Derivative Lawsuits Outside of Their Cultural Context: The Divergent Examples of Italy and Japan

By Scott H. Mollett*

Introduction

A COMPARATIVE ANALYSIS of derivative lawsuits may, at first glance, appear to be a fruitless exercise. Derivative lawsuits are a rarity in corporate law literature—a topic with some degree of unanimity. In her seminal article in 1991, Roberta Romano raised considerable concerns about whether derivative suits actually improved corporate governance or returned substantial benefits to shareholders.1 Derivative lawsuits are brought by aggrieved shareholders in the name of the corporation to remedy corporate governance failures.2 If the lawsuits prove successful, the winnings are returned to the firm for the benefit of all shareholders.3 Even if no money is returned to the firm, the pressure from litigation might be sufficient to force the firm to improve its governance. Romano’s study found that the only clear beneficiaries of derivative lawsuits were lawyers who received attorneys’ fees

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2. Derivative suits will be further defined infra in Part II of this Article.

3. Alessandro De Nicola defined a derivative suit as the action commenced by a company shareholder against a third party (usually a director or executive) in the name of the company, in order to make up for a damage suffered because of the wrongdoing of the third party. The shareholder plays the role of a nominal plaintiff and the company of a nominal defendant, although the possible compensation for damages established by the judge will be paid . . . to the corporation.

from settled cases. Much of the following literature has echoed Romano's claims, with few strong indications that derivative suits provided any significant governance benefits.

Considering the poor domestic track record, an analysis of international derivative suits should be relatively unexciting, especially in Japan and Italy. Japan and Italy are both civil law legal systems, originally based on the French and German models. Generally, derivative suits are thought to be highly dependent on the American legal system because of its powerful discovery tools, high attorneys' fees, and strong preferences for settlement. In short, it seems unlikely that derivative suits would be an important corporate governance mechanism in foreign systems when it appears to perform so poorly domestically.

Despite a mixed track record and academic appraisal, laws regulating derivative suits in Italy and Japan have been liberalized significantly over the past twenty years. Both Japan and Italy have substantially revised their corporate codes over the last decade. Revisions in the Italian Corporate Code in 1998 and 2004 added flexibility for companies regarding their corporate governance. Japan began changing its corporate laws in 1992, culminating in the New Company

4. In her research of derivative suits in the United States, Roberta Romano found that the only net benefit of the suits was the fees collected by the plaintiff's attorney. Romano, supra note 1, at 84 ("The principal beneficiaries of the litigation [ ] appear to be attorneys."). She found that "differential indemnification rights, insurance policy exclusions, and plaintiffs' counsel as the real party-in-interest creates powerful incentives to settle," with 83 of 128 resolved suits in her survey settling. Id. at 57, 60. The development of modern directors and officers ("D&O") insurance created one of the strongest incentives: if parties settle, both sides will be reimbursed. Id. at 57; see also Bernard Black et al., Outside Director Liability, 58 STAN. L. REv. 1055 (2006) (discussing D&O insurance and an analysis of the exposure of outside directors of public companies to liability not covered by the company or D&O insurance). This result is exclusive of significant corporate governance improvement: attorneys' fees are significant even if recovery is limited, and only a limited number of settlements resulting in monetary recovery—46 of 83 in Romano's survey, while 75 of 83 paid attorneys' fees. Id. at 61. The third and most significant criticism of derivative suits is that they are simply ineffective. Even if derivative suits were underutilized and a substantial amount of the benefits accrued to the plaintiffs' counsel, a target firm could have residual benefits in terms of corporate governance changes mandated by the settlement agreement. Yet, Romano concluded that (1) attorneys were the principal beneficiaries of derivatives suits, and there was little evidence of specific deterrence, with only increased top management turnover in sued firms; (2) general deterrence is probably weak; and (3) there was mixed evidence of indirect benefits, in particular advantages for block-shareholders. Id. at 84–85. Finally, she offered the idea that legal rules are a public good, and improvements and clarifications accrue to all.

Law of 2006, which incorporated all of the minor changes from the previous years into one comprehensive code. Not only did these modernizations substantially change corporate law in both countries, they also introduced numerous changes in the nature of derivative suits. These changes have resulted, at least in Japan, in several shareholder plaintiff victories and an active derivative suit industry. In contrast, the Italian derivative suit industry remains moribund despite increased accessibility to derivative suits.

The changes in corporate laws in Italy and Japan raise a number of questions about derivative suits and imported laws in general. First, are derivative suits culturally dependent? Second, if derivative suits are not culturally dependent, what elements are necessary for their successful incorporation into national laws? In this Article, these questions will be answered, bearing in mind a framework developed by Gunther Teubner. Teubner proposed that imported law should be understood as an ongoing interaction between social and legal pressures—an irritant rather than a transplant. Not only does a major change in one area significantly affect the other area, but neither track can be viewed in isolation. More importantly, the future legal and social ramifications of transplantation cannot be predicted accurately.

When viewed from a Teubnerian perspective, several points become apparent. Foremost, failure to implement derivative suits is not due to systematic inadequacies or broad cultural differences. That is to say, the lack of discovery or stereotypes, like Japanese non-litigiousness or Italian political corruption, have not been decisive in limiting derivative suit use. Rather, the social relevance of derivative suits has been the critical element in the acceptance and development of domestic derivative law. The success of imported law is dependent on its ability to irritate an aggrieved but heretofore impotent social group or provide advantageous tools to established players. Laws must apply to needs in order for them to be incorporated and utilized. In Japan,

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7. There were no Italian derivative suits filed between 1998 and 2006. Id. at 248. De Nicola attributes this to endogenous and systematic problems, including the high threshold for suits (2.5%) and characteristics of the domestic legal system. De Nicola, supra note 3, at 254.
8. Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Mod. L. Rev. 11 (1998). Teubner is a prominent academic, well-known for developing a social theory of law. The irritant framework developed in his article tries to introduce new forces into standard legal transplant analysis to explain how laws are received in new cultures. Id.
legal reform of derivative suits created a remedy to a group of plaintiffs and lawyers that had been unable to press their claims in court. In Italy, the derivative reforms were ultimately redundant to existing players and out of the reach of new potential plaintiffs.

These examples might indicate how the likelihood of transplant success can be increased. It is necessary for imported law to interact with domestic society in order to become part of a country’s living law. In Italy, the high threshold cost of filing a derivative suit limited any general response to the legal change. While it is unlikely that an Italian derivative suit industry would be similar to the United States due to the unpredictability of imported law, if the law permitted social interaction, some form of derivative suits could become part of the Italian legal framework. For imported laws to become relevant, there must be irritation of the social bylaws and the legal thresholds must be low enough to permit interactions between law and social elements, elements that were present in the Japanese example.

Part I will introduce some of the comparative frameworks that have dominated discussions about legal transplants, in addition to introducing Teubner’s model in detail. Part II introduces corporate governance and derivative suits, in particular Romano’s criticism of their efficacy. Part III provides an extended look at derivative suits in Italy and Japan using the Teubnerian model. Part IV builds on Part III by comparing derivative suits in Japan and Italy to highlight the major distinctions.

I. Comparative Framework

Empirical research on what kind of corporate law provides the greatest returns in socioeconomic wealth, and how to effectively transplant it, is a frequent topic of academic debate. Corporate law is concerned with internal company relations, in particular between the owners and managers of a company. This debate has both important academic appeal and significant real world consequences. The International Monetary Fund (“IMF”) and World Bank have attempted to determine corporate law best practices and have tied loans to struggling governments to the implementation of corporate law reform.

9. This builds on the theory of the firm, whereby ownership and management are separated, and agency costs become the primary concern. Agency costs occur due to the different interests and priorities of ownership and management. Corporate law is concerned with how to minimize these costs.

With the fall of the "Asian Tigers"\textsuperscript{11} and the strong resurgence of the American economy, particularly the dot-coms, American corporate law and governance ascended as the model for promoting economic growth and the rule of law.\textsuperscript{12} This change is worrisome, though, due to evidence that simply importing foreign law is generally insufficient to cause desired domestic change. Teubner's approach to imported law, discussed below, provides a compromise between the two extremes and recognizes if and when static elements will most strongly resist imported law.

The debate concerning the evolution of global corporate law can be best understood in terms of the "convergence" and "path dependency" schools of thought. Regarding the former, Henry Hansmann and Reinier Kraakman titled their provocative article "The End of History for Corporate Law," and argued that the turn of century would witness global corporate law gravitating towards a standard of shareholder primacy.\textsuperscript{13}

The basic law of corporate governance—indeed, most of corporate law—has achieved a high degree of uniformity across developed market jurisdictions, and continuing convergence towards a single standard is most likely. . . . There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.\textsuperscript{14}

This vision is expansive, indicating that even countries that do not share the traits of American corporations, including widely dispersed ownership, will ultimately succumb to the American corporate governance model.\textsuperscript{15}

\textsuperscript{11} The Asian Tigers were the rapidly growing economies in East Asia during the 1990s, prior to the 1997 Asian financial crisis. They generally included Hong Kong, India, Indonesia, Korea, Malaysia, and Thailand.

\textsuperscript{12} This assumption has undoubtedly lost some of its luster during the 2008-2009 credit crisis.

\textsuperscript{13} Henry Hansmann & Reinier Kraakman, \textit{The End of History for Corporate Law}, 89 Geo. L.J. 439 (2001). \textit{But see} Teubner, \textit{supra} note 8, at 24 ("Despite liberalization of the world markets[,] . . . the somewhat surprising result of the last thirty years is the establishment of more than one form of advanced capitalism."). This also reaches back to the Berle-Dodd debate of the 1930s regarding whether the board of directors owed a duty to just shareholders or to a broader constituency. \textit{See Klaus J. Hopt & Gunther Teubner, Corporate Governance and Directors' Responsibilities: Legal, Economic, and Sociological Analyses on Corporate Social Responsibility} 149-51 (1985) (describing the initial Berle-Dodd debate).

\textsuperscript{14} Hansmann & Kraakman, \textit{supra} note 13, at 439.

\textsuperscript{15} \textit{Id.} at 462-64. Hansmann and Kraakman argue in particular that insiders' political clout will fail to protect them as they inefficiently plunder the firm, prompting exit by shareholders. \textit{Id.} Similarily, insiders who preserve their firms and protections will become increasingly irrelevant. \textit{Id.}
The contrasting path dependency model argues that corporate governance has static elements that will resist convergence. Path dependency argues that law is not changing rapidly, and even superior law will fail due to entrenched domestic factors. The application of a path dependency model to corporate governance provides one reason why effective corporate law reforms are not universally implemented. Path dependence posits that "the pattern that develops will turn on a set of initial conditions driven by factors other than efficiency, and with the passage of time will prove costly to change even if a different pattern later becomes more efficient."\(^{16}\) Lucian Bebchuck and Mark Roe provide two models of path dependence, including structure-driven path dependence—the direct effect that initial ownership structure has on subsequent structures—and rule-driven path dependence, which "arises from the effect that initial ownership structures have on subsequent structures through their effect on the legal rules governing corporations."\(^{17}\) Bebchuck and Roe argue that corporate law fits this model.\(^{18}\)

The more extreme view is epitomized in the socio-cultural works of Pierre Legrand, whose writing against a universal European civil code emphasizes the insurmountable differences between national cultures.\(^{19}\) Legrand's rhetoric implies that law is not portable but

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18. Id.
19. Pierre Legrand, *Against a European Civil Code*, 60 Mod. L. Rev. 44, 61 (1997) ("Europe's distinctive circumstances throughout its history have repeatedly involved the recognition of insurmountable alterities arising from within."). *But see* Teubner, *supra* note 8, at 14 ("[Legrand's thesis is] a contemporary reformulation of Montesquieu's culturalist skepticism against the easy transfer of legal institutions, but with the important modification that the 'esprit des lois' is less a reflection of a national culture, but rather, of a specific legal culture."). Teubner further questioned how Legrand's thesis will "avoid the fatal calamities of any approach to 'gesellschaftliche Totalität[,]' to 'totality of society[,]' in which each legal element reflects the whole societal culture and vice versa?" Id. He wrote:

> How will such an appeal to the totality of cultural meaning, to the ensemble of deep structures of law and to society's culture *tout court* be translated into detailed analyses of interaction between law and culture? Legrand's still rather modest efforts stand in a somewhat strange contrast to the sweeping claims of his general programme. Secondly, how will he account for the manifold successful institutional transfers among Western societies that have taken place rapidly and smoothly? And thirdly, does his own transfer into legal discourse of anthropological culturalist knowledge, which presumes that legal phenomena are deeply culturally embedded, take into account fragmentation, differentiation, separation, closure of discourses that is so typical for the modern and post-modern experience? Does Legrand adequately reflect the double fragmentation of global society
there are numerous examples to the contrary. This represents the most extreme of opinions and it seems likely that certain laws rely on a larger social fabric, and others offer overwhelming benefits innately.

The convergence and path dependency arguments represent two extremes that can be separately rebutted with real world evidence. In examining corporate law issues comparatively, it makes sense to use a framework that can account for social, political, and legal differences. Here, Teubner’s irritants comparative law model, which focuses on the interaction between social and legal factors in successful legal adoption, has some critical advantages. Teubner’s work provides an interpretative framework for analyzing why imported law often fails to have an impact or has a radically different impact than expected.

In contrast to both convergence and path dependency, Teubner’s approach emphasizes the organic nature of legal development. Analyzing how foreign law is incorporated into a system raises a number of questions. For example, the convergence/path dependency debate establishes a binary system, with economic pressure at one end, and political or historical pressures at the other. It would seem desirable that rather than one factor completely dominating, a number of different factors should apply with different strengths. For example, certain countries might resist changes in their privacy rights due to strongly path dependent reasons, like abuses during an earlier fascist regime.

Similarly, limited areas of corporate law and regula-

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which consists not only in polyculturalism which he speaks about but also in deep cleavages between discourses which he tends to neglect?

_Id._


21. Research following these two articles provides evidence in favor of both arguments; indeed, as with most polar arguments, both sides’ arguments embody more than their fair share of the truth. Later work by Pistor and others found that “the pattern of legal change does indeed differ from those found in origin countries. Legal change is much less gradual, but tends to be erratic or stagnant even during periods of rapid socio-economic developments.” Katharina Pistor et al., The Evolution of Corporate Law: A Cross-Country Comparison, 25 U. PA. J. INT’L ECON. L. 791, 870 (2002). Other scholars have similarly noted that widely-dispersed shareholders are the exception, with the more common form of corporate ownership with a controlling shareholder becoming the focus of debate. This highlights the problem with the convergence debate: numerous countries that are not shareholder-centric perform quite well and do not appear to be converging.

22. Whistleblower protections are an example of a controversial legal import. In contrast to strong American support, whistleblowing conjures images of fascist government or betrayal of traditional corporate culture. Ruth V. Aguilera, Corporate Governance and Director Accountability: An Institutional Comparative Perspective, 16 Brit. J. MGMT. 39, 43 (2005) (“It is hard to imagine that firms in Japan might introduce a whistle-blowing hotline.”); John Gibeaut, Culture Clash, 92 A.B.A. J. 10, 10 (2006) (“Americans like to elevate whis-
tion, where the primary interests are multinational corporations, might be driven by economic concerns. Traditional comparative law provides some guidance in how to view the relationship between law and society. In this context, Teubner’s irritant framework—which utilizes a sociological approach—provides an attractive framework for understanding how social and legal pressures interact, not only in the initial acceptance of a transplant, but in its continued domestic implementation.

In “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences,” Teubner reconciles culturalist and legalist comparative arguments into a framework of co-evolving social and legal trajectories. Teubner argues that laws are not transplanted into a culture; rather, they are social and legal irritants. As an irritant, foreign law is not simply placed within a domestic code—it is the starting point whereby both the law and the domestic culture are altered and dynamically reconstructed.

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23. For example, the debate over which accounting method to use (Generally Accepted Accounting Principles (“GAAP”) or Financial Accounting Standards Board (“FASB”)) is one area that has achieved substantial convergence.

24. Teubner examined the importation of “bona fides” into English corporate law. Bona fides (or “good faith”) is a standard component of continental law that has been vigorously resisted by English courts. Teubner, supra note 8, at 11. Teubner discusses whether the doctrine will be rejected or interacted with, but later argues that this is a false dichotomy, and that irritation is the best mechanism for understanding the uptake of legal imports. Id.

25. Id. at 12 (“To be sure, transplant makes sense insofar as it describes legal import/export in organismic, not in mechanistic terms. Legal institutions cannot be easily moved from one context to the other, like the ‘transfer’ of a part from one machine into the other. They need careful implantation and cultivation in the environment. But ‘transplant’ creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself playing its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration.”).

26. Id. (“[Imported law] irritates law’s ‘binding arrangements.’ It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. ‘Legal irritants’ cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural con-
In examining how laws are imported into domestic legal systems, Teubner proposes four theses:

1. Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness.
2. They are no longer connected to the totality of the social, but to diverse fragments of society.
3. Where, formerly, law was tied to society by its identity with it, ties are now established via difference.
4. They no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories.\(^2\)

These theses provide varied levels of cultural dependence for laws. This recognizes the abstraction of some laws away from society to the legislature and the tight cultural binding of some laws.\(^2\) Teubner refers to the "coupling" between law and society to indicate the severity of influence changes in one area—law or society—can have in others; similarly, this indicates the resistance a given irritant may face.

Furthermore, the transplants do not exist within a legal vacuum—there will be active resistance to change. This echoes the path dependency argument, that entrenched legal, political, and social interests may resist even an in-the-aggregate beneficial change if it is personally disadvantageous.\(^2\) This leads to what Teubner refers to as "the Janus-like character of law's binding arrangements . . . . [E]conomic institutions are constraint and incentive structures that influence cost benefit calculations of economic actors, while legal institutions are ensembles of legally valid rules that structure the resolu-

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27. *Id.* at 18. Regarding the first and second points, this is one area where Teubner distinguishes his work from Kahn-Freund's earlier work. Teubner argues that when Kahn-Freund expressed his belief in the political system as the agent for change in the 1970s, it was dependent on the older European totalitarian states. *Id.* at 22. Teubner further argues that, "[f]rom the somewhat sobering perspective of the nineties, this seems to overestimate the importance of the political system at the expense of other social systems." *Id.*

28. Of course, Teubner goes into far greater detail than this, noting that even in areas of loose coupling, where an institutional transfer is easier to accomplish, this is not as 'mechanical' as . . . the analogy of changing a carburetor [sic] in an engine. . . . Even in those situations when the law is rather 'technical,' insulated from its social context, legal transfer is not smooth and simple but has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.

*Id.* at 19.

29. This also highlights a collective action problem that often thwarts meaningful change.
tion of conflicts."⁸⁰ Imported law is an irritant, not a transplant, that agitates both socially and legally. Change is required in order for it to be incorporated into either track, which in turn affects the other track. There is a co-evolving dynamic, with each side provoking the other, reacting to distinctly social or legal confrontations, and thus forcing the other track to shift accordingly. This progression is unpredictable, premised on irritating law's "binding arrangements" and creating an entirely new internal dynamic.⁸¹

Teubner's framework is extremely advantageous in analyzing the results of legal importation for two reasons. Foremost, it requires an examination of contemporaneous legal and social developments, especially in regards to how law actually functions: irritants should be defined by their actual functions, not just the words on the paper. Secondly, this framework highlights how each set of factors can affect the initial period of enactment and the continuing dialogue can modify the implications of a law. Teubner's framework encourages a deeper look into cultural explanations, and emphasizes the letter of the law and importance of change—a depth of inspection that a basic convergence, culturalist, or path dependency approach could never achieve.

II. Derivative Suits: Their Role and Their Interactions

Corporations and shareholders are part of most modern economies, and the protections of the modern corporation are essential for developing competitive companies. Corporate laws that affect these rules are diverse, varying both in their goals and their implementation. This Article examines how these laws compare when corporate governance fails and shareholders, the nominal owners of the firm, are required to protect their interests. Derivative suits are not the only form of shareholder protection nor are they the most drastic. Rather, "[I]iability rules are thought to be called into play when the primary governance mechanisms . . . fail in their monitoring efforts but the misconduct is not of sufficient magnitude to make a control change worthwhile."⁸² This Part will introduce the standard corporate governance model and introduce derivative suits in the context of some of the alternatives available to aggrieved shareholders. This Part will also

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30. Id. at 27.
31. Id. at 12.
32. Romano, supra note 1, at 55.
introduce some of the tools available to shareholders in the United States, Italy, and Japan.

A. Corporate Governance

Corporate governance attempts to limit the problems that occur when firm management and ownership are separated. In 1932, Adolf Berle and Gardinier Means wrote that the widely dispersed ownership of public firms meant that individual shareholders were too dispersed to control the firm, which resulted in the hiring of professional executives. This governance gap introduces agency costs, the premium necessary to ensure proper actions by the hired managers. Corporate governance minimizes these costs within a cost-benefit framework: management must be monitored but the costs of restraining management misbehavior should not exceed the benefits of management's role. At least recently, a law and economics perspective has dominated, one where market transparency and liquidity provide sufficient restrictions on abusive managers. This framework places a heavy burden on shareholders and their ability to influence management both indirectly, through a corporation's share price, and directly, using voting rights and pursuing shareholder suits.

The most common conception of corporate governance is the American shareholder-primacy model. Hansmann and Kraakman describe the standard model as:

[U]ltimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies . . . should have their interests protected by contractual and regulatory means rather than through participation in corporate governance; noncontrolling shareholders should receive strong protection from exploita-


34. Michael C. Jensen & William H. Meckling, Agency Costs and the Theory of the Firm, 3 J. Fin. Econ. 80, 85 (1976) ("We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority . . . . The principal can limit divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the aberrant activities of the agent."). Easterbrook and Fischel define agency costs as "the combination of monitoring, bonding, and residual costs." Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 10 (1991).

35. Easterbrook & Fischel, supra note 34, at 25 ("[T]he most powerful device for protecting participants in the venture—liquid markets with professional investors setting prices—applies exclusively to investors, principally equity investors.").
tion at the hands of controlling shareholders; and the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests.\textsuperscript{36}

This builds on the principal-agent model, where shareholders are the principals and the management their agents.\textsuperscript{37}

An important element of this corporate governance structure is the board of directors. The board of directors is one of the solutions to the agency problem, a monitoring group that can limit management excesses. Originally, insiders with firm-specific knowledge populated this group and intended to enable reasonable, macro decision-making. The twenty-first century board, however, is populated with independent directors.\textsuperscript{38} Independent directors have become almost mandatory—they are an important component for having corporate decisions reviewed with the lenient business judgment rule under Delaware's jurisprudence; the New York Stock Exchange requires most listed companies to have a majority of independent directors, and certain committees must be composed of independent members.\textsuperscript{39}

Over the last decade, however, comparative and empirical pieces have surged, many prompted by the realization that corporations managed by widely dispersed shareholders were not only a minority in the United States, but also an exception internationally. In particular, in "Law and Finance,"\textsuperscript{40} Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny examined forty-nine countries and compared the effectiveness of legal families—common law and civil law—in implementing "good" corporate law—as measured by minority shareholder protection. Their results showed large differences in the quality of law in different legal families, with common-law coun-

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\textsuperscript{36} Hansmann & Kraakman, \textit{supra} note 13, at 441-42.

\textsuperscript{37} This model has received a fair share of criticism, much of it based on the inapplicability of the principal-agent model to drastically more complex relations between dispersed shareholders and management. \textit{See}, e.g., Stephen M. Bainbridge, \textit{Director Primacy: The Means and Ends of Corporate Governance}, 97 \textit{Nw. U. L. Rev.} 547, 550 (2003) (proposing director primacy as the goal of corporate governance).


\textsuperscript{39} Mollett, \textit{supra} note 20, at 4-5; \textit{see also} E. Norman Veasey, \textit{State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors}, 28 \textit{J. Corp. L.} 441, 443 (2003) (listing areas where Sarbanes-Oxley and security exchange regulation has mandated changes in state corporate codes, including: "the composition of the board of directors; the composition of the audit, compensation and nomination/governance committees; some of the activities and requirements of the board and its committees; detail on definitions of independence of directors; reporting and certification requirements of the CEO and the CFO").

\textsuperscript{40} Rafael La Porta et al., \textit{Law and Finance}, 106 \textit{J. Pol. Econ.} 1113 (1998).
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tries affording the best legal protection to shareholders and French-
civil-law countries providing the worst. This raises questions con-
erning how effectively substitutes can mitigate the impact of bad law,
why countries with an abundance of controlling shareholders perform
well, and ultimately, how corporate law should be modified to be most
effective.

B. Alternatives to Derivative Suits

Corporate governance is not perfect and there continues to be a
risk that the firm's nominal owners may be dissatisfied with the per-
formance of management. Boards of directors and shareholder suits
are mechanisms designed to limit the excesses of management. They
are not exclusive, however, and a number of alternatives exist. These
range from simple measures for a shareholder to protect their invest-
ment, to stronger tactics for removing directors and directly influen-
cing the firm. For example, liquid markets might facilitate easy exit by
aggrieved shareholders, which has a lower cost to the average share-
holder than bringing suit. Similarly, the legal and social environment
might limit the need to resort to derivative suits—controlling share-
holders might have sufficient incentive to monitor management and
prevent ill behavior.

Derivative suits, the focus of this Article, are brought by a share-
holder against a third party, typically a member of the board, for a
breach of fiduciary duty with the recovery going to the company.

Derivative suits are so named because the shareholder's right to sue is
derived from the company. A derivative suit has two components:
"one action against directors to oblige them to act against wrongdo-
ers, the second against the company whose rights the shareholder
wants to enforce." Thus, in order to file a derivative suit in the
United States, a plaintiff must prove that they have made a good faith
effort to convince the company to remedy the breach of fiduciary

41. Id. at 1129. Italy was included as a French-civil-law type country and Japan was put
within the German tradition of civil law countries, despite some strong common law
tendencies.

42. Gordon, supra note 38, at 1535–40 (arguing that independent directors have be-
come pivotal in protecting shareholder rights).

43. Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation:
Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133, 143 (2004). For a detailed history of
the development of derivative suits jurisprudence, see Kenneth B. Davis, Jr., The Forgotten
Derivative Suit, 61 Vand. L. Rev. 387 (2008) (examining the decline of derivative suits in the
United States and whether shareholders benefit).

44. De Nicola, supra note 3, at 23.
duty. This includes a demand that the board file a suit on behalf of the company and, generally, upon the board’s failure to file the suit, the plaintiff may handle the derivative suit himself. If the board elects to pursue the claim and accede to the shareholder’s demand, the original shareholder plaintiff is removed from the process. Derivative actions are only a subset of shareholder litigation options; shareholders can also sue directly—as an individual or class—and receive the benefit of their suit directly. The procedural hurdles for each type of suit differ.

Shareholders have a variety of available recourses other than derivative suits. One thing that may limit the utilization of derivative suits in importing countries is the availability of satisfactory alternatives. Potential plaintiffs will do a cost-benefit assessment when considering their options. For example, the most basic recourse is the right to exit. Ownership of public shares generally provides a shareholder the right to sell their shares at a market price. Given limited options, exit is often the easiest and cheapest solution; similarly, given high thresh-

45. This is one odd area of United States derivative suits. Italy, for example, does not require such a demand of the directors. Id. at 241. The directors of the company have the power to institute the lawsuit. Id. at 210. This is reasonable because the board of directors is in a position to know more about the company than a shareholder and should be best equipped to decide if a suit is warranted against a board or management member who has mismanaged the firm. Id. If the board refuses the demand, however, and the decision is not protected by the business judgment rule, this power devolves to the initial third party plaintiff, who can conduct the suit for the corporation. Id. For a more detailed discussion of the demand requirement, see Davis, supra note 43, at 396–400 (describing the development of the demand requirement and the holding in Aronson v. Lewis requiring the plaintiff to show particularized facts that indicate the directors were not disinterested and that the decision was not a valid product of the business judgment rule); see also De Nicola, supra note 3, at 33 (stating that the demand requirement is not treated seriously and often not included in newer state company laws).

46. Davis notes that derivative suits are a component of a flexible U.S. governance system that, while not having perfect laws, places a strong emphasis on disclosure and engages in a holistic approach to enforcing fiduciary duties. Davis, supra note 43, at 388. Within this system, “[t]he critical issue, therefore, is who performs the fiduciary evaluation.” Id. “Traditionally, courts have exercised principal responsibility through shareholder derivative suits.” Id.; see also Larry E. Ribstein, International Implications of Sarbanes-Oxley: Raising the Rent on U.S. Law, 3 J. Corp. L. STUDS. 299, 301 (2003) (“Federal securities regulation in the United States for 70 years has been explicitly based on the fundamental principle that the law regulates what issuers must say about their companies and not the types of firms or securities that may be sold.”).

47. See Mark D. West, The Pricing of Shareholder Derivative Actions in Japan and the United States, 88 Nw. U. L. Rev. 1436, 1474 (1994) [hereinafter West, Pricing of Actions] (discussing how shareholders without the ability to voice their opinion will use exit as their sole means to counter director misbehavior).
olds for legal action it might be the only option.\textsuperscript{48} Exit, of course, does not allow for a direct recovery of losses, but the decrease in share price resulting from a mass exit may have a chastising effect on management. In addition, extralegal or social pressures could be brought to bear on companies, including complaints in newspapers\textsuperscript{49} or downgrades by financial analysts. These represent passive pressures—actions that might affect the stock price and minimize shareholder exposure to poor management, but do not actually hold the managers accountable.

In addition, there may exist opportunities for shareholders to take more direct action to rein in management excesses. Shareholders generally have the right to vote, which may facilitate direct change in the board of directors, who could in turn change the composition of management.\textsuperscript{50} A shareholder could file a direct suit, whereby they will personally recover for any inappropriate acts by the corporation,\textsuperscript{51} or a securities class action suit.\textsuperscript{52} In the United States, state law remedies provide a different path for chastising the board.

Extralegal measures are another option. Here, for example, a shareholder can increase their holdings to increase their direct control over the company and reduce the agency problems. One option is block holding of a significant amount of shares.\textsuperscript{53} Another option, used in Japan, is the cross-holding of shares by corporate affiliates to consolidate firm ownership. In areas with bad law, controlling share-


\textsuperscript{49} West, Pricing of Actions, supra note 47, at 1473–74.

\textsuperscript{50} See generally Church Lucier et al., Why CEOs Fall: The Causes and Consequences of Turnover at the Top (2002), available at http://extfile.bah.com/livelink/live

\textsuperscript{51} De Nicola, supra note 3, at 23 (noting that the shareholder is able to recover for a “breach of his or her contractual rights as a shareholder”).

\textsuperscript{52} See Thompson & Thomas, supra note 43, at 133.

\textsuperscript{53} Gilson and Gordon argued that there is a point of tangency between agency costs and problems that arise between controlling and non-controlling shareholders: “The presence of a controlling shareholder reduces the managerial agency problem, but at the cost of the private benefits agency problem.” Ronald J. Gilson & Jeffrey N. Gordon, Controlling Shareholders, 152 U. Pa. L. Rev. 785, 785 (2003); see also Mark J. Roe, Political Preconditions to Separating Ownership from Corporate Control, 33 Stan. L. Rev. 539, 539 (2000) (“Hence, public firms[,] . . . all else [being] equal, have higher managerial agency costs, and large-block shareholding has persisted as a shareholders' best remaining way to control those costs.”). Romano also noted that there was statistically significant evidence that block-holders had benefited from the availability of derivative suits. Romano, supra note 1, at 84–85.
holders might be the best way to secure expected benefits from shareholding.\textsuperscript{54}

The nature of the market might significantly affect the options available to shareholders. Corporate governance might not be the ideal method to reduce corporate abuses; instead, revisions to securities law\textsuperscript{55} or increased market or self-regulation\textsuperscript{56} might seriously reduce problems without requiring corporate governance mechanisms, like derivative suits, to be utilized. These alternatives must be considered even more seriously in the international context, as the availability of alternative methods may affect the actions taken by an aggrieved shareholder.

In the United States, the traditional means of holding a firm accountable have been the derivative suit, direct suit, class action, and some level of shareholder activism. Each of these solutions provides a different standard for filing and appeals to a different type of shareholder. For example, shareholder activism might involve shareholders with larger holdings pushing for their own slate of directors. Direct suits target a breach of a shareholder's contractual rights while derivative suits attack failures at the director level of the corporation. Both of these solutions require only minimal shareholdings. The array of tools available to shareholders is somewhat complementary. It would be understandable if exported derivative suits did not fill in the same niche in their host countries.

\textsuperscript{54} Ronald J. Gilson, \textit{Controlling Family Shareholders in Developing Countries: Anchoring Relation Exchange}, 60 STAN. L. REV. 633, 635 (2007) ("My hypothesis is that bad commercial law, as opposed to just poor minority shareholder protection as contemplated by the Law and Finance literature, breaks down the separation between equity distribution and firm value. I posit that the presence of a controlling shareholder and, in particular, a family controlling shareholder, allows the corporation to better conduct its business, but in a way quite different than the potential for a controlling shareholder to more effectively police the agency conflict between management and shareholders . . . .")


\textsuperscript{56} John C. Coffee, Jr., \textit{Convergence and Its Critics: What Are the Preconditions to the Separation of Ownership and Control?}, in \textit{CORPORATE GOVERNANCE REGIMES, CONVERGENCE AND DIVERSITY} 83 (Joseph A. McCahery et al. eds., 2002); see also id. at 84 ("Alternatively, the development of a pan-European securities market, possibly with listing and disclosure requirements more demanding than those of existing European markets, could conceivably provide the framework for the adoption of protections for minority shareholders that were essentially similar to those enjoyed today in common law countries. More importantly the key idea here is that of functional substitutes that provide alternative means to the same end.").
In contrast, as discussed below, Japan primarily makes available a derivative suit, short-swing profit recovery mechanisms, and measures specifically designed to counteract organized crime. More broadly speaking, Mark West characterized the options available to a Japanese shareholder as the legal options listed above and exit. Japan has also historically relied on main banks, which monitored their clients for abuses, and cross-holdings to maintain control over corporations and limit corporate abuses. This assortment of tools differs from the United States. When examining the use of derivative lawsuits, the incentives versus other remedies may differ significantly in comparison to the United States. Similarly, Italy offers shareholders a distinctive array of tools for enforcing their rights as owners of the corporation. These mechanisms have different shareholder requirements than the United States and provide a different set of options. Examining how derivative suits fit within these alternatives is critical in determining how they will be received. Similarly, assessing what social impediments exist will indicate how they will evolve differently from their original country. These differences and a Teubnerian approach will be the heart of the next part.

III. Use of Derivative Suits Overseas

Despite concerns about the efficacy of derivative lawsuits and the importance of United States legal mechanisms in supporting their use, foreign countries have imported or otherwise implemented derivative suits. Many European nations have made derivative lawsuits available to aggrieved shareholders, although the use of these provisions has varied and many countries see little utilization. For example, revisions to the Italian corporate law in 1998 and 2004 failed to encourage any derivative suit filings. In contrast, changes to the Japanese corporate code in 1993 and the subsequent 10,000% increase in derivative suits filings indicates that legal restraints might be the primary impediment to derivative suit use. This raises the ques-
tion of why derivative suits are utilized in some countries and not others.

This analysis depends on Teubner's framework for examining how legal changes have been implemented in each country. First, the derivative suit laws in each country will be described to highlight issues that might significantly affect derivative suits. Second, the social components that have significantly affected derivative suit adoption will be highlighted. This includes latent domestic features that have supported the use of derivative suits and an assessment of how legal changes energized these elements. Acting as a mild irritant, changes in the Japanese pricing model for derivative suits, combined with the degradation of traditional corporate governance mechanisms led to derivative suit utilization. The revisions appealed to aggrieved small shareholders who would not otherwise have legal recourse. In contrast, significant legal changes have not been sufficient to energize, or benefit from, latent social interests in Italy because they are largely redundant to existing measures and can only be used by parties with less expensive alternatives. What will be apparent is that social support has been pivotal in the acceptance of derivative suits as part of the domestic corporate governance framework.

A. Derivative Suits in Italy

Italian law has not been an archetypical model of "good" corporate law. In the 1998 Law and Finance survey, Italy scored poorly in the shareholder rights index. One area that corporate governance literature has examined is the presence of controlling shareholders rather than disparate share holdings. This assumption is premised on the law

62. One question that will not be addressed in this Part of the Article is the normative question of whether derivative suits are good. Roberta Romano and Mark West, at least to some degree, have provided empirical evidence that suits do not significantly improve corporate governance nor result in significant returns to shareholders. See Romano, supra note 1, at 67; West, Why Shareholders Sue, supra note 61, at 359. Neither author found evidence of stock price increases after a derivative suit filing is announced. Romano, supra note 1, at 67; West, Why Shareholders Sue, supra note 61, at 359. West extends this by noting that "shareholders apparently do not expect to receive gains of any sort or magnitude from filing." Id. at 359. Similarly, the stock prices of firms targeted by derivative suits showed little change in Japan and the United States, indicating the market's ambivalence about the suits' ability to cause significant improvement. Id. at 359. These peripheral benefits may be discussed, even if the larger normative question is postponed until more empirical evidence is available.

63. La Porta et al., supra note 40, at 1131. Italy actually scored very poorly, receiving a positive mark only for the preemptive right to new issues. Id. It otherwise performed below average for French-origin countries, a group that generally lagged in La Porta's survey. See id.
and finance argument that "entrepreneurs retain control to protect themselves against the private benefit extraction by someone who might subsequently assemble control if the entrepreneur gave it up."64 Italian corporate ownership rates and quality of enforcement figures have lagged the targets espoused in the literature: the proportion of ownership by the largest three shareholders in the top ten domestic firms had a mean of 58% and a median of 60% and the enforcement variables were low, evinced by the fact that the efficiency of the judicial system was a 6.75 and corruption a 6.13.65 Another indicator of deficiencies in Italian corporate governance is the high control block premium. The control block premium is the amount of firm value assignable to holding a controlling block, with low premia being associated with better governance. For example, Italian controlling ownership is marked by a control block premium of 37%.66

Italy made major revisions to its corporate laws in 1998 and again in 2004.67 These changes represent a significant step forward for the Italian corporate code, at least on paper. The 1998 revisions included improvements that modified quorums to promote blocking minorities, ensuring freer disclosure to facilitate proxy fights, and additional provisions for minority shareholders in the event of a compulsory takeover.68 The 2004 revisions added the ability to issue different types of shares and multiple corporate governance structures,69 building on the 1998 reforms.70 Commentators have, however, expressed substantial concern that progress on paper might fail to compel actual legal change.71 In particular, concerns about the judges' inability to effectively implement laws and the strength of the laws might foreshadow

64. Gilson, supra note 16, at 1654.
65. La Porta et al., supra note 40, at 1143, 1147. In contrast, ownership rates in American and Japanese firms were closer to a mean of 20% and a median of 12%, with scores two points higher on the enforcement criteria for both countries. Id. at 1130–31, 1143, 1147.
66. Gilson, supra note 16, at 1655. These results are consistent with Gilson’s work, which argues that controlling shareholders will extract higher premia in bad law states.
68. Id. at 2–5.
69. Ventoruzzo, supra note 48, at 115–16.
71. Id. at 767; Ventoruzzo, supra note 48, at 153.
limited change in practice.\textsuperscript{72} There are cultural—such as preferences for corporate insiders—and legal explanations—the high bars for bringing suits—that have been attributed to Italy's failure to rigorously enforce its corporate law. Regarding derivative suits, the major problem has been the gap between potential plaintiffs and available law: Eligible plaintiffs have recourse to other established mechanisms, while new plaintiffs are not included within the derivative suits mechanism.

1. \textbf{Italian Derivative Suit Mechanisms}

Luca Enriques describes four shareholder litigation mechanisms that are available to shareholders. Article 2393-\textit{bis} is the derivative suits mechanism and requires ownership of 2.5\% of the outstanding shares for listed firms, and 20\% of the shares for an unlisted firm.\textsuperscript{73} Shareholders can also use three other mechanisms to influence the board. First, Article 2377 allows a shareholder to bring suit to nullify resolutions that violate the law or the company bylaws.\textsuperscript{74} These suits are often brought ostensibly for change and then used to increase minor-

\begin{enumerate}
\item \textsuperscript{72} Enriques, \textit{supra} note 70, at 773–74.
\item \textsuperscript{73} Article 2393-\textit{bis} of the Italian Civil Code States:
\begin{quote}
The company action for liability may be exercised also by members representing at least one fifth of the capital or such different percentage indicated in the by-laws which in any case cannot be greater than one third.
For companies making recourse to the market of risk capital, the action described in the preceding paragraph may be exercised by the members representing one-forthieth of the company's capital or such lower amount contemplated in the by-laws.
The company must be convened in court and the deed of summons may be served on it also in the person of the chairman of the board of auditors.
The members who intended to promote the action appoint, by majority of the capital owned, one or more representatives for the exercise of the action and for the fulfillment of the related acts.
If the request is accepted, the company pays the plaintiffs the judicial expenditures and those incurred for the ascertainment of the facts which the judge charges to the losing party or which may not be possible to recover upon enforcement against them.
The members who initiated the action may abandon it or settle; any compensation for the waiver or settlement must be for the benefit of the company.
The provisions of the last paragraph of the preceding article apply to the action described in this article.
\end{quote}
\item \textsuperscript{74} "The resolutions not adopted in compliance with the law or the by-laws may be challenged by the members not present, by the dissenting ones or those who did not ex-
ity shareholder bargaining position. Second, Article 2395 facially permits recovery for director negligence or fraud. Finally, under Article 2409, shareholders holding greater than 5% of outstanding shares can complain if serious irregularities occur in the company's management.

While superficially this array of options appears to provide aggrieved shareholders with some remedy, shareholders are generally unable to effectively bring suits against the board. To wit, the 1998 revisions the derivative suit mechanism has never been used. Enriques attributed the anemic showing to the at-the-time high, 5% share ownership threshold, while Marco Ventoruzzo attributes the failure to (1) lack of economic incentives; and (2) civil procedure/professional regulation problems. The abundance of shareholder options might account for the underutilization by plaintiffs who have a number of mechanisms for pressuring the board and which are familiar to their lawyers. Enriques notes that remedies for specific problems are generally unavailable, forcing minority shareholders to use ostensible reasons to strengthen their bargaining positions. In particular, a plaintiff would need to advance the expenses for the litigation, which would only be recoverable with victory. Second, there are neither contingency suits nor extensive discovery which limits a lawyer's incentive to take risks and build a strong case.
2. The Failure of Italian Derivative Suits to Irritate

When implemented in 1998, derivative suits were designed to add an additional protection for minority shareholders. The 1998 Testo Unico della Finanza ("TUF") corporate reforms included several provisions designed to strengthen the interests of minority shareholders.\(^8^1\) Teubner's theses, however, focus on the interaction of the new laws with existing social structures and the strength of the law's connections with receptive parts of society. Thus, rather than simply looking at impediments that have muted incentives to file derivative suits, Teubner suggests that examining the failure of derivative suits to irritate the social system will lead to a better understanding of derivative suit use.

The core component of Teubner's argument is that law is selectively engaged with society at varying levels of intensity. Thus, changes that irritate and interact with important social elements or affect smaller social elements in a drastic fashion are more likely to evolve and embed themselves within the new environment. It could be expected that importation of derivative suits be limited in its impact: implementation is limited to shareholders with greater than 2.5% ownership, a minority of the population, and topically far from the mainstream. Teubner postulates that imported laws evolve due to conflictual interaction with social elements. Yet, the derivative suit mechanism implemented in Italy is subdued, affronting no component of society.

First, the laws relating to shareholder litigation limit the amount of litigation. The filing costs can be prohibitive, and effectively incapacitate derivative litigation, while the holding requirement is much higher than other countries examined in this Article.\(^8^2\) Derivative suits appeal to two groups, lawyers and potential shareholder plaintiffs. In terms of obvious social connections for the new law, derivative suits are unlikely to irritate either of these groups. A substantial shareholder must file the average derivative suit, and because they have substantial holdings, it is likely this shareholder has access to management's ear without the suit, and filing the suit will result in few private

\(^8^1\) But see Ventoruzzo, supra note 48, at 140 ("In sum, it cannot be said that the new rules regarding withdrawal rights have significantly extended the ability of shareholders to 'vote with their feet'.")

\(^8^2\) Both Japan and the United States effectively allow any shareholder to bring suit. West, Why Shareholders Sue, supra note 61, at 354; De Nicola, supra note 3, at 33–36.
benefits. Grechenig and Seykra have argued that high percentage limits result in no derivative lawsuits and zero monitoring of corporate actions. The holding requirement provides power to plaintiffs that have the least need for it. In addition, other rights are given to shareholders with significant holdings, including the right to challenge the board resolutions listed above. These shareholder powers have been used for demanding accountability of the board in the past and may be more desirable substitutes.

Similarly, a potential lawyer would need to find such a party or induce someone to purchase 2.5% of a company to file a suit. In the United States, lawyers are incentivized to pursue derivative suits by the possibility of recovering their legal fees. Derivative suits are often filed by shareholders with small holdings and the complications of filing a successful claim limit derivative suit utilization. The holding requirement significantly limits an Italian lawyer's ability to find possible plaintiffs or create them. In Italy, the inability of small shareholders, who have little influence with the corporate board, to use derivative suits shows that there would be little social response to the new rules. Without substantial public support for corporate accountability there is little social pressure to take on these risks.

Second, unfavorable support structures have diminished the use of derivative suits. This is a systematic argument made by Ventoruzzo and Alessandro De Nicola. Foremost, the judiciary and political structures have not proffered their support for derivative suit utilization. One major component of effective enforcement is the judiciary. In a civil legal system much of the onus lays on the judge. However, Enriques' study of Italian judges raises several concerns about the enforcement of corporate law. First, the development of skilled judges is limited prematurely: judges are not permitted to work on corporate cases immediately after their legal training. Second, existing practices, such as the use of frivolous claims to gain a modicum of access to courts and hard-to-read opinions, severely limit new judges' ability
to understand precedent and detailed legal issues. Finally, activist civil law judges, who might work around these limitations, are generally frowned upon.\textsuperscript{91} These systematic problems are a fundamental component of the decision to file made by any potential plaintiff. By decreasing the likelihood of a successful resolution and increasing plaintiff costs, these problems aggravate the difficulties for a shareholder suit. In his empirical analysis, Enriques found "egregious cases of deference to corporate insiders"\textsuperscript{92} in Italy. He expressed concerns that courts rarely consider the substantive reasons for the dispute and seldom care about the signaling effects or incentives that the cases may have.\textsuperscript{93}

As an example, Italy illustrates how the impact of law, even beneficial law, without social support is likely to be limited. Teubner argues that law is defined by its differences with society and that the conflictual interactions are what drives a new law's utilization in and adaptation to the domestic system. Without a serious level of interaction, the law remains inert. Social components, such as the small shareholder that is the foundation for derivative suits in Japan and the United States, have no incentive to utilize derivative suits. Thus, because of the law's loose coupling with Italian social components, there is too little irritation to promote adoption of the law into Italian jurisprudence.

Looking forward, recent Italian reforms have significantly liberalized the corporate governance options available. The changes, despite offering a sometimes desirable degree of flexibility, will probably only limit judicial effectiveness. In Italy, Teubner's dual-track model shows that changes in the law combined with tepid social support will lead to little change—the irritation is too subtle.\textsuperscript{94} Worse yet, by placing ineffective law on the books, the legal revisions threaten to undermine the legitimacy of Italian corporate law in general. Simple evaluations may point to a preference for insiders in Italy as a cultural explanation or declare Italy's legal system too barren for derivative suits to thrive. Neither explanation is satisfactory—some of the non-derivative action

\textsuperscript{92} Enriques, \textit{supra} note 70, at 809.
\textsuperscript{93} Id. at 809–10.
\textsuperscript{94} One could also argue that Teubner's system is working exactly as predicted: the initial 5% holding requirement was too high for social uptake. In response to this limited impact, the legal holding requirement was reduced to 2.5%. From this perspective, even no social response forces a legal change. See sources cited \textit{supra} note 73 and accompanying text.
substitutes would permit flexibility in their interpretation if judges would take risks. Similarly, judges might read outside the lines, as they already do; with greater precedents and stronger minority shareholder rights, minority shareholder suits might be more effective. Likewise, massive social changes, such as a fall from grace for corporate players, might further shift the cost-benefit analysis in favor of derivative suits.

B. Derivative Suits in Japan

Japan's corporate world has changed substantially over the last twenty years, along with its corporate law. Following the end of the bubble economy of the 1980s, Japan revised its corporate law in starts and stops, culminating in the 2006 New Company Law. The new law focused on increasing corporate governance flexibility and modernizing laws that lagged behind Japan's corporate growth. The changes were also designed to recognize the massive changes that occurred in Japan, including rapid "norm deterioration," compounded by the precipitous decline of off-the-books corporate governance mechanisms, like cross-shareholding, and the growing cultural acceptance of hostile takeovers.

Japan provides a good comparison to Italy and the United States. The United States strongly influenced Japanese corporate law and, though technically a civil law country, Japan continues to show strong similarities to the United States. The similarities to American law have prompted people to question why derivative suits in Japan have not been utilized in a similar fashion until recently. Like Italy, Japan did not utilize derivative suits, totaling less than twenty suits between 1950 and 1990, until 1993, when the filing requirements for derivative suits were changed. Unlike Italy, the change in Japanese filing requirements precipitated a 10,000% increase in the number of derivative suits filed. Moreover, unlike Italy, Japan has a strong reputation

95. Enriques, supra note 70 at 772, 785.
97. Fumio Kuroki, The Relationship of Companies and Banks as Cross-Shareholdings Unwind—Fiscal 2002 Cross-Shareholding Survey 6 (2003), available at http://www.nli-research.co.jp/english/economics/2003/eco031118.pdf (noting that between 1992 and 2002, cross-holding by value declined from 17.8% to 7.4%, and that long-term shareholding by value also decreased from 45.7% to 27.1%).
99. West, Pricing of Actions, supra note 47, at 1438.
100. West, Why Shareholders Sue, supra note 61, at 352.
for "good law," with favorable results in the *Law and Finance* survey in regards to corruption and judicial efficiency.101

Recent increases in Japanese derivative suit usage allows for comparisons with Italy and the United States. Traditionally, Japanese corporate governance has been considered "insular and conservative," beholden to its strong managerial roots.102 By reducing the filing fees for bringing suit, derivative suits became financially viable for lawyers and plaintiffs. In contrast with Italy, where the law is stymied by its inaccessibility to likely plaintiffs, derivative suit reform interacted with Japan's rapidly changing social norms to cause change and an active derivative suit industry.

1. Japanese Derivative Suits

The mechanisms for enforcing derivative suits in Japan were updated with the New Company Law, or *shinkaishahō*.103 This revised law went into effect May 1, 2006, and consolidated many of the piecemeal changes of the last decade. In particular, it unified the Japanese Commercial Code, Law on Company Limited, and other laws into a single Company Law.104 Still, like before, shareholder actions are available in

101. Japan scored 10 for judicial efficiency and 8.52 for corruption, and had similar shareholder rights to the United States. La Porta et al., *supra* note 40, at 1130–31, 1143, 1147.


104. *Shareholders in Japan: Pick Your Poison*, *Economist*, June 11, 2005, at 97 ("Japan's business leaders are pressing for more clarity about the rules of corporate control and the limits of shareholders' rights.").

The New Company Law was notable for several reasons. First, it defined new categories of companies that reaffirmed the divide between Japanese-style and American-style companies. Under the Company Law, there are four major company classifications: a general partnership, a limited liability partnership, a limited liability company, and *kabushiki kaisha* (or business corporation). *Kaishahō [Company Law]*, *supra* note 6. The *kabushiki kaisha* is further divided into large and small/midsize public and private corporations. *Id.* It also includes the *tokurei yūgen kaisha*, which replaces the *yūgen kaisha* classification that was previously used. *Id.*

Second, the New Company Law allowed for two different governance structures: the traditional Japanese auditor system, or a Western-style board. *Id.* It could thus be argued that these changes indicate that existing corporate governance structure and company styles will be permitted in the future. Rather than substantially change the system, the Company Law continues a policy of providing flexibility to managers. This includes a reduction of regulations for small and midsize companies and a general easing of requirements. Companies can continue to use the traditional Japanese system if it suits their interests. By emphasizing flexibility, the New Company Law fits within an enabling framework—rather than pushing any single approach, the Japanese laws defer to management and tailoring approaches for each company.
Japan under three different mechanisms. The first, covered in Article 847, provides for a traditional derivative suit, where a shareholder who has continuously held shares for six months or longer (unless a shorter period is provided in the articles of incorporation) can demand a filing against the corporation members requiring the return of profits to the company. Second, Article 968 parallels the former Article 294-4 by providing penalties for permitting sokaiya abuses, which include inappropriately participating in shareholder meetings or abusing other shareholder rights. Finally, Article 164 of the Financial Instruments and Exchange Law allows a shareholder to sue a director or major shareholder to disgorge short swing profits. The Company Law also contains restrictions on director and executive

Third, the new laws provided new regulations for mergers and acquisitions that offer stronger hostile takeover protections and legal recognition for techniques that were ambiguous under earlier laws. These new laws simultaneously simplified the merger process and were designed to promote more M&A activity. Tetsushi Kajimoto, New Corporate Law to Foster Additional M&As, JAPAN TIMES, May 3, 2006, available at http://search.japantimes.co.jp/cgi-bin/nb20060503a2.html.

A Japan External Trade Organization ("JETRO") article commented that the new corporate law still has limitations in terms of holding the board to task. "There is no legal system for class action lawsuits: No securities class action lawsuits; only derivative actions where the award is paid to the company; and no system of "discovery" that can be used to uncover evidence of director malfeasance, violations of fiduciary duty." NICHOLAS BENES, JAPAN'S NEW COMPANY LAW: ITS IMPACT ON GOVERNANCE, M&A, AND FDI 7 (2006), available at http://www.jetro.org/documents/event_documents/173/173_ACCJ_BENES_6-30-06_j1.pdf.

Article 847 references Article 423, which includes directors, accounting referees, statutory auditors, executive officers, and accounting auditors. Shōhō [Commercial Code], art. 847 (Japan). Thus, even audit firms can be targets for derivative suits. BENES, supra note 105, at 3.

This was formerly handled in Articles 267 through 268-3 of the former Commercial Code. West, Pricing of Actions, supra note 47, at 1446 n.37.

Sokaiya are professional shareholders who either extort management or intimidate other shareholders for profit. See id. at 1450-52; see also generally KENNETH SZYMKOWIAK SOKAIYA, EXTORTION, PROTECTION AND THE JAPANESE CORPORATION (2002) (providing a more colorful and in depth account of the history of sokaiya).

Shōhō [Commercial Code], art. 968-1 (Japan).

Id. art. 164 (translation on file with author). Article 164 provides: (1) In order to prevent the inappropriate utilization of secrets acquired by the officers and primary shareholders of listed companies due to their positions and the certain marketable securities held by such persons, in the event that a profit is realized for shares that are sold within 6 months of the purchase of securities based on the individual’s estimates or the purchase of shares within 6 months of a sale, the listed company will demand the benefit be provided to the listed company; (2) [i]n the event that the listed company does not make the demand within 60 days of the date they are supposed to make the demand according to the regulations in paragraph (1), the shareholders (including employees that are policyholders and investors) of such listed company can vicariously make the demand; and (3) [t]he right of to make such demand against the officers and primary shareholders of such listed company described in paragraph (1) will expire 2 years after the date of the benefit. Id.
behavior that are familiar to Western commentators, including restrictions on self-dealing\textsuperscript{111} and liability for breaches of the duties of care and loyalty.\textsuperscript{112}

Descriptions of Japanese derivative suits are heavily indebted to Mark West, a professor at the University of Michigan Law School. In his initial article in 1994, West argued that "although culture may play some role in explaining actor behavior, decisions on whether to bring derivative actions are primarily determined not by culture, but by economics."\textsuperscript{113} In particular, West focused on an internal claim—that cheaper substitutes dominated derivative suits—and external claims—different rules significantly reduced litigation in comparison with the United States.\textsuperscript{114} These played a primary role in the cost-benefit trade-off that West felt was important in limiting derivative suit use in Japan prior to 1993: substitutes were less costly than derivative suits.

As noted earlier, shareholder suits increased by 10,000\% after the 1993 amendments. The catalyst for this dramatic increase was the reduction of the derivative suit filing fee to ¥8,200 (approximately $70.46),\textsuperscript{115} from the previous practice of using higher rates established by a schedule.\textsuperscript{116} West comments, however, that despite the increase in filings, the success rate of Japanese derivative suits has been,Japan revised its securities laws in 2006, largely in response to domestic corporate scandals, including the live door bid for Fuji Television and Kanebo. Katharine Hyde, J-SOX Readiness: Potential Impact and U.S. SOX Lessons Learned, JAPAN SOCIETY, Feb. 22, 2007, http://www.japansociety.org/j-sox_readiness_potential_impact_and_us_sox_lessons_learned (summarizing the discussions of a moderated panel of experts on corporate finance and risk management); see also Yuriko Nagano, Japan Takes First Step Into J-SOX World, COMPLIANCE WEEK, Sept. 25, 2007, http://www.complianceweek.com/article/3712/japan- takes-first-step-into-j-sox-world. The revisions consolidated and harmonized several Japanese securities laws, while imposing Sarbanes-Oxley-style penalties for market fraud. See id. This protection was previously provided by Article 189 of the Securities and Exchange Law, as discussed by Mark West. See West, Pricing of Actions, supra note 47, at 1454. This provision is similar to Section 16(b) of the U.S. Securities and Exchange Act of 1934. Id.

\textsuperscript{111} Shōhō [Commercial Code], Art. 356 (Japan).

\textsuperscript{112} Id. art. 423.

\textsuperscript{113} West, Pricing of Actions, supra note 47, at 1441.

\textsuperscript{114} Id. The substitutes included injunctions, removal of directors, settlement, general griping, and exit. Id. at 1443.

\textsuperscript{115} This calculation assumes an exchange rate of 116.36 yen to the dollar, which was the average exchange rate between 1995 and 2005. U.S.-Japan Average Annual Exchange Rate, http://www.mac.doc.gov/japan/statistics/exchange.htm (last visited Apr. 10, 2009).

\textsuperscript{116} The change is discussed more extensively in West, Pricing of Actions, supra note 47, at 1463–65. In particular, a suit claiming $ 7.7 million in damages under the prior rules would require $24,000 in revenue stamps to be filed. Id. This placed a hefty price on potential litigants. In 1993, however, the Tokyo High Court held that fees should be based off a ¥950,000 claim when recovery was indeterminate—hence the ¥8,200 filing fee. Id.
as in the United States, “abysmal.” In particular, the data set included 73 suits: 2 plaintiff victories, 10 settlements, and 20 defendant victories or plaintiff withdrawals, with the remainder still pending. Results with this sample paralleled Romano’s survey in the 1980s: derivative suits did not cause significant price movements and shareholders did not expect to receive any significant gains from a filing. Severe director misconduct was a frequent precondition to a settlement. In conclusion, West noted that (1) Japan follows the United States in not providing significant increases in shareholder wealth; and (2) that the monetary incentives associated with the United States were not necessary to promote litigation.

The rapid change introduces a number of interesting questions. Foremost, much of West’s earlier analysis focused on procedural burdens that inhibited use of derivatives, such as poor cost-benefit trade offs for potential plaintiffs, limited discovery, and so on. Yet the change in filing fees indicates that these burdens might not bear evenly on potential plaintiffs—certain reforms might significantly increase the amount of derivative suits. West recognized the changes and, in his second article in 2001, significantly updated his analysis. West found that Japan had developed an active derivative suits industry, but with similar problems and patterns to the United States. This indicates that the lack of discovery and American litigiousness is not fatal. Yet, the question of why a simple fee change was sufficient to jump-start the Japanese derivatives industry remains.

In his initial analysis, West highlighted a number of impediments that limited the effectiveness of derivative suits in Japan. Some impediments that inhibited potential litigants include significant initial legal fees, lack of appropriate incentives for Japanese lawyers to bring suits, a system where the losing party pays, lack of discovery, disad-

117. West, Why Shareholders Sue, supra note 61, at 361.
118. Id. at 357. Recall that 83 of 128 suits discussed in Romano’s survey resulted in a settlement. Romano, supra note 1, at 57, 60.
119. West, Why Shareholders Sue, supra note 61, at 359.
120. Id. at 362.
121. Id. at 381–82.
122. West, Pricing of Actions, supra note 47, at 1462 (“[T]he inability of the Japanese system to channel the rewards of private enforcement to the bengoshi effectively raises the price of derivative litigation relative to the price of the same action in the United States, not only for the plaintiff but for the bengoshi as well.”).
vantageous informational asymmetries, certain legal rules, and the abuse of rights doctrine.\textsuperscript{123} 

2. Social Irritation by Changes to Japanese Derivatives Laws

Significant changes in the social irritation caused by derivative suits resulted in a role for derivative suits in Japan. The drastic reaction to filing fee changes is only one component of the significant social change that irritated Japan's corporate governance mechanisms. At the time, traditional Japanese corporate governance mechanisms were unraveling, destroying much of the mystique of the paternalistic corporation. This is a perfect example of Teubner's dual track system, where co-evolutionary trajectories influence each other: legal changes caused and irritated social changes, which in turn responded, leading to a narrative whereby change became self-perpetuating. The traditional main bank system of corporate governance was declining in the 1990s and many of the company cross-holdings also began to unravel.\textsuperscript{124} In this situation, the changes to the derivative suits filing fees fit into an active social discourse. Moreover, the low filing fee helped tip the cost-benefit analysis in favor of shareholder action. Thus, one of the major ingredients for an active narrative between the reformed law and society was satisfied by the timing of the derivative suit reforms.

The modification of the filing requirements for derivative suits irritated previously impotent social segments of Japan, such as plaintiffs with small holdings. It was previously argued that the 2.5% filing threshold in Italy was too high to permit an active derivative suits industry. In Japan, the derivative suit filing fee probably played a similar role by significantly increasing the costs for potential plaintiffs. The relation between perceived costs and benefits is more striking when West's results are examined. One of the residual explanations for de-

\textsuperscript{123} To some degree, these complaints mirror those voiced by Marco Ventoruzzo in regards to the failings of Italian corporate law. See supra Part III.A (discussing the deficiencies of Italian corporate law).

\textsuperscript{124} Masahiko Aoki describes the Japanese main bank system, in which a firm's lenders provided necessary corporate governance. See MASAHIKO AOKI, THE JAPANESE FIRM: SOURCES OF COMPETITIVE STRENGTH 20-22 (Masahiko Aoki & Ronald Dore eds., 1996). Yet, by the time of this writing, all of the banks to which Aoki refers in his book have either merged or gone bankrupt. At least three of Aoki's main banks, Sanwa Bank, Tokai Bank, and Mitsubishi Bank, were combined in the resulting Bank of Tokyo-Mitsubishi UFJ Limited. MITSUBISHI UFJ FIN. GROUP, 2007 CORPORATE REVIEW 4, available at http://www.mufg.jp/ir/annualreport/2007mufg/pdf/file/cr0704.pdf ("Recent History of MUFG"). Most of the remaining players were absorbed into the Mitsui-Sumitomo bank or redeveloped under a new name. See Aoki, supra, at 20-22.
ervative suits in Japan is nonmonetary motives, including justice and environmental activism. Legal changes empowered this pool of plaintiffs who had no similar recourse outside of derivative suits.

Lawyers have benefited from modifications to derivative suits filing laws. West provides several examples of lawyers collecting fees of approximately 10% in his survey. West conjectured that lawyers could significantly improve their possibility of success by cherry picking the best cases. The plaintiff's ability to "piggyback" on public prosecutor cases aided in this process. The availability of derivative suits corresponded with an increase in public prosecutor actions against corrupt corporations. Plaintiffs often follow public prosecutorial action, piggybacking on a successful action to gain access to information and exploit a successful ruling for derivative suit success. The legal change was sufficient to make a previously disinterested group take the risk for financial gain.

In addition, filers were able to exploit numerous supportive social elements. The derivative suit reforms were tied to several diverse parts of society, each of which provided support for the implementation and use of derivative suits. This included political support and, due to public prosecutor suits, cost reduction. An increase in derivative suit litigation was supported by ruling politicians. Following the 1980s, Japan has increasingly attempted to update its corporate law to meet international standards, while trimming the corporate fat and removing the skeletons accumulated during the bubble era. Derivative suits have played an important role in reducing corporate fraud, with most consistent success in "obviously" bad cases. This interpretation is consistent with J. Mark Ramseyer's argument that Japanese courts bend to

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125. The primary motive was attorney fees, but also included sokaiya suits, insurance-settlement motivations, and public enforcement. West, Why Shareholders Sue, supra note 61, at 372.

126. Whether these are ideal derivative-suit plaintiffs is a different issue. One of the arguments against lower thresholds is that they will promote strike suits motivated not by change, but by a desire for quick settlements.

127. He found 11% fees for the Shareholder Ombudsman group, 8% fees for a case in the Kobe District Court, and 9% fees for a settlement. West, Why Shareholders Sue, supra note 61, at 367–69.

128. Id. at 378.

129. See J. Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. LEGAL STUD. 721 (1994). Building on the work by William Landes and Richard Posner, politicians will keep courts independent if they expect elections to continue indefinitely and they continue to win. Independent courts will only be promoted if continued elections are likely and victory is unlikely. Id. at 722. These judges can be controlled by Japan's primary political party, the Liberal Democratic Party, using the judge renewal process and relocation scheme to promote supporters and distance detractors. Id. at 725.
The willingness of Japanese courts to hear derivative claims and side with shareholders, at least in the most egregious cases, created benefits for potential plaintiffs. This also forced major changes in the business culture of Japanese corporations and a growing awareness of fiduciary duties owed to shareholders.

These beneficial elements have been significant in promoting ongoing discourse between the law and society. Teubner argues that ties between law and society are defined by difference, and that law and society evolve through conflicting interactions. Thus, for law to be relevant in society it must act and react to social forces. The Japanese example highlights these interactions: the initial law prompted legal actions, which were supported by judicial support and indicators for likely targets that could be exploited by plaintiffs. These plaintiffs were rewarded with a number of big recoveries. The most famous example is the Daiwa Bank case: massive losses caused by a rogue trader at Daiwa Bank in New York resulted in a $775 million fee for filing misleading financial reports with the Ministry of Finance. In addition, several suits have settled for significant amounts, indicating at least some valid concerns about paying out a damages claim. Should these recoveries grow too large or suits too burdensome, it is

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130. Id. at 722.

131. One lawyer returning to practice in Japan in the late 1990s commented:

The first actor is the Japanese judge. I noticed that at the end of many projects, my clients would ask me, "Can the directors be sued?" This was the first time to hear this question in Japan. Shareholder derivative suits were now possible because the filing fee had been lowered in 1993 to only 8200 yen. Shareholders could now sue and win, and the directors would get nailed. So the president of a company might get angry if a deal didn't take place, but that was nothing compared to the threat of a lawsuit for a dumb deal. The Japanese judge had been brought into the drama, which forced people to consider shareholder value, whether they wanted to or not. There have been some recent revisions to the rules on these lawsuits in the company law. One problem with the revisions is that the company can now side with the company director during these suits. This is entirely inconsistent with the concept of these suits-they are to determine whether the director has harmed the company. The revisions also provide new settlement procedures, but there could be more disclosure in connection with settlement so as to prevent collusion between management and plaintiff shareholders. But in any event, overall the judge is still the most important actor in Japanese corporate governance.


132. Milhaupt, supra note 96, at 2115–16.

133. See West, Why Shareholders Sue, supra note 61, at 363 tbl.4.
likely that the burden would shift back to legal remedies and the conflictual social narrative would continue.

In Japan, the legal change was significant to prompt a social response. By reducing the requirements for filing a suit, both lawyers and shareholders were able to access derivative suits. This is the type of social irritation that one would expect from a significant legal change. The decrease in fees made derivative suits more accessible, although the utilization has been by different types of plaintiffs than in the United States. Similarly, an up-front fee retainer structure has motivated lawyers to make the practice profitable. This is dissimilar from the American model but consistent with Teubner's thesis of imported law reacting differently from the original.\footnote{Id. at 381.} \footnote{Id. at 372.}

IV. Thoughts Relating to the Italian and Japanese Examples

One argument that frequently occurs in comparative analyses is that cultural tendencies play a strong role in the successful importation of law. Yet both of these examples indicate that purely cultural factors have minimal influence on the acceptance of derivative suits. Rather, social relevance has been decisive in the success of importing derivative suits. In Japan, a cultural preference for non-litigious solutions was thought to play a major role in the lack of derivative litigation, especially due to the strong similarities between the United States and Japanese derivative suit mechanisms. However, the increase in suits following the change in the filing fee indicates that economic factors, rather than cultural distaste, were the deciding factor. This may hold lessons for Italy, where attributing the complete lack of derivative suits in Italy to cultural factors, like a preference for insiders, might distract one from the serious procedural impediments to shareholder litigation.

One element discussed in the previous two sections is the accessibility of derivative suits. West's survey indicated that several suits were filed for nonmonetary reasons. More specifically, interviewees file suits to express their anger over corporate scandals and environmental activism.\footnote{Id. at 372.} Whether these are valid suits that should be promoted by legal reforms is one question. However, that legal change irritated certain components of society that had previously been inert is incontrovertible. In addition, the lower filing fee was sufficient to change the cost-benefit analysis for lawyers and promote a viable derivative suits
plaintiff bar. In contrast, the precondition for filing in Italy is being a substantial shareholder in a company: 2.5% in a public firm and 20% in a private one. This threshold quickly removes some equivalent plaintiffs to those that had filed in Japan and creates prohibitive barriers to purchasing a sufficient number of shares to file a suit for plaintiffs and potential lawyers. In addition, the derivative suit does not create a new means of censuring corporate players—participants with 2.5% of the shares have access to other mechanisms.

The critical role played by different fragments of society, like environmental activists, supports the idea that disparate social forces are decisive in the importation of derivative suits and their successful adoption. One argument is that political willpower is necessary to provide laws that are accessible enough to invite shareholder action and that the social climate must be supportive enough for politicians to spurn business interests and develop a law with teeth. Such laws will then be dependent on political and social support for their successful implementation. For example, in Japan, the poor, post-bubble economy lead to a break in Liberal Democratic Party rule and corresponded with a political push for increased prosecution of corporate corruption. The improved access to derivative suits was part of a strong social push for more effective punishment for corporate malfeasance. This is in contrast to some degree with Teubner’s theses which he distinguished from Kahn-Freund by minimizing the role of a strong political state. Kahn-Freund argued that the political state was the primary agent for change, while Teubner asserts that the legal narrative with society broadly defined, determines the interpretation of the law.

Derivative suits have become useful tools for shareholders due to the decrease in filing costs. In comparison with Italian derivative suits, the significance of Japanese achievements is evident. By setting low bars to litigation—and arguably allowing frivolous suits—Japan has turned derivative suits into a punitive item, if not a legitimate action.

136. In contrast, Article 2377 requires only one one-thousandth of a firm’s publicly traded stock to challenge a resolution. Italian Civil Code, supra note 73, art. 2377.
137. As noted supra Part III.A, this includes four shareholder litigation mechanisms available to shareholders. Italy has also finally moved forward with a class action law that may provide a different option for aggrieved individuals without significant holdings. See Cristina Pagni, Italy: Class of Its Own, LEGAL WEEK, June 26, 2008, http://www.legalweek.com/Navigation/20/Articles/1139203/Italy+Class+of+Its+Own.html.
138. Teubner, supra note 8, at 18.
139. Id. at 22 (“Kahn-Freund singled out the political power discourse as law’s primary link to society. . . . [T]his seems to overestimate the importance of the political system at the expense of other social systems.”).
for aggrieved shareholders. This resembles Teubner's thesis, that laws will be adopted but their eventual form might differ significantly from the original transplant. Japan has also started to develop something lacking in Italian law: living law, with judges experiencing cases and writing case law.

This may lead one to think that derivative suits, even in the Italian form, are an improvement in corporate law. Especially in consideration of the other remedies available to shareholders under the Italian Civil Code, it is essential that derivative suits are liberalized sufficiently to irritate a broader spectrum of society. Even in their latent form, corporate laws like Italy's can potentially morph, with sufficient social pressure, into effective law. Under Teubner's argument, law and society are constantly in contact, with social aggravations leading to legal responses. One may hope that with social, or perhaps international business pressure, Italian law may flip like Japan. The Japanese example indicates that simply reducing expected costs can seriously increase the litigation. The Italian court system's inability to easily adapt remains another question.

**Conclusion**

Derivative suits have almost faded from the pages of law reviews and their insignificance has been thoroughly analyzed. Yet a comparative analysis paints a considerably more interesting picture. The Japanese example should be sufficient to make one reconsider the existing incentive structure in the United States and how necessary it is for laws to irritate some social component, assuming that the desire is for the new law to be utilized. Meanwhile, Italy's example in the derivative lawsuits context should highlight the importance of lowering the bars for litigation, which will at least raise the stature of derivative litigation and contribute to a culture of accountability.

Overall, these examples should make one reconsider the cultural dependencies of laws and how to import good law. Many of the cultural impediments and systematic inadequacies blamed for poor derivative suits uptake were not dispositive in these international contexts. Rather, it was essential that imported law interact with and irritate a heretofore unaffected part of society. In Japan, the lowering of filing fees made derivative suits financially possible for new plaintiffs. In contrast, derivative suits in Italy are no more accessible than previously available remedies, adding little to the remedies available to Italian shareholders. This illustrates how essential it is for imported law to irritate social elements as proposed by Teubner. The development of
the Japanese derivative suit industry shows how society responds to new laws and how law responds to society's input to create a co-evolving legal discourse. In the United States, derivative suits have an established role versus other shareholder remedies and Japan is finding a role for its derivative suits. Italy continues to modify its derivative suits laws and, with time, it too might find that making the law more accessible enervates the social response and causes further changes to the law.