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Persuasion and Resistance: The Use of Psychology by Anglo-American Corporate Governance Advocate in France

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ABSTRACT

The Author argues that in the 1990s Anglo-American corporate governance became the dominant model for large, public firms in the international business world, and that corporate governance professionals relentlessly promoted and exported Anglo-American corporate governance throughout the developed and developing world. Contending that it is an appropriate time–if only because the U.S. recession and international hostilities have tempered the "irrational exuberance" of capital market proponents–to examine critically the advocacy of Anglo-American corporate governance, the Author proposes that an important part of the critical assessment is to explain the momentum of the dominant model: to understand why Anglo-American corporate governance appeared so persuasive and inevitable, and why other models were less compelling and pushed to the margins of the debate. The Author argues that corporate governance advocates used psychological factors to create this momentum.

The Author bases his argument upon a study of how corporate governance advocates used psychological factors in public texts, French and non-French, influential in recent French corporate governance debates to make a psychologically persuasive case for the Anglo-American model. After presenting the results of the study, the Author explains that the study shows that there is a need for policymakers to develop a better, more rational way of debating about corporate finance and

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governance, in light of this pervasive use of the psychological factors by governance advocates. After offering a few general guidelines on how to achieve this goal, the Author argues that, because its development will take time, culture and politics give policymakers a mental framework that blunts the immediate effects of the psychological factors and that guarantees for them and others a space for debate on governance changes.

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I. INTRODUCTION

In the 1990s, I studied corporate governance in world-class French companies.[1] In the studies, I explained how a governance system suitable for French State and family ownership of firms partially evolved, or should evolve, to market capitalism. Looking back at this work now, I believe that in it I participated in a dominant advocacy movement regarding the oversight and management of large publicly-owned firms.

The animating idea of the movement was that there is a basic model of corporate governance that countries should promote, and that firms should adopt, because it is most suitable for current economic circumstances and is most likely to generate economic growth. Under the model, institutional shareholders such as pension funds and small retail investors are the main owners of a firm, and they leave its operations to technocratic management.[2] The main difficulty in the relationship between owners and management, which is the subject of corporate governance, is the well-known agency problem—that managers act primarily in the shareholders' interests.[3] The model also assumes that firms raise capital in large, liquid securities markets.[4] Investors have liquidity for their investments and numerous investment choices, and firms can raise low-cost capital.[5] Capital markets, moreover, provide firms with different

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1. *See, e.g.*, JAMES A. FANTO, CORPORATE GOVERNANCE IN AMERICAN AND FRENCH LAW (1997); James A. Fanto, *The Transformation of French Corporate Governance and United States Institutional Investors*, 21 BROOK. J. INT'L L. 1 (1995); James A. Fanto, *The Role of Corporate Law in the Adaptation of French Enterprises*, 1998 COLUM. BUS. L. REV. 97; James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 CORNELL INT'L L.J. 31 (1998).

2. *See* Fanto, *The Role of Corporate Law in French Corporate Governance*, *supra* note 1, at 36-39 (describing growing separation between management and shareholders).

3. The agency problem is by now standard in the corporate finance and governance literature. For a seminal article, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976).

4. *See* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1959 (1993) (describing the role of liquid securities markets in this economic model).

5. That is, because of the liquidity provided by capital markets, investors do not demand *ex ante* an additional return from a firm for their inability easily to resell their investments. In other words, investors do not demand a discount from the firm to

kinds of financing, rather than compelling them to look to few capital providers, such as banks or other large financial institutions, for their financing needs.

The model also has a political basis. This method of corporate finance is presented as more democratic and less paternalistic than its alternatives. Investors' freedom to choose among different kinds of investments is tied to a debate about pensions:[6] just as ordinary people are encouraged to take charge of and be educated concerning their investments, they should similarly control their retirement assets and not rely upon the state or the companies in which they work.[7] The freedom of self-directed pensions is contrasted with the paternalism of state-directed pension systems, where few officials make decisions and people are generally passive and dependent.[8] Under the model, a firm need not convince state officials or bankers in large financial institutions about its worthiness for financing.[9] Rather, any firm could test its value by offering its securities on liquid capital markets, with the implication that there will be investors ready to invest in any worthy firm. From a practical political perspective, the model reflects the kind of capitalism prevalent in the United States, which was the most dynamic superpower in the 1990s. The largest institutional investors, generally from the United States and the United Kingdom, which has a market capitalism system similar to that of the United States, increasingly invest their funds throughout the world[10] and desire to see their governance model employed by firms in other countries.

As a further justification, the dominant movement espouses both an economic and philosophical liberalism and condemns liberalism's

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compensate for this risk. Accordingly, a firm can raise more capital from investors. *Id.*

6. *See* James A. Fanto, *Comparative Investor Education*, 64 BROOK. L. REV. 1083, 1083-85 (1998); James A. Fanto, *Investor Education, Securities Disclosure, and the Creation and Enforcement of Corporate Governance and Firm Norms*, 48 CATH. U. L. REV. 15, 18-19, 31-32, 39 n.93 (1998); James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. 105 (1998).

7. *See* Fanto, *We're All Capitalists Now*, *supra* note 6, at 118-26.

8. The self-directed pension also has an economic justification: it is seen as a necessity for ordinary people because neither firms nor the State can any longer finance the retirement burden of a growing retiree population. Moreover, firms in countries mandating company sponsorship of generous retirement benefits would bear more retirement costs and would thus underperform firms in countries with a market-based retirement. *See* E. PHILIP DAVIS, PENSION FUNDS: RETIREMENT-INCOME SECURITY AND CAPITAL MARKETS, AN INTERNATIONAL PERSPECTIVE 5-26, 42-47 (1997).

9. *See* Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, *supra* note 4, at 1959 ("[A]s debt securities, commercial paper and bonds replace bank loans, so commercial banks' influence as lender declines.").

10. *Cf.* Magnus Dahlquist & Göran Robertsson, *Direct Foreign Ownership, Institutional Investors, and Firm Characteristics*, 59 J. FIN. ECON. 413, 435-39 (2001) (describing institutional investor participation in Swedish firms).

opponents. Economic liberalism accepts that individuals acting within the market are generally best suited to decide on the distribution of financing and the production of economic resources.[11] In Western countries, this economic liberalism goes hand in hand with the individual freedom espoused by philosophical liberalism.[12] The movement characterizes any opposition to liberalism as being authoritarian or paternalistic, and it derides non-market systems, such as socialism and communism.[13] The discourse naturally regards religion with skepticism, finding that certain religions, such as Catholicism and Islam, are authoritarian and anti-liberal.[14] According to the dominant movement, these religious undermine commercial growth and are hostile to capital markets.[15]

Indeed, there were and continue to be thoughtful academic criticisms of the dominant discourse, which will be discussed below. Yet even these perspectives that identify the value of other kinds of corporate finance and governance often suggest, either explicitly or implicitly, that there is little justification for resistance to market capitalism.[16] The almost uniform message is that Anglo-American

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11. *See, e.g.*, F. A. HAYEK, THE ROAD TO SERFDOM 36 (1944) ("The liberal argument is in favor of making the best possible use of the forces of competition as a means of co-ordinating human efforts, not an argument for leaving things just as they are. It is based on the conviction that, where effective competition can be created, it is a better way of guiding individual efforts than any other.").

12. In practice, the two went together. The interesting question is whether they in fact *must* go together. *See* DEEPAK LAL, UNINTENDED CONSEQUENCES: THE IMPACT OF FACTOR ENDOWMENTS, CULTURE, AND POLITICS ON LONG-RUN ECONOMIC PERFORMANCE 86-94 (1998). Lal offers an explanation of the origins of Western individualism that is based upon an effort by the Catholic hierarchy to separate the individual from the family and his or her immediate society, so as to make the individual more inclined to follow the hierarchy, and explains that this kind of individualism need not accompany the modern finance that developed in Western countries. *Id.*

13. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 6 (2001) (describing Mark Roe's position that strong securities markets are inconsistent with "social democracies"); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 541 (2000).

14. René M. Stulz & Rohan Williamson, *Culture, Openness, and Finance*, at 2-5 (Mar. 2001), *available at* http://papers.ssrn.com (presenting data that Protestant countries give better creditor rights, but not necessarily better shareholder rights, than Catholic countries).

15. *See, e.g.*, Coffee, *supra* note 13, at 56-58, 71-74 (arguing, with a rudimentary kind of historical analysis, that "private ordering," so essential for commercial growth, occurred only in the United States, the Netherlands and the United Kingdom (i.e., Protestant countries), in contrast to State-dominated, hierarchical societies); Stulz & Williamson, *supra* note 14, at 5.

16. *See, e.g.*, Coffee, *supra* note 13, at 91; Raguram Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the 20th Century*, at 40 (Mar. 2001), *available at* http://papers.nber.org/papers/W8178 (arguing that market capitalism may well spread, although its dominance is not inevitable).

corporate governance will inevitably extend throughout the developed and much of the industrialized world, barring political catastrophes.[17]

This Article offers one possible explanation for the force of the dominant movement: its advocates, who urged corporate governance changes in countries outside the United States and the United Kingdom, used psychological techniques that made their message particularly compelling. The debate over corporate governance in many countries has not been one in which advocates and policymakers rationally weighed the features of different corporate governance systems and recommended the most suitable alternative depending on the circumstances of a country. Debate over alternatives occurred. But, within this debate, corporate governance advocates, whether consciously or not, used powerful psychological techniques that gave force to their advocacy of the dominant model. The use of psychology did not make the debate irrational, but rather "quasi-rational,"—a term that is meant to convey how emotional and mental limitations constrain the exercise of human rationality.[18]

Part II of this Article briefly describes how the dominant model of corporate governance swept all those before it in the 1990s, both outside and inside the academy. It also emphasizes how the force of the model made its view of governance seem inevitable and convincing. Part III argues that it is an appropriate time to examine the model because of recent changes in world political and economic circumstances which have raised doubts about the model. Part IV sets forth the psychologically-based study of the Article. It first briefly summarizes the orientation of behavioral law and economics that inspired the study and identifies the major psychological factors identified by research. It then presents a study that looks for psychological factors in the major texts that are influential in recent French corporate governance debates. The Part proceeds by providing a little background on French corporate governance to place the study in context. Part V presents the results of the study by highlighting the major differences between the French and non-French corporate governance advocacy texts in their use of psychological factors. It then examines specific examples of how each of the texts employs the factors.

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17. See Bernard Black, *Does Corporate Governance Matter: A Crude Test Using Russian Data*, 149 U. PA. L. REV. 2131, 2138 (2001) (suggesting that corporate governance differences matter little in developed countries (i.e., that there is no correlation between economic performance and corporate governance reforms), but matter a lot in developing countries, where there are few norms of commercial behavior, securities laws, and corporate law). Of course, political and other catastrophes are unpredictable, as we have all seen in the September 11th terrorist attacks and the ensuing biological terrorism in the United States.

18. *See* RICHARD H. THALER, QUASI RATIONAL ECONOMICS, at xxi (1991).

Finally, Part VI draws several conclusions from the study. First, it argues that the study presents a new, psychologically-based account of the recent French corporate governance debates. This perspective implies that psychologically powerful advocacy altered the French corporate governance debate by pushing finance and governance alternatives into the background. Second, this Part contends that the advocacy did not promote a corporate finance and governance solution that is politically acceptable in France and addresses peculiarly French issues of corporate governance. Most importantly, the study suggests that policymakers in countries that are the object of aggressive corporate governance advocacy need to develop a better, more rational way of discussing corporate governance in light of the pervasive use of the psychological factors directed at them. They need, in short, to counter the influence of the psychological factors by developing a kind of comprehensive rationality that will limit the effect of the factors on their policy-making. After offering a few general guidelines on how to achieve this rationality, the Part then argues that, because its development will take time, culture and politics may give policymakers a mental framework that blunts the immediate effects of the psychological factors and that guarantees for them and others a space for debate on finance and governance changes. Part VI concludes by arguing that a recent French law dealing with corporate governance shows both the success of Anglo-American corporate governance advocates—based on the use of the psychological factors in the French corporate governance debates—and the cultural and political resistance to them by French policymakers.

Part VII concludes the Article by emphasizing the role of a country's culture and politics in ensuring a rational debate about corporate governance reform.

II. THE MOMENTUM OF THE DOMINANT DISCOURSE OF ANGLO-AMERICAN CORPORATE GOVERNANCE

The dominant discourse that swept outside and inside the academy was based on a U.S.-style corporate governance and market capitalism.[19] In international business, there has been relentless promotion and exportation of Anglo-American corporate finance, governance, and legal systems.[20] This effort certainly occurred in

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19. FRANKLIN ALLEN & DOUGLAS GALE, COMPARING FINANCIAL SYSTEMS 22 (2000).

20. *Id.*

France in the late 1990s, with U.S. shareholder activists and institutional investors at the forefront.[21] I personally participated by giving advice to government officials and others interested in reforming French corporate law so that it would advance and promote modern corporate governance.[22] The same advocacy characterized corporate governance reform efforts in other European countries, Asia, and the developing world.[23] As evidence of this reform, one has only to reflect for a moment on the growth of shareholder activism around the world and the formation of activist organizations that were encouraged and funded by major U.S. shareholder activists and pension funds.[24] Shareholder activism became business, if not "big" business.[25]

Scholars in U.S. law and business schools exhibited a more diverse and thoughtful reaction. However, the overall position, with a few notable exceptions, was to argue that corporate governance based upon a U.S. model should ultimately prevail, at least in industrialized countries.[26] Committed supporters of market

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21. I described this activity in an earlier article. *See* Fanto, *The Transformation of French Corporate Governance, supra* note 1, at 67-71; *see also* Lauren J. Aste, *Reforming French Corporate Governance: A Return to the Two-Tier Board?*, 32 GEO. WASH. J. INT'L L. & ECON. 1, 3-9 (1999).

22. This was really the purpose of FANTO, CORPORATE GOVERNANCE IN AMERICAN AND FRENCH LAW, *supra* note 1. The book, commissioned by the French Association d'Économie Financière, an organization underwritten by the State-owned Caisse des Dépôts, was designed to contribute to the then ongoing debate within and without government circles about French corporate governance. While Professor Roe might call this kind of reform "technical" because it concerns law reform, but does not deal with the underlying politics or culture of corporate governance, these reforms often indicate either that corporate governance in a country is changing or that there exists pressure for it to change. *See* Roe, *Political Preconditions to Separating Ownership and Control, supra* note 13, at 594-97.

23. *See* Jonathan Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan and the United States*, 48 STAN. L. REV. 73, 75 (1996).

24. *See* Fanto, *The Transformation of French Corporate Governance, supra* note 1, at 18-22 (describing the activism); *see also* The International Corporate Governance Network, *at* http://www.icgn.org (offering an example of worldwide corporate governance activism). In France, the best example is Sophie L'Héliàs, who began as a lawyer for a U.S. law firm in France, then moved to a Belgian-based activist investor group (Déminor). She next founded her own group, Franklin Associates, and has now moved to the United States and founded L'Héliàs Governance Advisors. She sits on the Board of Governors of the International Corporate Governance Network [hereinafter ICGN].

25. *See supra* note 24. Again, the sponsors of the ICGN reflect the large number of corporate governance activists. *See* http://www.icgn.org.

26. The most prominent legal academics in this camp include (former professor) Judge Easterbrook and Professors Jonathan Macey and Roberta Romano. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Macey & Miller, *supra* note 23; Roberta Romano, *Corporate Law and Corporate Governance*, 5 INDUS. & CORP. CHANGE 277 (1996). Professor Coffee also belongs in this camp, although he is more low-keyed in his advocacy, for he clearly assumes that market capitalism is the ideal form of economic relations and

capitalism are generally law and economics scholars who draw support for their position from work in finance and economics.[27] Their approach, at base, reflects the view that because opportunism is fundamental to human beings, individuals or groups capture government to promote their self-interest, with the worst example being a dictatorship.[28] From this perspective, market capitalism with a democratic government of limited powers is the best system for productive activity because it counters the human tendency to use the government to further self-interest and encourages people to be competitive in the market.[29]

Committed supporters of market capitalism often rely on empirical work undertaken by financial economists that link a country or region's economic performance to its corporate finance and governance.[30] These financial economists present themselves as agnostic because in their view they are attempting to find, in accordance with the scientific methods of their discipline, correlations between legal, political, and even cultural features on one hand, and corporate governance and economic success on the other.[31] On the

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argues that most developed countries are moving towards this capitalism. *See* Coffee, *supra* note 13, at 92.

27. *See, e.g.*, Rene M. Stulz, *Merton Miller's Contribution to Modern Finance*, J. APPLIED CORP. FIN., Winter 2001, at 8, 19 ("But Miller remained squarely in the camp of those who argued that the U.S.-U.K. model of market capitalism is the most reliable way of producing consistent economic growth.").

28. *See* ANDREI SHLEIFER & ROBERT W. VISHNY, THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES 4 (1998) ("At the root of the grabbing hand analysis are models of political behavior that argue that politicians do not maximize social welfare and instead pursue their own selfish objectives."). *See generally* MANCUR OLSON, POWER AND PROSPERITY 173-99 (2000) (describing spontaneous and irrepressible markets, explaining the ubiquity of markets as a result of human nature, and arguing for the importance of a political order to gains from trade).

29. The main weakness of a democracy is that, like every form of government, it may be captured by the ever-present groups that pursue their own interests at the expense of the greater good. *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 36-78 (1982).

30. *See, e.g.*, Ross Levine, *Bank-Based or Market-Based Financial Systems: Which is Better?*, (Dec. 2000), *available at* http://www.bus.umich.edu/jfi/WDI_Levine.pdf (describing the "law and finance" view of the question articulated by Rafael La Parta, Florence Lopez de-Silanes, and Andre Shleifer).

31. This work on correlations between corporate governance and economic prosperity is important and must be addressed by any corporate governance scholar. *See* Rafael La Porta et al., *Agency Problems and Dividend Policies around the World*, 55 J. FIN. 1131 (2000); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 492 (1999); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1143-48 (1997); Rafeal La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000). For an overall summary of this work, and an additional finding that law matters for the growth of a country's financial systems (especially a law that can continually adapt to changes in economic reality), see

basis of their empirical evidence, economists counsel policymakers to create corporate governance rules that will improve the economic well-being of their citizens by producing the highest wealth for the country.[32] They generally conclude that market capitalism and its governance form offer the best system for economic growth.[33]

Academics, such as Professor Ronald Gilson, speak respectfully about forms of finance and governance other than market capitalism, yet consider that they are unsuited for large companies in today's world economy.[34] Professor Gilson's basic message is that Anglo-American finance and governance is appropriate for our historical period.[35] He understands that, because of "path dependent" reasons—an evolutionary biological metaphor used to refer to historical and cultural causes for a particular form of governance[36]—countries may not be able to adopt this system immediately. Instead, countries or individual companies must design solutions that approximate market capitalism within the constraints of their own systems.[37]

Thorsten Beck et al., *Law, Politics, and Finance*, (Apr. 2001), *available at* http://papers.ssrn.com.

32. *See, e.g.*, James R. Barth et al., *Choosing the Right Financial System For Growth*, J. APPLIED CORP. FIN., Winter 2001, at 116 (presenting data about different countries' financial systems that are correlated with economic development); Thorsten Beck et al., *Finance and the Sources of Growth*, 58 J. FIN. ECON. 261 (2000) (presenting data that the development of financial intermediaries in a country is positively correlated with economic growth); Jeffrey Wurgler, *Financial Markets and The Allocation of Capital*, 58 J. FIN. ECON. 187 (2000) (presenting data that financial markets improve capital allocation, thus targeting funds better to growing industries).

33. *See, e.g.*, Simon Johnson & Andrei Shleifer, *Privatization and Corporate Governance*, at 22-23 (Sept. 26, 2001), *available at* http://www.nber.org/books/ease12/johnson9-26-01.pdf ("We are not arguing that all countries could or should become just like the United States. But in important dimensions we see countries around the world adopting investor protections measures that are modeled on US law. The evidence suggests that when these measures are implemented in an enforceable way, they can change both the extent of investor protection and the ability of firms to obtain external finance.").

34. *See* Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U. L.Q. 327, 331, 334 (1996).

35. *Id.* at 334.

36. *See, e.g.*, Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 134 (1999) ("By path dependent bases, we mean reasons arising from the different initial conditions with which countries started.").

37. *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, (May 2000), *available at* http://papers.ssrn.com (discussing the ways in which convergence can occur by countries or firms finding the functional equivalent of another system, by firms adopting by contract another system). Although Professor Gilson never says that Anglo-American corporate governance is the best system, and recognizes that it has been favored recently because of the economic strength of the United States, all the examples he uses tend to show the U.S. system favorably (e.g., in that paper, he extolls the strength of the U.S. venture capital industry). *Id.* at 4, 16-21.

Related to Professor Gilson's approach and relying greatly upon the perspective of path dependence, some scholars emphasize how corporate finance and governance are strongly influenced by politics and culture.[38] Their message to policymakers is that governance changes should occur carefully so as not to upset delicate political and cultural balances.[39] Professor Mark Roe takes a stronger position: that some changes may be impossible within a given system.[40] In a similar research project, Professor Amir Licht attempts to make cultural determinants of corporate governance the object of rigorous social scientific study.[41] On the basis of social psychological work, Professor Licht wants to establish an empirical relationship between cultural factors and corporate governance in different countries so that policymakers will understand the constraints within which they can accomplish reforms.[42]

Thus, there is now a rich debate in law and finance about whether the origins of corporate governance systems lie mainly in legal systems, politics, or elsewhere.[43] The debate has two important policy implications: (1) if the determining factor is law, then laws may be changed to create the best governance; and (2) if politics or culture is more important, then change is harder to bring about because these determinants are not easily transformed.[44] The most

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38. *See* William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213 (1999) (arguing that national systems of corporate governance are complexly determined).

39. *Id.* at 220-21.

40. Mark Roe, the most renowned scholar in this political school, emphasizes how macro politics have strongly determined corporate governance. *See generally* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994). Recently, he has argued that the large public firm is incompatible with European social democracies. In his view, because strong controlling shareholders (generally families of the founder of the firm in question) cannot be sure that unrelated managers will not be co-opted by government and labor pressures to act in ways that are harmful to the owners, the shareholders maintain control of firms and keep them entirely or largely away from capital markets. *See* Roe, *supra* note 13, at 550. He does, however, speculate that European social democracies may be breaking down in the worldwide economy, which would increase the number of public European firms with diversified ownership and would expand market capitalism on that continent. *Id.* at 600-03.

41. *See* Amir N. Licht, *The Mother of All Path Dependencies: Toward A Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001).

42. *Id.* at 149; *see also* Amir N. Licht et al., *Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Laws*, (May 2001), *available at* http://papers.ssrn.com.

43. For an excellent review of this literature (as of 1999), see Bratton & McCahery, *supra* note 38.

44. Yet another position (with which I am sympathetic) is that law matters, but that it must be carefully transplanted from one context into another in order to be effective. *See* Daniel Berkowitz et al., *Economic Development, Legality, and the*

prominent financial economists, such as Andrei Shleifer, take an opposing position to Professor Roe and argue that legal systems, not politics and culture, have greatly determined governance outcomes.[45] In contrast, financial economists Rajuram Rajan and Luigi Zingales, like law professor John Coffee, offer an interest group explanation for the development of different corporate governance systems.[46] Their explanation is a criticism of both political and cultural explanations, as well the legal account.[47] Rajan and Zingales argue that in the Great Depression that followed World War I, governments in Japan and Germany teamed with banks to close down capital markets in those countries in an effort to promote governance that centered around characteristics of the bank, family, and state.[48] Market capitalism and Anglo-American corporate governance may be reintroduced in those countries now that have groups favorable to them have emerged.[49]

As the 1990s progressed, it became difficult to argue for a finance and governance approach that was not based on Anglo-American corporate governance.[50] Arguments not based on the Anglo-American approach were not taken seriously outside the academy in governance reform efforts around the world.[51] In fact, from a realistic perspective, arguments against Anglo-American finance and governance had little persuasive force.[52] The political and economic

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Transplant Effect, at 2 (Nov. 1999), *available at* http://papers.ssrn.com. In the article, the authors argue:

> For law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand. If the transplant adapted the law to local conditions, or had a population that was already familiar with basic legal principles of the transplanted law, then we would expect that the law would be used. Because the law would be used, a strong public demand for institutions to enforce this law would follow. And, legal intermediaries that are responsible for developing and enforcing this imported law would be able to develop the law so at [sic] to match demand, because the strong demand for law would provide resources for legal change.

Id.

45. *See* SHLEIFER & VISHNY, *supra* note 28.

46. *See* Rajan & Zingales, *supra* note 16, at 12, 34-38 (arguing that the existence of vigorous capital markets in many pre-World War I civil law European and Asian countries demonstrates that neither law nor politics had much to do with the kind of corporate governance of these countries).

47. *Id.*

48. *Id.* at 34-35.

49. *Id.* at 37-40.

50. *See* ALLEN & GALE, *supra* note 19, at 5-6.

51. *Id.* at 22 ("By historical accident, much of the academic research on financial systems has been undertaken in the United States and United Kingdom. This has perhaps led to a bias toward market systems.").

52. This is one of the effects of the dominant movement's momentum. *See infra* Part III.

demise of Communist countries and the privatization of former state industries in those countries and elsewhere around the world were visible signs of the worldwide preference for Anglo-American corporate governance.[53] These historical events argued for a modern governance that valued private enterprise ownership and promoted popular participation in capital markets.[54]

III. EXPLAINING THE MOMENTUM

Critically examining the recent advocacy of Anglo-American finance and governance is appropriate for a number or reasons. "Irrational exuberance" about ever growing and expanding world capital markets may be coming to an end, or at least to a thoughtful pause.[55] Consciousness of market irrationality brought about by the precipitous rise and fall of the NASDAQ, the dot.coms, and now Enron, has undermined a ready faith in the markets and, potentially, in Anglo-American corporate governance.[56] This perspective is echoed by a growing literature in behavioral finance, which identifies evidence of "quasi-rationality" in capital markets.[57] In other words, we are in a period when we are jarred out of settled expectation because of unsteady markets, a recession, and terrorist events.[58] As a result, we may have a better perspective from which to take stock of recent events and circumstances.[59] Even the popular business

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53. *See* William L. Megginson & Jeffrey M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization,* 39 J. ECON. LIT. 321, 323-29 (2001). It is interesting, however, that available empirical data does not show either widespread legal or functional convergence to a U.S. model. *See* Tarun Khanna et al., *Globalization and Corporate Governance Convergence? A Cross-Country Analysis*, at 4 (Oct. 30, 2001), *available at* http://www.stern.nyu.edu/clb/Khanna.pdf. (finding only convergence in form among pairs of countries with interlinked economic systems (excluding the United States in the pair analysis)).

54. *See* OLSON, *supra* note 29, at 155-71. On the taking of a market approach in Eastern Europe, see generally Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law,* 109 HARV. L. REV. 1911 (1996).

55. *See generally* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2000) (expanding on the term used by Alan Greenspan in a 1996 speech).

56. *Id.* at 209-10.

57. *See generally* HERSH SHEFRIN, BEYOND GREED AND FEAR: UNDERSTANDING BEHAVIORAL FINANCE AND THE PSYCHOLOGY OF INVESTING (2000) (describing the impact of psychological forces on investor interaction with the market); ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE (2000); David Hirshleifer, *Investor Psychology and Asset Pricing,* 56 J. FIN. 1533 (2001); Hersh Shefrin, *Behavioral Corporate Finance,* J. APPLIED CORP. FIN., Fall 2001, at 113.

58. *See* SHILLER, *supra* note 55, at 210 (describing the possibility of this occurrence).

59. From a behavioral perspective, it may be only when an event "shocks" people out of their customary viewpoint that they understand the limitations of the

press—those that helped create the bandwagon for market capitalism—now expresses concern about the equity culture's ability to continue in an economic downturn and in a potentially unsteady worldwide political climate.[60]

Moreover, the United States—the paradigm of Anglo-American corporate governance—has not recently presented an entirely attractive picture of economic life—a fact that also weighs in favor of arresting the recent momentum.[61] Astronomical riches abound for some, such as CEOs, investment bankers, and their lawyers, while low wages abound for others, and the failure of corporate and securities laws to address the disparity is apparent.[62] Previously unthinkable levels of consumption have become acceptable, although there are warnings that this acceptance may have undermined the stability of our social order; we have produced an arms race in consumption with little in the way of growing satisfaction from it.[63] We also cannot help but question the practicality and advisability of exporting U.S. corporate finance and governance rules to other cultures because the rules may not be in harmony with the belief systems of people in other countries.[64]

This Article does not argue for the extreme of condemning Anglo-American finance and governance, which is what swept the academic, and to some extent the business practitioner, world in the 1990s recession. That was when many admired, and urged imitation of, German and Japanese governance and business practices.[65] Furthermore, the Article does not argue that policymakers should not and cannot rationally search for the best corporate governance

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viewpoint. *See, e.g.*, IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 15-16 (1982).

60. *See* John Peet, *Rise and Fall: A Survey of Global Equity Markets*, ECONOMIST, May 5, 2001, at 50; Marcia Vickers et al., *The Betrayed Investor*, BUS. WK., Feb. 25, 2002, at 104.

61. *See generally* ROBERT H. FRANKS, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999).

62. This income disparity has not particularly bothered many mainstream legal scholars. For example, despite the lack of evidence that investment bankers contribute justifiable value as advisors in mergers, *cf.* Anthony Saunders & Anand Srinivasan, *Investment Banking Relationships and Merger Fees*, at 16-28 (Oct. 2001), *available at* http://papers.ssrn.com, Coffee has remained a steadfast apologist for them. *See* Coffee, *supra* note 13, at 32-34.

63. *See* FRANKS, *supra* note 61.

64. *See* LAL, *supra* note 12, at 173-78; *see also* Licht, *Mother of All Path Dependencies*, *supra* note 41, at 187-203 (arguing that it may be shown scientifically that Anglo-American corporate governance may not work with the underlying cultural factors of other cultures). On the other hand, one may conclude that corporate governance is part of a technological world that other cultures could adapt with little effect on their deeper beliefs. *See* LAL, *supra* note 12, at 178.

65. *See* La Porta et al., *Investor Protection and Corporate Governance*, *supra* note 31, at 17-18 (describing swings in academic fashion regarding the superiority of corporate governance systems).

system for their country that might well include some reliance upon and imitation of Anglo-American market capitalism.[66] Rather, this Article will show how psychological factors were used to help create the momentum and the resulting one-sidedness of recent corporate finance and governance debates taking place in many countries. The factors suppressed discussion and gave advocates of the new order the appearance of correctness, persuasiveness, and inevitability, which made the force of their arguments hard to resist. The exercise of the factors prevented a completely rational discussion from occurring, pushed it to the margins, and undermined the effectiveness of corporate governance debates.[67]

IV. THE STUDY

A. *Psychological Background*

This Article examines how advocates used psychological factors in significant documents that they employed to influence French policymakers, company officials, investors, and academics to promote the new governance order. The Article refers to psychological factors such as biases and mental shortcuts that deflect or skew rational thinking in individuals, thus making much of normal decision-making "quasi-rational."[68] These factors are identified by research in

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66. Indeed, the desire to identify the best corporate governance system for promoting overall social wealth and to decide how to create it is the underlying reason for the academic debate on corporate governance. *See, e.g.*, Brian Cheffins, *Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies*, (Aug. 2001), *available at* http://papers.ssrn.com (discussing the academic debate on the origins of investor capitalism in the United States and the United Kingdom and the lessons a policymaker can draw from business and legal history in these countries).

67. In emphasizing a psychological and social psychological perspective on the dominant discourse, I admit that other factors, both institutional and political, would help account for the dominance of Anglo-American corporate finance and governance advocacy, but I do not focus upon them. *Cf.* Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 238 (2001) (discussing academic fads). It is hardly a surprise that Anglo-American corporate finance and governance were dominant when U.K. and U.S. funds advocating market-based finance and governance were the major cross-border investors in the world economy. *See* Dahlquist & Robertsson, *supra* note 10, at 438-39 (noting that institutional investors, primarily of U.S. origin, prefer to invest in large companies, with much liquidity and without controlling shareholders, resembling the U.S. model). For example, French policymakers (the subject of a good part of the remaining article) repeatedly observe, as a major factor in French debates about corporate governance, that they must take account of the wishes of Anglo-American institutional investors with significant investment in French markets and French companies. *See infra* Part V.B.

68. *See* THALER, *supra* note 18, at xxi.

the growing field of law and psychology, or broadly speaking, law and human cognition.[69]

The psychological approach in legal studies questions the adequacy of the "rational choice" model. This model is from the dominant law and economics perspective that views people as rationally able to weigh alternatives, with a dispassionate cost/benefit calculation, in making decisions or policies.[70] Much empirical evidence suggests that people do not behave in ways established by this model, which undermines the model's ability to predict behavior for policy-making purposes.[71] Behavioral and psychological studies have shown that there is a need for a different account of decision-making in order to explain and to predict how people in fact make decisions and behave.[72]

The psychological account offers a rich and realistic description of the motives for, and the process of, human behavior and decision-making. The account helps an analyst predict human behavior and form policies likely to modify and influence it.[73] The perspective

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69. *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein, ed., 2000); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics,* 88 CAL. L. REV. 1051, 1057 (2000) (arguing for the incorporation of cognitive psychology, sociology, and other behavioral sciences into the study of law); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review,* 51 VAND. L. REV. 1499 (1998) (reviewing the impact of behavioral psychology on legal literature); Shira B. Lewin, *Economics and Psychology: Lessons For Our Own Day From the Early Twentieth Century,* 34 J. ECON. LIT. 1293 (1996) (discussing the history of economics in the 20th century and its simultaneous resistance to psychology and interest in psychology at the expense of other social sciences). For a legal debate on the value of the psychological approach, compare Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler,* 50 STAN. L. REV. 1577 (1998) (contending that behavioral economics does not offer an adequate model predictive of human behavior) and Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law,* 50 STAN. L. REV. 1551 (1998) (arguing that rational choice theory and evolutionary biology can explain many problems identified by behavioral theory), with Christine Jolls et al., *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471 (1998) and Christine Jolls et al., *Theories and Tropes: A Reply to Posner and Kelman,* 50 STAN. L. REV. 1593 (1998) (explaining the scientific foundations of behavioral law and economics and the predictive force of the approach).

70. *See* Korobkin & Ulen, *supra* note 69, at 1060-66 (for an explanation of rational choice theory). *See generally* GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART 3-34 (1999) (describing heuristics as models of behavior for both organisms and artificial systems, capturing how real minds make decisions under the constraints of limited time and knowledge).

71. Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law,* 51 VAND. L. REV. 1765, 1766 (1998).

72. *Id.*

73. For comprehensive summaries of this account, see BEHAVIORAL LAW AND ECONOMICS, *supra* note 69; Jolls et al., *A Behavioral Approach to Law Economics, supra* note 69, at 1471-76; Korobkin & Ulen, *supra* note 69, at 1053-59; Langevoort, *supra* note 69. *See also* Cass R. Sunstein, *Behavioral Analysis of Law,* 64 U. CHI. L. REV. 1175 (1997); Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report,* 1 AM. L. & ECON. REV. 115 (1999).

understands human behavior as emotional and impulsive, rather than exclusively rational.[74] By their nature, people, in reacting emotionally, often focus on the present and the short term, meaning they are "myopic," and exclude the future.[75] At times, people often place inappropriate value on a present risk or attraction and find themselves either too preoccupied with it or unable to resist it.[76]

The psychological approach also sees limitations on human calculative rationality with one version of this approach using the term "bounded rationality."[77] Psychological studies show that people exhibit "biases" that prevent or distort rational calculation.[78] For example, human beings react more strongly to losses than to gains. In other words, people have an "aversion" to loss and a bias towards the "status quo."[79] Individuals become attached to what they have, and this is known as the "endowment effect."[80] Under another bias, people dislike extremes in decision-making. Therefore, people often select a middle ground rather than one of the extremes.[81]

Another bias that affects decision-making is self-confidence and over-optimism.[82] People overestimate the statistical probability of an outcome favorable to themselves and exaggerate their own chances or abilities when deciding or taking any action.[83] Under the "hindsight bias," people feel that decisionmakers or policymakers in the past should have predicted the outcome of their decision that was not predictable given the information actually available at the time.[84] Accordingly, in decision or policy-making *of all kinds*, individuals act

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74. *See* Jolls et al., *A Behavioral Approach to Law Economics, supra* note 69, at 1476-77; Korobkin & Ulen, *supra* note 69, at 1059.

75. *See* Korobkin & Ulen, *supra* note 69, at 1113-26 (discussing the power of visceral cravings, myopia and focus on sunk costs); Sunstein, *A Progress Report, supra* note 73, at 122-23.

76. *See generally* STEVEN PINKER, HOW THE MIND WORKS 41-42 (1997) (demonstrating how a focus on the present makes sense from an evolutionary perspective).

77. *See, e.g.*, Sunstein, *A Progress Report, supra* note 73, at 131; *see also* GIGERENZER ET AL., *supra* note 70, at 12-14.

78. Another way of saying this may be seen as less critical of human beings: the approach considers that human beings are constantly measured in relationship to an inhuman, unattainable standard of rationality. Recognizing heuristics is simply to acknowledge the limitations on human rationality that developed in the evolutionary process, i.e., that, because of their limitations, people needed to develop frugal ways of thinking. *See* GIGERENZER ET AL., *supra* note 70, at 33-34.

79. Sunstein, *Behavioral Analysis, supra* note 73, at 1179-81.

80. *Id.*; Korobkin & Ulen, *supra* note 69, at 1107-13.

81. *See* Sunstein, *Behavioral Analysis, supra* note 73, at 1181-82; Sunstein, *A Progress Report, supra* note 73, at 135-36.

82. Sunstein, *Behavioral Analysis, supra* note 73, at 1182.

83. *Id.* at 1182-84; Korobkin & Ulen, *supra* note 69, at 1091-95.

84. *See* Korobkin & Ulen, *supra* note 69, at 1095-1100; Sunstein, *A Progress Report, supra* note 73, at 138-39.

"quasi-rationally," or in a limited, yet adaptively rational manner, instead of acting hyper-rationally or irrationally.[85]

In addition, over the millennia, people have developed ways of thinking, known as "heuristics,"[86] which are used to simplify decision-making, but which may not always produce the best outcomes in certain cases. They have been successful adaptations because they work well generally.[87] For example, a person may focus on something that is noticeable to him or her as *the* issue deserving attention or *the* problem needing a solution, such as an airplane accident.[88] The focus exists even though, according to the probabilistic order of importance, the event should not receive such extreme focus, which is called the "availability" heuristic.[89] Related to this way of thinking is the "anchoring" heuristic where people make judgments on the basis of values that are initially given or accepted, even if the values are arbitrary and not always appropriate for the issue to be decided.[90] Similarly, people often engage in decision-making on the basis of present cases, examples, or values, from which they then move away incrementally.[91] Outside of a crisis, people dislike large, sweeping decisions.[92]

Presentation and social factors enhance these individual behavioral characteristics.[93] Research indicates that presentation or "framing" devices trigger biases and emotional effects.[94] For example, a choice outcome can be helped by framing the desired choice as the middle one between extremes.[95] Social pressures can magnify individual cognitive biases.[96] For instance, in the "cascade" phenomenon, a few individuals exercising the availability heuristic in turn influence other people for both rational and quasi-rational reasons. This is the case either because others believe that the first individuals are privy to special information or that they desire to be recognized as part of a group that advocates a particular

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85. THALER, *supra* note 18, at xxi.

86. *See, e.g.*, Sunstein, *A Progress Report, supra* note 73, at 139-42.

87. *See* GIGERENZER ET AL., *supra* note 70, at 29-31 (for a strong argument about the adaptive value of heuristics).

88. *See id.*

89. *See, e.g.*, Korobkin & Ulen, *supra* note 69, at 1087-88 (observing that, under the "availability heuristic," people focus on salient events in their decision-making and ignore their probability, which can lead to error if the events are not truly representative).

90. *See id.* at 1100-02; Sunstein, *A Progress Report, supra* note 73, at 141.

91. *See* Sunstein, *Behavioral Analysis, supra* note 73, at 1189-90.

92. *See id.* at 1191 (arguing that people are generally averse to "situations of uncertain probability and try to avoid choices that place them in such situations").

93. *See* JANIS, *supra* note 59, at 175.

94. *See, e.g.*, Korobkin & Ulen, *supra* note 69, at 1106.

95. *See id.*; Sunstein, *A Progress Report, supra* note 73, at 139.

96. *See* Timor Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 710-11 (1999).

perspective.[97] Indeed, groups of people may even create their own cognitive limitations[98] that orient and distort their decision- or policy-making.[99]

Anglo-American corporate governance advocates have rational reasons for their corporate finance and governance arguments.[100] The Article suggests that an idealized model of rationality cannot realistically tell the story about corporate governance advocacy because of human psychology and limitations on rationality. Psychological factors will, for example, help reinforce the rationality of a particular approach and marginalize alternative explanations or accounts. Psychological pressures may ensure that an adequate debate about corporate governance does not occur and that the results achieved are not in fact rational in any idealized sense.

B. *The Data and the Study*

This Article utilizes French corporate finance and governance because of my familiarity with the subject, and because of its timeliness as an arena where methods of finance and governance

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97. *See id.* at 711. Kuran and Sunstein argue:

> The *frames* through which individuals interpret a situation are generally formed socially. Their *reference points* for assessing gains and losses are generally given by popular conventions and communicated through conversation, not chosen by individuals autonomously. *Anchors,* which in principle can vary enormously across individuals, are in practice the product of social interactions and widely shared information flows.

Id.

98. A classic form is the "groupthink" syndrome, which is the tendency of individuals to arrive at distorted judgments because of attachment to group norms. See JANIS, *supra* note 59, at 174-77.

99. *See also* SIGAL G. BASADE, THE RIPPLE EFFECT: EMOTIONAL CONTAGION IN GROUPS (Yale School of Management, Working Paper Series A, Organizational Behavior, No. 91, Nov. 1, 2001) (discussing research on group enhancement of emotions); Sigal G. Barsade & Donald E. Gibson, *Group Emotion: A View from Top and Bottom, in* 1 RESEARCH ON MANAGING GROUPS AND TEAMS 81 (1981) (discussing ways of viewing group emotion as something produced by the group and imposed on individuals or as a creation of individuals); *see generally* James P. Walsh, *Managerial and Organizational Cognition: Notes from a Trip Down Memory Lane, in* 6 ORG. SCIENCE 280-321 (1995) (reviewing and summarizing literature in the managerial and organizational cognition literature).

100. *Cf.* Korobkin & Ulen, *supra* note 69, at 1073. Korobkin and Ulen argue:

> There is no doubt that a single, universally applicable theory of behavior is convenient and highly desirable. But if universality is inconsistent with sophistication and realism, legal policymakers are better off foregoing universality and, instead, creating a collection of situation-specific mini theories useful in the analysis of discrete legal problems.

Id.

were being advocated and debated.[101] The approach used was first to identify the public documents, French and non-French, that were the most influential in French debates that occurred in the last five to ten years about corporate finance and governance. These major texts are not difficult to identify for several reasons: because (1) they are, at least in some cases, official French pronouncements on the subject and (2) they are included in compilations of corporate governance by most corporate finance and governance authorities.[102] French documents are either general corporate governance guidelines or projects for legal reform.[103] The non-French texts, while not always directed at France, were considered important as influential or reference texts in the general international debates on corporate governance, and are representative of the overall position of corporate governance advocates.[104]

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101. There continues to be relatively little work on French corporate governance, whether inside or outside France, although there are notable exceptions. *See* Pierre-Henri Conac, La Dissociation des Fonctions de Président du Conseil d'Administration et de Directeur Général des Sociétés Anonymes selon la Loi Relative aux Nouvelles Régulations Économiques (2002) (unpublished manuscript, on file with the author), *available at* http://www.Droit21.com.

102. For example, most of the French texts are listed in the Worldbank's library on corporate governance. *See* Worldbank, *About Corporate Governance*, *at* http://www.worldbank.org/html/fpd/privatesector/cg/index.htm.

103. These texts are five in number. *See* ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES, LE CONSEIL D'ADMINISTRATION DES SOCIÉTÉS COTÉES (July 1995), *available at* http://www.ecgi.org/codes/country-documents/France/vienotl_fr.pdf (last visited Sept. 2, 2002) [hereinafter 1ST VIÉNOT REPORT]; PHILIPPE MARINI, RAPPORT AU PREMIER MINISTRE SUR LA MODERNISATION DU DROIT DES SOCIÉTÉS (July 13, 1996) [hereinafter MARINI REPORT]; ASSOCIATION FRANÇAISE DE LA GESTION FINANCIÈRE, RECOMMENDATIONS SUR LE GOUVERNEMENT D'ENTREPRISE (June 23, 1999) [hereinafter AFG RECOMMENDATIONS]; ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉS, RAPPORT DU COMITÉ SUR LE GOUVERNMENT D'ENTREPRISE PRÉSIDÉ PAR M. MARC VIÉNOT (July 1999), *available at* http://www.ecgi.org/codes/country_documents/ France/vienot2_en.pdf (last visited Sept. 2, 2002) [hereinafter 2ND VIÉNOT REPORT]; ERIC BESSON, RAPPORT FAIT AU NOM DE LA COMMISSION DES FINANCES, DE L'ÉCONOMIE GÉNÉRALE ET DU PLAN SUR LE PROJET DE LOI RELATIF AUX NOUVELLES RÉGULATIONS ÉCONOMIQUES 2327 (Apr. 12, 2000) [hereinafter BESSON REPORT]. These texts do not show directly Anglo-American corporate governance advocacy, because they are written by French legislators (or their staff) or business committees. My contention is that, influenced by this advocacy, they "translate" it for the French audience. As discussed below, they are thus representative of both the advocacy and the French resistance to it.

104. They are four. *See* CALPERS, FRANCE MARKET PRINCIPLES (Mar. 17, 1997), *available at* http://www.calpers-governance.org/principles/international/france/page01.asp (last visited Sept. 2, 2002) [hereinafter CALPERS PRINCIPLES]; AD HOC TASK FORCE ON CORPORATE GOVERNANCE, OECD PRINCIPLES OF CORPORATE GOVERNANCE SG/CG(99)5 (Apr. 19, 1999), *available at* http://www.oecd.org (last visited Sept. 2, 2002) [hereinafter OECD PRINCIPLES]; INTERNATIONAL CORPORATE GOVERNANCE NETWORK, STATEMENT ON GLOBAL CORPORATE GOVERNANCE PRINCIPLES (July 9, 1999), *available at* http://www.icgn.org/documents/globalcorpgov.htm (last visited Sept. 2, 2002) [hereinafter ICGN PRINCIPLES]; WORLDBANK, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION, AN OVERVIEW (September 1999) [hereinafter

I then reviewed the texts for evidence of the psychological factors mentioned above and established tables on the presence or absence of factors in each text.[105] The Article initially sidesteps the question to what extent corporate governance texts reflect the influence of psychological factors on actual French policy-making by emphasizing how corporate governance advocates use psychological factors to push a particular view of corporate finance and governance, as opposed to how policymakers actually decide issues. The Article assumes and tries to verify that corporate governance advocates are attempting to influence psychologically French policymakers, such as French business practitioners and legislators. The Article also assumes that people are not Machiavellian; they try to influence others' decisions because they have already been persuaded to adopt a particular perspective. Statements in corporate governance texts are thus representative of both the advocate's beliefs and attempts to influence others' beliefs and decisions.[106] Yet, admittedly, the Article does assume that there is a causal link between the advocacy and the French corporate governance outcome.[107]

C. *A Brief Overview of French Finance and Governance*

Before presenting and discussing the results of the study, it is useful to give a brief overview of French finance and governance. In general, French corporate governance is unlike Anglo-American governance.[108] However, as will be seen below, Anglo-American corporate governance advocates have been trying to make the French

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WORLDBANK OVERVIEW]. Calpers and the ICGN are clearly representative of Anglo-American corporate governance advocacy. The OECD and the Worldbank are more complex cases because they are international organizations or institutions. It is clear, however, that Anglo-American corporate governance has heavily influenced their positions on the subject and that, as explained below, they become a significant part of its advocacy.

105. I have done this kind of study in a recent work on merger decision-making. *See* James A. Fanto, *Quasi Rationality in Action: A Study of Merger Decision-Making*, 42 OHIO ST. L.J. 1333 (2001). There I looked at psychological factors in joint proxy statements that reported on the reasons given by boards of directors for their decisions to enter into mega-mergers. Admittedly, this approach has an interpretative orientation because the analyst (i.e., me) decides what in a corporate governance text indicates that a given psychological factor is present or absent. However, the results of this kind of analysis are highly suggestive of the presence of psychological factors in the texts examined, and the data is readily available for any other scholar to examine and to criticize.

106. *See, e.g.*, MARINI REPORT, *supra* note 103.

107. I offer some evidence on the actual influence of the psychologically-based Anglo-American advocacy on French corporate governance policy-making. *See infra* Part VI.B.

108. *See* FANTO, *supra* note 1 (describing many of the significant legal differences between U.S. and French corporate governance).

system similar to that in the United States and the United Kingdom.[109] One may reasonably argue that France is evolving towards market capitalism.[110] Large French companies are usually dominated by controlling shareholders,[111] and the financial and managerial relationships between these companies and the French State remain strong despite significant privatization waves in the 1980s and 1990s.[112] For a long time, this meant that the focus of U.S. corporate governance was of little importance in France.[113] Many of the legal and nonlegal aspects of Anglo-American corporate governance were absent or unimportant in France for several reasons. First, large French companies were primarily financed through family, state, and bank finance, not by capital market investors. Second, because their managers generally came from an elite network of state bureaucrats, these companies were closely monitored by family owners or the state.[114]

French policymakers have been attempting to develop French market capitalism for a number of understandable reasons: (1) because of budgetary constraints and European Union regulation, the French State cannot continue to maintain its large stakes in private companies; (2) in competing with non-French companies, French world-class companies need flexible as well as inexpensive sources of financing; and (3) France wants the benefits that a strong capital market can give to its securities industry and to its investors.[115] Moreover, with the growth of French capital markets there is increasing foreign ownership in French companies, particularly by U.S. institutions.[116] Both U.S. and French institutional investors are advocating in France a kind of corporate finance and governance that

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109. *See* sources cited *supra* note 104 and accompanying text.

110. *See* FANTO, *supra* note 1.

111. *See* Patricia Charlety, *Activism des Actionnaires: Le Cas Particulier des Fonds de Pension* (Nov. 16, 2000). *See also* Laurence Bloch & Elizabeth Kremp, *Ownership and Control in France* (European Corp. Governance Network, Working Paper No. D97/97, 1997) (observing that French listed companies still have highly-concentrated ownership structures, e.g., first investor has about 55%, and owners in general are not financial firms, but individuals and "holdings"); Isabelle Dherment-Ferere & Luc Renneboog, *Share Price Reactions to CEO Resignations and Large Shareholder Monitoring in Listed French Companies*, at 21 (Ctr. For Econ. Research, Research Paper No. 2000-70, 2000) (presenting data on control of French listed companies, which shows that the controlling shareholders has generally 50% control and lists the categories of controlling shareholders, with holding companies, industrial companies and the government being the most prominent); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 27 J. FIN. ECON. 365, 379 (2002) (noting that, of publicly-traded French firms in data set, approximately 64% are controlled by families).

112. *See* FANTO, *supra* note 1.

113. *Id.*

114. *Id.*

115. *See* Bloch & Kremp, *supra* note 111.

116. *Id.*

is market-based and that resembles Anglo-American corporate governance.[117] There have thus been many French governmental and business efforts in the 1990s to promote market capitalism.[118] The most notable efforts were legal changes designed to create a framework supportive of this capitalism, as well as behavioral changes that would develop an entrepreneur and investor culture favoring this kind of finance and Anglo-American corporate governance.[119] Several corporate governance texts in the database reflect these efforts.[120]

V. THE RESULTS OF THE STUDY

A. *General Results*

Table 1 is a compilation of the results from all of the corporate governance texts. Each text was examined for evidence of a given psychological factor, and then an admittedly subjective assessment of its strength was made. A "strong" characterization was given to repeated and highlighted uses of the factor in a corporate governance text. By contrast, a "weak" characterization meant either an infrequent or unemphasized use of the factor, or the absence of the factor altogether. No further breakdown of the psychological factors beyond this strong/weak dichotomy is provided because the Article discusses the uses of the psychological factors in each text.

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117. Statistics show that French finance is becoming more capital-market oriented and that there is less bank-based finance, even for smaller enterprises (in Germany, by contrast, only the largest enterprises are moving away from bank finance). *See* DEUTSCHE BUNDESBANK & BANQUE DE FRANCE, CORPORATE FINANCE IN GERMANY AND FRANCE 88 (1999) [hereinafter CORPORATE FINANCE]. One of the best indications of the growth in U.S.-style corporate governance is the activity of the French equivalent of the U.S. SEC, the Commission des Operations de la Bourse. *See, e.g.*, COMMISSION DES OPÉRATIONS DE LA BOURSE, CONSULTATION PUBLIQUE SUR UN PROJET DE REFORME DE LA PROCÉDURE DE CONTRÔLE DES OPÉRATIONS FINANCIÉRES ET DE LA DÉLIVRANCE DU VISA DE LA COB (July 31, 2001) (in requesting comments on a program regarding public offerings in France, COB promotes a flexible disclosure system, akin to the U.S. preliminary and final prospectuses, and overall goal of improving capital raising in France).

118. *See* CORPORATE FINANCE, *supra* note 117.

119. In some respects, France demonstrates Professor Cheffin's thesis that some European countries may attempt to "jump start" investor capitalism through legal changes that make it more attractive, even if one understands that law cannot alone cause investor capitalism. *See* Cheffins, *supra* note 66, at 36.

120. *See, e.g.*, 2ND VIÉNOT REPORT, *supra* note 103.

Table 1 confirms the Author's research and that of others about the pervasive nature of psychological factors in both decision and policy-making, and in advocacy aimed at influencing decisions.[121]

121. This research is growing. As one example of its growth, the Social Science Research Network consecrates several electronic journals to publishing abstracts of empirical research with a behavioral and psychological orientation. *See, e.g.*, Social Science Research Network, Legal Scholarship Network, Experimental and Empirical Studies, *available at* http://www.ssrn.com (last visited Sept. 2, 2002).

TABLE 1

PSYCHOLOGICAL FACTORS FOR GOVERNANCE DOCUMENTS

Corporate Governance Documents				
Origin	French		Non-French	
Psychological Factors				
Strength	strong	weak	strong	weak
Emotion (Impulses)				
Myopia	Besson, Marini, 1st Viénot, 2nd Viénot	AFG	ICGN, Worldbank	Calpers, OECD
Bias				
Loss aversion	Besson, Marini, 1st Viénot, 2nd Viénot	AFG	Calpers, ICGN, Worldbank	OECD
Extremeness aversion	AFG, Besson, Marini, 1st Viénot, 2nd Viénot		Calpers, OECD	ICGN, Worldbank
Over-optimism	Besson	AFG, Marini, 1st Viénot, 2nd Viénot	ICGN, Worldbank	Calpers, OECD
Hindsight Bias		AFG, Besson, Marini, 1st Viénot, 2nd Viénot	Worldbank	Calpers, ICGN, OECD
Heuristic				
Availability	Besson, Marini, 1st Viénot, 2nd Viénot	AFG	ICGN, OECD, Worldbank	Calpers
Anchoring	Besson, Marini, 1st Viénot, 2nd Viénot	AFG	OECD, Worldbank	Calpers, ICGN
Case-based decision-making	AFG, Besson, Marini, 1st Viénot, 2nd Viénot		Calpers, OECD	ICGN, Worldbank

The Table reveals particularly strong use of the psychological factors of myopia, loss aversion, extremeness aversion, availability,

anchoring and case-based decision-making.[122] As described in more detail below, this result is not particularly surprising. Corporate governance advocates generally presented French corporate governance as a problem that had to be solved in order to avoid losses to French firms and investors and they were basing their solution on Anglo-American governance models.[123] Yet the advocates tried to present the solution as one that was not "extreme" for the French. Given these overall goals of the corporate governance advocates, one would thus expect to see them use each of these factors.

There are noticeable differences between French and non-French advocates in the use of particular psychological factors. In particular, all French texts strongly use extremeness aversion and case-based decision-making.[124] This suggests that, in a politically-charged environment of longstanding resistance to foreign, and particularly Anglo-American, solutions, the domestic advocates for corporate governance change will present their reforms as "middle of the road" modifications and as being only a few steps away from the existing situation. This incremental approach would be less necessary for non-French advocates who were neither part of the French domestic scene nor necessarily addressing their documents specifically to the French context. This is particularly the case with the ICGN and the Worldbank.[125] The Article illustrates that Calpers is a special non-French case because Calpers is the only non-French advocates to address French corporate governance.[126] Hence, Calpers' use of psychological factors follows more closely the pattern of French advocates.[127]

In contrast, the texts show weak use of several psychological factors, particularly over-optimism and hindsight bias.[128] The lack of use of optimism is surprising in advocacy texts, as one would expect that advocates would use this bias to motivate people to change.[129] In French documents, this absence might be related to the presentation of suggested corporate governance changes as being incremental and in the French tradition. There is thus no need for French advocates to evoke this significant bias and the momentum that it generates to overcome resistance to change. In contrast, over-optimism does appear in the most programmatic corporate governance statements by those groups most aggressive in pushing corporate governance

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122. *See supra* TABLE 1.
123. *Id.*
124. *See, e.g.*, 2ND VIÉNOT REPORT, *supra* note 103.
125. *See* documents cited *supra* note 104 and accompanying text.
126. *See* CALPERS PRINCIPLES, *supra* note 104.
127. *See id.*
128. *Id.*
129. *Id.*

reform, such as the ICGN and the Worldbank.[130]

The lack of hindsight bias, at least by French advocates, is more understandable. Under the influence of the bias, one blames earlier decisionmakers or policymakers for errors that are presently apparent, but were not necessarily apparent in the past. In present circumstances in France, this would mean that corporate governance advocates condemn past French policymakers for their corporate governance policies. But this condemnation contradicts the more conservative and practical, yet incremental, approach taken by French corporate governance advocates. Hindsight bias is more likely to appear in a crisis where condemnation of past policymakers would be appropriate, which is not yet the case in France. Only the programmatic Worldbank Overview displays this blame feature of the hindsight bias.[131]

B. *Examples of the Use of Psychological Factors*

The above overview does not adequately convey the different uses of each psychological factor in corporate governance texts. Thus, in the following presentation, the Article outlines the various uses.

1. Myopia

This emotion-based motivation suggests that a present or recent event, or set of circumstances, that generates strong emotions inordinately influences decision or policy-making.[132] This psychological factor is often related to the "availability" heuristic, which causes an individual to focus on and become attached to an issue that is present in one's consciousness or memory.[133] Myopia is clearly and strongly present in corporate governance advocacy texts, although French and non-French advocates use it differently.

The French documents exhibit strong myopia because their very existence is justified by reference to the pressure of corporate governance advocates in France. In the First Viénot Report, this strong myopia is exemplified by the Report's self-description as a response to the "ferment" that corporate governance reports and discussions, primarily in the Anglo-American world as shown in the United Kingdom's Cadbury Report, have generated.[134] Formulation

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130. *See* ICGN PRINCIPLES, *supra* note 104; WORLDBANK OVERVIEW, *supra* note 104.

131. *See* WORLDBANK OVERVIEW, *supra* note 104.

132. *See* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 73 (1995).

133. *Id.*

134. *See* 1ST VIÉNOT REPORT, *supra* note 103, at 5, 13.

and discussions of corporate governance codes of conduct in other countries put pressure upon French businesses to come up with their own corporate governance response.[135] Senator Marini's Report echoes this approach. He justifies his work by noting the current corporate governance discussions and activities, and speaks of the "urgency" of reforming French corporate law in response.[136] Senator Marini also mentions the pressure from foreign investors in France who implicitly or explicitly threaten to sell their French investments unless changes are made to the French corporate governance rules.[137]

The Second Viénot Report also shows strong myopia in a way similar to the First Viénot Report.[138] Yet the Second Viénot Report justifies itself as a response to the proliferation of *international* corporate governance codes, such as the OECD's, similar to the way that the First Report responded to Cadbury.[139] In particular, the advocacy generating the French myopia comes from international organizations, not just from Anglo-American investors. By contrast, while also referring to pressure from foreign investors in France and international corporate governance reforms, the Besson Report is motivated more by recent corporate governance related events in the French capital markets, which sparked domestic debates over the quality of French corporate governance.[140] This orientation suggests that more than general corporate governance debates are necessary to cause actual changes to French corporate law: there must be events in France demonstrating the need for the changes.[141]

The non-French texts split between a strong and weak myopia. In its Principles, Calpers simply mentions in passing, thus showing a weak myopia, that France needs foreign investors similar to it because the French State can no longer capitalize enterprises itself.[142] The OECD Principles refer to the relation between economic success and corporate governance without dramatizing the connection.[143] Because it is not focusing on reform in a specific

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135. *See id.*

136. *See* MARINI REPORT, *supra* note 103, at 6-7.

137. *See id.*

138. *See* 2ND VIÉNOT REPORT, *supra* note 103.

139. *See id.* at 3.

140. The Besson Report refers to the lengthy takeover battle between Banque Nationale de Paris, Paribas and Société Générale, the problems of funding of, and abuse of minority shareholders in, Eurotunnel, and the bankruptcy of Crédit Lyonnais. *See, e.g.*, BESSON REPORT, *supra* note 103, at 14, 28-30.

141. By contrast, the AFG Recommendations exhibit weak myopia, for this organization mentions only in passing the corporate governance activity, changes in French markets, entrance of activist U.S. pension funds as reasons for its proposals. *See* AFG RECOMMENDATIONS, *supra* note 103, at 1.

142. *See* CALPERS PRINCIPLES, *supra* note 104, at 2.

143. *See* OECD PRINCIPLES, *supra* note 104, at 2-3, 13 (referring to increase in foreign shareholders in capital of firms in many OECD countries).

country, the OECD weakly uses emotions to motivate change.[144] Yet the other non-French texts, which come from advocates with powerful reform programs, strongly evoke a myopic focus on corporate governance because they are attempting to argue forcefully for a specific position.[145] The ICGN exhibits strong myopia when it unequivocally emphasizes the importance of corporate governance for the economy and for capital market investors.[146] This approach is typical of the ICGN, which, as an organization of institutional investors, is a crusader for corporate governance.[147] This same kind of powerful advocacy typifies the Worldbank because its Overview emphasizes the importance of corporate governance for the success of firms and countries, and it states that the speed of adapting to corporate governance standards is important for a country's economic success.[148] It may well be that the Worldbank can be particularly forceful because it dispenses funds and actively tries to change firm and government behavior, although it does so generally in developing countries.[149]

2. "Status Quo Bias" or "Loss Aversion"

Under this bias, people become overly attached to what they have—the "endowment effect"—and thus dislike a risk of its loss more than they like an equal risk of gains—"loss aversion." They do not like change from their current state of affairs, which the Article refers to as the "status quo bias." However, people may paradoxically accept transformation to maintain the "status quo."

The French texts show a strong use of the bias, with some texts emphasizing loss aversion and others the status quo.[150] For example, the First Viénot Report displays one of the most powerful examples of status quo bias because it is essentially a reactionary, even a jingoistic, document.[151] Its response to Anglo-American corporate

144. *See id.*
145. *See supra* TABLE 1.
146. *See* ICGN PRINCIPLES, *supra* note 104, at 1-2.
147. *See id.*
148. *See* WORLDBANK OVERVIEW, *supra* note 104, at 2-3.
149. *See id.*
150. *See supra* TABLE 1.
151. As an example of its emphasis on French tradition, it would not recommend change to the French legal focus on the "intérêt social" in favor of shareholder value. *See* 1ST VIÉNOT REPORT, *supra* note 103, at 8. It thus reaffirms the "principes traditionnels du droit et de la pratique" ("traditional principles of law and practice") that a board represents the corporation, not distinct groups. *Id.* at 12. It also praises the French law that gives both the board and its chairman overlapping legal powers, which in its view allows a French board flexibility to adapt to circumstances. *See id.* at 10.

governance reforms, such as the Cadbury, is to observe that little change is needed to French law to accommodate the demands of corporate governance advocates.[152] The Report argues that the status quo is acceptable.[153] In its view, either French law is well suited to French circumstances and already accommodates most demands of these advocates, or French companies are making the necessary governance changes on their own.[154] For instance, it observes that French law already limits the number of inside management directors who can sit on a board of directors and it allows the board to appoint specialized board committees.[155] Both reforms are high on corporate governance advocates' list.[156] Moreover, it presents the practices of good corporate governance as implicit or already used informally in France.[157] Hence, the Report is simply formalizing what is already present—the status quo.[158] When it does propose reform, the change is characterized as a continuation of French law and tradition.[159] For example, the Report ties its recommendation about independent, non-management directors to French law, which already limits the number of inside, management directors on a firm's board of directors.[160]

The Marini Report also has a strong status quo bias and offers a classic statement of it: "Il s'agit moins d'en changer [la loi] que de la reformer" ("It is less about changing the law as about reforming it").[161] The Report asserts that it is maintaining "la souplesse actuelle de la loi française" ("the flexibility of French law") and is trying to increase this flexibility "là où c'est possible, là où c'est nécessaire" ("where it is possible or necessary").[162] Yet the Report also exhibits a strong loss aversion by its repeated statements about the need for French law to change in order for France and French firms to maintain a position in international economic competition.[163] This evocation of potential loss is understandable in a report that

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152. *See id.*

153. *See id.* at 5.

154. *See id.* at 7. For example, it is favorable to specialized board committees (nomination, audit, compensation), and observes that many French companies already have these committees. *Id.* at 18.

155. *See id.*

156. *See id.* at 6. It also observes that French law already provides for the separation of the CEO and Chairman of the Board (if a firm wants this structure), *see id.* at 10, and it declines to mandate the separation, considering that this governance feature is not significant for the success of the enterprise. *See id.* at 11 (using status quo bias as a shield).

157. *See id.*

158. *See id.* at 23.

159. *See id.*

160. *See id.* at 13.

161. MARINI REPORT, *supra* note 103, at 7.

162. *See id.* at 50.

163. *See id.*

urges actual changes to French law and that is more active in this advocacy than the First Viénot Report.[164] In an important passage, the Report thus observes that "la compétition économique met également en concurrence les systèmes juridiques" ("economic competition puts into competition legal systems").[165]

In contrast, the Second Viénot Report continues the conservative approach of the First Report with an emphasis on the status quo rather than loss aversion.[166] The Second Report states that French companies have continued to evolve in their corporate governance practices and that the earlier Report worked well in advancing the French governance situation.[167] For example, the Second Report praises French law that allows one person to hold both the Chairman and CEO positions[168] and that does not require disclosure of individual executive compensation.[169] Like the Marini Report, the Besson Report emphasizes loss aversion by noting that, if changes are not made to French corporate law, French companies will not be competitive and international investors will stay away from French markets.[170] The AFG Recommendations do not use the bias to advocate change.[171] While the AFG expresses its dissatisfaction with French legal and business practices, such as cross-shareholdings,[172] it may be that this organization of French institutional shareholders is reluctant to appear too aggressive on corporate governance and not adequately supportive of French enterprises.[173]

The emphasis of the non-French texts is on loss aversion because, as outsiders to France, they are not as concerned as the French advocates in defending the French status quo. Calpers, for instance, strongly evokes loss aversion by plainly asserting that, if French companies do not treat their minority shareholders well and adopt the needed legal reforms, then the funds will go elsewhere with

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164. *See id.*

165. *See id.* at 17 ("[E]conomic competition puts into competition legal systems.").

166. *See* 2ND VIÉNOT REPORT, *supra* note 103.

167. *See id.* at 2-3. Indeed, the Report reviews firms' progress on issues raised in the First Report. *See, e.g., id.* at 18 (noting increased frequency of meetings of boards of directors in French firms).

168. *See id.* at 6.

169. *See id.* at 12.

170. *See, e.g.,* BESSON REPORT, *supra* note 103, at 199-200. Again, this emphasis is not surprising, since the Report reviews proposed legislation dealing with corporate governance. Also like the Marini Report, the Besson Report points to provisions of French law that do not need to change to accommodate corporate governance developments. *See id.* at 199.

171. *See* AFG RECOMMENDATIONS, *supra* note 103.

172. *Id.* at 4, 7.

173. *See id.*

their capital.[174] Calpers states, "If needed capital begins to disappear, corporate directors may discover their own countrymen demanding legislative reform. But by then, they may find that investors are quite happily invested in other markets. Thus, a wise board would do well to attend to its responsibilities to its minority shareholders."[175] Similarly, the OECD, as a neutral international organization, weakly evokes loss aversion when it points out that if companies are to attract international investors, then their "corporate governance arrangements must be credible and well understood across borders."[176]

The two organizations with powerful advocacy programs—the ICGN and the Worldbank—take a strong approach on this bias with an emphasis on loss aversion.[177] The Preamble to the ICGN Principles states that corporate governance is necessary to enable companies to attract scarce capital, and to enhance their performance and that of their economies.[178] In its Global Voting Principles, the ICGN warns that an economy risks not receiving capital if (1) it does not give international shareholders the votes that their capital deserves, or (2) it makes the voting process too difficult for these shareholders.[179] The message in the Worldbank Overview is that countries and companies, particularly companies in developing nations, will be left behind or fail to prosper if they do not adopt good governance practices.[180] Indeed, it asserts that the financial stability of these countries is threatened if they do not follow its advice.[181] Countries and firms, particularly developing countries and their firms, are warned that they do not have time to wait for structural reform because they need instant credibility with capital market investors.[182]

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174. *See* CALPERS PRINCIPLES, *supra* note 104, at 2.

175. *Id.*

176. OECD PRINCIPLES, *supra* note 104, at 3.

177. *Compare* ICGN PRINCIPLES, *supra* note 104, *with* WORLDBANK OVERVIEW, *supra* note 104.

178. *See* ICGN PRINCIPLES, *supra* note 104, at 2.

179. INTERNATIONAL CORPORATE GOVERNANCE NETWORK, GLOBAL SHARE VOTING PRINCIPLES (July 10, 1998), *at* http://www.icgn.org/documents/sharevoting.html (representing an additional development of the ICGN's Corporate Governance Principles on the issue of shareholder voting).

180. *See* WORLDBANK OVERVIEW, *supra* note 104, at 2 (expressing an urgent need for reforms to avoid country and company losses).

181. *Id.* at 4.

182. *See id.* at 17.

3. Extremeness Aversion

People influenced by this bias do not like extremes and tend to select the "middle" strategy or outcome when they are presented with several choices in their decision- or policy-making. In other words, an advocate can influence decision-making by presenting, in a particular way, the position he or she wants others to adopt.[183] All the French documents evoke this bias.[184] The advocate must simply be careful not to denigrate the status quo of French law or practice, which would conflict with the status quo bias, in order to push the desired position. The French texts often harmonize the use of these biases by suggesting that the status quo is dynamic, which justifies some movement in policy-making away from "things as they are."[185]

One extreme is the corporate governance that Anglo-American institutional investors espouse. The other extreme is to maintain current French finance and governance as they are. This leaves a middle and psychologically attractive policy position of a new kind of French corporate governance, which moves people from the French status quo, but not enough to threaten it seriously. This kind of advocacy has great psychological power because advocates can argue that a country is remaining true to its origins on corporate governance while also urging it gradually towards an Anglo-American position. Moreover, this approach could be particularly powerful in France where policymakers desire to be seen as keeping the French system as an exception to Anglo-American dominance.[186]

This approach characterizes the First Viénot Report. The Report highlights that French law and practice on governance are different from those of the Anglo-Americans.[187] In particular, French law recognizes the firm's overall interest, while Anglo-American law focuses on the interests of specific groups, primarily the shareholders.[188] The Report characterizes its reform proposals as being both within the French "tradition" and small steps away from the status quo.[189] For example, it rejects the Anglo-American call for French boards of directors to have a specific number of independent

183. An advocate can, for example, present a middle position between two extremes.

184. *See, e.g.*, documents cited *supra* note 103.

185. *See id.*

186. Support of this position is found in MICHEL ALBERT, CAPITALISME CONTRE CAPITALISME (1991), in which Albert defends the European systems of capitalism against those of the United Kingdom and the United States.

187. *See* 1ST VIÉNOT REPORT, *supra* note 103.

188. *See id.* at 8.

189. *See id.*

directors, but recommends that boards consider having at least three such directors.[190] It further notes that by law one-third of directors of a French company need to be non-management directors.[191] The Second Report follows this approach of affirming French "difference" and proposes small, intermediate steps.[192] For example, the Second Report observes that French law occupies a middle ground with respect to the separation of the Chairman and CEO positions, as compared to the Anglo-American tradition of combination and the German tradition of separation of the roles.[193] Specifically, French law allows a firm to elect either separation or combination.[194] It proposes a small reform to allow separation of the positions in a unitary board—where the firm does not have the management/supervisory board structure—which would give French firms the best of all possible worlds.[195]

The Marini Report also strongly uses this bias.[196] In particular, in discussing the reform of French corporate law, the Marini Report observes that the law could go in the direction of Anglo-Saxon contractualization or continued French codification.[197] It then observes that "[e]n réalité, aucune de ces deux approches n'est réellement satisfaisante" ("In reality, neither of these two approaches is really satisfying").[198] It proposes a middle ground of reforming existing law by having it adopt more of an Anglo-American contract-based approach without completely abandoning the French code-based approach.[199] Rather than using the bias to advocate a global reform strategy, as does the Marini Report, the AFG Recommendations evoke it to motivate individual reform

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190. *See id.* at 12-13 (offering little justification for this suggestion other than to say that the directors would improve the quality of debates and protect minority shareholders in a firm with a controlling shareholder).

191. *See id.*

192. *See* 2ND VIÉNOT REPORT, *supra* note 103.

193. *See id.* at 3-4.

194. *See id.*

195. *See id.* On executive compensation disclosure, the Report juxtaposes the Anglo-American tradition of full disclosure against the Continental one of little disclosure, and then adopts a middle ground that requires a more detailed disclosure about executive compensation (e.g., how each company determines executive compensation) without requiring disclosure of compensation of individual executives. *See id.* at 4-5.

196. *See* MARINI REPORT, *supra* note 103.

197. *See id.*

198. *Id.* at 7 (stating that, "[i]n reality, neither of these two approaches is really satisfying," and observing that wholesale adoption of Anglo-Saxon law and practice would be too foreign for France as it is based on a different culture and that continued codification of French law would be too slow to respond to current circumstances).

199. As another example, the Report observes that, with respect to control of the firm, French corporate governance is between the shareholder control of the Anglo-American system and the stakeholder control of the German system. *See id.* at 88.

proposals.[200] For example, they do not advocate eliminating the "pouvoir en blanc," which is a global proxy that a shareholder gives to management to vote as the latter sees fit.[201] Yet, the AFG Recommendations ask that these proxies be given only for a specific resolution and request that French law and practice develop other methods of proxy voting, such as voting "par correspondence"—by mail—or "par procuration"—by way of a stand-in.[202]

Finally, the Besson Report evokes the bias to advocate specific legal reforms.[203] It asserts that its proposed legal changes are not based on a wholesale adoption of U.S. corporate governance, nor do they leave that law untouched.[204] In discussing a reform of disclosure of executive compensation that would require disclosure of an individual executive's compensation, the Besson Report observes that, while this reform would bring French disclosure in line with U.S. and U.K. practice, Anglo-American pension funds actually want *more*—namely, a voice in the determination of the compensation.[205] The proposed legislative solution of disclosing individual executive compensation thus becomes a middle ground between the current French practice of disclosure of global executive compensation and the position of the pension funds.[206]

The non-French documents show extremeness aversion in varying degrees. In an interesting use of the bias, the Calpers Principles present the proposals of the First Viénot Report as one extreme and U.S. corporate governance as the other.[207] This leaves the middle ground of Calpers' proposed reform of French law that goes beyond those offered in the First Viénot Report, but not as far as the position that Calpers would advocate for a U.S. company.[208] As a foreign advocate in France, Capers can thus avoid presenting itself as

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200. *See* AFG RECOMMENDATIONS, *supra* note 103.

201. *See id.*

202. *Id.* at 4. Similarly, the AFG does not demand disclosure of individual executive compensation, but only disclosure of global compensation for the main officers and directors. *See id.* at 3. It also accepts the French practice of giving double voting rights to shares held by an individual shareholder for a specified period, but, as a middle recommendation, suggests that these be eliminated after a firm has been listed for five years. *See id.* at 4.

203. *See* BESSON REPORT, *supra* note 103.

204. *See id.* at 199.

205. *See id.*

206. *See id.* at 256-57.

207. *See* CALPERS PRINCIPLES, *supra* note 104, at 3.

208. *See id.* at 6. In keeping with this balanced position, Calpers suggests that the French stock exchange should have as a listing requirement that a firm disclose its compliance with the First Viénot Report. *See id.* at 3. Yet it does request that any future French committee looking into French corporate governance reform include a representative of foreign institutional investors. *See id.* at 4.

an extremist Anglo-American fund.[209] While, for example, accepting the First Viénot Report's suggestion that each board of a French company have at least two independent directors, it offers two related proposals: (1) in the medium term, a majority of the non-executive directors should be independent; and (2) in the long term, a majority of all directors should be independent.[210]

The other non-French texts show this bias in their general statements about corporate governance, which often reflect a political compromise that a text is attempting to achieve. For example, in a strong use of the bias, the OECD Principles take a middle position of not recommending a specific kind of corporate governance.[211] They suggest, for example, that independent board members should sit on key board committees, such as those dealing with audit, nomination and compensation, without specifying the composition of the committees.[212] For example, should those committees be composed of majority independent board members? Or perhaps all independent board members? They recognize the contribution of stakeholders other than shareholders to a firm, but offer little in the way of a definitive course of action regarding these stakeholders.[213]

The weakest uses of the extremeness aversion bias are in the statements most supportive of Anglo-American corporate governance, such as the ICGN Principles and the Worldbank Overview. This is because these organizations have no need to take a compromise or middle position.[214] The ICGN Principles offer a weak example of compromise on stakeholders, which may be explained by the political alliance between large institutional investors and labor unions.[215] They state that a corporation should align stakeholder interests with those of the corporation and shareholders through stock options, allowing the corporation to remain focused on shareholder value.[216] Similarly, while the Worldbank Overview states that it is not advocating a specific kind of corporate governance and points to the existence of different systems, like those of the United States and

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209. *See id.*

210. *See id.* at 5. As another example, although Calpers wants French law to eliminate staggered boards and have an annual election of all board members, it offers as a middle position the elimination of director terms of more than three years. *See id.* at 6.

211. *See* OECD PRINCIPLES, *supra* note 104, at 3. Again, this is because the OECD countries themselves have different governance systems.

212. *See id.* at 9.

213. *See id.* at 18.

214. *See* WORLDBANK OVERVIEW, *supra* note 104.

215. *See* ICGN PRINCIPLES, *supra* note 104, at 6 (addressing the role of stakeholders in corporate governance).

216. *See id.* Similarly, it advocates "cooperation" between stakeholders and companies and firms' "manag[ing] successfully [their] relationship[]" with stakeholders, but offers no further specifics on how to achieve this compromise. *See id.* at 5-6.

Germany,[217] it is plainly supportive of Anglo-American corporate governance[218] and offers strong views on the related reforms on a government's competition and trade policies.[219]

4. Over-optimism or Over-confidence

Under this bias, people overestimate their abilities and the likely success of their decisions. Many advocates of market capitalism and Anglo-American corporate governance clearly exhibited this bias in the exuberance of the stock markets of the late 1990s. Yet, as Table 1 indicates, over-optimism is generally weak or absent from both the French and non-French corporate governance texts alike.[220] This is a surprising result in advocacy texts where one would expect advocates to use optimism to build support among policymakers for proposed reforms.

This Article contends that French advocates do not need to use this psychological factor when they recommend, as do most of the French advocates, only incremental changes to French corporate governance and not a major shift in policy. In other words, if an advocate were proposing a significant change to the current system, he or she would need to evoke over-optimism to overcome the status quo bias. Indeed, the First Viénot Report speaks optimistically about existing French corporate governance and the lack of any need for major reforms, instead of using optimism to push its proposed reforms.[221] The Marini Report shows a similarly weak optimism in its favorable portrayal of existing French law.[222] The Second Viénot Report also follows this approach, although its optimism regarding French corporate governance is more subdued, perhaps because of its recognition of the increased international pressure for reform of the French system.[223] Only the Besson Report gives an optimistic presentation of the need for the legal reform that it presents, which makes sense because it is the only French document supporting a proposed change to the law that is the subject of immediate French parliamentary action.[224]

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217. *See* WORLDBANK OVERVIEW, *supra* note 104, at 9-10.

218. *See id.* at 10 (noting that, as a result of globalization, there is increasing harmonization of governance practices).

219. *See id.* at 7-8.

220. *See supra* TABLE 1.

221. *See, e.g.*, 1ST VIÉNOT REPORT, *supra* note 103, at 5, 10, 12.

222. *See* MARINI REPORT, *supra* note 103, at 18.

223. *See* 2ND VIÉNOT REPORT, *supra* note 103, at 3-4 (discussing proposed reform of French board structure that would allow the chairperson of the board to be someone other than the chief executive officer of the company). The AFG Recommendations do not display this psychological feature. *See* AFG RECOMMENDATIONS, *supra* note 103.

224. *See, e.g.*, BESSON REPORT, *supra* note 103, at 14.

As Table 1 indicates, the non-French texts show more optimism than do the French texts. This is because of their generally programmatic nature, which suggests that, if the proposed corporate governance guidelines are followed, then economic success for firms and countries will ensue.[225] The Calpers Principles, which is the least programmatic of the group, display only weak optimism in this regard.[226] The OECD Principles exhibit a similarly weak optimism based on their assertion that, if its principles were followed, then an economy would do better as would companies and all stakeholders involved therein.[227] In contrast, the ICGN Principles provide strong over-optimism in their confident presentation of their approach to corporate governance.[228] Finally, as one might predict, the Worldbank Overview exhibits the same strong optimism.[229] More than any other organization, the Worldbank has an ambitious reform program, and therefore needs to generate optimism to motivate its addressees.

5. Hindsight Bias

This bias involves judging past decision- or policy-making from the perspective of the present and thus thinking that the result of the decision or policy was more predictable than it in fact was.[230] The bias is usually employed to fix blame for a present state of affairs or outcome on the decisionmaker or policymaker.[231] A hypothetical example of the bias would be if a corporate governance advocate were to say that, during the post-war years when they disregard French corporate law and governance, French policymakers made erroneous policies favoring state and family control of enterprises over the development of market capitalism. That is, if they had favored

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225. *See* documents cited *supra* note 104.

226. *See* CALPERS PRINCIPLES, *supra* note 104, at 6 (discussing the advantages of eliminating the French practice of having companies hold shares of other companies, which in turn hold shares in the former (cross-holdings)).

227. *See, e.g.*, OECD PRINCIPLES, *supra* note 104, at 3 (discussing the advantages of good corporate governance).

228. *See* ICGN PRINCIPLES, *supra* note 104, at 2 ("The ICGN contends that if investors and managers succeed in establishing productive communication on issues, they will have enhanced prospects for economic prosperity, fuller employment, better wages, and greater shareholder wealth.").

229. *See* WORLDBANK OVERVIEW, *supra* note 104, at 2 ("Countries realize that just as overall governance is important in the public sector, so corporate governance is important in the private sector. They also realize that good governance of corporations is a source of competitive advantage and critical to economic and social progress."), at 12 ("The evidence increasingly suggests that such behavior [following voluntary codes of corporate governance] enhances the reputation and value of companies.").

230. *See* Korobkin & Ulen, *supra* note 69, at 1095-96; BEHAVIORAL LAW AND ECONOMICS, *supra* note 69, at 1182-84.

231. BEHAVIORAL LAW AND ECONOMICS, *supra* note 69, at 1182-84.

market capitalism, as opposed to state and family capitalism, their firms and investors would probably be in a better position in the current investment and business world.

This example, with its emphasis on blame, underscores why the bias is relatively absent from the governance texts. That the bias is generally weak or non-existent in the French texts is not surprising given that the texts emphasize how French corporate governance, suited to French circumstances, is being changed by outside events and investors.[232] With one exception, the French texts do not imply that earlier French policymakers went down the wrong path in their corporate governance policies.[233] One may expect that only a major crisis, when people are looking to blame others for past policies and decisions, would result in texts exhibiting the hindsight bias. That kind of a crisis has not happened yet in French corporate governance.[234] Moreover, the incremental approach to corporate governance change that is characteristic of French texts is incompatible with the hindsight bias in any strong form.[235] This is because the approach assumes that the existing state of affairs is generally acceptable and in need of only minor modifications.[236]

The only real suggestion of the bias is in the Marini Report, which argues that French policymakers made a mistake in 1966 by excessively codifying corporate law and by embracing the "social interest" principle to orient this law.[237] Marini contends that this approach resulted in an inflexible law that neglected the contractual nature of the firm, and that is thus not suitable to the kind of market capitalism that policymakers had all along wanted to develop.[238]

In the non-French texts, the bias is similarly absent or weak, except when advocates point out that certain countries have taken the wrong approach to corporate governance.[239] The Calpers Principles exhibit a weak form of the bias by suggesting that French law and practice have improperly ignored shareholder interests to accommodate those of the French State.[240] As befits its aggressive message on corporate governance, the Worldbank exhibits a strong form of this bias: it blames countries, particularly developing

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232. *See* documents cited *supra* note 103.
233. *See* MARINI REPORT, *supra* note 103, at 7-8 (implying that French policymakers excessively codified corporate law in 1966).
234. *See* documents cited *supra* note 103.
235. *See id.*
236. *See id.*
237. *See, e.g.*, MARINI REPORT, *supra* note 103, at 7-8.
238. *Id.*
239. *See* documents cited *supra* note 104.
240. *See* CALPERS PRINCIPLES, *supra* note 104, at 2.

countries, for lacking good corporate governance laws and for erroneous decisions on corporate governance-related issues.[241]

6. Availability Heuristic

A heuristic is a short-cut way of thinking. Under the "availability" heuristic, people believe that something is an issue or a problem if they find it available, which means that they can call it readily to mind, like a recent disaster.[242] The heuristic can produce availability "cascades," which are social phenomena where people are motivated by one another's focus on a recent event or problem. The focus caused by the heuristic may well contradict the statistical importance of the event or problem.[243] The results on availability will likely mirror those for myopia because, under each psychological factor, people pay inappropriate attention to present circumstances.[244]

In France, observers would expect to see evidence of the availability heuristic, and even an availability cascade, with the attention there to Anglo-American corporate governance. The quasi-rational aspect of this example of availability arises from the fact that it has not yet been convincingly established that a particular form of corporate governance has a determining effect on a firm's productivity or success in the marketplace.[245] Firms with very different governance systems are successful in the world's economy.[246] In other words, the French focus on Anglo-American corporate governance, and even on corporate governance itself, may not be rational, because it owes much to the publicity on the subject generated by corporate governance advocates.

Unsurprisingly, the French documents strongly present the heuristic; Anglo-American corporate governance and debate over French corporate governance are *the* issues in them and are, in fact, the reason for the documents' existence and reform proposals.[247] The

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241. *See* WORLDBANK OVERVIEW, *supra* note 104, at 18 ("With such opposition, it is not surprising that corporate governance reforms (in developed countries as well as developing and transition economies) have often been driven by major economic crisis or serious corporate failure.").

242. *See generally* GIGERENZER ET AL., *supra* note 70; BEHAVIORAL LAW AND ECONOMICS, *supra* note 69 (explaining and giving examples of heuristics).

243. *See generally* GIGERENZER ET AL., *supra* note 70; BEHAVIORAL LAW AND ECONOMICS, *supra* note 69 (explaining and giving examples of heuristics).

244. *See generally* GIGERENZER ET AL., *supra* note 70; BEHAVIORAL LAW AND ECONOMICS, *supra* note 69 (explaining and giving examples of heuristics).

245. *See, e.g.*, Black, *supra* note 17, at 2133-34.

246. *See id.* (referring to the debate, and data, over the importance of corporate governance for economic performance of a firm).

247. *See, e.g.*, 1ST VIÉNOT REPORT, *supra* note 103, at 5; 2ND VIÉNOT REPORT, *supra* note 103 (stating that special committees were formed to study corporate governance).

results here mirror those for myopia.[248] The subject of corporate governance, as described in the First Viénot Report, came from its availability because of the activity of Anglo-American corporate governance advocates, such as Sir Adrian Cadbury.[249] The Marini Report[250] and the Second Viénot Report[251] exhibit the same strong presentation based upon their accepting the importance of, and the international focus on, corporate governance.[252] In the Besson Report, the strong characterization arises from its straightforward recognition of standard corporate governance issues that it uses to justify the legal reform proposals.[253] In contrast, the AFG Recommendations offer a weak use of availability, primarily because they assume, without explaining why, corporate governance matters for a firm's success.[254] From another perspective, this tacit assumption may in fact reveal a strong form of the heuristic because the AFG accepts—without any need for justification—the importance of the subject and the Anglo-American approach.[255]

Not surprisingly, the non-French documents again show a strong use of availability because they assume or state that corporate governance issues are matters of importance and must be addressed by France and all other countries.[256] The OECD Principles strongly exhibit this heuristic if only because they are part of a report on corporate governance.[257] The ICGN Principles strongly exhibit the heuristic by providing a commentary on the OECD Principles.[258] The ICGN Principles contain additional assertions about the importance

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248. *See supra* TABLE 1.

249. *See* 1ST VIÉNOT REPORT, *supra* note 103, at 12 (discussing the need for independent directors on a company's board).

250. *See* MARINI REPORT, *supra* note 103, at 96-97 (discussing the ability for investors to bring a class action in France).

251. *See* 2ND VIÉNOT REPORT, *supra* note 103, at 6 (discussing separation of CEO and Chairman in a board of directors, a major issue for Anglo-American corporate governance).

252. *See supra* notes 250-51.

253. *See* BESSON REPORT, *supra* note 103, at 236 (discussing disclosure concerning conflicts of interest).

254. *See* AFG RECOMMENDATIONS, *supra* note 103, at 1.

255. *Id.*

256. *See, e.g.*, ICGN PRINCIPLES, *supra* note 104, at 1-2 (stating that the OECD principles show government recognition that corporate governance is an important pillar in the twenty-first century global economy).

257. *See* OECD PRINCIPLES, *supra* note 104, at 2 ("One key element in improving economic efficiency is corporate governance, which involves a set of relationships between a company's management, its board, its shareholders and other stakeholders."), at 3 ("At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist.").

258. *See* ICGN PRINCIPLES, *supra* note 104, at 1-2.

of corporate governance.[259] The Worldbank Overview provides the strongest example of the heuristic. The opening page of the Worldbank Overview is entitled, "Why corporate governance matters–now more than ever."[260] Similarly, the Worldbank Overview states that, "[C]ountries realize that just as overall governance is important in the public sector, so corporate governance is important in the private sector."[261]

The Calpers Principles present an interesting, yet weak, example of the heuristic. Calpers is a major U.S. institutional investor.[262] However, its discussion about France is based on the First Viénot Report, which itself was a reaction to the corporate governance advocacy by institutional investors like Calpers that made corporate governance "available" in France in the first place.[263] The Principles thus begin with proposals for reform without providing the necessary justification about corporate governance's importance; the assumption is that corporate governance simply matters.[264]

7. Anchoring Heuristic

Under this heuristic, people make decisions or policies, or at least orient their decision- or policy-making, on the basis of a value or "anchor" that may be arbitrarily chosen and to which people hold fast, despite the rationality of other values.[265] In this case, the anchor is Anglo-American corporate governance. This heuristic is related to availability and myopia: people "anchor" to Anglo-American corporate governance because, in contemporary debates about corporate governance, it is simply available. One would expect the heuristic to be strongly present in the texts because the entire corporate governance discussion is based on Anglo-American corporate governance.[266] The quasi-rationality of this anchor, however, arises because financial economists have shown that Anglo-American corporate governance is the minority form of corporate governance around the world and is by no means correlated with strong company

259. *See id.* ("The ICGN affirms—with the OECD Principles—that along with traditional financial criteria, the governance profile of a corporation is now an essential factor that investors take into consideration when deciding how to allocate their investment capital. The Principles highlight elements that ICGN investing members already take into account when making asset allocation and investment decisions.").

260. WORLDBANK OVERVIEW, *supra* note 104, at 1.

261. *Id.* at 2.

262. *See* documents cited *supra* note 104.

263. *See* CALPERS PRINCIPLES, *supra* note 104; 1ST VIÉNOT REPORT, *supra* note 103.

264. *See* CALPERS PRINCIPLES, *supra* note 104, at 2. Again, as in the case of the AFG Recommendations, this perspective could be viewed as a "strong" case of availability because it takes the importance of corporate governance for granted.

265. *See* Korobkin & Ulen, *supra* note 69.

266. *See, e.g.*, 2ND VIÉNOT REPORT, *supra* note 103.

or country economic performance.[267]

The French documents confirm this prediction. Even if Anglo-American corporate governance practices and values are not entirely accepted, and are even contested by the French, they are clearly the bases or anchors against which French law and practice are measured and judged.[268] Although the First Viénot Report asserts its fidelity to French legal and governance values, it centers its entire discussion on positions and reforms pushed by Anglo-American corporate governance advocates.[269] Anglo-American capitalism and governance are taken as a base, which is particularly seen in the First Report's comments on firms' cross-shareholdings and reciprocal directors.[270] The Marini Report also strongly anchors to Anglo-American corporate governance values, despite its assertion that it remains close to French legal tradition.[271] As in the First Report, the Second Viénot Report takes the Anglo-American values as given, even if the Report disagrees with some of them.[272] A notable example is the Second Report's comments on the disclosure of executive compensation, an issue that is at the heart of Anglo-American corporate governance.[273] In discussing legislative changes, the Besson Report constantly refers to Anglo-American laws and practices as establishing the standards against which the reforms should be measured.[274] For example, Besson looks at how U.K. and U.S. firms separate the powers between the Chairperson and CEO.[275]

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267. *See* La Porta et al., *Corporate Ownership Around the World, supra* note 31, at 492-98.

268. *See, e.g.*, 2ND VIÉNOT REPORT, *supra* note 103 (using Anglo-American corporate ideals as the measure of effectiveness for French corporate law).

269. 1ST VIÉNOT REPORT, *supra* note 103, at 15.

270. *Id.* (describing French capitalism as being "weak" because there are no pension funds and other kinds of institutional investors, which necessitates the cross-shareholdings with other companies). Similarly, the Report's discussion of director duties is based upon Anglo-American models of board member behavior. *See id.* at 21 (describing such duties as requiring board members to gather information and avoid conflicts of interest).

271. *See* MARINI REPORT, *supra* note 103, at 8 (observing that the law, in focusing on "intérêt social," has neglected that "la première raison d'être de toute société est l'enrichissement de ses actionnaires" ("the first reason for existence of every company is the enriching of its shareholders")–the shareholder value standard pushed by Anglo-American corporate governance advocates).

272. 2ND VIÉNOT REPORT, *supra* note 103, at 11.

273. *Id.* (disagreeing with the position of disclosure of an individual executive's compensation in favor of retaining disclosure of global executive compensation but adding further information on the method of determining this compensation).

274. BESSON REPORT, *supra* note 103, at 207.

275. *Id.* Similarly, with respect to disclosing contracts involving conflicts of interest between a director and his or her firm, Besson notes that this disclosure occurs in the United Kingdom and the United States. *See id.* at 236. Besson also notes, in discussing the disclosure of individual compensation of board members and directors,

The non-French texts generally anchor to Anglo-American corporate governance values because the texts can be seen as programs for the development of this kind of corporate governance.[276] This is particularly true of the Worldbank Overview.[277] The Calpers Recommendations exhibit weak anchoring, if only because their dependence on the values is implicit and understood by all.[278] Obviously, this institutional shareholder is promoting these values, but it is not discussing the values at length or even putting them into the foreground; Calpers assumes the values' validity. The ICGN Principles, like Calpers, exhibit weak anchoring. Although the OECD Principles disavow advocacy of one system of corporate governance over another, they refer favorably to practices in member countries, particularly to Anglo-American practices.[279] In discussing equitable treatment of shareholders, the OECD Principles point out that shareholders need some form of redress for abuses, and companies need to be protected from excess litigation.[280] Both goals may be achieved by rules like the "business judgment rule" in U.S. corporate law.[281] Even more strongly than the OECD, the Worldbank Overview anchors to Anglo-American governance practices by telling developing countries that they must look to the standards of developed countries and those of the global investment community for their corporate governance models.[282]

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that this disclosure is one of the bases of the Anglo-Americans corporate governance and specifically refers to SEC disclosure and U.K. practices. *See id.* at 256.

Once again, the weakest example comes from the AFG Recommendations, which sporadically and implicitly refer to Anglo-American corporate governance values. For instance, they argue that the French practice of blocking shares to identify shareholders eligible to vote in shareholders' meetings should be abolished in favor of one modeled upon the U.S. "record date." *See* AFG RECOMMENDATIONS, *supra* note 103, at 5. Again, this implicit acceptance of Anglo-American corporate governance values might equally be considered to be "strong" anchoring.

276. *See* ICGN PRINCIPLES, *supra* note 104 (stating that ICGN principles are minimum acceptable standards for companies and investors around the world).

277. WORLDBANK OVERVIEW, *supra* note 104.

278. CALPERS PRINCIPLES, *supra* note 104.

279. OECD PRINCIPLES, *supra* note 104, at 16 (showing a trend in OECD member countries regarding custodian institution voting rules).

280. *Id.* at 15-17.

281. *See* OECD PRINCIPLES, *supra* note 104, at 15. The Principles also advocate disclosure practices, mentioning the experience of such practices in countries with large capital markets. *See id.* at 19-22. They also appear to "anchor" to board practices associated with Anglo-American countries, particularly the independent director and the use of different board committees on which independent directors should sit. *See id.* at 23-24.

282. *See* WORLDBANK OVERVIEW, *supra* note 104, at 17. The anchor is styled as the "culture of compliance and enforcement," as opposed to crony behavior and state control. *See id.* at 19. It observes that firms and countries must adhere to the "best practices and rules set by global markets." *See id.*

8. Case-based Decision-making

Here, parties prefer to make incremental decisions or policies when faced with specific problems rather than make major changes. Because this heuristic is related to the people's innate conservatism, the results approximate those for the status quo bias and, to a lesser extent, extremeness aversion.[283] Since the French texts support the status quo and avoid extremes, they uniformly propose incremental governance changes or portray their reforms as small and based upon earlier ones.[284] In its strong use of this heuristic, for example, the First Viénot Report proposes small adaptations to French law to accommodate foreign investors, rejecting any major reform as unnecessary.[285] The Marini Report, as might be expected from the above, also exhibits a strong use of the heuristic even if some of its proposals are in fact major.[286] The AFG Recommendations are similarly incremental in nature, despite the AFG's stated disapproval of some French governance practices. For example, it recommends the gradual elimination of allotting shares double voting rights[287] and a minor adjustment to the age of so-called "elderly" directors—namely, dropping the mandatory retirement age limit from seventy to sixty-five.[288] The Second Viénot Report makes numerous incremental proposed changes to French practice,[289] as does the Besson Report.[290] For example, the Besson Report observes that allowing "virtual" presence of directors at board meetings is a small step following previous legal reforms that permit a board more flexibility in scheduling its meetings.[291]

The non-French texts are mixed on their use of this heuristic. One would expect to see little of the heuristic in any programmatic text, which is the case for the ICGN Principles and the Worldbank

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283. *See* BEHAVIORAL LAW AND ECONOMICS, *supra* note 69.

284. *See* 1ST VIÉNOT REPORT, *supra* note 103, at 5 (advocating small changes in French corporate law).

285. *Id.*

286. MARINI REPORT, *supra* note 103, at 44-45. There are too many examples to cite in this program for reform of changes to French law. For example, it makes a minor reform suggestion regarding the number of directorships that a person could have (i.e., include within the eight allowed by French law at that time those otherwise excluded in the calculation–directorships in subsidiaries of the company). *Id.*

287. AFG RECOMMENDATIONS, *supra* note 103, at 4.

288. *Id.* at 9.

289. *See, e.g.*, 2ND VIÉNOT REPORT, *supra* note 103, at 6-10 (proposing modification to French law to allow chairperson to be other than the chief executive officer).

290. BESSON REPORT, *supra* note 103.

291. *Id.* at 222-24.

Overview.[292] For example, the Worldbank Overview admits that reforms must be made on a country-by-country basis,[293] but it makes broad assertions regarding the necessary reforms, with the suggestion that there is likely to be only one approach that may well sweep away a country's existing practices.[294] There is, however, a kind of incrementalism in the Calpers Principles and the OECD Principles. The Calpers Principles show a strong use of the heuristic in their strategy of pushing for small changes to French practice.[295] Surprisingly, the OECD Principles have a strong use of the heuristic if only because they do not specify many corporate governance reforms and make vague, general statements without forcefully pushing for major changes in countries.[296]

VI. IMPLICATIONS OF THE STUDY

A. *General Implications*

What are the implications of identifying quasi-rationality in the key texts showing the efforts of Anglo-American corporate governance advocates in France?[297] The study offers an interesting perspective on the corporate governance debates. It is clear that corporate governance advocates—consciously or not—used psychological factors to manipulate or persuade policymakers, such as French legislators and regulators, members of the investment community, and CEOs, to

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292. ICGN PRINCIPLES, *supra* note 104; WORLDBANK OVERVIEW, *supra* note 104.

293. *See* WORLDBANK OVERVIEW, *supra* note 104, at 10 ("The systems may vary by country and sector and even for the same corporation over time.").

294. *See id.* ("These global market pressures are providing the impetus for private investors to harmonize corporate governance practice—to reduce risk to investors and hold down the cost of capital to corporations.").

295. *See, e.g.*, CALPERS PRINCIPLES, *supra* note 104, at 2 (discussing the importance of French law and practice to focus on minority shareholders). The changes are not in all cases as insignificant as the Report suggests.

296. *See* OECD PRINCIPLES, *supra* note 104, at 3. The Principles state:

> There is no single model of good corporate governance. At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist. For example, they do not advocate any particular board structure and the term "board" as used in this document is meant to embrace the different national models of board structures found in OECD countries.

Id.

297. As a general matter, it should be no surprise that quasi-rationality exists in these circumstances, given the prevalence of psychological factors in human behavior. The study confirms the presence of the psychological factors in yet another human activity.

support a particular form of corporate finance and governance.[298] In other words, advocates used "framing effects" or devices to trigger the psychological emotions, biases, and heuristics in French legal and business policymakers.[299]

This perspective also implies that the psychologically powerful advocacy altered the French corporate governance debate by pushing finance and governance alternatives into the background.[300] Anglo-American corporate governance clearly oriented the debate, which is demonstrated by the study's results on myopia, availability, and anchoring.[301] In using the psychological factors, it is true that some advocates, particularly the French, did not argue for the Anglo-American solution in a one-sided way.[302] As the study demonstrates, French advocates, who were themselves coming to terms with the Anglo-American position, often extolled the strengths of the French system.[303] Several of the non-French advocates, particularly the OECD, took a balanced position on the merits of different kinds of corporate governance.[304] As international organizations, such as the Worldbank, increasingly favored the Anglo-American model, and as Anglo-American institutional investors became more vocal in France, even French organizations became more accepting of this model. The French became less willing to defend their own.

Concluding that psychological manipulation that placed governance alternatives in an unfavorable light existed in the French corporate governance debates leads to a more serious and troubling consequence: that corporate governance advocates did not necessarily promote a corporate finance and governance solution most suitable for France. Admittedly, this is a difficult argument to advance because it presupposes that one can state with confidence what is now the best governance outcome for France, and even for other developed countries. Identifying this solution or outcome has been a subject of considerable debate in finance and financial law since corporate governance has become an area of sustained scholarship.[305]

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298. *See* documents cited *supra* notes 103, 104.

299. *See* documents cited *supra* notes 103, 104.

300. *See* documents cited *supra* notes 103, 104.

301. *See supra* TABLE 1.

302. *See* documents cited *supra* note 103.

303. *Id.*

304. *See, e.g.*, OECD PRINCIPLES, *supra* note 104, at 3 ("There is no single model of good corporate governance. At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist.").

305. *See, e.g.*, La Porta et al., *Investor Protection and Corporate Governance*, *supra* note 31, at 6-13 (referring to the debates on this point within law and finance). Again, a Nobel economist like Merton Miller would likely have confidence regarding

Even if one cannot identify the best corporate governance solution, whether in France or elsewhere, one can at least argue that it makes little sense to promote, without qualification, Anglo-American corporate governance in France for several reasons. First, even if Anglo-American corporate finance and governance were a superior system in current economic conditions, it might not be best to advocate them in an unqualified way in France because, as Professor Mark Roe has contended, the promotion might lead to too much short-term political resistance.[306] Because many features of this form of governance—namely, shareholder primacy and exclusion of employees from a major role in the corporate governance framework—are not immediately acceptable in, and indeed conflict with aspects of, the French system, its unbridled promotion, to say nothing of its adoption, might produce a political and legal backlash that could lead to worse results than the current situation.[307] Although France has a sophisticated economy and successful, world-class companies, market capitalism has not taken complete hold even among its affluent population.[308] Market capitalization may well need to be developed in a particular way if it is to be successfully implemented so that it does not provoke too much resistance from those who are threatened by it.[309] The bald advocacy of Anglo-

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the best system. *See* Stulz, *supra* note 27, at 20. *See also* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function,* 14 J. APPLIED CORP. FIN. 8, 11 (2001) (arguing that "200 years' worth of work in economics and finance indicate that social welfare is maximized when all firms in an economy attempt to maximize their own total firm value").

306. *See* Mark J. Roe, *Backlash,* 98 COLUM. L. REV. 217, 217-18 (1998) (describing the potential for political backlash to corporate governance advocacy or to any legal changes motivated by pure efficiency concerns).

307. *See id.* at 234. *See also* Rajan & Zingales, *supra* note 16, at 5. Rajan and Zingales argue:

> [T]he competitive forces unleashed by open markets have a downside in that they can destroy some forms of relationships and the associated insurance provided by domestic social and economic institutions. . . . These forces also reduced the ability of the political authorities in each country to intervene to provide the insurance. The consequences were not particularly troubling when economies were doing well. But as the world slid into depression towards the end of the 1920s, the public felt the loss of insurance when faced with severe and widespread shocks. These enabled the public to overcome collective action problems. The popular clamor from the masses for political action to reverse the effects of the market strengthened. Incumbents rode on the coattails of the popular demand for insurance to overcome any political strength accumulated by advocates of financial development during the period of openness. (citations omitted).

Id.

308. *See* documents cited *supra* notes 103, 104.

309. For example, in a survey of European attitudes towards the welfare state, researchers Tito Boeri, Axel Borsch-Supan and Guido Tabbellini found that the largest group of the French respondents wanted to maintain the welfare state as is (with a

American corporate governance might thus make no sense in a particular culture, like France, unless it is adjusted to the culture's circumstances.[310]

Second, and related to the previous point, is the problem of advocating changes in France that may not be effective, even if creating an Anglo-American capitalism were an agreed-upon goal. Much of the program for Anglo-American corporate governance advocates involves France's adopting laws similar to those found in market capital systems. Behind this advocacy lies the belief that, if a country adopts laws used in market capitalist economies, market capitalism will follow. This position has considerable support from the financial economists who have established correlations between legal systems and forms of capitalism and who are influential in organizations like the Worldbank.[311] This cause-and-effect relationship between legal rules and forms of capitalism is too

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clear majority electing either to maintain or increase it). *See* Tito Boeri, *Would You Like to Shrink the Welfare State? A Survey of European Citizens*, 16 ECON. POL'Y 32, 33 (2001).

310. Clearly, Senator Marini was aware of this argument. *See* MARINI REPORT, *supra* note 103, at 7 ("D'une part, parce que les modèles anglo-saxons s'inscrivent dans un environnement sociologique et juridique différent, leur simple transposition n'est ni possible, ni souhaitable." In English: "On the one hand, because Anglo-Saxon models are immersed in a different sociological and legal environment, their simple adoption is neither possible nor desirable."). *See also* Licht et al., *supra* note 42, at 152-59 (noting that governance positions must be adjusted for a country's culture if they are to succeed). Even financial economists realize that reforms in a given context must be suitable for it. *See, e.g.*, La Porta et al., *Investor Protection and Corporate Governance*, *supra* note 31, at 22 ("The strategy for reform is not to create an ideal set of rules and then see how well they can be enforced, but rather to enact the rules that can be enforced within the existing structure.").

311. *See* documents cited *supra* note 31. The influence of these economists among policymakers was clear from their involvement in reform efforts in the 1990s involving the promotion of markets in Russia and other former Socialist countries. In their current work these economists are beginning to realize that laws may grow out of culture and that, therefore, they cannot be easily engrafted onto other situations with the same effect. *See* EDWARD L. GLAESER & ANDREI SHLEIFER, LEGAL ORIGINS (Nat'l Bureau of Econ. Research, Working Paper No. 8272, 2001), *available at* http://papers.nber.org/papers/08272.pdf (describing the historical origins of the civil and common law systems that may have resulted in their being less and more promotive of market capitalism). *See also* EDWARD L. GLAESER & ANDREI SHLEIFER, THE RISE OF THE REGULATORY STATE (Harvard Inst. of Econ. Research, Discussion Paper No. 1934, 2001), *available at* http://post.economics.harvard.edu/hier/2001papers/HIER1934.pdf ("The goal of economic institutions is the same across times and places, namely to secure property and to make perpetrators of harmful acts accountable. But even though the goals are constant, which institutions are appropriate for achieving them varies.") On the new interest in the importance of the creator and enforcer of laws, rather than laws themselves, see Katharina Pistor & Chenggang Xu, *Incomplete Law-A Conceptual and Analytical Framework, and its Application to the Evolution of Financial Market Regulation* (Jan. 2002) (on file with the author) (discussing the importance of market regulator in financial law).

simplistic, however, at least in developed countries.[312] Putting so much psychological pressure behind particular legal changes may be completely misguided and not achieve what advocates hoped.[313]

Third, from a normative perspective, if Anglo-American corporate governance is transplanted to France "as-is," then it may not address governance problems and related social issues peculiar to France. It is well known that France is a highly elitist culture, a characteristic partly based upon the state's cultivation of a governing elite through a system of ostensibly meritocractic recruitment, at least since the time of Napoleon.[314] A major problem for the last

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312. *See, e.g.*, Mark J. Roe, *Rents and Their Corporate Law Consequences*, 53 STAN. L. REV. 1463, 1480-82 (2001); MARK ROE, THE QUALITY OF CORPORATE LAW ARGUMENT AND ITS LIMITS 5 (Columbia Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 186, 2001), *available at* http://www.law.columbia.edu/law-economicsstudies/papers/wp186.pdf. Professor Roe argues,

> Moreover, by focusing so strongly on developing good corporate law institutions *first*, policy-makers could be using the wrong strategy: It did not happen that way before, and a better strategy (if not foreclosed by other impediments) may have been *first* to develop private enterprise (probably in closely held form) and *then*, when entrepreneurs sought to raise new capital, to merge, or to sell, *later* seek to build corporate and securities law institutions. Policymakers are trying to use corporate law to bring about, or to make up for the lack of, fundamental change elsewhere in those societies, seeking to remedy their lack of regularity, their weak private institutions generally, and their worthless reputational and social capital. This effort to so use corporate law is laudable, perhaps even necessary as the only, or as the best, available tool, but we should appreciate that such efforts would not replicate what worked before, and would have corporate law do something new and much more ambitious.

Id.

Admittedly, in attacking the law-centered explanation of corporate governance, Professor Roe is defending a position that made his reputation–that politics is just as important a determinant of corporate governance outcomes as is the law. *See id.*

313. This is not to suggest that corporate and securities law reform is trivial, or that it cannot have an impact in a governance situation. However, a truly effective reform program cannot rely exclusively on the law. I thus disagree with Professor Roe, who tends to relegate legal reforms to the technical and unimportant category. *See* ROE, QUALITY OF CORPORATE LAW, *supra* note 312, at 36-37. Professor Coffee takes a position similar to Roe's when he argues that corporate governance changes comes primarily from transformations in behavior by market participants, and only secondarily from legal reform. *See* Coffee, *supra* note 13, at 91 ("By no means does this imply that stronger legislation protecting minority rights is not desirable, but historically this step has followed and not preceded the initial growth of the equity market.").

314. *Cf.* GERALDINE CARMINATTI-MARCHAND & MATHIEU PAQUEROT, THE ELITE AND THEIR BOARDS OF DIRECTORS (2001) (arguing that French company boards and management are "colonized" and operated for the benefit of elite networks from elite schools, such as ENA and Polytechnique; U.S. corporate governance reforms hardly address this kind of domination, unless the elite can embrace the reforms). I say "ostensibly" because French sociologists have found that elites generally come from well-off families and thus that the elites perpetuate themselves, although through a seemingly neutral recruitment process. *See generally* PIERRE BOURDIEU, LA NOBLESSE D'ÉTAT: GRANDES ÉCOLES ET ESPRIT DE CORPS (1989).

decade in France has been to curb the abuses of the elite in government and industry, regardless of the political party in power.[315] It is not at all clear that the extension of Anglo-American corporate governance will necessarily reduce the power of the elite. The elite may simply use corporate governance reforms for their own benefit, or a particular group of the elite may promote the reforms to increase its power at the expense of other groups. Admittedly, this form of governance may have the potential for transforming French society if it erodes the power bases of the traditional elite—namely, in state and family ownership of companies—and if it gives economic power to other groups in French society. Indeed, that certain French parties are behind the reforms may suggest that these groups have gained enough strength to upset the power relations typical of former state/family French capitalism. Nevertheless, any French governance reform will have to address, with sensitivity and thoughtfulness, the elite issue if it were to have an enduring, transforming effect in France and not simply to become another tool of the elite.[316] Anglo-American corporate governance advocacy is completely silent on this issue.

Fourth, and finally, one may argue that France's adopting of Anglo-American corporate governance may not be the best outcome for ordinary people in all circumstances because it introduces much more risk in their lives than does state and family-based capitalism.[317] The nature of risk—as seen in recent circumstances in the United States—is that there is considerable volatility about investment return, which may be both negative and positive.[318] Policymakers might well question whether they want individuals to bear this risk because a negative outcome is difficult to support politically as it may produce even worse economic and political outcomes. That is, Do policymakers really want ordinary people to hold riskier, market-based assets so that if there is a significant market decline, they may make even more demands upon the government for help? Through financial intermediaries or state

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315. *See, e.g., The Bitterness of a Judge,* ECONOMIST, Jan. 19, 2002, at 43 ("In Mr. Halphen's view, 'justice works at two speeds' in France: the ordinary criminal gets hammered while the politically powerful get off scot-free.").

316. Indeed, recent finance literature studies the role of elites in promoting, or restraining, financial development. *See generally* Beck et al., *supra* note 31, at 5 (describing a phenomenon that has no evident comparison in the United States).

317. *See* Franklin Allen & Douglas Gale, *Comparative Financial Institutions: A Survey*, at 12 (Apr. 2001), *available at* http://www.ssrn.com (discussing how the U.S. system may simply expose ordinary individuals to more risk); ALLEN & GALE, *supra* note 19, at 442 (observing that there are significant costs to markets (i.e., volatility) and individuals do not have the tools to deal with these costs), at 465 (identifying the problems associated with giving people too many investment choices).

318. *See* ALLEN & GALE, *supra* note 19, at 469-75.

safety nets, other governance systems that are not largely based on market capitalism may provide more protection on the downside for investors. Though these systems may give people less upside, which comes with their reduced exposure to risk, they might be more politically stable in a significant crisis.[319]

All this leads to the final conclusion that there is a need to develop a better way of debating about corporate finance and governance. The system should be designed to lead to governance results that promote the most overall economic wealth, given a country's legal, political, and cultural constraints. The goal is particularly in line with the purpose of much psychological literature, which is to improve policy and decision-making in different situations by developing strategies to counteract, or at least recognize, the influence of emotions, biases, and heuristics.[320] If legal and regulatory policymakers become aware that they were swept along in the psychological momentum and made the targets of psychological influence, then they might be particularly receptive to adopting better methods of public debate about corporate governance to address the psychological shaping of the discussion.

Behavioral scholars have called this "comprehensive rationality."[321] Following this approach, corporate governance debates and policy-making would not be based upon the model of economic cost/benefit calculus, which pushes psychology to the margins of consideration.[322] Rather, the debates and policy-making would be a method of rational debate, aware of the presence and influence of psychological factors, and equipped with techniques to counter or balance their effects.[323] Because the development of better policy- and decision-making in other areas receiving much more attention from psychological and behavioral researchers than corporate governance is still in progress, one cannot offer firm conclusions on the proper way to make corporate governance policy so

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319. *Id.* at 474.

320. A good example is seen in the recommendations that scholars have made on ways of countering psychological phenomena that lead groups to make poor decisions. *See* JANIS, *supra* note 59, at 260-76. *See also* James N. Druckman, *Using Credible Advice to Overcome Framing Effects*, 17 J.L. ECON. & ORG. 62 (2001) (presenting experimental data on how individuals may resist "framing effects" in decision-making and cautioning against a too ready acceptance of psychological handicaps of people). Certainly, because legal academics have for a time debated differing positions on corporate governance, they would likely favor a more comprehensive approach to corporate governance that considered the potential of psychological factors to undermine rational decision-making and that developed ways of blunting their force. The psychological momentum of the dominant discourse of Anglo-American corporate governance affected those in the legal academy, although perhaps to a lesser degree than it did policymakers. *See id.*

321. *See* Kuran & Sunstein, *supra* note 96, at 748.

322. *Id.*

323. *See id.*

as to deal appropriately with the psychological factors.[324] One must also understand that the psychological factors evolved over the millennia as adaptive ways of behaving in environments where human beings were formed.[325] Not only were they advantageous for survival on the African plains of our origins, but some factors, such as over-optimism, continue to be highly adaptive.[326] Accordingly, reforms seeking to blunt the effects of the psychological factors in any given situation must be done with care so as not to ignore their positive contribution to our ability to function in the world.[327]

Here are a few general guidelines about how comprehensive rationality may be created in this field. One simple and unsurprising guideline for improving the process of the corporate governance debate is to create awareness of the presence and influence of the psychological factors. If, as a result of the study, policymakers see how the Anglo-American model dominated the corporate governance debate because of the use of myopia, availability, and anchoring by advocates, then they may shift the debate from the assumptions of that model as reinforced by these factors.[328] They may refuse to have the entire agenda set by the Anglo-American model, or, if a particular governance issue were to be considered, they may articulate other positions or anchors as starting places for the debate, besides those proposed by this model. For instance, the First Viénot Report takes this approach by offering a view of the corporation based on "social interest," not exclusively on Anglo-American shareholder value.[329] They could blunt the force of loss aversion evoked by the Anglo-

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324. This is especially so because corporate governance itself is only a relatively recent subject of study.

325. *See* John Tooby & Leda Cosmides, *The Psychological Foundations of Culture, in* THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 53-55 (1992).

326. The whole thrust of the work of the Center for Adaptive Behavior and Cognition is to suggest that many of the psychological biases and shortcuts produce rational results in many decision-making circumstances. *See* GIGERENZER ET AL., *supra* note 70, at 3-34.

327. In a related vein, management researchers study the role of emotional similarity or dissimilarity for effective performance in management teams. *See, e.g.*, Sigal G. Barsade, *To Your Heart's Content: A Model of Affective Diversity in Top Management Teams,* 45 ADMIN. SCI. Q. 802, 823 (2000) (finding that "affective diversity" among management teams leads to their underperformance).

328. Indeed, this is the thrust of suggestions to counter the "Groupthink" phenomenon: to have some members of the group present a different model or scenario of outcomes of a decision or policy. *See* JANIS, *supra* note 59, at 262-63.

329. *See* 1ST VIÉNOT REPORT, *supra* note 103, at 8 ("Dans les pays anglo-saxons, l'accent est principalement mis sur l'objectif de maximisation rapide de la valeur de l'action, alors que, sur le continent européen et en particulier en France, il est plutôt mis sur l'intérêt social de l'entreprise." In English : "In Anglo-Saxon countries, the emphasis is mainly placed on the objective of maximizing shareholder value, while, in Europe and particularly in France, it is instead placed on the firm's social interest.").

American model by identifying the other "losses" arising from adoption of this model, such as social cohesion in France.[330]

Simple awareness of psychological factors and their operation brings with it strategies to counter or blunt them. Yet the development and implementation of this kind of comprehensive rationality in corporate governance debates will take time and require the efforts of scholars in the diverse fields that study the subject. It is worthwhile to ask what can help policymakers now, if only on a provisional basis, until this form of rationality is developed.

B. *A Provisional Solution*

Before a method of comprehensive rationality on corporate governance is developed, there is a provisional solution for policymakers faced with aggressive corporate governance advocates who use psychological factors. Policymakers may find "homegrown" sources of resistance to psychological factors in politics and culture. These sources are a mixed blessing because they may discourage positive governance or economic changes or may favor existing elites. Yet they may also provide policymakers with a mental framework that blunts the immediate effects of psychological factors. An important practical message to policymakers on achieving a kind of short-term comprehensive rationality is to use any available oppositional perspectives, if only to guarantee for themselves and others a space for debate on finance and governance changes.[331]

To state the above in another way, policymakers will naturally view corporate governance proposals from their cultural perspective. However, rather than downplaying cultural differences in the name of a transnational corporate governance, they should articulate or raise these differences to help themselves resist the psychological power of the advocacy. If, for example, policymakers were to assert that the exclusive shareholder focus of Anglo-American corporate governance is alien to a perspective that sees employees as a central part of a firm, then they help reduce the advocacy's force by deflecting its use of myopia and the availability heuristic. As a result, this deflection may open the way for a more rational discussion of policy changes and a more realistic view of the changes that can be effected.

There is evidence showing both the effect of psychological factors in French corporate governance debates and the use of politics and

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330. *Id.*

331. This observation borrows from the economist Deepak Lal, who argues that, because certain cultural traditions are long-lasting and relatively resistant to immediate change, they are fundamental to maintaining stability in a society. *See* LAL, *supra* note 12, at 17. By contrast, he argues that techniques of economic production can change relatively easily. *See id.* at 15-16.

culture by French policymakers to blunt their force.[332] Admittedly, this argument about French cultural resistance is not surprising for anyone familiar with France.[333] In many respects French culture has historically defined itself in opposition to Anglo-American values and cultures.[334] This opposition has no doubt grown out of one thousand years of political struggles between England and France, as well as religious differences between the citizens of each country.[335] The evocation of French cultural and political differences is almost automatic among the French when faced with any Anglo-American advocacy. Since policymakers in other countries may not have this kind of longstanding, and almost visceral defense to Anglo-American advocacy, they may benefit from being aware of this use of culture in French corporate governance debates.

This evidence, which is the subject of the Besson Report, is a significant reform that made major changes to French law on corporate governance.[336] This legal reform has been discussed and debated for over ten years in France[337] and was finally enacted in 2001.[338] As in any major law reform in any country, the reform can be explained from different perspectives and attributed to numerous

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332. *See* documents cited *supra* note 103.

333. The preceding discussion of the five corporate governance texts written by the French can serve as evidence of French cultural resistance.

334. *See generally* GLAESER & SHLEIFER, THE RISE OF THE REGULATORY STATE, *supra* note 311 (discussing cultural and political differences between French and English legal traditions). Indeed, one could use a French phrase popular in another context: "Vive la différence!"

335. Of course, before the formation of the nation-states in the sixteenth and seventeenth centuries the countries' political and cultural lives were interwoven.

336. *See* Law No. 2001-420 of May 15, 2001, (Fr.), *available at* http://www.legifrance.gouv.fr [hereinafter the NOUVELLES REGULATIONS ÉCONOMIQUES]. The Besson Report is an explanation of this legislation to the French National Assembly. *See* BESSON REPORT, *supra* note 103. As Professor Wymeersch has remarked, changes to corporate law with a corporate governance purpose are becoming more common in European countries. *See* EDDY WYMEERSCH, SOME RECENT TRENDS AND DEVELOPMENTS IN COMPANY LAW 4 (Fin. Law Inst., Working Paper No. WP 201-17, 2001), *available at* http://system04.rug.ac.be/fli/ew.html.

337. The reform in many ways was presaged by the proposals of Senator Marini in his Report. Senator Marini himself makes this clear in a report he authored regarding the reform proposal for the French Senate. *See* RAPPORT PRÉSENTÉ AU NOM DE LA COMMISSION DES FINANCES, DU CONTRÔLE BUDGÉTAIRE ET DES COMPTES ÉCONOMIQUES DE LA NATION SUR LE PROJET DE LOI, ADOPTÉ PAR L'ASSEMBLÉE NATIONALE APRÈS DÉCLARATION D'URGENCE, RÉLATIF AUX NOUVELLES RÉGULATIONS ÉCONOMIQUES, PAR M. PHILIPPE MARINI 26 (5 Sénat, Session Ordinaire 2000-2001, Oct. 4, 2000) [hereinafter RAPPORT AU SÉNAT] ("En effet, votre rapporteur ne peut que rappeler les termes et le contenu du rapport qu'il avait remis en 1996 au Premier ministre et qui visait à procéder à une modernisation du droit des sociétés" (footnote omitted). In English: "In effect, your reporter can only call to mind the terms and content of the report that he gave in 1996 to the Prime Minister and that was designed to further a modernisation of company law.").

338. *Id.*

causes. Yet, there is evidence of both the success of the psychologically-powerful Anglo-American corporate governance advocacy, and the political and cultural resistance to it by the French.[339] Admittedly, this Article makes several assumptions regarding the reform, both of which are supported by the legislative history. First, the Article assumes that the psychological approach of Anglo-American advocates did have an effect on corporate governance in France, and that the use of psychology affected policymakers. Second, the Article also assumes that, where the result of the legal reform did not simply follow Anglo-American advocacy, it was often due to French cultural resistance.

To support this argument, in a schematic fashion, relevant sections of the new law can be broken down into three parts: (1) laws clearly influenced by the corporate governance advocacy, (2) laws exhibiting French cultural resistance to it, and (3) laws that may owe something both to the advocacy and to the resistance. Legislative reports, such as the Besson Report, that introduce and discuss the legislation support this break-down.[340]

1. Anglo-American Based Reforms

The following reforms to French corporate law were clearly motivated by Anglo-American corporate governance advocates and were in many cases justified in legislative reports as being a response to them. They thus show the success of the psychologically-based advocacy. Many legal changes are designed to enhance the performance and quality of the board of directors of a French public company. The board is the main governance protection for shareholders in Anglo-American market capitalism, and improvements to its performance are the subject of much Anglo-American corporate governance advocacy. Article 104 of the new law addresses a complaint of corporate governance advocates that a typical French board of directors—"conseil d'administration"—is generally too large to be productive by reducing the statutory maximum number of directors from twenty-four to eighteen.[341] Even more significant is a new definition of the purpose of the French board to supervise the overall operation and future of the firm and to control management.[342] This was in juxtaposition with the former definition that was identical to the role of the chief execution and that

339. *See id.*
340. *See* BESSON REPORT, *supra* note 103, at 206.
341. *See* CODE DE COMMERCE [C. COM.] arts. 225-17, -69, -95 (Fr.).
342. NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336 (codified at C. COM. art. 225-35).

thus downplayed the board's importance.[343] The reform also encourages better French board performance—a goal of Anglo-American advocates—by having both more formal and flexible board practices.[344] Article 106(2) provides that a company's certificate of incorporation should stipulate the board's meeting and deliberation practices.[345] Article 109 allows directors to attend meetings by video-conference or other electronic means to encourage board attendance and the resulting deliberations.[346]

Prior to the reform, French law provided that the chief executive officer—*président directeur général* or the "PDG"—of a firm who had a "unitary" board had to be chairperson of the board.[347] Governance advocates wanted these functions to be disassociated so that the chairperson could provide an independent source of power to that of the PDG. Article 106(4) of the new law now allows a firm to separate the supervisory—*president*—and management—*directeur*—functions,

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343. *See id.* ("Le conseil d'administration détermine les orientations de l'activité de la société et veille à leur mise en oeuvre. Sous réserve des pouvoirs expressément attribués aux assemblées d'actionnaires et dans la limite de l'objet social, il se saisit de toute question intéressant la bonne marche de la société et règle par ses délibérations les affaires qui la concernent." In English: "The board of directors determines the goals of the company's activity and pays attention to their implementation. Within the limitation of the powers expressly attributed to shareholder meetings and in the limit of the company's purpose, the board considers every question dealing with the effective operation of the company and rules through its deliberations the matters that concern it."). The pre-reform definition asserted that both the board and the chief executive officer "est investi des pouvoirs les plus étendus pour agir en toute circonstance au nom de la société" ("is invested with the most extensive powers to act in every circumstance in the name of the company"). Article 107(4) also limited the CEO's power by having it subject to the powers of the shareholders and the board. *See* C. COM. art. 225-56(I). Senator Marini explains that the concern to ensure that the board's power is not limited by that of the chief executive officer is inspired by corporate governance debates in the United States. *See* RAPPORT AU SÉNAT, *supra* note 337, at 295.

Article 106(1) of the NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336, also enhances the independent ability of each board member to obtain, and verify, information about the firm (apart from what management gives it). *See* C. COM. art. 225-35(1). This is designed to emphasize the individual responsibility of each board member to inform himself or herself on the direction of the firm. *See* RAPPORT AU SÉNAT, *supra* note 343, at 299.

344. *Id.*

345. *See* C. COM. art. 225-36-1. According to Besson, this reform is meant to encourage the formalization of board decision-making practice that has often been too informal and casual. *See* BESSON REPORT, *supra* note 103, at 206.

346. This deliberation process, however, does not apply to major decisions (election of board chairperson, appointment of CEO (i.e., the "directeur général"), revocation of CEO, approval of the company accounts).

347. *See* CODE DES SOCIÉTÉS art. 113 (Dalloz 1996). The "unitary board" is the most commonly used governance structure for French companies. *See* C. COM. art. 225-37.

or to keep them together.[348] The board must simply explain its governance structure to the market.[349]

Yet other legal changes are designed to protect and enhance the power of minority shareholders in a firm. These shareholders particularly need protection in a country like France where a firm is generally controlled by a family or the state.[350] Article 111 of the new law mandates board review of "conflict of interest" transactions between a firm and any shareholder holding more than five percent of the firm's voting rights, or any company controlling a firm that is such a shareholder.[351] Under prior law, this board review rule applied only for transactions between a firm and a top executive—*directeur*—or board member.[352] Similarly, Article 114 lowers, from ten percent to five percent, the amount of a firm's capital that a shareholder, or group of shareholders, must hold to exercise certain rights—namely, to call a shareholders' meeting if the board has not done so and to ask the board questions about the firm's operations that legally require a response from the company.[353] As in the case of the boards of directors, the new law seeks to facilitate shareholder attendance at meetings by permitting a firm's certificate of incorporation to provide that shareholders can attend meetings by video-conference or by other means of telecommunications.[354]

The best example of the Anglo-American corporate governance advocacy's success is how the new law specifically enhances voting by foreign shareholders like Calpers.[355] Article 119 of the new law

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348. *See* C. COM. art. 225-51-1 ("La direction générale de la société est assumée, sous sa responsabilité, soit par le président du conseil d'administration, soit par une autre personne physique nommée par le conseil d'administration et portant le titre de directeur général." In English: "The management of a corporation is assumed, under his responsibility, either by the chairperson of the board of directors, or by another natural person nominated by the board and having the title of *directeur général*.").

349. On the import of this separation and its significance in the history of French corporate law, see Conac, *supra* note 101, at 4-7 (explaining that this model is actually a return to the board structure in the years before the Vichy government (i.e., French government that collaborated with the German occupiers in World War II)).

350. *See* sources cited *supra* note 111.

351. *See* C. COM. arts. 225-38.

352. *Id.*

353. *See* C. COM. arts. 103 (shareholders' meeting), 231 (right to pose questions). In his Report, Besson remarks that this reform is aimed at increasing the power of individual shareholders in France, a reform that is necessary because of recent scandals involving small shareholders abused by controlling shareholders. *See* BESSON REPORT, *supra* note 103, at 239-44.

354. NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336, art. 115 (codified at C. COM. art. 225-107(II)). The provision leaves the French State to specify what telecommunications methods would be acceptable, so that it is unclear what form of shareholder participation will result from the change. *See* EDDY WYMEERSCH, CURRENT COMPANY LAW REFORM INITIATIVES IN THE OECD COUNTRIES: CHALLENGES AND OPPORTUNITIES 18 (Fin. Law Inst., Working Paper No. WP 2001-04), *available at* http://system04.rug.ac.be/fli/ew.html.

355. *See* CALPERS PRINCIPLES, *supra* note 104.

allows a French financial intermediary to hold shares for non-French owners collectively in the intermediary's name and for these owners to exercise their right to vote through the intermediary.[356] The same Article requires intermediaries to identify foreign shareholders as a condition to exercising the voting right.[357] There is, accordingly, no need for a foreign shareholder to attend shareholder meetings personally to exercise its franchise, which adds to the voting power of Anglo-American shareholders in French companies.[358]

2. Reforms Exhibiting, and Resulting from, Political and Cultural Resistance

Other provisions of the new law are primarily based on French culture and politics that resist Anglo-American corporate governance advocacy.[359] These perspectives support a form of capitalism that accepts government intervention in markets and regards stakeholders other than shareholders as important participants in corporate governance.[360] A prominent new example is the law requiring that a party launching a tender offer consult with the workers' committee of the targeted firm.[361] In contrast, a tender offer under a "purer" market capitalist system would legally have to be addressed solely to the shareholders of the target firm.[362] An amendment to the French Labor Code requires the consultation; if the party making the offer fails to comply with this requirement, it cannot exercise its voting rights in the target firm until it meets with the workers' committee.[363] In addition, the committee has the right

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356. *See* C. COM. arts. 225-107-1, 228-1. Under the former legal system, intermediaries could hold the shares; but no legal provision allowed the intermediaries to vote the shares for the beneficial owners. *See* RAPPORT AU SÉNAT, *supra* note 337, at 361-63.

357. *See* C. COM. art. 228-3-2.

358. Yet the identification of foreign shareholders may adversely affect how foreign shareholders vote, if the latter are concerned that company management may "punish" identifiable opponents. On the other hand, firms would want this right to identify shareholders because they are concerned about being able to identify potential takeover bidders that may be foreign parties.

359. *See* FANTO, *supra* note 1.

360. *See id.*

361. Workers' committees are so required under French statutes. *See generally* CODE DU TRAVAIL [C. TRAV.] art. 431-1, *available at* http://www.legifrance.gouv.fr.

362. This is clearly an issue of degree, for some U.S. state corporate statutes allow a board of directors of a target firm to consider the interests of stakeholders other than shareholders in the exercise of their duties, including when considering how to respond to a tender offer. *See* N.Y. BUS. CORP. LAW § 717(b) (Gould 2000).

363. *See* NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 342, art. 4 (Régulation financière, Titre 1er) (codified at C. TRAV. art. 432-1). In effect, before the reform, a CEO of a target firm had to notify the committee of the offer, and the committee could invite the bidder to appear before it. However, there was no

to announce whether it considers the offer hostile to the firm's employees.[364] An adverse position on the committee's part cannot legally stop the bid, but it may generate negative publicity that could spur government intervention in the takeover.[365] An addition to the same Code empowers employees to select a representative who can call a shareholders' meeting in case of an urgent need and propose resolutions to that meeting, as well as designate workers' representatives to attend shareholders' meetings.[366]

3. Reforms with Dual Origins

Some provisions of the new law owe their origin to *both* Anglo-American corporate governance advocacy *and* to French politics and culture. This category is in many ways the one that most reflects reality because law reforms cannot often or easily be traced to one cause as they are due to multiple causes. The new law, for example, now requires disclosure of shareholder agreements involving 0.5% of shares or votes of a listed French company.[367] The new law also mandates that any sale or acquisition of shares of a firm that is the object of a tender offer must occur on a recognized securities market

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requirement that the bidder appear or that the committee pronounce on the offer. *See* RAPPORT AU SÉNAT, *supra* note 337, at 50. Indeed, Marini points out that the former provision was used only once because, in France, bidders usually visited committees voluntarily. *Id.* at 51.

364. *Id.*

365. This ability of the workers' committee to characterize the offer as "hostile" was the subject of controversy in the legislative debates. Senator Marini pointed out that what could be hostile to one party could be favorable to others (e.g., shareholders) and that the consulting procedure could become a kind of poison pill defense for management. *See* RAPPORT AU SÉNAT, *supra* note 337, at 57-58.

366. *See* NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336, art. 99 (Régulation de l'entreprise, Titre 1er) (codified at C. TRAV. art. 432-6-1). Senator Marini opposed this reform since it puts the workers' committee on the same level as the shareholders and because the committee already has significant consulting powers. *See* RAPPORT AU SÉNAT, *supra* note 337, at 284-86.

The form of capitalism that this law suggests is not without its limits. The French Conseil Constitutionel recently struck down, on the ground that it established the wrong balance between the right to undertake a business and the right to work, a definition of "economic layoff" (*licencement économique*) added to the Code du Travail by a recent French law, which was designed to penalize employers by restricting the situations in which they could lay off employees for economic reasons without incurring a penalty. *See* Decision No. 2001-455 DC of Jan. 12, 2002, (Fr.) (Loi de modernisation sociale) ¶¶ 43-50. The Conseil also noted that vague definitions of what would constitute an economic layoff (e.g., "difficultés sérieuses n'ayant pu être surmontées par tout autre moyen") would improperly require judges to substitute their judgment for that of executives. On the functioning of the Conseil, in juxtaposition to other constitutional courts, see RAPHAEL LA PORTA, THE GUARANTEES OF FREEDOM 12 (Nat'l Bureau of Econ. Research, Working Paper No. 8759, 2002), *available at* http://papers.nber.org/papers/w8759.pdf.

367. *Id.*

and not off-market.[368] The new law enhances transparency and disclosure, and thus market capitalism, for it is designed to help reduce the power of large, controlling shareholders.[369] In addition, the law can make takeovers more difficult and expensive by alerting firms and the French State to potential bidders and can protect firms and their workers from corporate control by the market.[370]

As another example of the potential dual origin of provisions of the new law, the number of management and director positions that any board member can have at one time has been reduced.[371] The reform clearly originates from the Anglo-American governance concern of making board members pay more attention to their work by not dispersing their efforts over too many companies.[372] Yet the law can also be seen as addressing the excessive elitism in French board membership, which keeps it within a small group of French society.[373]

A final but significant example of the multiple causes for legal change is the new law requiring disclosure of individual compensation of officers and directors, each *mandataire social*.[374] This contrasts with the former disclosure regime and with existing disclosure schemes in many other European countries that required disclosure only of the total amounts a company paid to all major

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368. *See* NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336, arts. 1, 2 (Régulation financière, Titre 1er) (codified at C. COM. art. 233-11, and at CODE MONÉTIER ET FINANCIER art. 421-12). This law was specifically addressing the transactions between Société Générale/Paribas/BNP in 1999 where secret shareholding agreements surfaced and where transactions occurred off the organized market. *See generally* RAPPORT AU SÉNAT, *supra* note 337, at 42-47.

369. *See id.*

370. *See id.*

371. In French, this is the subject of the "cumul des mandats." Article 110 of the NOUVELLES RÉGULATIONS ÉCONOMIQUES, Régulation de l'entreprise, reduces from eight to five the number of director positions that any one person can occupy. C. COM. art. 225-21 (including positions in companies controlled by a firm in which the person is a director, unless the subsidiary is unlisted). Similarly, a person can hold only one executive position (i.e., *directeur général*) except in controlled companies' circumstances. *See* C. COM. art. 225-54-1. Similarly, in general and with some exceptions, the law limits to five the total number of directorships and executive positions any one person may have. C. COM. art. 225-94-1.

372. Indeed, Senator Marini justifies this reform in explicit corporate governance terms, with reference to Anglo-American corporate governance debates and to enhancement of board behavior. *See* RAPPORT AU SÉNAT, *supra* note 337, at 320.

373. *See* BESSON REPORT, *supra* note 103, at 226.

374. *See* NOUVELLES REGULATIONS ÉCONOMIQUES, *supra* note 336, art. 116 (Régulation de l'entreprise, Titre 1er) (codified at C. COM. art. 225-102-1 (including compensation from work in controlled companies)). The disclosure here also requires information about any positions that officers and directors have in the firm in question and in any other firm.

executives and board members.[375] The law has clearly been motivated by the goal of better monitoring compensation of the primary corporate agents.[376] This kind of monitoring has, for a long time, been one of the major goals of activism by Anglo-American corporate governance advocates, who feel that corporate agents cannot be appropriately controlled if their compensation is inadequately disclosed.[377] In France, however, this new kind of disclosure also originates from a proper French attempt to reduce the power of French business and political elites who often hide their compensation and its sources for political and tax reasons.[378]

The above schematic account of parts of a recent French legal reform is not meant to trace the full origins of any particular provision of the new law. It provides evidence, however, that the powerful Anglo-American corporate governance advocacy, which has been present in French business and legal circles for at least ten years, ultimately had an effect upon French law. It equally suggests that this advocacy met resistance based on French culture and politics that oppose unqualified acceptance of Anglo-American market capitalism. In the face of a dominant discourse, French policymakers may take comfort in this result. They can use the traditions strategically in a similar manner in the future, so as to provide themselves with a space in which to conduct the necessary debates. There will be a built-in resistance to psychologically powerful advocacy as French policymakers adjust their governance system to current economic and business realities and as they develop a better system of conducting corporate governance debates.

VI. CONCLUSION

This Article contends that in the 1990s Anglo-American corporate governance became the dominant model of corporate governance rules for large, public firms in international business. The Article also asserts that corporate governance professionals relentlessly promoted Anglo-American corporate governance throughout the developed and developing world. Current political and economic circumstances have made it an appropriate time to examine critically this advocacy and, in particular, to explain the

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375. The former disclosure regime did not require a breakdown for individual compensation. *See id.*

376. *See id.*

377. It is in these corporate governance terms that Senator Marini explains the reform. *See* RAPPORT AU SÉNAT, supra note 337, at 354.

378. Perhaps the best recent example of this characteristic among the French elite is President Chirac's refusal to disclose the source and use of presidential funds. *See supra* note 150.

momentum and persuasiveness of the dominant model. This Article's primary contention is that corporate governance advocates used psychological factors to create this momentum in many countries and to persuade policymakers abroad to use Anglo-American corporate governance as a model to transform their governance systems. Consequently, psychological factors made the corporate governance debate purely one-sided.

This hypothesis is supported by a review of the use of psychological factors in major French and non-French corporate governance advocacy texts that had an influence in France. This study revealed an extensive use of the psychological factors. From these results I drew several conclusions. In particular, the use of psychological factors to promote Anglo-American corporate governance shows that French debates over a governance model were quasi-rational as much as rational. This characterization of the debates also suggests that the best outcome was not necessarily promoted or attained in French corporate governance. Most importantly, ways of debating about and analyzing corporate governance should be developed with a view toward helping policymakers resist, or at least better handle, psychological factors used by the advocates. As in the case of many psychologically-based studies, this study urges that there be ongoing efforts to recognize the use of psychological factors and to create a form of deliberation that takes into account how psychological factors affect the rationality of any debate.

On a positive note, the examination of Anglo-American corporate governance advocacy in France also suggests that culture and politics may help policymakers resist the momentum generated by the psychological factors. This aid may especially be important in current circumstances before a comprehensive rationality is developed in some form. Like corporate governance advocacy itself, these traditions should not be used without reflection, because they may be invoked to close down discussions and to prevent a necessary reform to a country's corporate governance. Yet if employed with care by policymakers, they may not only point to aspects of a country's corporate governance that cannot easily be altered, because they are so ingrained in encompassing belief systems, but may also provide a natural source of resistance to the psychologically-driven momentum of corporate governance advocacy. This Article proposes that politics and culture become not the ultimate arbiter of what can or cannot be achieved in a country's corporate governance, but one available guarantee of a *rational* debate about corporate governance reform.

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