation and strategic direction.⁷⁴ The state financed and directed industrial development and national economic strategy but then let the “animal spirits” of entrepreneurs own and control the businesses.⁷⁵ While the United States has had a long history of industrial enterprises dating back to the nineteenth century,⁷⁶ the Korean experience of large-scale industrial corporations has only been a few decades, dating back to the Chung Hee Park era (1961-1979).⁷⁷

As industrialization rapidly continued, the private wealth of founding families and the feasibility of debt financing to capitalize

Kim & Ezra F. Vogel eds., 2011). Prior to this period, Korea was an agrarian society. CUMINGS, *supra* note 49, at 182.

68. Eun Mee Kim & Gil-Sung Park, *The Chaebol, in THE PARK CHUNG HEE ERA: THE TRANSFORMATION OF SOUTH KOREA*, *supra* note 49, at 266–68.

69. *See id.* at 268 (“Park backed his *chaebol* allies with massive subsidized resources, but contrary to the portrayal of guaranteed business success, he was prepared to let failing *chaebols* groups go under, once he thought he had exhausted relief measures.”); *see also* CUMINGS, *supra* note 49, at 316–18; FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES & THE CREATION OF PROSPERITY* 138–39 (1995) (describing the ways in which the government supported *chaebol* ventures); Kim, *supra* note 58, at 92.

70. *See supra* notes 47, 58, and accompanying text.

71. *See* Kim & Park, *supra* note 68, at 267.

72. *Id.* at 266, 268.

73. *See* KOREAN CONSTITUTION, art. 126 (S. Kor.) (“Private enterprises shall not be nationalized nor transferred to ownership by a local government, nor shall their management be controlled or administered by the State, except in cases as prescribed by Act to meet urgent necessities of national defense or the national economy.”).

74. *See* Kim & Park, *supra* note 68, at 265–66, 276.

75. *See id.* at 267.

76. *See generally* MANSEL G. BLACKFORD & K. AUSTIN KERR, *BUSINESS ENTERPRISE IN AMERICAN HISTORY* 125–65 (3d ed. 1994) (providing examples of American industrial enterprises).

77. *See* Kim & Park, *supra* note 68, at 266.

corporate ventures of global scale reached their limits.⁷⁸ Advanced market-based economies are characterized by open markets including public equities.⁷⁹ As Korean firms turned to domestic and foreign investors, the ownership stakes of founders were diluted.⁸⁰ Chaebol families today own about 1 percent of the economic rights of all group companies;⁸¹ nevertheless, they *still* control the most important corporate groups and thus the national economy.⁸² Since industrialization began in the mid-twentieth century, chaebols evolved from family-owned businesses into investor-owned public companies.⁸³ Yet in the twenty-first century, they are still managed like closely-held firms and controlled by families through intergenerational transfer of control.⁸⁴

The chaebols represent a unique twist on the Berle-Means problem of the separation of ownership and control.⁸⁵ In the United States, control of public companies generally rests with managers who own little equity.⁸⁶ Various devices collectively incentivize performance and discipline abuse, such as executive compensation, shareholder activism, market for corporate control, derivative suits, and independent boards.⁸⁷ The separation of ownership and control in Korea takes the form of control by families who own little equity.⁸⁸ The agency problem in Korea is much more acute. Families cannot be fired by the board or the market.⁸⁹ They are only sporadically disciplined by the government, often for political reasons and

78. *Id.* at 286.

79. *See infra* Subpart V.A.

80. *See* Joongi Kim, *supra* note 17, at 285 (“In the 1970s, however, the government browbeat chaebols into listing their major companies on the stock exchange. Listing by chaebols served two governmental purposes. First, compelling chaebol families to disperse their ownership to the public would lead to sharing of the benefits that chaebols received from the special preferences. Second, rights offering served to provide much-needed liquidity to the fledgling stock market. Families initially resisted listing their companies out of concerns that dispersion of their ownership could threaten their control.”).

81. *See* Eun-jung, *supra* note 57 (“[S]hares owned by the heads of the top ten groups themselves dipped from 1.4% in 2002 to 1.1% in 2011.”); Kim & Ah-jeong, *supra* note 40 (“In Korea, chaebol families often actually own only small fractions of the companies they control.”); Lee Sun-young, *Chaebol Owners’ Control Groups with 0.9% Shares*, KOREA HERALD (last updated July 8, 2016), <http://www.koreaherald.com/view.php?ud=20160707000812>.

82. *See supra* note 56.

83. *See supra* notes 80–81.

84. *See supra* note 34.

85. BERLE, JR. & MEANS, *supra* note 9, at 5–6.

86. David I. Walker, *The Manager’s Share*, 47 WM. & MARY L. REV. 587, 610 (2005).

87. SEA-JIN CHANG, FINANCIAL CRISIS AND TRANSFORMATION OF KOREAN BUSINESS GROUPS 172 (2003).

88. *See* Sun-young, *supra* note 81.

89. *See* CHANG, *supra* note 87, at 163, 184; Chun, *supra* note 54, at 179–80.

appeasement in the face of popular disapproval of bad behavior.⁹⁰ Control passes in a hereditary line of succession.⁹¹ This problem is unique in the global market of advanced economies. In much of the world, including the United States, corporations have controlling shareholders;⁹² however, control ultimately lies in property rights, ownership of stock with voting rights therein. Korea has an *inverted* controlling shareholder problem.⁹³ It is the only country among advanced nations where minority shareholders, without commensurate property rights, exercise control to abuse the majority.⁹⁴

How do chaebol families maintain control of large corporate groups of international scale with so little equity? The answer to this enigma does not lie solely in legal property rights. Cultural factors and government support play important roles in de facto control.⁹⁵ Chaebols are corporate groups, but some are not organized in a holding company structure. Chaebol families lack the personal wealth to own a controlling stake in a hierarchical corporate group.⁹⁶ They achieve control through cross-shareholdings in loosely affiliated companies.⁹⁷

The chart below provides a simple stylized example of a crossholding scheme. Imagine a simple corporate group of firms A, B, C, and D and two groups of shareholders: family and nonfamily. Firm D is a key asset in the group and has a value of 1,000. The corporate group is arranged not as a holding company structure, but as a cross-shareholding structure. Firm D owns 10 percent stakes in firms A, B, and C (see dotted lines), and it has a public float of 80 percent (see dashed line) and direct family ownership of 2 percent.

90. See Carlos Tejada, *Money, Power, Family: Inside South Korea's Chaebol*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/south-korea-chaebol-samsung.html>.

91. See CHUNHYO KIM, SAMSUNG, MEDIA EMPIRE AND FAMILY 2 (2016).

92. ROE, *supra* note 27, at 2.

93. See Chun, *supra* note 54, at 176, 180.

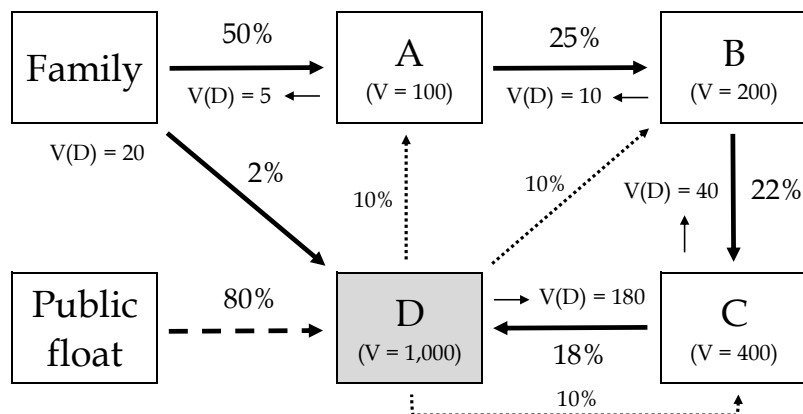
94. *Id.* at 180.

95. *Id.* at 179–80; see Hwa-Jin Kim, *supra* note 17, at 68.

96. See Chun, *supra* note 54, at 180.

97. *Id.* (noting that “cross-shareholdings, circular shareholdings and pyramidal structures” enable the exercise of control that is “substantially greater than their economic cash flow rights”); Pak, *supra* note 4747, at 96 (describing the “*chaebol* circular-web ownership structure”).

FIGURE 1. CROSSHOLDING SCHEME EXAMPLE



The family controls the firm through a circular cross-shareholding arrangement (see solid lines). The family de jure controls firm A with a 50 percent holding, but firm A has a value of only 100. Firm A holds a minority 25 percent stake in firm B. Firm B holds a minority stake of 22 percent in firm C. Firm C holds a minority stake of 18 percent in firm D. Through a combination of managerial and shareholder allegiances in each firm, firm A can de facto control firms B, C, and D. The family's ultimate economic claim on firm D is only $V(D) = 25$, constituting 2.5 percent ownership stake. Yet it controls 20 percent of votes in firm D: direct holding of 2 percent and indirectly through firm C of 18 percent. When added with managerial and other shareholder alliances,⁹⁸ these minority stakes can result in de facto control.

This domino arrangement of crossholding is pernicious.⁹⁹ When all shares are calculated, the corporate group has a total firm value of 1,700. Public and nonfamily shareholders collectively own 96

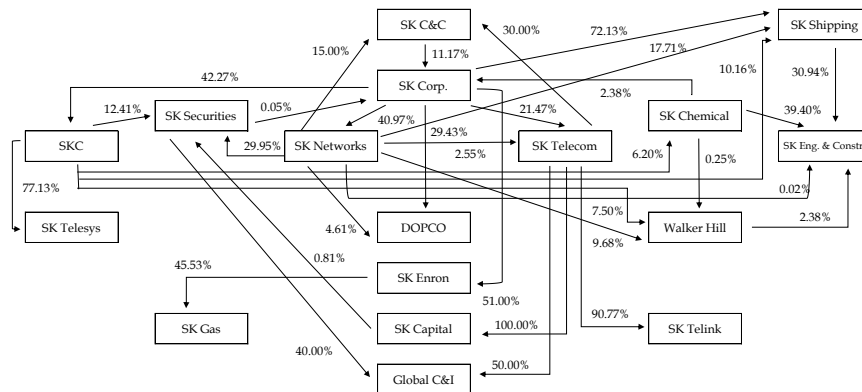
98. Like royalty in monarchical societies, chaebol families create interchaebol alliances through marriage. See CUMINGS, *supra* note 49, at 327 (noting that 31 out of the 33 largest firms have interchaebol connections through marriage, and that Samsung and Hyundai have connubial ties). Additionally, a key shareholder in corporate Korea and frequent ally of families is the National Pension Service, which is one of the largest single shareholders in the world and a Korean state-controlled pension fund. See *infra* notes 261–62 and accompanying text.

99. American corporate law precludes certain kinds of voting in cross-shareholdings where the corporation controls the votes of an entity. See DEL CODE ANN. tit. 8 § 160 (2020); MODEL BUS. CORP. ACT § 7.21(b) (2016). The comment to MBCA § 7.21 provides: “if the voting power is exercised by someone acting on behalf of the corporation or by a member of management of the corporation, a court could find that the shares otherwise belong to the corporation, and are not entitled to vote under section 7.21.”

percent of the corporate group and the family owns only 4 percent. But the family is the controlling shareholder. If this corporate group was arranged as a hierarchical holding company, the family would be an activist shareholder, a seat at the table of corporate influence perhaps, but hardly a controlling shareholder.¹⁰⁰

The stylized example shows the potential for abuse and the lack of transparency. The reality is much more complex and murky. The following is the corporate group structure of the SK chaebol around the time of a failed hostile takeover attempt by a foreign investor, as reported by Curtis Milhaupt and Katharina Pistor in 2005.¹⁰¹

FIGURE 2. SK CHAEBOL



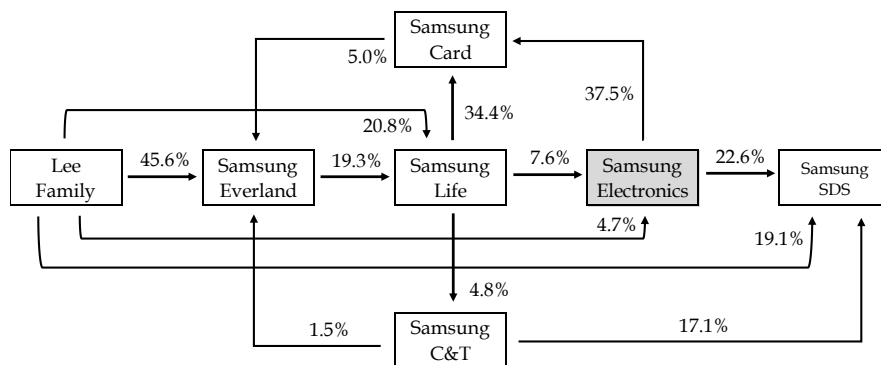
Ten years later, the basic dynamics of the chaebol cross-shareholding system have not changed. Below is the simplified corporate group structure of the Samsung chaebol, as reported by the *Wall Street Journal* in 2014.¹⁰²

100. See Robert J. Rhee, *Corporate Short-Termism and Intertemporal Choice*, 96 WASH. U. L. REV. 496, 554 n.266 (2018).

101. CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 115 fig. 6.1 (2008).

102. Aaron Back, *Samsung Restructuring Could Offer Opportunities: Hospitalization of Patriarch Lee Kun-hee Raises Expectations for Changes to Chaebol*, WALL ST. J. (June 17, 2014, 12:38 AM), <https://www.wsj.com/articles/samsung-restructuring-could-offer-opportunities-1402849806>. This structure is a simplified version. The Samsung chaebol is composed of sixty-seven companies, including seventeen public companies, and accounts for about 26 percent of the total capital of the Korean stock market. Chun, *supra* note 54, at 180.

FIGURE 3. SAMSUNG CHAEBOL



Samsung Electronics is the key firm and is family controlled. At that time, the Lee family owned directly or indirectly less than 7 percent of Samsung Electronics, the crown jewel of the group. Yet, it controls the group. If there is any doubt as to the family's control, consider these astonishing recent events. The third generation heir was convicted of bribing then-president of the country, Geun Hye Park, and was sentenced to five years in prison.¹⁰³ The bribery was part of a larger corruption scandal that resulted in Park's impeachment and removal in 2017 and subsequent conviction and twenty-five-year prison sentence.¹⁰⁴ With respect to the company heir, the Korean courts reduced his sentence by half and suspended the remaining sentence.¹⁰⁵ Upon his release, he resumed his role in

103. Choe Sang-Hun et al., *Samsung Verdict Sends a Tough New Message to South Korea Inc.*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/business/samsung-bribery-embezzlement-conviction-jay-lee-south-korea.html>.

104. Choe Sang Hun, *Park Geun-hye, Ex-South Korean Leader, Gets 25 Years in Prison*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/world/asia/park-geun-hye-sentenced-south-korea.html>. See *supra* note 66.

105. See Choe Sang-Hun & Raymond Zhong, *Samsung Heir Freed, to Dismay of South Korea's Anti-Corruption Campaigners*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/business/samsung-lee-jae-yong-appeal.html> ("When . . . the de facto leader of Samsung, walked free on Monday after spending barely a year in jail, it reaffirmed a pattern South Koreans have fought for decades to break: Business tycoons convicted of corruption here hardly spend any time behind bars."). However, as of the writing of this article, the saga continues as the Korean Supreme Court ordered a retrial on the corruption charge, but then the lower court rejected a prosecutor's arrest warrant. See Elizabeth Koh, *South Korean Court Denies Arrest Warrant for Samsung's Lee Jae-Yong*, WALL ST. J. (June 8, 2020, 3:44 PM), <https://www.wsj.com/articles/south-korean-court-denies-arrest-warrant-for-samsungs-lee-jae-yong-11591641310>; Kim Tong-Hyung, *Samsung Heir Lee Appears in Court for Corruption Retrial*, AP NEWS (Oct. 24, 2019), <https://apnews.com/e8155fc8f4df44ce9ca7df532c6f7330>.

the company.¹⁰⁶ In the American context, it would be implausible to permit a manager with a small ownership stake to continue the leadership of a public company upon release from prison for a serious felony.¹⁰⁷ Korea does not impose a character and fitness requirement for leaders of public companies.¹⁰⁸

The passing of corporate leadership to male descendants of founding patriarchs is simply assumed, something akin to patrilineal title.¹⁰⁹ Recently, the corporate market has suddenly undergone *transformational* leadership change. In addition to the above noted change at Samsung, generational transfer of control occurred at Hyundai,¹¹⁰ the second largest Korean chaebol, and the LG Group, the fourth largest chaebol. The public statements of LG are illuminating. Upon the death of the chairman in 2018,¹¹¹ the company issued this statement: “Under the owner family’s strict principle of handing over the leadership to the eldest son, the

106. Timothy W. Martin & Eun-Young Jeong, *Samsung Heir Emerges from Prison to Chart Giant’s New Course*, WALL ST. J. (Feb. 5, 2018, 10:44 PM), <https://www.wsj.com/articles/samsung-heir-lee-jae-yong-to-be-freed-from-prison-by-appeals-court-1517813046>.

107. Cf. U.S. SECURITIES AND EXCHANGE COMMISSION, LITIGATION RELEASE NO. 19794, *Martha Stewart and Peter Bacanovic Settle SEC’s Insider Trading Charges*, SEC Press Release (Aug. 7, 2006), <https://www.sec.gov/news/press/2006/2006-134.htm> (providing that Stewart agreed to a five-year bar from serving as a director, officer or employee of a public company).

108. American law in various related fields have devices to remove corporate leaders based on character and fitness. *E.g.*, 12 U.S.C. § 248(f) (2018) (banking); 12 U.S.C. § 1818(e) (banking); 15 U.S.C. § 77t(e) (securities); 15 U.S.C. § 78u(d)(2) (securities); Sarbanes-Oxley Act § 1105, codified at 15 U.S.C. § 78u-3(f) (2018) (securities); DEL CODE ANN. tit. 8, § 225(c) (2019) (corporate); *see generally* Jayne W. Barnard, *SEC Debarment of Officers and Directors After Sarbanes-Oxley*, 59 BUS. LAW. 391 (2004) (describing the SEC’s power to bar officers for fraudulent activities following the passage of Sarbanes-Oxley); Renee M. Jones, *Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud*, 82 U. CINN. L. REV. 439 (2013) (describing the process and power to bar officers and directors from their roles).

109. *See* HAN-KYUNG RHO, SHAREHOLDER ACTIVISM: CORPORATE GOVERNANCE REFORMS IN KOREA 53 fig. 5.2 (2007) (showing the heredity passage of chairmanship among the biggest chaebols). Unfortunately, in addition to a patrilineal line of control, the composition of Korean corporate boards is virtually all male. *See* Joongi Kim, *Korea*, in CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH 302 (Bruce Aronson & Joongi Kim, eds., 2019) (“Korea has the lowest proportion of women at listed companies. In 2016, among the ten largest chaebols, only 1.7 percent of the directors were women.”).

110. *See* Cho Chung-un, *Is Hyundai Motor Transferring Leadership to Heir?*, INVESTOR (Dec. 6, 2017, 5:12 PM), <http://www.theinvestor.co.kr/view.php?ud=20171206000906> (noting the third-generation transfer of control to the forty-seven-year old only son of Hyundai Motor chairman who controls the chaebol with a 7 percent stake in Hyundai Mobis).

111. Song Su-hyun, *Koo Bon-moo, Chairman of LG Group, Dies at 73*, KOREA HERALD (May 20, 2018, 6:00 PM), <http://www.koreaherald.com/view.php?ud=20180520000077>.

chairman's son . . . is joining the board.”¹¹² His 40-year old son, the fourth generation, had been an executive for only five years at the time. The chairman's younger brother, a 67-year old executive and the vice-chairman, resigned to pave the way to the son's succession, consistent with company tradition designed “to prevent a feud among members of the owner family and back the eldest son to secure stable management rights.”¹¹³ Samsung, LG, and Hyundai are public corporations operating on a global scale. Their shares are owned by the aggregate of unaffiliated public shareholders. Absent a mechanism for de jure control, such as dual class stocks,¹¹⁴ it is inconceivable that in the American system a small minority owner can institute dynastic control over public corporations.¹¹⁵

Control by the chaebol families has been a profound policy quandary. The well-known problems are three. First, Korea has had a long, infamous history of public corruption tied to chaebol and family business interests.¹¹⁶ Most civilian presidents have been tainted by corruption either directly or through family and affiliates.¹¹⁷ The last two former presidents, Geun Hye Park (2013-2017) and Myung Bak Lee (2008-2013), were convicted of misdeeds, including corrupt dealings with certain chaebols, and they are

112. See Song Su-hyun, *LG Group Speeds Up Leadership Succession Process*, KOREA HERALD (May 17, 2018, 4:20 PM), <http://www.koreaherald.com/view.php?ud=20180517000670> (describing leadership “inheritance process from the third generation of the owner family to the fourth generation” in light of the imminent passing of his father).

113. Shin Ji-hye, *LG to Face New Management Centering on Koo's Son*, KOREA HERALD (May 20, 2018, 6:07 PM), <http://www.koreaherald.com/view.php?ud=20180520000209>.

114. An example of an American outlier is the Ford Motor Co. See Deepa Seetharaman, *Ford Chairman Nearly Doubles Stake in Supervoting Shares—Filing*, REUTERS (June 26, 2013, 5:11 PM), <https://www.reuters.com/article/autos-ford-family/ford-chairman-nearly-doubles-stake-in-supervoting-shares-filing-idUSL2N0F219I20130626> (“Class B shares [held by the Ford family] make up less than 2 percent of outstanding Ford Shares, but hold 40 percent of voting power.”).

115. In the United States, dynastic control could be achieved through dual class stock. See generally Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019) (discussing the problem of minority shareholders exercising control over the majority through dual class stocks). But Korea prohibits the use of dual class stock due to the principle of “one share, one vote.” Chanho Park, *Commercial Law*, in INTRODUCTION TO KOREAN LAW, *supra* note 58, at 194. Indeed, dual class stocks would permit perpetual, irredeemable control of major Korean firms in the hands of a few families, a disastrous outcome for the Korean economy, which explains why Korean corporate law does and would not permit it.

116. See Denyer & Kim, *supra* note 22 (noting “high-level corruption and collusion between the political elite and the powerful business sector”).

117. After the Korean War, military dictators ruled the nation. The first civilian president was Young-sam Kim (1993-1998).

currently serving lengthy prison sentences.¹¹⁸ These kinds of prosecutions are not outliers, and a majority of past presidents have been tainted by corruption.¹¹⁹

Second, families use control to engage in tunneling.¹²⁰ Tunneling occurs when controlling persons “use their power to divert value at the expense of the company and its public investors.”¹²¹ These kinds of practices include favorable purchase or sale of assets or stock, rigged transactions for personal benefit, propped up personal ventures with corporate funds, and excessive compensation.¹²² The low valuations in the Korean market reflect value diversion from public shareholders to families.¹²³

Third, the Korean economy has monopolistic and oligopolistic traits. Chaebols control large parts of the country’s production, employment, and economic prospect.¹²⁴ A few brands dominate the economy.¹²⁵ For example, while the Samsung brand is commonly associated with electronics, the chaebol operates businesses in real estate, securities, insurance, amusement parks, biological products, and shipping.¹²⁶ The economy is undiversified, geared toward export of higher-end capital goods such as ships, steel, automobiles, and electronics.¹²⁷

Each of these problems arising from family control of corporate groups alone would be a major quandary for law and governance. Together, they pose a fundamental structural problem that pervades the nation’s entire social-political-economic fabric.

III. A COMPARATIVE ANALYSIS OF FUNDAMENTAL RULES

The frontline rules designed to mitigate managerial agency cost are the concepts of fiduciary duty, enforcement for breach, board

118. See Denyer & Kim, *supra* note 22.

119. See Sofia Lotto Persio, *South Korean Presidents All Seem to Suffer Turbulent Downfalls—Park Geun-Hye Is No Exception*, NEWSWEEK (Apr. 6, 2018), <https://www.newsweek.com/south-korean-presidents-all-seem-end-dead-or-court-874613>; Kim Tong-Hyung, *South Korea’s History of Bad Presidential Endings Grows*, AP NEWS (Apr. 6, 2018), <https://apnews.com/f4de2c758f70450583bdf1539e3fa3bd/South-Korea's-history-of-bad-presidential-endings-grows>.

120. See MILHAUPT & PISTOR, *supra* note 101, at 110; Kee-Hong Bae et al., *Tunneling or Value Added? Evidence from Mergers by Korean Business Groups*, 57 J. FIN. 2695, 2695 (2002); *The Korea Discount: Corporate Governance Explains South Korea’s Low Stockmarket Ratings*, *supra* note 43.

121. Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1280 (2017).

122. *Id.*

123. See Pak, *supra* note 47, at 96–97; Pritchard, *supra* note 56, at 82; *infra* Subpart IV.A.

124. Ramon J. Aldag, *Chaebol*, ENCYCLOPEDIA BRITANNICA (Feb. 9, 2016), <https://www.britannica.com/topic/chaebol>.

125. *Id.*

126. *Affiliate Companies*, SAMSUNG, https://sgsg.samsung.com/main/newpage.php?f_id=samsung_companies (last visited July 28, 2020).

127. PREMACK, *supra* note 25, at 3.

independence, and shareholder primacy.¹²⁸ Over time, American law has developed ways to mitigate agency cost and opportunism of controlling persons.¹²⁹ Although Korean law is said to be modeled on American corporate law, they differ as stated and practiced.

A. *Fiduciary Duties and Liability*

Directors are fiduciaries and owe duties. Those duties are the duty of care and the duty of loyalty.¹³⁰ The scope, terms, and conditions of the duties may differ across jurisdictions. Korean corporate law, situated largely in the Commercial Act (“KCA”),¹³¹ is heavily statute-based and is said to borrow in part from American law.¹³² In some aspects, Korean and American rules track closely. In other matters, they differ fundamentally.

Under the American scheme, the duty of care is unlike the substantive standard of care under tort law. Tort law imposes a substantive standard of care; a doctor or a driver must act in accordance with a standard of care, usually the reasonable person under the circumstances.¹³³ Corporate duty of care is not substantive care, but is a duty to be informed when exercising judgment.¹³⁴ If a decision is made on an informed basis, courts do not judge the quality or substance of a board’s business judgment, no matter how poor that judgment was.¹³⁵

To encourage business venturing and risk-taking, American law limits the liability of managers. The business judgment rule is the principal rule limiting the liability of directors. It operates as “a presumption that in making a business decision, the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company.”¹³⁶ Absent a rebuttal of the presumption, the rule precludes

128. See John Armour et al., *Agency Problems, Legal Strategies, and Enforcement* 1–13 (Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 644, 2009), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf.

129. *Id.* at 1–3.

130. See Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1145–46 (2013).

131. COMMERCIAL ACT, Act No. 1000, Jan. 20, 1962, *amended by* Act No. 10696, May 23, 2011 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=37127&lang=ENG.

132. KO, *supra* note 1, at 9.

133. See Rhee, *supra* note 130, at 1158.

134. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

135. *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

136. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). See Bernard Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & BUS. 27, 29 (2017).

judicial review of business decisions.¹³⁷ The rule complements the statutory authority of the board to manage the business and affairs.¹³⁸

The Korean duty of care is different. Directors “shall execute their duties with such care as is required of good managers” and, if they neglect their duties under the statute or the articles of incorporation, they shall be jointly and severally liable for damages.¹³⁹ The duty of care encompasses substantive negligence and a director’s failure to comply with the obligations under Korean corporate law.¹⁴⁰

The KCA does not establish a form of the business judgment rule.¹⁴¹ Scholars have commented that Korean courts have adopted or applied some form of the rule,¹⁴² but disagree on the scope of the rule.¹⁴³ In the United States, the rule is intricate in application.¹⁴⁴ Statutory silence means that Korean courts, which are civil law courts, must work out the intricacies in case-by-case adjudications. This is problematic. Derivative suits are infrequent.¹⁴⁵ The legal boundaries of the rule are not tested. An inherent tension with the statute exists because the KCA incorporates concepts of substantive negligence and poor decisions.¹⁴⁶ Because the fundamental principle of the business judgment rule is the preclusion of judicial review of substantive decision-making,¹⁴⁷ the American rule transplants awkwardly onto the Korean scheme. In a civil law jurisdiction, statutory guidance on the contours of the business judgment rule is

137. See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) (commenting that a decision characterized as “‘stupid’ to ‘egregious’ or ‘irrational’”, provides no ground for director liability”).

138. DEL. CODE ANN. tit. 8, § 141(a) (2019); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989).

139. COMMERCIAL ACT, art. 399 (Korea Legislation Research Institute 2019) (S. Kor.); CIVIL ACT, Act No. 471, Feb. 22, 1958, *amended by* Act No. 8720, Dec. 21, 2007, arts. 61, 65 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45912&lang=ENG.

140. *E.g.*, COMMERCIAL ACT, art. 393 (Korea Legislation Research Institute 2019) (S. Kor.) (power to dispose or transfer assets, borrow large scale assets, appoint or dismiss managers, manage all affairs of the corporation); *id.* art. 408-2 (power to appoint or dismiss an executive director and supervise the executive director); *id.* art. 412-2 (duty to “immediately report” to its auditor “any fact that is likely to inflict a substantial loss”).

141. JEEHYE YOU, LEGAL PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY: LESSONS FROM THE UNITED STATES AND KOREA 115 (2015).

142. Kim & Park, *supra* note 5, at 8; Pak, *supra* note 47, at 98; YOU, *supra* note 141, at 116.

143. YOU, *supra* note 141.

144. See *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009); Rhee, *supra* note 130, at 1148.

145. See *infra* note 212 and Subpart II.B.

146. The American rule by contrast emphasizes informedness in decision-making. See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

147. See *supra* note 135 and accompanying text.

preferred, lest there is ad hoc deference or not by courts that must rule without statutory guidance.¹⁴⁸ Judicial rulings could and do incorporate unstated factors that may affect outcomes.¹⁴⁹

Under Korean law, directors could be sued for making ill-advised decisions or failure to execute all obligations under the statute.¹⁵⁰ Such a case may be in the milieu of political or public condemnation.¹⁵¹ A judgment of liability under these conditions may disincentivize risk-taking.¹⁵² Personal liability may result in risk aversion, which diminishes profit.¹⁵³ However, some degree of risk aversion in the Korean situation may be rational. If diversification is feasible, risk neutrality is better because it maximizes returns.¹⁵⁴ The Korean economy is not as diversified and is concentrated in a few large enterprises.¹⁵⁵ It is more sensitive to large bad outcomes. The misfortune of a large firm would have traumatic effect on any society. But the collapses of Enron and Daewoo probably had different effects in their countries.¹⁵⁶ To some degree, risk aversion may make sense when risk is concentrated and cannot be diversified in a large market, and its manifestation would have broad social impact.¹⁵⁷

The Korean duty of care may reflect a reasoned policy preference to incentivize prudent decision-making. American law may countenance a manager's "stupid to egregious or irrational"¹⁵⁸ actions to advance the specific policy of risk-taking while relying on an array of monitoring and market mechanisms to achieve good aggregate

148. See Rhee, *supra* note 130, at 1147–48.

149. For example, Korean courts have cited the potential adverse impact on the national economy as justification for leniency given to chaebol families in criminal and regulatory actions. See Joongi Kim, *supra* note 17, at 334 (“Courts acted similarly. Even when they found *chaebol* executives guilty, they routinely commuted their sentences based upon ‘enormous contributions to the economy.’”); Tong-Hyung, *supra* note 105 (noting that business leaders convicted of corruption “often received relatively light punishment with judges often citing ramifications to the country’s economy”).

150. Johneth Chongseo Park & Doo-Ah Lee, *The Business Judgment Rule: A Missing Piece in the Developing Puzzle of Korean Corporate Governance Reform*, 3 J. KOREAN L. 15, 45 (2003).

151. *Id.* at 23–25.

152. *Id.* at 45.

153. *Id.* at 15.

154. See ROBERT J. RHEE, *ESSENTIAL CONCEPTS OF BUSINESS FOR LAWYERS* 138 (2d ed. 2016).

155. See *supra* notes 124–25 and accompanying text.

156. Daewoo was a prominent chaebol before it collapsed and imposed significant effects on Korean society. See generally Joongi Kim, *supra* note 17 (discussing Daewoo’s corporate governance and subsequent downfall).

157. Korea is not alone in meeting these qualifications. Even the United States, the most sophisticated economy in the world, learned that risk can be concentrated, undiversifiable, and profoundly consequential, as was the case in the financial crisis of 2008–2009.

158. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

outcomes. On the other hand, Korean law may rationally prefer a policy that says, in effect, “don’t take stupid risks and tank our economy.”¹⁵⁹ Endogenous factors determine the rule. American rules of duty of care and business judgment are better suited for a large market that has various legal and economic accountability mechanisms. Korean rules may reflect a public preference for some risk aversion to avoid a problematic moral hazard.¹⁶⁰ Otherwise, the private costs of bad decisions by families could be externalized to the public fisc in light of past government support of chaebols.

With respect to the duty of loyalty, American and Korean rules track more closely.¹⁶¹ In the United States, a controlling shareholder owes a duty of loyalty to minority shareholders.¹⁶² In determining control, American courts in equity reject formalism in favor of pragmatism.¹⁶³ They look past layers of entities to reach the actual controlling person.¹⁶⁴ There is no bright line rule for determining de facto control.¹⁶⁵ Whether one controls the corporation is contextual, depending on an inquiry of actual control.¹⁶⁶

Korean law mirrors American rules. A person can be a de facto director if he or she instructs a director by “using his/her influence over the company.”¹⁶⁷ A director can be a major shareholder, defined as one who owns 10 percent of outstanding shares or “exerts de facto influence on important matters related to the management of the listed company.”¹⁶⁸ Of course, the question of “actual control” or “de

159. See *supra* notes 155–57 and accompanying text.

160. See *supra* notes 150–52 and accompanying text.

161. Kim & Park, *supra* note 142, at 4 n.11 (stating that many Korean scholars opine that Korean corporate law adopted the American concept of duty of loyalty); see *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (discussing the reason for loyalty to a corporation).

162. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 642 (Del. 2014).

163. See *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007); *Schnell v. Christ-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1991).

164. *E.g.*, *S. Pac. Co. v. Bogert*, 250 U.S. 483, 491–92 (1919) (holding that shareholder of parent company that is the controlling shareholder of the downstream corporation owed fiduciary duty to the downstream shareholders); *In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991) (holding that directors of the corporate general partner of a limited partnership owed fiduciary duty directly to the limited partnership).

165. *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1113–14 (Del. 1994).

166. *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012).

167. COMMERCIAL ACT, art. 401-2 (Korea Legislation Research Institute 2019) (S. Kor.); see Kim, *supra* note 109, at 304 (“Technically, a controlling shareholder participating in the business of a company by, for instance, instructing a director or holding a title of authority such as chair or president can be deemed a de facto director and held liable to the company and third persons, but this rarely occurs.”); Ko, *supra* note 1, at 19 (noting that family members can be deemed to be de facto directors “while, in the past, they could manage their companies without holding any official titles or assuming any legal responsibilities”).

168. COMMERCIAL ACT, art. 542-8(2) (Korea Legislation Research Institute 2019) (S. Kor.).

facto influence” are factual inquiries determined case by case, assuming an effective litigation system and broad access to courts.

Directors and de facto directors are prohibited from competing with the company,¹⁶⁹ self-dealing,¹⁷⁰ misappropriating business opportunities,¹⁷¹ and engaging in bad faith.¹⁷² These prohibitions fit the Korean circumstance well. The enforcement of the duty of loyalty should, in theory, curb the abuses in the chaebol system. With respect to bad faith, the history of Korean business is replete with public corruption and bribery at all levels.¹⁷³ Under American principles, violations of positive law are bad faith and disloyal acts.¹⁷⁴ Korea has dealt with these problems through criminal law as it should, but corporate law should play a role by equating corruption with bad faith subject to liability for disloyalty.

American law permits the exculpation of personal liability for a breach of the duty of care, but not for a breach of the duty of loyalty.¹⁷⁵ Korean law is similar in principle. It imposes liability for a breach of the duty of care, but caps damages to a reasonable limit.¹⁷⁶ Director liability is limited to six times annual compensation (three times for outside directors).¹⁷⁷ This limitation of liability is not permitted for a breach of the duty of loyalty.¹⁷⁸

Lastly, Korean and American corporate laws diverge with respect to duties to nonshareholders. Under American law, fiduciary duties run to the corporation and shareholders in solvent firms and not to third parties.¹⁷⁹ Under Korean law, third parties may sue a director

169. *Id.* art. 397.

170. *Id.* art. 398.

171. *Id.* art. 397-2.

172. *Id.* art. 382-3.

173. Kim, *supra* note 58, at 92; e.g., Kim Da-sol, *Court's Ruling Unexpected: Lotte Group*, KOREA HERALD (Feb. 13, 2018, 11:54 PM), <http://www.koreaherald.com/view.php?ud=20180213000988>; Kim So-hyun, *Probe Underway on More Bribery Allegations Linked to ex-President Lee*, KOREA HERALD (Feb. 28, 2018, 5:10 PM), <http://www.koreaherald.com/view.php?ud=20180228000553>.

174. *In re Massey Energy Co.*, C.A. No. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 131, 163–64 (Del. Ch. 2004). See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (citing an example of bad faith when “the fiduciary acts with the intent to violate applicable positive law”). Korean courts embrace the same concept. Kim & Park, *supra* note 142, at 11 (noting that in Case No. 2003-Da69638 (Oct. 28, 2005), the court rejected the idea that bribery on behalf of the company can get business judgment protection).

175. DEL CODE ANN. tit. 8, § 102(b)(7) (2019); *Emerald Partners v. Berlin*, 787 A.2d 85, 96 (Del. 2001).

176. COMMERCIAL ACT, art. 400(2) (Korea Legislation Research Institute 2019) (S. Kor.).

177. *Id.*

178. *Id.*

179. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996).

jointly and severally for damages if the director “has neglected to perform his/her duties intentionally or by gross negligence.”¹⁸⁰ Duties also run to the public at large. Chapter VII of the KCA provides criminal penalties related to corporate actions.¹⁸¹ Certain provisions are uncontroversial, such as conduct based on fraud, theft, or corruption.¹⁸² But crimes in Korea also include breaching the duty of loyalty,¹⁸³ engaging in speculative transactions,¹⁸⁴ and violating formal requirements of corporate law.¹⁸⁵ Such provisions have no counterpart in American law. A mere breach of the duty of loyalty based on opportunism, such as self-dealing transactions,¹⁸⁶ or a failure to perform duties, such as complying with rules on issuance of shares,¹⁸⁷ are not inherently criminal acts.

B. Board Independence and Shareholder Actions

American and Korean rules largely agree on the general conduct that would breach the duty of loyalty. The real difference lies not in the letter of the law, but in practice and internalization. In both countries, “board capture” can be a real problem. In the United States, the problem of board capture occurs at the hands of senior executives.¹⁸⁸ In Korea, it occurs at the hands of controlling families.¹⁸⁹ In the presence of controlling shareholders, two devices elicit good governance and board compliance with the ideals of fiduciary duty.¹⁹⁰

One prophylactic against controlling person abuse is an independent board structure and corporate culture.¹⁹¹ Independent

180. COMMERCIAL ACT, art. 401 (Korea Legislation Research Institute 2019) (S. Kor.); see Bernard Black et al., *Shareholder Suits Against Korean Directors*, in KOREAN BUSINESS LAW, *supra* note 5, at 35 (noting the “unusual” aspect of third parties having rights to enforce a director’s duties).

181. COMMERCIAL ACT, ch. VII (Korea Legislation Research Institute 2019) (S. Kor.).

182. See, e.g., *id.* arts. 628, 630, 631, & 634.

183. *Id.* art. 622 (“any pecuniary benefit by acting in breach of his/her duty”).

184. *Id.* art. 625 (“disposed of the company’s assets for speculative transactions”).

185. *Id.* art. 629 (“issued shares in excess of the total number of shares authorized”); *id.* art. 635 (listing various administrative and compliance violations under corporate law).

186. E.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

187. E.g., *Waggoner v. Laster*, 581 A.2d 1127, 1137–38 (Del. 1990).

188. See Robert J. Rhee, *Intrafirm Monitoring of Executive Compensation*, 69 VAND. L. REV. 695, 706 (2016).

189. See MILHAUPT & PISTOR, *supra* note 101102, at 118 (“Loyalty to the founder was rewarded in a variety of ways, and the lack of an active market for managerial talent reinforced allegiance to the group. By contrast, directors and [statutory] auditors felt little accountability toward shareholders.”).

190. See Chun, *supra* note 5454, at 184–86; Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1090 (2000).

191. See Chun, *supra* note 5454, at 184–86.

directors are important because they are said to not be beholden to controlling persons.¹⁹² Korea adopted the concept of an independent director from American law,¹⁹³ but its efficacy is mixed at best.¹⁹⁴ Corporate cultures and social norms in each country are unique. They produce pros and cons when applied to specific social problems. The corporate system in Korea is influenced by the Confucian tradition of hierarchy, which is strong in Korean society.¹⁹⁵ The larger socio-cultural environment and the rigidity of strict hierarchy in a chaebol system beget a corporate culture where directors are less independent.¹⁹⁶

When examining board independence, one must distinguish legal structure and culture. *Structure* is a legal concept and it is easily installed through the stroke of a lawmaker's pen. Both Korea and the United States mandate a majority of independent directors in public

192. *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019); *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 648–49 (Del. 2014).

193. “Outside director” is the Korean term for an independent director. Chun, *supra* note 54, at 190. “[U]nder the KCC, independent directors must be independent from the company in all respects including ownership, kinship, employment and business relations.” See COMMERCIAL ACT art. 382(3) (Korea Legislation Research Institute 2019) (S. Kor.); Chun, *supra* note 54, at 194. The concept of an independent director was previously nonexistent in Korea. It is a legal transplant from American corporate law. Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH, *supra* note 54, at 89–91. The primary expected function of an independent director in Korea is to monitor controlling shareholders. *Id.* at 111.

194. Pritchard, *supra* note 56, at 95; Black et al., *supra* note 12, at 557. The concept of an independent director has been ineffective in Korea. See *infra* note 357.

195. One cannot understand Korean society without an appreciation of Confucianism, a social philosophy that originated from China and that is deeply embraced in Korea.

The Confucian system is built on five relationships: father/teacher and son (filial piety is the most important of all virtues), ruler and subject, husband and wife, older brother and younger brother, and friend and friend. Three of the five concern the family, which is the building block of society and is organized on authoritarian principles The traditional Confucian society was aristocratic, authoritarian, and static. Hierarchy was the dominant feature, and the five basic relationships tended to keep people in their places

LAWRENCE E. HARRISON, WHO PROSPERS: HOW CULTURAL VALUES SHAPE ECONOMIC AND POLITICAL SUCCESS 82–83 (1992). See Dwight H. Perkins, *Law, Family Ties, and the East Asian Way of Business*, in CULTURE MATTERS: HOW VALUES SHAPE PROGRESS 232, 233–34 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); see also Kim, *supra* note 20, at 127–28 (describing the role of Confucian philosophy in Korean corporate governance and noting that the “controlling shareholder would command the obedience and loyalty of all employees”). Korean society is more Confucian than even China. See FUKUYAMA, *supra* note 69, at 131; MICHAEL SCHUMAN, CONFUCIUS AND THE WORLD HE CREATED 70 (2015).

196. See Kim, *supra* note 20, at 127–28.

companies.¹⁹⁷ Korean corporate law goes a step further. It statutorily designates a monitor called an “auditor,” who is distinct from an independent financial auditor.¹⁹⁸ The statutory auditor, in theory, is an additional layer of independent oversight and acts as a super-monitor over the board.¹⁹⁹ The auditor must be independent of the board and managers.²⁰⁰ In the letter of the law, the auditor has “powerful authority”²⁰¹: the power to “audit directors’ performance of duties[,] . . . request a director to report on relevant business[,] and inspect the affairs and financial conditions of a company.”²⁰² But the concept of an all-powerful super-monitor is ineffective in practice.

The audit system under the Commercial Act is unique and rare in other countries. But it is unfortunate that the audit system in the past was merely a system existing only on the Act. Auditors were not active in a company and powerless. It was common to see auditors present at a general meeting to just read a report that was prepared by a company. They failed to check the management as expected by the Commercial Act.²⁰³

Well-intentioned laws can be written, but are not effective because they are either not enforced or never internalized.²⁰⁴ The much tougher nut to crack on independence is board *culture*.²⁰⁵

197. COMMERCIAL ACT art. 542–8(1) (Korea Legislation Research Institute 2019) (S. Kor.) (requiring a majority of the board of a Korean public company be “outside directors”); NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL rule 303A.01 (2009); THE NASDAQ STOCK MARKET RULES rule 5605(b)(1) (2006); Puchniak & Kim, *supra* note 193, at 116.

198. Dongho Lee, *Corporations*, in KOREAN BUSINESS LAW: THE LEGAL LANDSCAPE AND BEYOND, *supra* note 47, at 85–86.

199. See COMMERCIAL ACT, art. 412 (Korea Legislation Research Institute 2019) (S. Kor.); Park, *supra* note 115, at 203.

200. COMMERCIAL ACT, art. 411 (Korea Legislation Research Institute 2019) (S. Kor.).

201. Park, *supra* note 115, at 203.

202. COMMERCIAL ACT, art. 412 (Korea Legislation Research Institute 2019) (S. Kor.). The statutory auditor has other expansive legal powers. See *id.* art. 412–2 (directors to report likelihood of substantial loss to auditors); *id.* art. 412–3 (power to convene an extraordinary shareholder meeting); *id.* art. 412–4 (power to demand board meeting); *id.* art. 412–5 (power to investigate subsidiary company); *id.* art. 413 (power to examine agenda items and documents to be submitted to shareholders).

203. Park, *supra* note 115, at 204. See Kim, *supra* note 20, at 131 (noting that the statutory auditor “failed to perform their role as internal watchdogs that monitored board and management decisions”); MILHAUPT & PISTOR, *supra* note 101, at 102 (noting that the statutory auditor “did not operate effectively as a check on management”).

204. See Robert D. Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 191, 191–92, 195, 198, 201–02 (Michael Bruno & Boris Pleskovic eds., 1996).

205. See Pritchard, *supra* note 56, at 95 (“A more daunting challenge for reformers, however, is cultural rather than legal.”). Cf. Peter Molk, *The Puzzling*

Although board capture by executives is a reality, the United States is further developed in the culture of board independence.²⁰⁶ It is conceivable that due to the limitation of factfinding in adjudications, boards in both countries meet all legal definitions of independence and yet are in fact beholden or loyal to controlling individuals. But the idea of independence in the United States has been internalized.²⁰⁷ Strong evidence of this is the routineness of CEO firings.²⁰⁸ In Korea, the concept of independence is not firmly rooted in Korean corporate governance.²⁰⁹ Families are not fired by the board; rather, the typical board and management are beholden to the patron family.²¹⁰

Another prophylactic against controlling shareholder agency cost is derivative litigation. Much of American corporate law on fiduciary duties is developed through the common law.²¹¹ In Korea, a less litigious society generally,²¹² shareholders could, in theory, become powerful monitors. But derivative actions in Korea are few.²¹³ It denies standing to most shareholders. For public companies, only shareholders holding at least 0.01 percent (1/10,000) of shares can bring a derivative suit (e.g., a holding of \$100,000 for a mid-cap company with \$1 billion market capitalization).²¹⁴ Only institutional shareholders can feasibly bring a derivative suit against most mid- and large-cap companies.²¹⁵ This rule is not egalitarian and shuts the courthouse doors to all retail investors.²¹⁶ The American rule is liberal and does not impose such restriction.²¹⁷ It relies on a

Lack of Cooperatives, 88 TUL. L. REV. 899, 933–35 (2014) (noting the link between economics, culture, and organizational law).

206. See Michael Klausner, *Fact or Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1357–58 (2013).

207. *Id.*

208. See Jeanne Sahadi, *Up to Half of Exiting CEOs Don't Quit. They Get Fired*, CNN BUS. (July 19, 2019, 4:16 PM), <https://www.cnn.com/2019/07/19/success/ceos-getting-fired/index.html>; see also Klausner, *supra* note 206, at 1358 (noting that independent boards do well at firing underperforming CEOs).

209. See *supra* note 193 and accompanying text.

210. See Chun, *supra* note 5454, at 179–80.

211. See Fisch, *supra* note 190, at 1074.

212. See Kim & Park, *supra* note 142, at 12 (noting that the first derivative action was brought in 2000).

213. See Black et al., *in* KOREAN BUSINESS LAW, *supra* note 5, at 28 (describing the growth of derivative actions in Korea, but noting that such actions are few); see also Kim, *supra* note 109, at 313 (noting that the concept of a derivative suit was a legal transplant but that “private enforcement remains weak in Korea”).

214. COMMERCIAL ACT art. 542(6) (Korea Legislation Research Institute 2019) (S. Kor.).

215. See Black et al., *in* KOREAN BUSINESS LAW, *supra* note 5, at 36–37.

216. See *id.*

217. DEL. CODE ANN. tit. 8, § 327 (2019) (plaintiff must have been a stockholder at the time of the subject transaction); MODEL BUS. CORP. ACT § 7.41 (2016).

privatized form of enforcement of essential duties.²¹⁸ Because any recovery belongs to the corporation, the real party of interest (thus the actual monitor) is the plaintiff's attorney.²¹⁹ To disincentivize derivative actions further, Korean law provides no real economic incentive in terms of attorney fees and costs.²²⁰ A plaintiff may recover "cost incurred in relation to the action" but this does not include attorney fees, and such costs are recoverable only when the shareholder "wins the case."²²¹ Under Delaware law, a court may provide attorney fees if the plaintiff shareholder's suit provided a substantial benefit to the corporation.²²² Given the barriers to litigation in Korea, one is not surprised at all that the derivative action there is not a serious tool to hold wayward fiduciaries accountable and to improve corporate governance. Unless fundamental changes in the structure of incentives are made, notwithstanding a few quixotic actions each year, Korea permits derivative suits in name only.

C. Shareholder Primacy

Shareholder primacy is the idea that the purpose of the corporation is to maximize shareholder wealth,²²³ and in the United States, it is a rule of law.²²⁴ It is a complex rule. It is not an enforceable fiduciary duty; there is not a single statute or case mandating compliance upon pain of personal liability.²²⁵ It is a filamentary principle that weaves through the legal architecture of

218. See *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999) ("Our legal system has privatized in part the enforcement mechanism for policing fiduciaries by allowing private attorneys to bring suits on behalf of nominal shareholder plaintiffs.").

219. See *id.* ("To be sure, a real possibility exists that the economic motives of attorneys might influence the remedy sought or the conduct of the litigation. . . . [T]he attorney in pursuit of his own economic interests may usurp the role of the plaintiff and exploit the judicial system entirely for his own private gain.").

220. COMMERCIAL ACT, art. 405(1) (Korea Legislation Research Institute 2019) (S. Kor.).

221. *Id.*

222. *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980). *E.g., In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 972 (Del. Ch. 1996) (stating that the plaintiff's case was "extremely weak" and thus approved a settlement of the derivative suit on favorable terms to the defendant directors, but awarded plaintiff's attorney fees of \$869,000 in fees and costs).

223. See Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (arguing "corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders").

224. See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1954 (2018) ("Shareholder primacy is not a social norm originating from a shared belief in the community, independent of legal origin or influence. It is law obligating managers to maximize value.").

225. *Id.* at 1961.

the corporate system.²²⁶ It is given legitimacy by systematic judicial rulings that intricately work within the statutory framework of broad board authority. The rule, albeit unenforceable, is efficacious. Broad compliance is achieved by the total effect of incentives put on managers by the architecture of the corporate system: judicial articulation of a legal obligation in the Hartian tradition,²²⁷ the structure of executive pay tied to stock value, the market for corporate control, shareholder monitoring through derivative actions, and shared norms.²²⁸

Like all American corporate law statutes, the KCA is silent on the issue of shareholder primacy. Nor have Korean courts directed managers to “maximize shareholder profit.” If the Korean government were to enact such a rule, there would probably be strong populist resistance.²²⁹ There are clear implications of a society’s embrace of the rule: e.g., layoffs, outsourcing, divestitures, market for corporate control, rent-seeking through influencing of public policy, and minimal compliance with laws.²³⁰ Although these traits are commonly seen in the American market, the average Korean would find these strategies objectionable.²³¹ Shareholder primacy dictates that the manager should pursue all legal means to maximize shareholder profit.²³²

Shareholder primacy is not a rule of law in Korea.²³³ The rule requires a complex legal architecture that does not exist: executive compensation is not substantially tied to stock value; a market for corporate control is limited; shareholder monitoring is inert; no legal

226. *Id.* at 1999.

227. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012) (articulating a theory of legal positivism).

228. *See* Rhee, *supra* note 224, at 2011–13 (discussing the pathways through which “the law and legal system writ large achieve broad compliance [with shareholder primacy]”).

229. Populist sentiments and movements can affect the direction of corporate law and governance. *See generally* ROE, *supra* note 35 (discussing the role of populism in the structure of corporate ownership and capital markets).

230. *See* Rhee, *supra* note 224, at 1961 (“As a conceptual matter, a rule-sanction framework of a duty to maximize profit presents an irreconcilable conflict between authority and accountability because profit-seeking is the core managerial function in a business corporation.”).

231. *See* RHO, *supra* note 109, at xxi (discussing how the rise of shareholder activism in Korea was not at first particularly favorable).

232. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (requiring companies to “maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders”).

233. *See* Sang Yop Kang, *Tension Between Shareholder Primacy and (Quasi) Monopoly: A Theoretical Analysis of Controlling Shareholder Economies and China*, 11 U. PA. ASIAN L. REV. 128, 139–40 (2015) (discussing how Korea came close to a shareholder primacy system after the Asian market suffered in 1997).

pronouncement, neither statute nor ruling, has been stated.²³⁴ The incentive mechanisms that elicit compliance with an unenforceable rule do not exist. There is not even a strong norm because the principle of shareholder primacy may conflict with broadly-shared Korean ethos.²³⁵

Korean rules substantially support the view that the country embraces a stakeholder concept of corporate purpose.²³⁶ Directors owe duties to the corporation, but not to shareholders.²³⁷ They owe duties to third parties under corporation law and the public at large through the criminal provisions in the corporate law.²³⁸ The Korean government actively manages the national economy to promote egalitarian social welfare.²³⁹ The Korean Constitution endows the government with the authority to promote a democratized economy.²⁴⁰ Shareholder primacy is more prevalent and robust in markets where product competition is strong, as is the case of the American market.²⁴¹ The Korean market is characterized by industry concentration, dominance by chaebols, and weak internal competition.²⁴² Shareholder primacy does not and cannot exist in the strong form seen in the United States. The systematic discounting of the values of Korean companies is the convincing evidence.²⁴³

A stronger embrace of shareholder primacy would benefit the Korean market. The conflict between shareholder-centrism and stakeholder theory is not irreconcilable. The two ideas can coexist, if uneasily, as they did in the United States for many years before the 1980s when shareholder primacy began to dominate theory and was

234. *Id.*; see Rhee, *supra* note 224, at 2011–13 (discussing characteristics of a system for shareholder primacy).

235. See RHO, *supra* note 109, at xxi (noting that public opinion “reveals that most Koreans believe that business profits should be returned to the society rather than to the shareholders”).

236. See Pak, *supra* note 47, at 93 (suggesting that “Korea’s egalitarian and group-oriented society more naturally fit” a stakeholder theory of corporate purpose). See also CUMINGS, *supra* note 49, at 317 (“[P]olitical leaders pay attention not to efficiency and rationality but to political and, in this case, national efficacy. . . . The firms that got policy loans were quasi-state organizations that had common interests with the government . . .”).

237. Park, *supra* note 115, at 198.

238. See *supra* Subpart III.A.

239. See *supra* note 59.

240. KOREAN CONSTITUTION, art. 34(2) (S. Kor.) (“promote social security and welfare”); *id.* art. 32 (prescribing work conditions in conformity with democratic principles); *id.* art. 119 (“regulate and coordinate economic affairs . . . to democratize the economy through harmony among the economic agents”).

241. Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2063 (2001).

242. While chaebols are privately owned, they share certain characteristics of state-owned enterprises, such as a strong link to the state and relegation of profit maximization. Cf. D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 B.Y.U. L. REV. 1713, 1727–31 (2009).

243. See *infra* Subpart IV.B.

integrated into the legal architecture of the corporate system.²⁴⁴ The adoption of shareholder-centric rules would mitigate the costs associated with family control. Since Korea does not have the necessary conditions to implement a strong form of the rule, and since the government manages the national economy per its constitutional powers, its market will not speed toward the dynamics seen in the American corporate market if it embraces greater shareholder protection. The Korean system has legal, institutional, cultural, and political brakes. A fuller embrace of shareholder-centric rules *and* the mechanisms necessary to implement them will make the Korean corporate market more efficient.

IV. THE COSTS OF INEFFICIENCY

Through the prism of American principles, Korean law and governance are flawed because they permit obvious inefficiencies. The social costs are two. Inefficient rules produce lower firm values as capital markets price in weaknesses in corporate governance. Lower values negatively affect the structure of wealth, entrench economic classes, and ossify economic mobility in the population.²⁴⁵

A. *Primary Cost: The “Korean Discount”*

Ineffective corporate law and governance produce well-known problems: empire building; suboptimal capital structure and intragroup capital allocation; crowding out innovation and entrepreneurship; management control by bloodline rather than executive talent; rent-seeking through political patronage and public corruption; self-dealing and tunnelling.²⁴⁶

Not surprisingly, Korean firms suffer from the “Korean discount.”²⁴⁷ The capital markets systematically discount their values.²⁴⁸ One measure of value is the price-to-earnings (P/E) multiple, which indicates the amount investors are willing to pay as a multiple of annual earnings on the assumption that the firm will

244. See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265–66 (1992) (explaining the long coexistence and tension between the private property and the social entity models of the corporation).

245. See Kang, *supra* note 233, at 138–39 (discussing the theory that shareholder primacy increases the value of corporations and increases efficiency).

246. See, e.g., Joongi Kim, *supra* note 17, at 296–315 (recounting the many internal problems at the Daewoo chaebol).

247. Stephen G. Heckman, *Korea Discount*, KOREA TIMES (Jan. 10, 2010, 3:50 PM), http://www.koreatimes.co.kr/www/opinion/2017/09/198_58738.html (“The ‘Korea Discount’ is defined ... as ‘the amount by which investors undervalue Korean stocks.’”).

248. See *id.* (“This discount rate can be seen in how Korean stocks have consistently maintained low price-earnings ratios, and are predicted to maintain this low ratio in the future as well.”).

continue to pay earnings indefinitely in the future.²⁴⁹ According to one recent study, Korean companies are cheap.²⁵⁰

Despite being one of the wealthiest countries in the world (11th in 2015 GDP, 30th in PPP GDP per capita) and housing some of the world's most successful companies in Samsung, Hyundai, and LG, members of the KOSPI index trade at an average P/E of only 9.7. This compares with an average P/E of ~18 for companies in the S&P 500 and NIKKEI 225, 13.7 for the Chinese SSE Composite, and 12.5 for the Brazilian Bovespa.

Based on these data, Korean companies are discounted by 46 percent and 29 percent compared to American and Japanese companies, respectively.²⁵¹

Another recent account suggests that Korean companies trade at 0.8x price-to-book (P/B).²⁵² This means that the market value of assets net of liabilities (the market value of equity) is less than the book value of equity.²⁵³ Ordinarily, the P/B multiple would be greater than 1.0. The market value of assets is higher than their book value because the firm is expected to deploy assets such that they generate profit beyond acquisition cost.²⁵⁴ In ordinary situations, that is the case.²⁵⁵ The most likely explanation of a P/B multiple of less than 1.0 is that the markets anticipate the diminution of asset values in the hands of the management in control of the firm and its assets.²⁵⁶ In other words, the firm is better off dissolving and liquidating assets rather than continuing as a going concern because management is expected to destroy firm value.²⁵⁷

249. See RHEE, *supra* note 154, at 194 (explaining the price-to-earnings multiple).

250. Luke Schiefelbein, *Korea Is Cheap, and About to Get a Lot More Shareholder-Friendly*, FORBES (June 26, 2017, 10:58 AM), <https://www.forbes.com/sites/lukechiefelbein/2017/06/26/korea-is-cheap-and-about-to-get-a-lot-more-shareholder-friendly/#5d457197425f>. See Mike Bird, *The Horsemen Stalking the Korean Stock Market*, WALL ST. J. (Aug. 31, 2019, 9:03 AM), <https://www.wsj.com/articles/the-horsemen-stalking-the-korean-stock-market-11567256580> (noting that Korean companies are trading at 11x forward P/E); Heckman, *supra* note 247 (“The forward price-earnings ratio for Korea is 10.8. Compare this with Japan’s ratio of 21.6, or even the historic average median of the American ratio on the S&P 500 of 15.7.”).

251. Scheifelbein, *supra* note 250.

252. Bird, *supra* note 250.

253. See RHEE, *supra* note 154, at 194–95.

254. See *id.* at 25–26.

255. See *id.* at 24–26.

256. See generally Marco Realdon, *Credit Risk, Valuation and Fundamental Analysis*, 27 INT’L REV. FIN. ANALYSIS 77, 82 (2012) (“Therefore value stocks, i.e. stocks with low price to earnings ratio and/or low price to book ratio, may have high expected stock returns in order to compensate high credit risk.”).

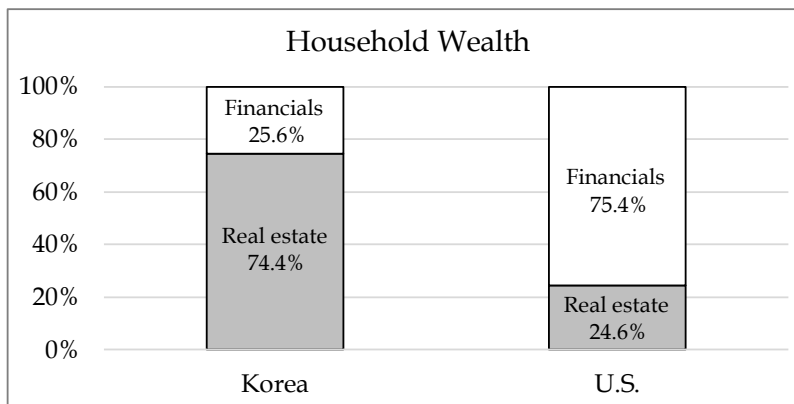
257. *Id.*

The “Korean discount” incorporates the market view that the chaebol system suffers from weaknesses in governance.²⁵⁸ While the discount is not entirely attributable to poor corporate governance (i.e., each country’s risk profile is unique), inefficient laws and governance contribute substantially to lower systematic firm values. All shareholders, domestic and foreign, are harmed by this system.

B. Secondary Cost: Economic Ossification

A secondary cost to low firm values is the downstream negative effects on the broader society. Corporate valuations affect the structure of household wealth.²⁵⁹ In 2017, the personal wealth of the average Korean was principally in real estate holdings.²⁶⁰ As between real estate and financial assets, the allocation was 74.4 percent and 25.6 percent respectively.²⁶¹ The structure of American household wealth is the mirror opposite.²⁶²

FIGURE 4. COMPARISON OF KOREA AND U.S. HOUSEHOLD WEALTH



258. See Pritchard, *supra* note 56, at 83 (“[T]he stock market appears to recognize this risk of abuse by the controlling shareholders of *chaebol* firms.”); *The Korea Discount: Corporate Governance Explains South Korea’s Low Stockmarket Ratings*, *supra* note 43 (“But the prime cause of the discount is more likely to be poor corporate governance . . .”).

259. See *supra* Part II.

260. The average Korean household owned real estate assets of ₩283.8 million and financial assets of ₩97.8 million (approximately \$258,000 and \$89,000 under the exchange rate of ₩1,100 = \$1.00). *The Survey of Household Finances and Living Conditions (SFLC) in 2017*, STAT. KOREA 1 (Dec. 21, 2017), <http://kostat.go.kr/portal/eng/pressReleases/6/1/index.board>.

261. *Id.*

262. Total household real estate assets were \$24,511.1 billion and financial assets were \$85,271.9 billion in 2017. *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts*, FED. RES. STAT. RELEASE 138 (Sept. 20, 2018), <https://www.federalreserve.gov/releases/z1/20180920/z1.pdf>.

There is a clear social implication. The Korean real estate market is concentrated in the greater Seoul metropolitan area including its satellite cities, where almost half of the country's population of about fifty million resides.²⁶³ The residential real estate market is expensive.²⁶⁴ As one of the largest cities in the world, the commercial real estate market is large.²⁶⁵ Real estate tends to ossify economic classes in Korea.²⁶⁶ Those who have it tend to be richer; those who do not tend to be poorer.²⁶⁷ The acquisition of real estate requires substantial capital. Korea does not have a deep market in residential mortgages and leveraged loans.²⁶⁸ Outside of plutocratic families, individuals in the wealthier class in Korea are property owners.²⁶⁹ They are rentiers.²⁷⁰ This wealth was created at the time when Korea suddenly transitioned from post-war destitution to first world status.²⁷¹ The wealthy came to be by the fortuitous dint of their initial position in a country that underwent rapid economic

263. *2018 Population and Housing Census*, STAT. KOREA 1 (Aug. 29, 2019), <http://kostat.go.kr/portal/eng/pressReleases/8/7/index.board> (“As of November 1st, 2018, the population of South Korea was 51.63 million persons. The population of the Seoul Capital Area accounted for 49.8 percent of the total population of South Korea.”).

264. *See* Hyunsu Yim, *Seoul Housing Prices More Expensive Than London and LA*, KOREA BIZWIRE (Sept. 4, 2017) (“[H]ousing prices in Seoul are more expensive than London and Los Angeles, considering the average household incomes in each city. . . . [T]he average price for an apartment in Seoul was estimated at 596.7 million won [about \$570,000 at \$1.00 = ₩1,050].”).

265. *See, e.g.*, Jack Sidders et al., *As China Retreats from Global Property Deals, Korea Fills The Void*, BLOOMBERG (Oct. 1, 2019, 5:00 PM), <https://www.bloomberg.com/news/articles/2019-10-01/as-china-retreats-from-global-property-deals-korea-fills-void> (“Korean investors splurged almost \$6.8 billion on international commercial real estate in the year [2019] through August.”).

266. *See* Yim, *supra* note 264 (finding that in Seoul, “the average housing price is over 10 times higher than the disposable income of households in the South Korean capital This means an average household in Seoul would have to work for a decade and save up without spending a penny before buying a home.”).

267. *Id.*

268. *See* Maria de Guzman, *Housing Price Slowdown in South Korea; Soaring Prices in Seoul*, GLOBALPROPERTYGUIDE 5 (Mar. 12, 2019), www.globalpropertyguide.com/Asia/South-Korea/Price-History. By mid-2018, the total mortgage loan in Korea was approximately ₩600 trillion (approximately \$570 billion at \$1.00 = ₩1,050). *Id.* at 4. The average loan-to-deposit ratio was 115.16, which implies that the average equity in the home was 46%. *Id.* at 2. New government regulation mandates: “Mortgages only allowed for houses worth more than KRW 900 million (US\$ 801,139) when intended for residential purpose.” *Id.* at 5.

269. *See* Yim, *supra* note 264.

270. *See* THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 331 (Arthur Goldhammer trans., 2014) (“The first of these two ways of achieving such high inequality is through a ‘hyperpatrimonial society’ (or ‘society of rentiers’): a society in which inherited wealth is very important and where the concentration of wealth attains extreme levels The total income hierarchy is then dominated by very high incomes from capital, especially inherited capital.”).

271. *See supra* Part II.

transformation. To become wealthier today, one must own real estate, but without capital it cannot be acquired.²⁷² Capital is not dynamic. These conditions create the wealth ossification trap in Korea.²⁷³

Economic mobility could be improved if financial assets perform well. Earnings from wages could be invested in corporate equities as an alternative asset class. If stocks earn sufficient rates, the economic lot of a person without real estate could be improved through a broader shareholder society. But corporate equities do not perform well. Koreans have fewer investment options to invest savings and earn suitable returns, the kind that the equity markets should deliver.²⁷⁴ Thus, concentrated wealth in the real estate sector and an underperforming corporate sector, seemingly unrelated, are in fact linked factors that tend to ossify economic and social classes in Korean society.²⁷⁵

V. CORPORATE LAW AS MIRROR OF ENDOGENOUS INTERESTS

The Korean corporate market is an oddity. It is open to foreign investment.²⁷⁶ It presents a trove of opportunities for activist shareholders and hostile acquirers, more likely foreign investors, to

272. Even the rental market requires a substantial down payment. Monthly rent is not the typical rental arrangement. See Guzman, *supra* note 268, at 6 (noting that the lump-sum deposit on the typical rental arrangement is about 70% to 80% of the property value).

273. See *id.* at 5–6.

274. See RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 169, 172, fig. 7.3 (13th ed. 2019) (noting that from 1900 to 2017 American stocks provided nominal returns of 11.5 percent and that some foreign countries provided higher returns than the United States). The lack of investment opportunities among average Koreans may explain the curious fact that Korea was a global center of the recent Bitcoin speculation and bubble. See Jae-Hyuk Lee & Matthew Fennell, *Bitcoin in Korea: A Get-Rich-Quick Opportunity or Another Bubble?*, ASIA SOC'Y, <https://asiasociety.org/korea/bitcoin-korea-get-rich-quick-opportunity-or-another-bubble> (last visited July 28, 2020) (“So, how does a country of only 50 million people become the third-largest market in the world for Bitcoin trades, behind Japan and the United States? . . . Young investors in Korea say that this is the only way they can emulate the rich, while others argue that the virtual currency market will never be able redistribute the wealth.”).

275. See, e.g., MYUNG HUN KANG, THE KOREAN BUSINESS CONGLOMERATE: CHAEBOL THEN AND NOW 198 (1996) (“Recently in Korea, the concentration of wealth by *chaebol* groups has been introduced as an important social issue. Special focus is given to the speculation in real estate by *chaebol* groups. Excessive investment in real estate by an enterprise raises many issues on the national economic side—for example, hampering sound management and weakening the economy’s international competitiveness.”).

276. See Foreign Investment Promotion Act, Act No. 5559, Sept. 16, 1998, amended by Act No. 16131, Dec. 31, 2018 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=49546&lang=ENG.

enhance efficiencies in systemically undervalued firms.²⁷⁷ Enormous profit can be had by “simply” removing family control. Why hasn’t rational, systemic market intervention occurred?

The chaebol system is an enigma. A few plutocratic families with little equity control a G-20 economy.²⁷⁸ Like water through cracks, abuse flows through obvious gaps in corporate law. The costs and social consequences are high. Average Koreans object to wealth inequity, stagnant economic opportunities, and hubris by families.²⁷⁹ Why hasn’t this strange system been reformed?

Corruption between business interests and government explains much.²⁸⁰ But it is only an incomplete answer, and the most convenient one. If it was the sole cause, then we would conclude that the chaebols will be dismantled once the highest levels of Korean politics improve with respect to integrity and transparency. Perhaps, but I believe likely not. The chaebol system has a legitimate rationale and social utility under endogenous conditions. It has remained durable not in spite of inefficiencies, but because of them in the sense that inefficiency and legitimate interest are inextricably intertwined.²⁸¹ The situation is complicated.

Korean corporate law can be understood as a lingua franca. It restates the terminology of core American principles and thus provides some assurance to foreign investors in a modern global market.²⁸² At the same time, it maintains old traditions based on a cozy and sometimes strained relationship between the two most important stakeholders—dynastic families and the government.²⁸³

277. See generally Rhee, *supra* note 100, at 551–56 (describing shareholder activism by hedge funds and the market for corporate influence).

278. Kim & Ah-jeong, *supra* note 40 (“In Korea, chaebol families often actually own only small fractions of the companies they control.”).

279. See, e.g., Se-Woong Koo, *Anger and Envy in the Chaebol Republic*, FOREIGN POL’Y (Apr. 9, 2015, 2:04 PM), <https://foreignpolicy.com/2015/04/09/anger-and-envy-in-the-chaebol-republic-korea-nut-rage-samsung/>; East Asia Forum, *The Growing Inequality in South Korea*, ECON. WATCH (Apr. 15, 2015), <https://www.economywatch.com/features/The-Growing-Inequality-in-South-Korea.04-15-15.html>.

280. See, e.g., Sang-Hun & Zhong, *supra* note 105 (“Over the decades, numerous chaebol executives have been paraded into courts on bribery and other charges. But they have usually walked away with light sentences (most of them suspended), free to manage their businesses, even as courts routinely sentenced lesser-known white-collar criminals to far longer terms for lesser offenses.”).

281. See, e.g., Simon Denyer, *South Korea’s President Once Decried Powerful Tycoons, Now He Needs Them to Woo Pyongyang*, WASH. POST (Dec. 8, 2018, 9:16 PM), https://www.washingtonpost.com/world/asia_pacific/south-koreas-president-once-decried-powerful-tycoons-now-he-needs-them-to-woo-pyongyang/2018/12/08/dfff8020-eeff-11e8-9236-bb94154151d2_story.html (“South Korea’s megacompanies have become key partners in his outreach to North Korea.”).

282. Ko, *supra* note 1, at 9.

283. See Joongi Kim, *supra* note 17, at 284.

The peculiar Korean system exists because these two stakeholders share a common interest.²⁸⁴

The private interest of controlling families requires little comment. The aggrandizement of wealth and power is as old as humankind.²⁸⁵ The interest studied in this article is the Korean government's legitimate interest in maintaining a chaebol system despite a myriad of social and economic problems associated with a chaebol system. This alignment of private and public interests explains much.

A. *Public Benefit of Control*

The paramount interest of government is to maintain power over the economy.²⁸⁶ Economic control is a part of the government's constitutional obligation.²⁸⁷ This interest is advanced when chaebol families retain control of major corporate groups.²⁸⁸ Chaebol control maintains the original Chung Hee Park policy of state participation in economic development.²⁸⁹ It enables the government to coordinate and control the economy more easily.²⁹⁰ Compare this situation to one where companies are controlled by professional managers who owe duties only to the corporation and all shareholders. In the United States, the private nature of corporate law is doctrine; corporate law is not generally considered imbued with a public purpose grounded in national interests.²⁹¹ This doctrine is not embraced in Korea. The state has a paramount interest in the economy,²⁹² and a large portion of the economy is attributable to a few corporate groups. Family control is a reassuring, long-term partner in a public enterprise.²⁹³

284. *See id.*

285. *See supra* Part II.

286. Two public interests are paramount: national security and the economy. These interests are related, and the chaebols are a link. *See Denyer, supra* note 281.

287. *See supra* notes 58, 239 and accompanying text.

288. *See supra* notes 57–58 and accompanying text

289. *See supra* notes 66–70 and accompanying text.

290. *See supra* notes 66–70 and accompanying text.

291. *Cf.* DEL. CODE ANN. Tit. 8 § 122(9) (2019); Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 701–02 (2010) (showing that in a national crisis, corporate law empowers the corporation to pursue the “public welfare” and to aid in “national emergency”).

292. KOREAN CONSTITUTION, art. 119(2) (S. Kor.); *see supra* note 59 and accompanying text. “The Korean system has included significant central planning and guided capital markets, with regulatory and prosecutorial actions as the primary sources of legal action with respect to disciplining managers of large corporate wealth (as opposed to private litigation). The governance environment resulting from the economic and political institutions of Korea are unique to the nation.” Pak, *supra* note 47, at 94.

293. *See* Puchniak & Kim, *supra* note 193, at 5.

The government's interest in influencing corporate governance is evinced by the criminal provisions in Korean corporate law.²⁹⁴ There is a spectrum of bad conduct.²⁹⁵ At one end are substantively negligent, unreasonable, or ill-advised actions. Korea and the United States differ on how to treat such actions because risk preferences and economic calculations are different.²⁹⁶ At the other end are obvious criminal actions involving the concepts of fraud, theft, public harm, or intentional violations of law.²⁹⁷ The middle is the grey area. It encompasses actions that are in bad faith or opportunistic by managers and controlling shareholders. Here, the two laws diverge. Crimes under Korean corporate law include violations of duties arising under corporate law.²⁹⁸ The United States has no comparable provisions because the internal affairs of the corporation, without more,²⁹⁹ are deemed to be in the private realm.

This divergence is best understood in the context of Korean political and economic organization. Monitoring by investors has historically been feeble.³⁰⁰ Bank scrutiny was lax and shareholder derivative suits were few.³⁰¹ Since chaebols enjoyed government financing, criminalization of corporate law imposes public oversight in the absence of private monitoring.³⁰² Criminalization gives the government a lever of control in internal affairs in some circumstances, which is consistent with the Korean constitutional scheme.³⁰³ It evinces a public purpose of corporations, the pursuit of national interests through private enterprise.³⁰⁴

Monitoring aside, the government uses a broader spectrum of criminal law, such as tax and anticorruption laws, to regulate chaebol families.³⁰⁵ While such actions are not apparently related to corporate governance (from the perspective of how American corporate law and governance generally work), criminal prosecutions have been an oft-used tool in the government's toolbox to discipline

294. See *supra* notes 181–85 and accompanying text.

295. See *supra* notes 181–85 and accompanying text.

296. See *supra* Subpart III.A.

297. *Supra* notes 181–85 and accompanying text.

298. *Supra* notes 183–85 and accompanying text.

299. *E.g.*, Sarbanes-Oxley Act § 906, 18 U.S.C. §§ 1348, 1350 (2018).

300. *KO, supra* note 1, at 15.

301. *Id.*

302. See *infra* notes 355–60 and accompanying text.

303. See *supra* note 292.

304. Pak, *supra* note 47, at 93. See BREEN, *supra* note 58, at 218 (“Unlike, say, American companies, which run on a model of increasing shareholder wealth, Korean firms existed initially for nation-building.”); *infra* Subpart III.C.

305. *E.g.*, Choe Sang-Hun, *Family Behind Korean Conglomerate Lotte Is Indicted in Corruption Case*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/business/international/south-korea-lotte-chaebol-conglomerate-indicted.html>; Choe Sang-Hun, *Samsung's Chairman Is Indicted for Tax Evasion in Corruption Case*, N.Y. TIMES (Apr. 17, 2008), <https://www.nytimes.com/2008/04/17/business/worldbusiness/17iht-samsung.4.12107507.html>.

wayward families.³⁰⁶ A prime example of this disciplinary device is the recent scandals surrounding the family of Korean Air Lines, a company in the Hanjin chaebol.³⁰⁷ Their troubles are truly tawdry tales. The most infamous episode is known as the “nut rage incident.”³⁰⁸ The chairman’s older daughter, an executive in the airline, ordered a Korean Air plane, which was taxiing on the runway at a New York airport in route on an international flight, to return to the terminal gate to expel a flight attendant for breaching service protocol by failing to remove the macadamia nuts from the plastic package before serving her in the first class section.³⁰⁹ She was subsequently convicted in Korean court for illegally forcing a flight change under Korean aviation law, but her conviction was overturned on appeal on suspect legal reasoning.³¹⁰ Recently, other members of

306. *E.g.*, *supra* note 305; *infra* notes 307–11 and accompanying text.

307. Unlike other chaebol companies, the family owns a substantial stake in Korean Air. See Emily Price, *Korean Air CEO Ousted from Board after Family Scandals*, FORTUNE (Mar. 27, 2019, 1:56 PM), <https://fortune.com/2019/03/27/korean-air-ceo-ousted-from-board-after-family-scandals/> (reporting that the family owns about 32% of shares).

308. The incident has its own Wikipedia page. *Nut Rage Incident*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nut_rage_incident (last visited July 28, 2020).

309. The following description provides a sense of the behavior: “[According to the head steward, the chairman’s] daughter had forced him to kneel and apologize on the plane as punishment for the way one of his stewards had served the nuts to passengers in first class. The head steward was kicked off the aircraft when it returned to the gate. ‘You can’t imagine the humiliation I felt unless you experienced it yourself,’ the steward, Park Chang-jin, said, adding that Ms. Cho called him names, hit him several times with a folder of documents and hurled it at the junior steward.” Choe Sang-Hun, *Korean Air Chairman Strips Daughter’s Titles After Her ‘Foolish’ Behavior*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/world/asia/korean-air-chairman-removes-daughter-from-executive-posts-after-nut-incident.html>.

310. Joyce Lee, *South Korean ‘Nut Rage’ Executive Remains Free After Court Upholds Suspended Sentence*, REUTERS (Dec. 21, 2017, 2:01 AM), <https://www.reuters.com/article/us-southkorea-nuts-verdict/south-korean-nut-rage-executive-remains-free-after-court-upholds-suspended-sentence-idUSKBN1EF0L5>. This case illustrates a common pattern of government prosecutions followed by judicial intervention in favor of chaebol families, resulting in light sanctions. See *supra* note 149 and *infra* notes 319–20. The legal grounds for such favorable interventions are sometimes questionable. See *supra* note 149. This case is illustrative. The statute in the case provides: “Any person who has impeded a normal flight of any aircraft by causing the deviation of its air route *in flight* through deceptive or forcible means shall be punished by imprisonment for not less than one year but not more than ten years.” Aviation Security Act, Act. No. 14939, Oct. 24, 2017, art. 42 (emphasis added), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45882&lang=ENG. “In flight” is a statutory term of art. The statute defines: “The term ‘in flight’ means the status maintained by an aircraft from the point when its *doors are all closed following boarding* by passengers until the *doors are opened to allow the passengers to disembark*.” *Id.* art. 2(1) (emphasis added). The definition seems plain and unambiguous even to non-Korean lawyers. Yet, the Korean Supreme

the Hanjin chaebol family have been alleged to have engaged in bad behavior, sparking various government inquiries.³¹¹ This spate of scandals and investigations spurred shareholders to deny a board seat to the father, a rare moment of successful activism even though the family controlled about 32 percent of votes.³¹²

The Hanjin chaebol is a large corporate group.³¹³ Korean Air is a major public corporation and the flagship national carrier.³¹⁴ In April 2019, the father died, and his son assumed the corporate leadership.³¹⁵ The market reaction to the death of the patriarch was a discernible, abnormal increase in stock price.³¹⁶ Family control and

Court's contorted decision was based on the contrived reasoning that, despite the plain meaning in the statutory definition, "in flight" encompasses only a flying plane as opposed to a taxiing plane. See Supreme Court [S. Ct.], 2015Do8335, Dec. 21, 2017 (S. Kor.) (en banc).

311. See Cho Chung-un, *Korean Air Chief Apologizes, Fires Daughters Over 'Water Rage'*, KOREA HERALD (Apr. 22, 2018, 7:11 PM), <http://www.koreaherald.com/view.php?ud=20180422000237> ("Triggered by [the chairman's] youngest child reportedly throwing water at an agency official during a meeting, the 'water rage' spread fast inside and outside the country, raising questions as to unqualified chaebol scions in executive posts."); Sohn Ji-young, *Korean Air Heiress Returns Home to Barrage of Criticisms, Probe for Violence*, KOREA HERALD (Apr. 15, 2018, 6:10 PM), <http://www.koreaherald.com/view.php?ud=20180415000193> ("[T]he case had highlighted the privileges and abuse of power by scions of Korea's family-run conglomerates that dominate the economy."); Kyunghee Park, *Korean Air's Chairman Faces Trial After Embezzlement Probe*, BLOOMBERG (Oct. 15, 2018, 2:53 AM), <https://www.bloomberg.com/news/articles/2018-10-15/korean-air-s-chairman-cho-faces-trial-after-embezzlement-probe> ("Korean Air Lines Co. Chairman Cho Yang-ho is set to stand trial in an embezzlement case, adding to troubles faced by a family that's been at the center of rage-driven scandals."); Kim Tong-Hyung, *Widow, Daughter of Korean Air Chairman Appear on Trial*, WASH. TIMES (May 2, 2019), <https://www.washingtontimes.com/news/2019/may/2/widow-daughter-of-korean-air-chairman-appear-on-tr/> ("The widow and daughter of Korean Air Chairman appeared in a South Korean court on Thursday over charges they unlawfully hired housekeepers from the Philippines.");

312. Price, *supra* note 307.

313. Stephen Evans, *Hanjin Bankruptcy: Are South Korea's 'Chaebols' In Crisis?*, BBC NEWS (Sept. 8, 2016), <https://www.bbc.com/news/business-37295185>.

314. *Korean Air to Introduce Boeing 787-10 for First Time in Korea*, KOREAN AIR (June 19, 2019), https://www.koreanair.com/global/en/about/news/press_release/2019_06_B787-10/.

315. *Korean Air Parent Appoints Heir Apparent Cho Won-tae as New Chairman*, REUTERS (Apr. 24, 2019, 6:06 AM), <https://www.reuters.com/article/hanjin-kal-chairman/update-1-korean-air-parent-appoints-heir-apparent-cho-won-tae-as-new-chairman-idUSL3N2262H5>. The son is not without controversy. See Kwak Jung-soo, *Korean Air Princess Is Just the Tip of the Abusive Chaebol Iceberg*, HANKYOREH (Dec. 11, 2014, 13:20 KST), http://english.hani.co.kr/arti/english_edition/e_editorial/668599.html (noting allegations of "pushing over a woman in her seventies over a road dispute, or a 2012 episode when he verbally abused a civic group protesting over the management of Inha University").

316. Andrew Frew McMillan, *Korean Air Parent Hanjin's Stock Rockets on Death of Chaebol Leader*, REAL MONEY (Apr. 8, 2019, 1:00 PM), <https://realmoney.thestreet.com/investing/stocks/korean-air-parent-hanjins->

filial corporate governance raise a serious public policy question: What does hereditary (and patrilineal) passage of control to the descendants of chaebol families mean for the nation?

The scandals of the Hanjin chaebol family and the bad behavior of other chaebol families are seemingly unconnected to corporate governance. But American norms and practices show that supposedly private bad acts can be properly seen as important matters of corporate governance because moral, ethical leadership is critically important.³¹⁷ In the case of Korea, bad behavior is more than just fodder for tabloid tales and social reprobation.³¹⁸ The rule of law in Korea applies leniently to chaebol families and executives on account of their perceived contribution to the national economy.³¹⁹ There is a historical pattern of government sanctions or criminal inquiries followed by light judicial penalties or presidential pardons.³²⁰ This pattern highlights a serious aspect of Korean corporate governance. Criminal and regulatory actions for bad behavior are a form of public monitoring and disciplining whenever families stray too far from either public expectations or minimal standards of corporate governance and ethical leadership of important enterprises.³²¹ Both the government and the chaebols are susceptible to public (populist) reprobation because they are linked in history and are still in

stock-rockets-death-chaebol-leader-14919913 (“Korean Air Lines shares closed up 1.9% on Monday in Seoul, having risen as much as 8.2% during the day. The shares of holding entity Hanjin Kal soared 20.6%.”).

317. *E.g.*, Don Clark, *Intel C.E.O. Brian Krzanich Resigns After Relationship with Employee*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/technology/intel-ceo-resigns-consensual-relationship.html>; David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/>; David Yaffe-Bellany, *McDonald's C.E.O. Fired Over a Relationship That's Becoming Taboo*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/business/mcdonalds-ceo-fired.html>.

318. *See* Joongi Kim, *supra* note 17, at 333–35.

319. *See id.* (noting that prosecutors, courts, and the president show systematic leniency when chaebol families and executives engaged in criminal conduct in light of “their roles in developing the economy” and “exaggerated concerns that punishing corporate defendants, especially from larger *chaebols*, would damage the reputation of the company and in turn cause serious economic damage to the country”).

320. Sherisse Pham, *South Korea's Long History of Light Sentences for Business Leaders*, CNN BUS. (Jan. 17, 2017, 6:23 AM), <https://money.cnn.com/2017/01/17/investing/south-korea-chaebol-culture-corruption/index.html>. *See* Sang-Hun et al., *supra* note 103 (noting that prior heads of the Samsung chaebol repeatedly escaped prosecution for bribery and tax evasion with suspended or light penalties); sources cited *supra* note 149 (noting that courts cite adverse effects on the national economy as justification for leniency).

321. *See* Sang-Hun et al., *supra* note 103.

symbiosis today.³²² The history of Korean politics shows that Koreans are capable of mass populist movements, political activism, and rebellions.³²³ The recent impeachment and removal of Geun Hye Park is just the latest demonstration of modern Korean politics. The state and the chaebols are well aware of the volatile possibility of popular sentiments.³²⁴

322. See Kim & Park, *supra* note 68, at 267 (“[D]uring the Park era, the state-*chaebol* relationship was characterized by a constant effort to balance between the predatory and the developmental tendencies of the state, the cronyism and the entrepreneurial energy of the *chaebol*, and the generation of rents and the regulation of the ensuing moral hazards.”); Ko, *supra* note 1, at 9–10 (“It may be true that *chaebols* are a big source of the problem One might, however, be justified in arguing that *chaebols* themselves are a product of the Korean development model and they evolved responding to the signals they received from the government and the whole economy.”); RHO, *supra* note 109, at 56 (noting that government policy viewed chaebols as serving three roles: (1) “as an instrument of a social goal, that is, of national prosperity”; (2) “*chaebol* had an obligation as a beneficiary of national support”; (3) “especially because their growth owed much to state intervention, the *chaebol* were expected not to exercise their economic power against the interest of social justice”).

323. See CUMINGS, *supra* note 49, at 342–403. The transition from military dictatorship to civilian government was preceded by a mass and violent pro-democracy movement from the 1960s to 1980s. See *id.* at 343 (describing the Kwangju Rebellion in May 1980, which resulted in the killings of hundreds of protestors by the military, as “Korea’s Tiananmen nightmare”). The most recent example of populist uprising is the 2017 successful impeachment of the Geun Hye Park, the daughter of the dictator Chung Hee Park who created the chaebol system. Indeed, in the impeachment of Park, Korea showed the world how the populace in a developed democracy can exercise a more direct form of democracy through compelling, peaceful popular expression. This impeachment was not instigated or implemented by the workings of political institutions; instead, the popular will forced the political institutions, including the courts, to remove a corrupt, incompetent president. Cf. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 787 (2002); Sungmoon Kim, *From Remonstrance to Impeachment: A Curious Case of “Confucian Constitutionalism” in South Korea*, 44 LAW & SOC. INQUIRY 586, 589 (2019). The impeachment followed months of peaceful protests in which millions of Koreans demonstrated during the coldest months of winter. Frank Ahrens, *South Koreans Are Showing the World How Protests Can Work*, WASH. POST (Dec. 8, 2016, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/12/08/south-koreans-are-showing-the-world-how-protests-can-work/> (noting that Koreans protested for six straight weeks in downtown Seoul with as many as 1.7 million protesters); Ju-min Park & Jack Kim, *South Korea Park Approval Rating Slightly Up to 5 Percent: Gallup Korea*, REUTERS (Dec. 8, 2016, 8:23 PM), <https://www.reuters.com/article/us-southkorea-politics-poll-idUSKBN13Y04L>; Choe Sang-Hun, *South Koreans Rally in Largest Protest in Decades to Demand President’s Ouster*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/asia/korea-park-geun-hye-protests.html> (“[H]undreds of thousands of South Koreans filled central Seoul on Saturday to demand the resignation of President Park Geun-hye”); Choe Sang-Hun, *South Korea Removes President Park Geun-hye*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/world/asia/park-geun-hye-impeached-south-korea.html>.

324. See Ahrens, *supra* note 323.

If the chaebols and their families are so troublesome to policymakers, so irrational to scholars, and so unpopular among average Koreans,³²⁵ why not break them up with real reform? It is not too difficult to envision the core principle toward effective reform: a prohibition against the use of cross-shareholding for control or entrenchment purpose and effective enforcement of that rule of law.³²⁶ Policymakers have been conflicted over the pros and cons of the chaebol system. For all their faults, chaebols have played a major role in the Korean economic miracle.³²⁷ One hastens to add, however, that their accomplishments were possible only because the state picked winners and losers with public assets in the initial condition of rapid economic transformation.³²⁸ This fact is the source of popular disapproval and resentment.³²⁹ On the other hand, as the drivers of the national economy, the chaebols have a public purpose.³³⁰ This consideration prevails in the Korean system.³³¹

The critical public benefit is that the chaebol system is a form of national control.³³² From the private side of the families, the chaebol system maintains control over businesses they no longer own. From the public side of policymakers, it is another form of mercantilism. It is the key takeover defense against foreign acquisition of national economic assets.³³³ Such protectionist control is grounded in facts and not legal devices, which is a critical distinction.³³⁴ Among economically advanced nations that partake in open markets and free trade, rules that discriminate against foreign investors would be suspect and counterproductive to attracting capital. A distinction

325. See BREEN, *supra* note 58, at 223, 233 (“The *chaebol* have always been a visible and convenient target for the broader complaints of Koreans about the corruption, unfairness, and powerlessness they experience. . . . No one loves them.”); Alastair Gale, ‘*Nut Rage*’ Reignites Backlash Against South Korea’s Family-Run Conglomerates, WALL ST. J. (Jan. 7, 2015, 1:22 PM), <https://www.wsj.com/articles/nut-rage-reignites-backlash-against-south-koreas-family-run-conglomerates-1420654954> (discussing public disapproval of chaebols and their families); Sang-Hun & Zhong, *supra* note 105 (noting that the third generation of heirs of chaebols are viewed “with skepticism, if not downright scorn” and are “accused of inheriting management control and wealth” through questionable corporate governance practices).

326. See *supra* note 99 (describing the American rule on cross-shareholding).

327. See Joongi Kim, *supra* note 17, at 277.

328. See *supra* note 70 and accompanying text.

329. BREEN, *supra* note 58, at 238 (“Koreans do not believe the rich have earned their wealth fairly and legitimately. Rather, given the extent of government control and corruption, it is as if they have been allowed to get rich because it was useful for the country for them to do their thing, while your average Mr. Kim wasn’t.”).

330. See CUMINGS, *supra* note 49, at 317.

331. See *supra* notes 286–93 and accompanying text.

332. See Pak, *supra* note 47, at 100–01.

333. See BREEN, *supra* note 58, at 223.

334. See Pak, *supra* note 47, at 100–01.

between rule-based and fact-based prohibitions is important. Facts are simply the circumstances in which an investment is made. Even when markets are open to foreign investment and investors expect legal protections consistent with an advanced market, chaebol control keeps domestic companies in national control.³³⁵

Families have principal control, but control is really a duopoly. Korean law does not permit perpetual, property-based control, such as dual class stock. The nature of complex cross-shareholding shows that family control can be quite tenuous due to continual equity dilution. The government is a key arbiter. Family control is augmented by the government per the National Pension Service, a public pension plan and the largest single shareholder in Korea.³³⁶ This set of private and public voting blocks must be seen as a significant benefit among a consensus of Korean elites and, implicitly, even the general populace in a country that has a strong national identity and a collective sense of shared interest in the national economy.³³⁷ Foreign acquisitions without broad consensus on the benefit to Korean interests would conflict with perceived national interests.³³⁸ The most important benefit of the chaebol system is ultimately rooted in the collective stake in the economy and strong nationalism that is a fundamental trait of the Korean nation and people.³³⁹ In the United States, excepting key industry sectors with

335. *See id.* (recounting the attempted foreign takeover of SK Corp. and attributing nationalistic sentiments to the defeat).

336. *See* KIM, *supra* note 109, at 308 & figure 11.1 (noting that the NPS is the third largest pension fund in the world and the largest shareholder in some of the biggest Korean corporations); Geoffrey Cain, *Korean Pension Fund Backs Corporate Royals Again*, ASIA TIMES (Mar. 23, 2019), <https://asiatimes.com/2019/03/korean-pension-fund-backs-corporate-royals-again/> (noting that the NPS holds 5 to 10 percent of chaebol companies).

337. *See* BREEN, *supra* note 58, at 233.

338. *See id.* (“While making money out of foreigners—i.e., exporting—was considered virtuous, there was a collective revulsion at the notion that foreigners should be making profits in Korea.”).

339. One cannot understand Korean society without appreciating Korean nationalism. *See id.* at 88–97 (“One of the best-known things about the Koreans is that they are nationalistic.”); FUKUYAMA, *supra* note 69, at 141 (“[N]ationalism and national identity are much more highly developed in Korea than they are in China, for all of the similarities between the two cultures.”); Wönsik Hong, *Korean’s Formation of Relationships Based on Uri (“We”) and its Philosophical Background*, in KOREAN SOC’Y 34 (noting a connection between Korean nationalism and Confucianism). “Nationalism” is a loaded term in light of the tragic history of the twentieth century and more recently the election of Donald Trump and his “America first” shibboleth. Korean nationalism is not the aggressive ideology of the awful kind that has led to historical tragedies. It is not based on demagoguery, racism, imperialism, or collective insanity. Korea is the only country in the East Asia region that has no history of attacking its neighbors. Instead, tragedies have historically been inflicted on the Koreans. Always being in a position of weakness, it was historically known as the Hermit Kingdom, a moniker expressing a collective desire to be left alone. Korean nationalism arose as a response to repeated historical tragedies; the sentiment is defensive, insular,

direct national security implications, corporate law and governance are not generally seen through the prism of nationalism. If Sony, a Japanese company, bought Apple (assuming no issues related to national security or violation of competition law), the deal would likely be cheered for delivering value to the collective shareholders. But the perspective of corporate law as existing in the realm of private law cannot be assumed in the Korean case. If Sony bought Samsung, the deal would most certainly be traumatic to Korean society and economy. Nationalism is an important facet of Korean corporate law and governance.

The importance of control is seen in the failed hostile takeover of the SK Corporation, the key corporation in the SK chaebol. Milhaupt and Pistor recount the following basic facts.³⁴⁰ Before the takeover attempt, the SK group endured several years of scandals involving self-dealing transactions and accounting fraud by the chairman, resulting in depressed stock prices for most companies in the group, including SK.³⁴¹ In 2003, a foreign investor (Sovereign Asset Management) acquired 14.9 percent of SK's stock.³⁴² Its purpose was to acquire control, remove family members from management, and operate SK as an independent company.³⁴³ In response, the company devised a white knight, antitakeover strategy. It sought to sell shares constituting 10.4 percent of voting power to a friendly bank, which would pledge support of incumbent management.³⁴⁴ Sovereign sued to enjoin the issuance, arguing that the tactic "would be a blatant breach of globally accepted standards of corporate governance."³⁴⁵ The trial court (Seoul District Court) ruled that "faced with Sovereign's possible takeover, the decision by SK's board, which was made to defend its management control, is legitimate."³⁴⁶ Sovereign

and based on a strong sense of community bound by a common history, ethnicity, and adversity. A strong nationalistic sentiment preserved the Korean nation through repeated history of conquest and colonization, a vulnerability rooted in its strategic geography between China and Japan. See FUKUYAMA, *supra* note 69, at 141; KI-BAIK LEE, A NEW HISTORY OF KOREA 300–72 (Edward W. Wagner & Edward J. Shultz trans., 1984). This communitarian, collectivist form of nationalism is seen in the habitual linguistic use of the word *uri* (우리) (meaning "we" or "us" or "our"), which conveys a deep cultural meaning of "our nation," "our people," "our community" in daily language. See Hong, *supra*, at 31–48.

340. MILHAUPT & PISTOR, *supra* note 101, at 109–13 (providing the facts in this paragraph). See Hwa-Jin Kim, *The Market for Corporate Control in Korea*, in KOREAN BUSINESS LAW, *supra* note 5, at 244–48; Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol's Corporate Governance*, 14 CARDOZO J. INT'L & COMP. L. 21, 54–57, 69 (2006) (describing the SK chaebol and Sovereign's failed takeover).

341. MILHAUPT & PISTOR, *supra* note 101, at 110–11.

342. *Id.* at 111.

343. *Id.*

344. *Id.* at 112.

345. *Id.*

346. *Id.*

then waged a proxy contest to obtain the votes of other foreign shareholders who held 42.3 percent of shares (diluted down from 46.9 percent due to the new share issuance).³⁴⁷ Sovereign lost. Thirty-four of thirty-six domestic institutional shareholders sided with management, and control remained with the family.³⁴⁸ Sovereign then sought to call an extraordinary meeting to seek a vote on the removal of the family patriarch. It had a legal right to call this meeting, but the board refused.³⁴⁹ Sovereign sued again, and the court again sided with the company. While acknowledging Sovereign's legal right to call a meeting, the court ruled that "continuous instability with respect to the management right might bring about the departure of investors and cause the investment value to decline" and noted the importance of "management stability at least until the annual general shareholders meeting next year."³⁵⁰ On appeal, the Seoul High Court affirmed the trial court's decision and characterized Sovereign's exercise of a legal right as an "abuse of right."³⁵¹ It also upheld the chairman's criminal conviction, but suspended the sentence, permitting him to resume his chairmanship and control of the company. Sovereign divested its stake in SK and called the entire affair "a national tragedy."³⁵²

The SK saga illustrates the role of the government and national interest in maintaining chaebol control. Most domestic institutional investors sided with management, notwithstanding the impact on firm value, return on investment, and the abusive acts of the controlling family. The court ruled in favor of management, notwithstanding a major shareholder's legal rights, related to the shareholder franchise under Korean corporate law. Newspapers played on nationalistic sentiments and warned that chaebols were engines of economic growth and that they were being "attacked" by foreign investors.³⁵³

To understand the SK episode, one must understand the real conflict. The interests in conflict were not between shareholders and management in the paradigm of agency cost and shareholder primacy, an American-centric perspective. Instead, they were between good corporate governance and control of national economic

347. *Id.*

348. *Id.*

349. *Id.* at 113.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 121. See Pak, *supra* note 47, at 100 (commenting that foreign investors' call for greater shareholder rights "has been interpreted in many cases as a foreign challenge to Korean cultural values" and "has predictably triggered a fortress mentality among the ranks of management, labor, and community activists at companies perceived as coming under attack by shareholder rights advocates from abroad").

assets. In the SK saga, this choice was binary. National interest prevailed.³⁵⁴

The chaebols have been and are a form of a public-private bargain.³⁵⁵ The government and the chaebols have a long history together. The relationship has been symbiotic, if not simpatico.³⁵⁶ This simple fact explains how a convicted criminal can be released from jail and thereupon resume control of an important public company.³⁵⁷ The economy is organized in the model of state-corporate capitalism where the government is a regulator, a monitor, and a partner. The government could break up the chaebols through sweeping reform,³⁵⁸ but does not. The main reason is the risk of the unknown: What happens if the chaebols are broken up? What happens when key companies are independent and ultimate control lies in the markets?

From the perspective of Korean policymakers, the answer cannot be to let control float in the global capital markets. Like all advanced economies, the economy and its corporations are inextricably linked.

354. MILHAUPT & PISTOR, *supra* note 101, at 118–20.

355. *See supra* notes 57–59 and accompanying text.

356. *See supra* note 322. Even the concept of an independent director has been molded into a public-private framework by the chaebols, which was not the government's original design. In Korea, as well as other parts of Asia, the policy goal of independent directors is to monitor controlling shareholders in family-dominated enterprises. Puchniak & Kim, *supra* note 193, at 111. However, independent directors have been used as a revolving-door link between the government and the company. *Id.* at 116 (explaining that Korean companies employ ex-government officials as independent directors to serve a lobbying function because Korean law prohibits companies from retaining professional lobbyists). Unlike the United States, where independent directors are generally selected for their business experience, Korean directors are professors (28.5 percent), lawyers including former judges and prosecutors (17.9 percent), former government officials (15.9 percent), businesspersons (13.3 percent), and accountants (5.7 percent). Chun, *supra* note 54, at 203. Why so many professors? "From the perspective of the controlling shareholders and their family members, professors would be far less dangerous to their interests than the senior executives of other companies, because they have fewer conflicts of interest and less knowledge about the actual business or industry." *Id.* at 206.

357. *See MILHAUPT & PISTOR, supra* note 101, at 113 (noting that the chairman of SK resumed control upon conviction and suspended sentence); Denyer, *supra* note 281 (noting lenient outcomes for the leaders of several chaebols). In the United States, government authorities have broad authority to bar persons unsuitable for service as an officer or director of a public company. *See* 12 U.S.C. §§ 248(f), 1818(e) (2018); 15 U.S.C. §§ 78u(d)(2), 77t(e) (2018). *See generally* Barnard, *supra* note 108 (discussing the SEC's power to suspend and bar service of officers and directors to public companies); Jones, *supra* note 108 (arguing that the SEC barring senior executives and outside directors would do more to deter fraud than corporate penalties and the unlikely chance of criminal prosecution).

358. Such reform would not be complicated in concept. It could broadly prohibit the use of cross-shareholding for entrenchment purpose. *See supra* note 99.

They are connected to national interest.³⁵⁹ Control of large corporate groups held in a few families with a history of symbiotic relations facilitates public control of the economy and society.³⁶⁰ A complex market of innumerable private actors, each acting under private incentives with no obligation owed to public interests—i.e., the American model—would be a difficult leap in a system of state-corporate capitalism with Korean characteristics. Because many companies in chaebol groups have been subsidized or propped up, an uncontrolled severing of cross-affiliations may result in vulnerabilities to financial distress and hostile takeover, and related economic and social disruptions from acquisitions, disposals, change in control, and changes in entity domestication. Such events would concern, to say the least, policy elites and average Koreans alike. Unless and until there is a clear, palatable alternative to chaebols, family control achieves important public outcomes. Dramatic reform of chaebol ownership structure is unlikely because Korean policymakers deem unacceptable the alternative of passing control to the aggregate of unaffiliated shareholders in the global capital markets. In Korean eyes, legitimate policy considerations are quite complex.³⁶¹

B. Culture and Corporate Governance

Culture is a significant factor in explaining any country's corporate law. This is not a generally applied concept in the American

359. See FUKUYAMA, *supra* note 69, at 141 (“[E]conomic success was pursued for reasons of national pride; nationalism was one motive, independent of economic rationale, for wanting large-scale industries in leading economic sectors.”).

360. Dwight Eisenhower's comment about pro-American dictators is apt here: “They're OK if they're *our* s.o.b.'s.” ALFRED W. MCCOY, IN THE SHADOWS OF THE AMERICAN CENTURY: THE RISE AND DECLINE OF US GLOBAL POWER 62 (2017) (emphasis in original).

361. The current Jae In Moon administration is a liberal, reform-minded administration that, thus far, seems to be largely free of the corruption that has tainted past presidents. Prior to the presidency, Moon was a human rights attorney. The following account of a key bureaucrat in the Moon administration hints at the complex dynamics of the government's policy calculus.

The man who personified the hopes for reform is Kim Sang-jo, an anti-chaebol activist brought in to head the regulatory Korea Fair Trade Commission. Kim was nicknamed the “chaebol sniper” and was violently dragged out of a Samsung shareholders' meeting in 2004 after asking about bribes paid to politicians. In government, Kim is less outspoken. He now says the chaebols are “the core of our nation's competitive power.” Rather than break them up, he wants to create incentives for voluntary “behavioral change” by amending competition law and launching investigations into cases where chaebols are suspected of breaking existing laws.

Denyer, *supra* note 281. See Bryan Harris & Song Jung-a, *South Korea Chaebol Reform Efforts Fail to Impress*, FIN. TIMES (Apr. 16, 2018), <https://www.ft.com/content/7ec84434-4124-11e8-803a-295c97e6fd0b>.

literature on corporate law, which is heavily influenced by the academic discipline of economics. But a comparative analysis here requires an examination of culture since laws are a product of the entire social-political-historical-economic milieu. Since some readers may not have substantial knowledge of Korean culture to contextualize the link, two noncorporate examples are given to illustrate the importance of culture in particular situations in specific social enterprises. The first is about playing soccer, and the other about flying airplanes. These examples are stark and illustrate an important lesson in Korean corporate culture.

Prior to the 2002 World Cup, the Korean men's soccer team had never won a World Cup game.³⁶² In that year, the country unexpectedly finished in the top four of the tournament among thirty-two countries, the first Asian team to make the semifinals of the world's most prestigious sports competition.³⁶³ The team beat traditional European powerhouses Spain, Italy, and Portugal along the way. The success was attributable to the Dutch coach Guus Hiddink.³⁶⁴ Upon taking the reins, he was surprised by the role of cultural hierarchy and social connections.³⁶⁵ Players were selected on the basis of non-meritorious factors such as social connections and seniority, and field play saw younger players passing the ball to older players out of hierarchical obligation.³⁶⁶ Hiddink disabused the team of that culture and instituted a merit-based system.³⁶⁷ Due to the legacy of the 2002 World Cup unexpected success and the breakthrough cultural change, Korea today consistently fields highly competitive teams in international competitions and produces young players who play in top European leagues.

Another example of the influence of culture in social enterprise is Korean Air's history of deadly accidents in the 1980s and 1990s.³⁶⁸ A major cause of the terrible safety record was the cockpit culture, which mirrored larger social dynamics. Subordinate crew were

362. *South Korea National Football Team*, WIKIPEDIA, https://en.wikipedia.org/wiki/South_Korea_national_football_team (last updated Apr. 8, 2020).

363. *Id.*

364. Chris Bakker, *Eternal Korean Hero Guus Hiddink*, HANZE MAG (Apr. 10, 2017), <https://hanzemag.com/eternal-korean-hero-guus-hiddink/>.

365. *Id.*

366. See SIMON KUPER & STEFAN SZYMANSKI, SOCCERNOMICS 398 (2012) ("The Korean disease, as Hiddink soon discovered, was hierarchy. In Korean soccer, the older the player, the higher his status.")

367. PAUL D. SWEENEY & DEAN B. MCFARLIN, INTERNATIONAL MANAGEMENT: STRATEGIC OPPORTUNITIES AND CULTURAL CHALLENGES 438 (5th ed. 2015). Among other things, Hiddink cut some of the older players from the squad and made a young player the captain. *Id.* at 399.

368. See *Korean Air Incidents and Accidents*, WIKIPEDIA, https://en.wikipedia.org/wiki/Korean_Air_incidents_and_accidents (listing many accidents in 1980s and 1990s) (last updated Sept. 30, 2019).

hesitant to question the captain's judgment, and this culture contributed to some of these accidents.³⁶⁹ Multiple hierarchies were at work in the cockpit. Hierarchy in corporate culture is universal. Korean culture is strongly influenced by the Confucian philosophy of social relationships and hierarchy.³⁷⁰ Korea has mandatory military service, and virtually all civilian pilots would have had military experience, many in military aviation. Only when Korean Air fixed the cockpit culture did it become one of the safest airlines in the world.³⁷¹ Cultural changes included instituting English as the formal language in the cockpit³⁷² and Western-style crew resource management protocols.³⁷³

These two examples show that certain cultural norms in the context of specific social enterprises may have pros and cons. Two poorly run social enterprises became global successes only when cultural norms ill-suited to the specific enterprise (scoring goals and flying safely) were replaced with better ones. This lesson is applicable to corporate governance. Culture is a core problem and presents the limits of corporate governance reform in Korea. Corporate control and governance cannot be explained purely in terms of property rights. Culture explains two major deficits in Korean law and

369. See SCHUMAN, *supra* note 195, at 186 ("Both Asian and non-Asian experts deemed the hierarchy within the cockpits of Korean airliners a factor behind their weak safety records."); Jonathan DeHart, *Asiana Airlines Crash: A Cockpit Culture Problem?*, DIPLOMAT (July 16, 2013), <https://thediplomat.com/2013/07/asiana-airlines-crash-a-cockpit-culture-problem/>; Don Phillips, *Is Culture a Factor in Air Crashes? Guam Probe May Raise Touchy Issue*, WASH. POST (Mar. 18, 1998), <https://www.washingtonpost.com/archive/politics/1998/03/18/is-culture-a-factor-in-air-crashes-guam-probe-may-raise-touchy-issue/7aca0396-a176-42ca-a4b0-4f6d8568115f/>.

370. See HARRISON, *supra* note 195, at 82–83.

371. Abby Ohlheiser, *Malcolm Gladwell's Cockpit Culture Theory and the Asiana Crash*, ATLANTIC (July 10, 2013), <https://www.theatlantic.com/national/archive/2013/07/malcolm-gladwells-cockpit-culture-theory-everywhere-after-asiana-crash/313442/>.

372. The use of English was an important reform for two reasons. It is the language of the aviation world. Just as important is the culture embedded in language. See BREEN, *supra* note 58 (describing the cultural significance of the word *uri* ("we" or "us")); Kim Park Nelson, Uri Nara, *Our Country: Korean American Adoptees in the Global Age*, in DIASPORIC RETURNS TO THE ETHNIC HOMELAND: THE KOREAN DIASPORA IN COMPARATIVE PERSPECTIVE 144 (Takeyuki Tsuda & Changzoo Song eds., 2019). Korean language has many levels of formalities that indicate social situations and relative position among speakers. Different forms of speech and vocabulary are used in conversations among, for example, friends, persons of different age, relatives, and businesspersons. Speaking in improper levels would be odd or rude. When the deferential form of language is used, as would be the case between superior and subordinate officers, the language conveys a hierarchy and social norms require subordination based on relative social positions.

373. See Bruce Stanley, *Korean Air Bucks Tradition to Fix Problems*, WALL ST. J. (Jan. 9, 2006, 12:01 AM), <https://www.wsj.com/articles/SB113676875085241209> (describing changes in cockpit culture and protocols brought about by foreign experts).

governance: the distrust of private enforcement, and the lack of managerial independence.

Korean corporate law exhibits a clear distrust of private shareholder enforcement. It emasculates the device for public companies through the 1/10,000 ownership rule.³⁷⁴ Only large institutional shareholders can qualify. But institutional shareholders are not good monitors. Judging by the behavior of domestic investors in the SK saga and the culture of patronage in a market dominated by oligarchic enterprises, few domestic shareholders would serve as plaintiffs. Foreign activist shareholders face legal, political, and societal hurdles. In large matters such as the SK episode, Korean courts cannot be relied upon to separate economic and business issues from national interests.³⁷⁵ Judges are not insulated from the influence of other branches of government, the press, and possibly populist backlash. Given the general unpopularity of chaebols among average Koreans, retail shareholders are a pool of motivated plaintiffs if the right economic incentives are present, i.e., feasible attorney fees and costs³⁷⁶ and an impartial judiciary on these matters. This policy choice behind the restrictive standing rule obviously expresses a dim view of the American model of private attorney general. Why?

A culture of enforcement through private litigation is distinctly American.³⁷⁷ Korea does not have a long history of reliance on litigation. Also, the concept of the corporation as a separate and distinct entity subject to harm by persons therein is a relatively foreign concept in Korea. The modern legal structure of corporate law is linked to industrialization. In this regard, Korean industrialization dates back only to the 1960s, and companies then were closely-held, family businesses.³⁷⁸ The concept of the public company is relatively new. Among some Koreans, these companies are not considered owned by the public, but by the families of founders, or at least their rule should continue irrespective of the niceties of the legal structure of ownership and the formalities of corporate law.³⁷⁹ The older generation still harbors some sense of goodwill toward the original founders for their substantial contribution to nation-building and the rise of modern Korea.³⁸⁰ Another social factor is that Korean society

374. COMMERCIAL ACT, art. 542(6), (Korea Legislation Research Institute 2019) (S. Kor.).

375. See MILHAUPT & PISTOR, *supra* note 101, at 112.

376. COMMERCIAL ACT, art. 405(1), (Korea Legislation Research Institute 2019) (S. Kor.).

377. JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 1* (2015).

378. Aldag, *supra* note 124.

379. See BREEN, *supra* note 58, at 218 (“Owners started floating their companies, but still conceived of them as their own. People who bought shares were seen as gamblers without any rights, rather than co-owners.”).

380. *Id.*

has deep roots in the Confucian notion of social order and hierarchy.³⁸¹ These cultural factors subjugate the role of shareholders even when the aggregate of unaffiliated shareholders are the true equity owners. Nationalistic sentiments can be a factor if a foreign investor is involved. Legal means exist to challenge foreign acquisitions that do not have at least tacit approval.³⁸² In sum, Korean law and culture relegate most shareholders to virtually no role in governance: domestic institutional shareholders are passive and pliant;³⁸³ foreign are unappreciated when they seek influence without consent from important constituents; retail shareholders are shut out completely.

Culture also explains the lack of independence. The concept of the firm as an independent legal person is strongly rooted in American law.³⁸⁴ But the abstraction of owing duties to the corporation itself has not taken deep root in Korean corporate governance. In practice, managers believe they owe loyalty to the chaebol families. Several cultural factors preempt the abstract rule of legal personhood.

381. While the Confucian concept of hierarchy works detrimental effects at the micro-level of corporate governance, it may impart certain benefits at the macro-level of a state-led capitalistic system. See HARRISON, *supra* note 195, at 116 (noting that while Confucian philosophy have been associated with authority, hierarchy, and order, it also supported “education, merit, discipline, and work, coupled with the Taoist tradition of frugality, [which] have been an important driving force in the immense achievements in human progress in East Asia during the past forty years”); see also Teemu Ruskola, *What Is a Corporation? Liberal, Confucian, and Socialist Theories of Enterprise Organization (and State, Family, and Personhood)*, 37 SEATTLE U. L. REV. 639, 645–47 (2014).

382. The Foreign Investment Promotion Act protects foreign investments. See FOREIGN INVESTMENT PROMOTION ACT, Act No. 16131, (Korea Legislation Research Institute 2019) (S. Kor.) But it proscribes foreign investment “[w]here the activity threatens the maintenance of national safety and public order.” *Id.* art. 4(2)(1). “National safety” seems to relate to “national security” interests. Enforcement Decree of the Foreign Investment Promotion Act, Presidential Decree No. 28212, July 26, 2017, art. 5(1)2, (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=44628&lang=ENG. The scope of “public order” is less clear. Presumably, it could encompass the acquisitions of large companies if they are deemed to disrupt the national economy and welfare. Also, article 4(2)3 has a catch-all provision stating that foreign investment is prohibited “[w]here the activity violates the [country’s] acts and subordinate statutes.” *Id.* art. 4(2)3.

383. RHO, *supra* note 109, at 105.

384. See *Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 483 (Del. 1945) (“Few principles of corporation law are clearer than that, as a general rule, a corporation is an entity distinct from its stockholders.”). Even in noncorporate entities, which more closely align owners to the firm, the principle of entity personhood is strongly rooted in law. See, e.g., UNIF. LTD. LIAB. CO. ACT § 104 (2006); UNIF. LTD. P’SHP ACT § 104 (2001); UNIF. P’SHP ACT § 201 (1997). The concept of legal personhood even reaches constitutional dimensions such that corporations have some constitutional rights. See *Citizens United v. Fed. Election Com’n*, 558 U.S. 310, 342 (2010).

One is power and patronage. Controlling families are the highest echelon of Korean society.³⁸⁵ One need look no further for compelling evidence than the practice of corporate leadership ascension, which resembles an *ancien régime* of hereditary title rather than an embrace of meritocracy and management talent. Chaebols provide patronage to the entire corporate business community including managers, directors, and professional advisers such as bankers and lawyers.³⁸⁶ Although Korea is a large advanced economy, the market and professional circles are actually small. The social fabric is tightly knit. Korean society in general is highly interconnected with only several degrees of separation among the entire population. Social norms create a strong expectation of group conformity.³⁸⁷ Independence under American law is an individualized inquiry. But this underlying assumption of a culture based on strong individualism may not transplant well. In Korea, it is possible, and probable, that the professional managerial class is systemically beholden.³⁸⁸ Social and business cultures are major impediments to better governance. Dependence is not something that can be eliminated by just legal fiat.

There is more than just careerism. The risk of board insularity and passivity is particularly high in a society with a strong Confucian tradition.³⁸⁹ Korean society was historically an aristocracy, and authoritarian rule was the basis of post-war political governance until the recent transition to civilian government.³⁹⁰ Patriarchal lineage is respected.³⁹¹ This culture is still strong among the older generation of Koreans who likely populate the senior managerial ranks today. Corporate managers perceive an obligation flowing to controlling persons and families. When controlling persons dominate and one's career depends on patronage, the abstractions of the corporation as a

385. See Tomasz Sleziak, *The Influence of Confucian Values on Modern Hierarchies and Social Communication in China and Korea: A Comparative Outline*, 8 KRITIKE 207, 217 (2014).

386. See MILHAUPT & PISTOR, *supra* note 101, at 116–19.

387. John M. McGuire, *Why Has the Critical Thinking Movement Not Come to Korea*, 8 ASIA PAC. EDUC. REV. 224, 228 (2007).

388. See Chun, *supra* note 54, at 205–06 (“[Families] made important strategic and managerial decisions and hired/fired senior executives, leaving little room for growth of experienced professional managers. There is only a limited pool of senior businessmen who are widely respected in the Korean business community.”).

389. See Black et al., *supra* note 12, at 557 (noting “no tradition of active [board] discussion,” lack of experience among directors, and concern “about the effective independence of many independent directors”); BREEN, *supra* note 58, at 224 (noting culture and ritual of power that “the ordinary Westerner would find peculiar” such as for example “even the top executives stand to attention when the chairman walks in”).

390. See generally LEE, *supra* note 339 (describing the aristocratic and authoritarian tradition in Korean history).

391. See Sleziak, *supra* note 385, at 222.

separate and distinct entity and the aggregate interest of all unaffiliated shareholders are merely textbook concepts.³⁹²

It is almost trite to say that a culture of independence in the boardroom is better than one of obedience and passivity to the authority of specific persons. Korean corporate governance suffers from an ill-suited culture. Cultural change does not take place unless strong forces demand them. In the case of Korean soccer, that force was the absolute authority of a coach who demanded the elimination of seniority and patronage on the pitch.³⁹³ In the case of Korean Air, that force was the corporate survival instinct.³⁹⁴ In the case of Korean corporate governance, that force may be a strong system of accountability for breaches of the duty of loyalty when the local market is not highly competitive and the market for corporate control is nascent.

VI. TOWARD EFFICIENCY WITH KOREAN CHARACTERISTICS

The Korean corporate market today is at a crossroads. Since 2018, it has seen transformational leadership ascension of the third and fourth generation of scions in the largest chaebols, and the consequences may reverberate in the decades to come. The fate of the economy now lies in the talent and merit of the grandchildren of founders. Leadership in public companies should not be a birthright, but in a chaebol system it unfortunately is. If so, how can inefficiencies and abuses be mitigated given endogenous conditions?

A. *Enforcement as Catalyst for Culture Change*

There is a wide chasm between the statement of duties, which resembles American doctrine, and enforcement in the Korean system.³⁹⁵ The incentive system conflates loyalties to the company and families. Real institutional and cultural factors limit compliance with well-formulated statements of duty. Absent legal enforcement, independence cannot be achieved systemically. In the Korean situation, board independence and derivative suits are causally linked.³⁹⁶ In other words, enforcement can instill a culture of independence that competes with social norms of hierarchy and

392. See MILHAUPT & PISTOR, *supra* note 101, at 114–16 (discussing the “chaebol problem” within Korean corporate governance).

393. See KUPER & SZYMANSKI, *supra* note 366, at 398.

394. See Ohlheiser, *supra* note 371.

395. The supremacy of shareholder rights is “conspicuous” on the surface in Korean law, but courts are reluctant to introduce concepts of fiduciary duties in its rulings. Kim & Park, *supra* note 142, at 24–25.

396. In the United States, board independence and derivative suits are independent devices. This is seen in the demand futility doctrine, which precludes a suit if the board was independent and disinterested. See *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984).

patronage. The problem is aligning the rules of law with the actual practice of governance.

From the American perspective, the first thought is the derivative suit. Korea adopted the device, but in the most tepid way, i.e., the 1/10,000 rule.³⁹⁷ If the fear is exposing companies to crank or misguided shareholders, a policy option could be to replace the rule with a watered-down minimum investment rule. The goal would be to include some retail shareholders while still excluding most: for example, a rule of ₩50,000,000 (a little less than \$50,000 under current exchange rate). Since litigation is unpleasant, a shareholder would have a rational basis for pursuing a derivative suit. That motivation has social utility.³⁹⁸

Egalitarian inclusiveness has an instrumental benefit. The Korean corporate world is still insular and tightly connected by business, social, family, school, and class relationships.³⁹⁹ These connections are generally very important in Korean society.⁴⁰⁰ Lawsuits among this class may rile prevailing social norms and undermine one's standing in the elite stratum of society.⁴⁰¹ Given this real dynamic, it is not surprising at all that the number of derivative lawsuits in Korea is small.⁴⁰² However, such constraints may not bind foreign institutional shareholders or Korean retail shareholders. The hypothesis on retail shareholders is based on several factors: the history of mass political activism against past authoritarian rule and political corruption,⁴⁰³ the strong information networks among Koreans, their strong sense of collectivism and common vested interest in the national economy,⁴⁰⁴ and their ambivalence, if not

397. COMMERCIAL ACT, art. 542(6), (Korea Legislation Research Institute 2019) (S. Kor.).

398. See *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999).

399. See *supra* note 339 (describing Korean society).

400. See Pritchard, *supra* note 56, at 82 (noting that boards are filled with insiders and friends).

401. See RHO, *supra* note 109, at 107 (noting that some institutional shareholders "can hardly exercise their voting right against the management, because they need to maintain business relations with the corporation").

402. See Black et al., in KOREAN BUSINESS LAW, *supra* note 5, at 28; see generally Ok-Rial Song, *Improving Corporate Governance Through Litigations: Derivative Suits and Class Actions in Korea*, in TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA (Hideki Kanda, et al. eds., 2008) (discussing derivative suits in South Korea).

403. See *supra* note 323.

404. Koreans have a strong sense of collective unity. See *supra* note 339 (describing Korean nationalism). This sentiment derives from both nationalism and Confucianism. See Hong, *supra* note 339, at 32–48 (attributing the strong sentiment of "we" in Korean society to the Confucian tradition); see also Ruskola, *supra* note 381, at 645 ("Perhaps the most significant difference between liberal and Confucian worldviews . . . is that while the former seeks to divide social life into separate spheres, the aspirational norm of Confucianism is *unity*.").

hostility, toward chaebols. The well-to-do retail shareholder, who is not misguided, would serve well as a private monitor of the worst abuses so long as an effective and open litigation system can support the proper use of derivative litigation.

Actions for loyalty violations can result in personal liability.⁴⁰⁵ For controlling persons, the risk is clear: they will pay out of their own pocket.⁴⁰⁶ For a director who may feel beholden to controlling persons, a real risk of legal liability could counteract a corporate culture of conformity and lack of independence in Korean companies. With an effective litigation system, legal liability may be the strong force that begets managerial independence.

To some extent, the above discussion may be academic. It may be naïve to assume that policymakers and business elites would ever allow an American-style private attorney general model to flourish. Korea is not alone. In many advanced nations, the American litigation model of enforcement is viewed with skepticism. The discussion also assumes legal institutions that can mimic the American model and a sterile socio-political environment with respect to judicial workings. These assumptions may not hold. The private attorney general model is not the traditional Korean way.⁴⁰⁷

Korea is also a civil law jurisdiction.⁴⁰⁸ The structure of the legal system has institutional implications for the role of the judiciary.⁴⁰⁹

At an ideological or cultural level, the civil-law tradition assumes a larger role for the state, defers more to bureaucratic decisions, and elevates collective over individual rights. It casts the judiciary into an explicitly subordinate role. In the common-law tradition, by contrast, judicial independence is viewed as essential to the protection of individual liberty.⁴¹⁰

This thought well describes, at least, the Korean situation. The judiciary is subordinate to the larger role of the state in matters of corporate law and governance and the management of the

405. See *supra* notes 175–78 and accompanying text.

406. See *supra* notes 177 & 179.

407. The state has always been strong in Korea. The society is strongly Confucian and has a hierarchy between the state and the individual. See *supra* note 196. Post-war Korean government has roots in authoritarian dictatorship. LEE, *supra* note 339, at 381–82. Under civilian rule, the state still controls and regulates many facets of society. Korean social organization and culture are not based on American-style individualism and an extensive rights-based order as a bulwark against state control.

408. See *supra* note 145 and accompanying text.

409. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503, 511 (2001).

410. *Id.*

economy.⁴¹¹ One expects that it defaults to supporting domestic industry and the state.⁴¹²

The civil law tradition of Korea does not recognize the principle of *stare decisis*, even if lower courts tend to follow higher court rulings.⁴¹³ Consistent with the civil law tradition, opinions are in brief form and do not typically develop complex bodies of law as in the common law tradition.⁴¹⁴ Until recently, Korean judges were academically trained and appointed very early in career judicial tracks, and they did not have work or professional experience in business as attorneys or otherwise.⁴¹⁵ It remains a question on whether courts can develop laws and legal principles through case-by-case adjudications, the hallmark of Delaware corporate law.⁴¹⁶

It also remains a question of whether the courts can sufficiently adjudicate business litigation involving control of key economic assets in a way that does not weigh national identity as a factor in decision-making. One has real doubt in light of rulings in the SK litigation⁴¹⁷ and the repeated favorable treatment of chaebol families when they run afoul of the law.⁴¹⁸ The suggestion is not that the judiciary is corrupt, though that is a possibility as well among some judges,⁴¹⁹ but that societal expectations are so ingrained in the culture and identity that it may be unrealistic to expect dissociation of these influences in decision-making in a society that is so tightly bound together in webs of social relationships, obligations, and expectations. To be clear, the critique of Korean courts here is not based on a comparison with the American judiciary on the dubious assertion that the American judicial system is somehow better. One may fairly question whether intrinsic biases affect the judiciaries of both nations. In the United States, that question is whether judicial independence is free of the corrupting influence of intranational politics in a milieu of increasingly polarization of politics in general and the judicial

411. See *supra* notes 58–59 and accompanying text.

412. THOMAS KALINOWSKI, ET AL., SUSTAINABLE GOVERNANCE INDICATORS, 2015 SOUTH KOREA REPORT 29 (2015).

413. Kipyoo Kim, *Overview*, in INTRODUCTION TO KOREAN LAW, *supra* note 58, at 16.

414. Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1448 (2012).

415. Kim & Park, *supra* note 142, at 25. Since 2009, Korea has required judges to have at least five years of practice experience prior to judicial appointment. Interview with Judge Yunkyung Bae, Asian Law Centre Newsletter, The University of Melbourne (Dec. 2018).

416. See *supra* note 212.

417. See *supra* note 340 and accompanying text.

418. See *supra* note 320 and accompanying text.

419. See Choe Sang-Hun, *Ex-Chief Justice of South Korea Is Arrested on Case-Rigging Charges*, N.Y. TIMES (Jan. 23, 2019), <https://www.nytimes.com/2019/01/23/world/asia/south-korea-chief-justice-japan.html>.

appointment process in particular.⁴²⁰ In Korea, that question is whether judicial independence is free of the nationalism that is a defining trait of the Korean society when the political and economic considerations are inter-national.⁴²¹ Judicial independence in Korea is weak in the context discussed here by virtue of its unique political economy and sociology of its institutions.⁴²²

There is little doubt that the many institutional, social and cultural barriers cast a long shadow on the feasibility of private litigation as an effective monitoring device.

B. *Enforcement with Korean Characteristics*

If private litigation is not palatable, what could enforcement look like beyond ad hoc actions brought by government regulators and prosecutors? A feasible answer may lie in the National Pension Service (“NPS”).⁴²³ The NPS is a government-controlled pension fund, a social insurance program.⁴²⁴ It is the Korean equivalent of Social Security. Under the National Pension Act, it is governed under the Ministry of Health and Welfare.⁴²⁵ It is one of the largest institutional shareholders in the world⁴²⁶ and the largest shareholder in corporate Korea.⁴²⁷

420. See generally Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) (outlining a new framework for Supreme Court reform to preserve legitimacy); Matthew W. Green Jr. et al., *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461 (2012) (describing the eroding effect of politicization on judicial independence); Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195 (2015) (discussing the increased politicization of the Supreme Court and presidential nominations in recent years).

421. See *supra* note 149.

422. Rodrigo G. Quintero, *Judicial Review in the Republic of Korea*, 34 REVISTA DE DERECHO 1, 4 (2010).

423. See Kim Jaewon, *South Korea's Moon Turns Pension Service into Chaebol Watchdog*, NIKKEI ASIAN REV. (Feb. 1, 2019), <https://asia.nikkei.com/Economy/South-Korea-s-Moon-turns-pension-service-into-chaebol-watchdog>.

424. See generally *NPF at a Glance*, NAT'L PENSION SERV. INV. MGMT. https://fund.nps.or.kr/jsppage/fund/mcs_e/mcs_e_08_01.jsp (last visited July 3, 2020).

425. *Fund Governance*, NAT'L PENSION SERV. INV. MGMT. https://fund.nps.or.kr/jsppage/fund/ifm_e/mpc_e_01.jsp (last visited July 28, 2020).

426. See Eun-Young Jeong, *Want to Oversee the World's Third-Largest Pension Fund? There's Just One Catch*, WALL ST. J. (Sept. 11, 2018, 10:57 AM), <https://www.wsj.com/articles/want-to-oversee-the-worlds-third-largest-pension-fund-theres-just-one-catch-1536677863> (stating that the NPS is the world's third-largest pension fund with \$565 billion in assets, more than the GDP of Belgium).

427. See *supra* note 336.

The NPS's votes are extremely important in corporate affairs.⁴²⁸ That alone could be used to promote real reform of corporate governance if the NPS exercises voting power with an eye toward efficiency. It could serve in a role that represents the interests of an aggregate of unaffiliated shareholders. In addition to voting, the NPS could be a plaintiff in derivative actions. Its publicness vitiates the concern over the American model of private litigation. It negates the issue of nationalism and bias in Korean courts, particularly when no foreign investors are involved or have a stake in the dispute.

Despite this real potential, there are hurdles to reform. The NPS is not free from the corruption that has plagued other parts of the Korean government, particularly with respect to business dealings with chaebols.⁴²⁹ Recently, the head of the government agency that oversees the NPS was indicted for improperly influencing the consolidation of control by the family of the Samsung chaebol.⁴³⁰ The NPS has historically sided with management in disputes involving other shareholders.⁴³¹ In a recent prominent dispute between Hyundai and an American activist hedge fund, the NPS again sided with management.⁴³² Like management, domestic shareholders, and

428. See Jeong, *supra* note 426 (“The job can be intensely political. [T]he government-run pension service often casts the deciding vote in corporate decisions.”).

429. See, e.g., Martin & Jeong, *supra* note 106 (discussing pattern of Korean business corruption).

430. Youkyung Lee, *South Korea's Ex-Health Minister Found Guilty of Swaying Samsung Vote*, CHI. TRIB. (June 8, 2017, 7:36 AM), <https://www.chicagotribune.com/business/ct-south-korea-ex-health-minister-guilty-samsung-20170608-story.html>. See Eun-Young Jeong, *South Korea Indicts Pension Chief Involved in Samsung Merger*, WALL ST. J. (Jan. 15, 2017, 9:11 PM), <https://www.wsj.com/articles/south-korea-indicts-pension-chief-involved-in-samsung-merger-1484532698>; Lee Ji-Yoon, *NPS May Apologize Over Its Vote for Samsung Merger in 2015*, INVESTOR (Apr. 9, 2018, 5:40 PM), <http://www.theinvestor.co.kr/view.php?ud=20180409000815>.

431. See Cain, *supra* note 336 (“For decades, Korean fund managers have balked at ‘interfering in management’ and have ‘signal[ed] – yet again – that the chaebol heirs have a powerful protector.’”). This policy has been at the expense of value maximization. *Id.* (“It’s under more pressure than ever to exercise its shareholding authority to demand stronger returns and better leadership of the companies it invests in.”).

432. See Hyunjoo Jin, *South Korean Pension Fund Deals Blow to Elliott in Hyundai Fight*, REUTERS (Mar. 14, 2019, 12:38 AM), <https://www.reuters.com/article/us-hyundai-motor-nps/south-korean-pension-fund-deals-blow-to-elliott-in-hyundai-fight-idUSKCN1QV0DO> (“Elliott Management received a potentially fatal blow in its proxy fight to shake up South Korea’s Hyundai Motor Group . . . [when the NPS] said it would vote down the U.S. hedge fund’s proposals.”); Song Jung-a, *South Korean Pension Fund Backs Hyundai in Showdown with Elliott*, FIN. TIMES (Mar. 14, 2019), <https://www.ft.com/content/fdb42ece-4624-11e9-b168-96a37d002cd3>. Elliott, managed by billionaire Paul Singer, invested over \$1 billion in Hyundai. Scott Deveau, *Elliott’s \$1 Billion Hyundai Stake Adds to Korea Inc. Battle*, BLOOMBERG (Apr. 3, 2018, 10:25 PM),

courts, the NPS is affected by similar cultural and social dynamics. The difference here is that reform at the level of *one* institution can impart *systemic* reform on the entire corporate market, such is the potential power of the NPS as one of the largest shareholders in the world. Stated differently, if a shareholder holds 5-10 percent of the entire market in a chaebol system where control depends on a delicate network of alliances, that shareholder is a kingmaker. Thus, reform can be surgical with global effect.

Lastly, a potentially effective reform may be to remove the NPS from the auspices of the Ministry of Health and Welfare and place it in the Ministry of Strategy and Finance. Unless the current structure is attributable to bureaucratic turf battles or political patronage, it must have been based on the reasoning that welfare and insurance programs should belong to the portfolio of the agency dealing with social welfare. However, in light of the core role of the NPS as the most influential shareholder in Korea, the better fit is an agency that actually has an expertise in finance and industrial strategy. The Korean scheme seems to recognize the connection between finance and welfare because the Ministry of Strategy and Finance provides the Ministry of Health and Welfare certain guidelines on NPS fund management.⁴³³ These agencies have bureaucrats with different education, training, and analytical outlooks—a total package of different skill sets.⁴³⁴ In the American context, if the government were to own large stakes in corporations and desire efficiency and return on investment, would it place control in the Department of Health and Human Service or an agency like the Department of Treasury? The Ministry of Strategy and Finance could potentially consider different priorities in exercising its votes and rights as a shareholder and custodian of the retirement savings of all Koreans. It would more likely be a better shareholder and monitor.

VII. A LESSON FOR AMERICAN CORPORATE LAW AND GOVERNANCE?

Corporate law serves internal political economy and social order, which may produce different priority interests and attendant costs. The discussion has assumed that fundamental American rules and principles, the basis for a comparative analysis here, have remained

<https://www.bloomberg.com/news/articles/2018-04-03/elliott-takes-on-korea-inc-again-with-1-billion-hyundai-stake>.

433. See *Fund Governance*, NAT'L PENSION SERV. MGMT. (2018), https://fund.nps.or.kr/jsppage/fund/ifm_e/mpc_e_01.jsp.

434. *Compare Mission*, MINISTRY ECON. & FIN. (last updated Apr. 1, 2018), <http://english.moef.go.kr/co/selectAboutMosf.do?boardCd=C0004> (defining the Ministry's mission as "developing a strong economy" and "work[ing] to ensure macroeconomic and financial stability"), *with Vision & Goals*, MINISTRY HEALTH & WELFARE (last visited Apr. 7, 2020), https://www.mohw.go.kr/eng/am/am0103.jsp?PAR_MENU_ID=1001&MENU_ID=100116 (expressing the Ministry of Health and Welfare's goals as navigating social insurance, individualized care, and Korean healthcare challenges).

stable, perhaps axiomatic and at the point of end of history.⁴³⁵ The concepts of efficiency, fiduciary duties, legal personhood, derivative suits, shareholder primacy, and independence are firmly entrenched ideas about governance.⁴³⁶

Since the production of law is a function of political economy and social order, there is no guarantee that concepts once thought to be axiomatic will continue unchallenged in the political and legal systems. This is certainly not a prediction of the future.⁴³⁷ Rather, the forty-year neoliberal turn of corporate law and governance, marked from the beginning of the Reagan era, grounded in concepts of private property, shareholder wealth maximization, and efficiency, may confront a future in which these interests may not take priority, and attendant costs may be deemed to be acceptable in a cost-benefit analysis in a social compromise.

Most will agree that the United States has undergone profound social, political, and economic changes of late. Wealth inequity has continued its upward ascent to a point now where it is the highest since the Gilded Age.⁴³⁸ The financial crisis of 2008-2009 and the subsequent Great Recession devastated large swaths of the middle class in the United States.⁴³⁹ Since then, the stock market has experienced one of the longest bull runs in history, and the small segment of society who own capital has gotten much wealthier.⁴⁴⁰

435. See generally ELIZABETH WARREN, *A FIGHTING CHANCE* (2015) (describing Senator Warren's perception of the American economy).

436. See Rhee, *supra* note 224, at 1951, 1953, 1978.

437. "Prediction is very difficult, especially if it's about the future." Michael Cavna, *Niels Bohr Doodle Google: Great Quotes from a Man at the Nucleus of Atomic Understanding*, WASH. POST (Oct. 7, 2012), https://www.washingtonpost.com/blogs/comic-riffs/post/niels-bohr-doodle-google-12-great-quotes-from-a-man-at-the-nucleus-of-atomic-understanding/2012/10/07/1000dc02-1095-11e2-ba83-a7a396e6b2a7_blog.html (quote by Niels Bohr, Nobel Prize (1922) in physics and founder of quantum mechanics).

438. Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014), <https://www.nybooks.com/articles/2014/05/08/thomas-piketty-new-gilded-age/> (reviewing PIKETTY, *supra* note 270).

439. Moritz Kuhn et al., *Research: How the Financial Crisis Drastically Increased Wealth Inequity in the U.S.*, HARV. BUS. REV. (Sept. 13, 2018), <https://hbr.org/2018/09/research-how-the-financial-crisis-drastically-increased-wealth-inequality-in-the-u-s>; Nelson D. Schwartz, *The Recovery Threw the Middle-Class Dream Under a Benz*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/business/middle-class-financial-crisis.html>.

440. Patricia Cohen, *We All Have a Stake in the Stock Market, Right? Guess Again*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/business/economy/stocks-economy.html> ("A whopping 84 percent of all stocks owned by Americans belong to the wealthiest 10 percent of households."). Even in the middle of the Covid-19 pandemic in the first half of 2020, the stock market has, inexplicably to many, recovered most of the losses from the initial crash and in fact the Nasdaq reached new all-time highs. A major factor is the unprecedented

However, consumer debt continues to increase, is now more than the pre-financial crisis levels, and is more than the revenues of the 500 largest American companies combined and two-thirds of United States GDP.⁴⁴¹ Government debt has rapidly increased and now surpasses the milestone of 100 percent of GDP.⁴⁴² In the first half of 2020 during the writing and editing of this article, two extraordinary events occurred: first, the Covid-19 pandemic has killed more than 123,000 Americans in just six months, caused unemployment and economic distress for millions of workers not seen since the Great Depression, and prompted unprecedented intervention in the markets by the Federal Reserve to inflate asset values in the capital markets; second, the killing of George Floyd, an unarmed handcuffed black man, at the knees of police has sparked transformational consciousness of long-existing, continuing racism and social injustice. In the face of these tectonic economic and social changes in just the past two decades, political outcomes have swung in unpredictable directions and will likely do so in the future.

With respect to corporate law and governance, two recent statements portend a possible period of uncertainty triggered by large changes in societal conditions. One is a bill titled the Accountable Capitalism Act, sponsored by Senator Elizabeth Warren, a former chaired professor at the Harvard Law School and a plausible contender for the Democratic nomination for president for the 2020 election⁴⁴³ and who may be a serious candidate in future presidential

intervention and bailout of the capital markets by the Federal Reserve. See Jeanna Smialek & Peter Eavis, *With \$2.3 Trillion Injection, Fed's Plan Far Exceeds Its 2008 Rescue*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/04/09/business/economy/fed-economic-rescue-coronavirus.html>. As of the first half of 2020, the result has been a disconnect between the superficial appearance of a healthy stock market and the real ill of the greater economy in which unemployment is at a level not seen since the Great Depression.

441. Research & Statistics Grp., Ctr. for Microeconomic Data, *Household Debt and Credit Report 2019: Q2*, FED. RES. BANK OF N.Y. 3 (Aug. 2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf (noting \$13.86 trillion in consumer debt); *Fortune 500 2018*, FORTUNE, <https://fortune.com/fortune500/2018/> (last visited July 28, 2020) (noting that Fortune 500 companies earned revenue of \$12.8 trillion, accounting for two-thirds of United States GDP); Alexandre Tanzi, *U.S. Household Debt Exceeds \$14 Trillion for the First Time*, BLOOMBERG (Feb. 11, 2020, 11:03 AM), <https://www.bloomberg.com/news/articles/2020-02-11/u-s-household-debt-exceeds-14-trillion-for-the-first-time>.

442. *Federal Debt: Total Public Debt as Percent of Gross Domestic Product*, FED. RES. BANK ST. LOUIS (last updated Mar. 26, 2020), <https://fred.stlouisfed.org/series/GFDEGDQ188S>. See Jeff Cox, *US Deficit Surges 25% in Fiscal 2020 and Is \$1.1 Trillion Over the Past Year*, CNBC (Feb. 12, 2020, 6:10 PM), <https://www.cnbc.com/2020/02/12/us-deficit-swells-25percent-in-fiscal-2020-up-1point1-trillion-over-past-year.html> (stating the total national debt as \$23.3 trillion).

443. Senator Warren, along with Senator Amy Klobuchar, were endorsed by the New York Times to be the Democratic candidates for president. Editorial Board, *Amy Klobuchar and Elizabeth Warren: The Democrats' Best Choices for*

elections. The act would require a federal charter for large corporations.⁴⁴⁴ It imbues these companies with “the [corporate] purpose of creating a general public benefit” defined as “a material positive impact on society.”⁴⁴⁵ This proposed law would constitute a revolution in American corporate law for at least two reasons.⁴⁴⁶ It would preempt Delaware’s franchise in corporate law.⁴⁴⁷ It would also override the rule of shareholder primacy. This proposal is not made by a fringe politician or a misguided academic touting quack theories, but by one of the most prominent politicians and a former major presidential candidate running on a progressive campaign agenda.

Another portent is a recent statement of corporate purpose by the Business Roundtable.⁴⁴⁸ It proclaims that corporations should commit to customers, employees, suppliers, communities, and shareholders: “Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”⁴⁴⁹ This statement purports to reject shareholder-centrism. It reiterates a classic formulation of stakeholder theory.⁴⁵⁰ The statement should be taken seriously in light of the association’s status and prominence. But a more hard-nosed view might be that it is less a genuine commitment for social

President, N.Y. TIMES (Jan. 19, 2020), <https://www.nytimes.com/interactive/2020/01/19/opinion/amy-klobuchar-elizabeth-warren-nytimes-endorsement.html>. As of the writing and editing of this article, Senator Warren is on Biden’s shortlist for vice president selection. See Alexander Burns & Jonathan Martin, *Biden’s Vice-Presidential Search: Who’s on the List and Where It Stands*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/13/us/politics/joe-biden-vice-president.html>.

444. Accountable Capitalism Act, S. 3348, 115th Cong. § 4(a)(1)(A) (2018).

445. *Id.* § 5(a)(1), (b)(2).

446. The proposed statute would provide more revolutionary concepts. It mandates that at least 40 percent of the board shall be elected by employees. *Id.* § 6(b)(1). It regulates executive compensation and political spending. *Id.* §§ 7, 8. It provides a provision for revocation of the federal corporate charter for harms to stakeholders. *Id.* § 9(c)(2)(A)(i).

447. See generally Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003) (arguing that the threat to Delaware’s dominance is the federalization of corporate law).

448. The Business Roundtable is a trade organization comprised of the chief executive officers of leading companies. *Members*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us/members> (last visited July 28, 2020).

449. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

450. See R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 6 (1984) (describing the “managerial view” as an obligation “to simultaneously satisfy the owners, the employees and their unions, suppliers and customers”).

and economic change and more a public relation strategy in face of current social and political pressures.⁴⁵¹ Irrespective of which view of motivation one believes, the important point is that the most prominent trade association representing leading figures in corporate America felt compelled to make a high profile statement that departs from established dogma, one that has enriched the shareholder and managerial classes for the past four decades of the neoliberal turn.

Senator Warren and the Business Roundtable announced similar policies that, if realized, would bring about a revolution in a fundamental rule of American corporate law and governance.⁴⁵² One should not overstate the import of mere proposals for political gain. But it is not naïve to assess that the apparent confluence of thought from the antipodes of the ideological spectrum may indicate that endogenous factors of political economy and social order are stressed at the moment at least or may even be changing in some fundamental ways. For one, the uncertain state may present an opportunity to pursue a genuine political commitment to a deeply held ideal;⁴⁵³ for the other, it may require a measured public relations response to felt pressure in a time of social uncertainty and political transformation.

451. See Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), <https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric>. The statement has good public relations optics for the current moment of political times. If supported by other acts—e.g., proposals to sever the strong connection between executive pay to shareholder value—the statement could be seen as more credible. See Rhee, *supra* note 224, at 1980–81 (“The law and the legal system link the stock value of shareholders and the architecture of the corporate system and capital markets. These linkages clearly affect managerial incentive to maximize profit.”). Some critiques take the Business Roundtable’s statement on face value. See Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, CORNELL L. REV. (forthcoming 2020), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978; George Shultz *et al.*, *Some Thoughts on the Business Roundtable’s Statement of Corporate Purpose*, REALCLEAR MARKETS (Feb. 5, 2020), https://www.realclearmarkets.com/articles/2020/02/05/some_thoughts_on_the_business_roundtables_statement_of_corporate_purpose_104069.html.

452. The Business Roundtable may not be alone among those on the same region of the political spectrum. Senator Marco Rubio, a Republican Senator representing Florida, has recently proposed a case for “common-good capitalism.” Marco Rubio, *The Case for Common-Good Capitalism*, NAT’L REV. (Nov. 13, 2019, 6:30 AM), <https://www.nationalreview.com/2019/11/the-case-for-common-good-capitalism/>. He argues: “What we need to do is restore common-good capitalism: a system of free enterprise wherein workers fulfill their obligation to work and enjoy the resultant benefits, and businesses enjoy their right to make a profit and reinvest enough to create high productivity jobs, which is what I mean by dignified work for Americans.” This may require sacrificing efficiency in the traditional way that concept has been defined, i.e., profits and shareholder wealth: “Common-good capitalism also means recognizing that what the market determines is most efficient may not be best for America.” *Id.*

453. See *supra* note 435.

With these observations in mind and recognizing transformational changes on both sides of the Pacific, we can comment on the potential future of corporate law and governance in Korea and the United States. With respect to the Korean system, the country could incrementally move toward American rules and principles as the social cost of chaebol inefficiency becomes too great to bear. Change may precipitate when society reaches a tipping point on the perception of corporate purpose: that is when the chaebols no longer serve primarily the national interest of supporting an economy that lifts all boats from the tragedies of the twentieth century, but instead only the private interest of aggrandizing the power and wealth by a few plutocratic families long-chosen to serve a public interest through the grant of the public fisc. If that social perception crosses the tipping point, the legitimacy of the chaebol system would be irredeemably compromised, and only corruption would remain as the sole explanation of a very peculiar, inefficient corporate and economic system.

With respect to the American system, it is thought by some that American corporate law has reached “the end of history.”⁴⁵⁴ But such proclamations, in law or political philosophy,⁴⁵⁵ seem in hindsight parochial to the time. In view of the current moment of history, if endogenous conditions continue to change in basic ways, it cannot be that the American legal system remains at some logical, natural end of the neoliberal turn in the late twentieth century. A glimmer of this idea is seen in the announcements of Senator Warren and the Business Roundtable. They proposed similar changes to the fundamental rule of shareholder primacy that has prevailed in American law and governance for the past forty years.⁴⁵⁶ These statements may be the chink in the armor of axiom. Until recently, the possibility of such proposals advanced by bookends on the ideological spectrum at rarefied levels of policy influence would have been inconceivable—as improbable as the rise of Donald Trump and Bernie Sanders in presidential politics was just a few years ago. Yet here we are. If the United States continues down an uncertain path in history, culture, economy, and politics, and as the pressures of the time build, it is not hard to imagine among the possibilities an

454. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value. This emergent consensus has already profoundly affected corporate governance practices throughout the world. It is only a matter of time before its influence is felt in the reform of corporate law as well.”).

455. See Francis Fukuyama, *The End of History?*, NAT’L INT., Summer 1989, at 3, 4 (declaring “the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government”).

456. See *supra* notes 445, 449 and accompanying text.

incremental move toward the Korean model of conceptualizing corporate law and governance as grounded in the public and national interest.

Alternatively, there may be incremental moves by both countries toward a convergence. As endogenous conditions change, it is uncertain whether the fixed ideas of the past several decades on both sides of the Pacific based on prior conditions will remain fixed. The future is unknown, but the pathways of corporate law and governance may not be so opaque.

VIII. CONCLUSION

Corporate law serves endogenous political economy and social order. Because complex market-based economies have unique societal interests and operate different forms of capitalism, countries prioritize their interests. Efficiency is an important interest, but is just one of many possibilities. A comparative analysis of American and Korean rules shows that an advanced economy may choose inefficient rules. This choice explains the divergence of the basic rules of corporate law and practices of corporate governance between the United States and Korea. Under the American rule- and property-centric view, brought to the fore in the neoliberal turn of the late twentieth century, Korean rules are flawed because they are inefficient and result in systemic value diminution. The choice of inefficiency reflects the fact that Korean corporate law is imbued with a public purpose and cannot be extricated from nationalism and societal expectations. It is connected to the history of Korean industrial development and today's complex mix of political, economic and social factors.⁴⁵⁷ Like all compromises, it comes with benefits and costs. The problem for Korean policymakers is the weighing of endogenous priority interests and attendant costs in light of the country's unique condition. Both the United States and Korea, and other countries as well, are subject to the same meta-dynamics of political economy that ultimately determine law and governance.⁴⁵⁸ The bundle of conditions in a social organization are not always fixed. Their change may result in changing priority interests.

457. Black et al., *supra* note 12, at 539–42.

458. Hwa-Jin Kim, *supra* note 17, at 61–62.