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# Performativity and convergence in comparative corporate governance

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## **Abstract**

We engage with the convergence/divergence debate in the comparative study of corporate governance by commending a nuanced formulation of the convergence thesis. Directing attention to the precarious constitution and adoption of knowledge claims about corporate status and architecture in the field of corporate governance we suggest that the study of comparative corporate governance might usefully incorporate consideration of claims about corporate governance as potentially performative statements that function to stabilize particular ideas of status and architecture of the modern corporation with substantive outcomes for political economy, thereby influencing the shape of the institutions comprising the field of corporate governance. We conclude that the predominantly epistemological preoccupations of participants in the convergence/divergence debate could be usefully refined and supplemented by giving closer attention, empirical as well as theoretical, to the relation between performativity, convergence/divergence, and political economy.

## **Keywords**

Corporate governance, comparative corporate governance, performativity, political economy

## **Introduction**

In the comparative corporate governance field there are on-going deliberations over whether there is movement towards ‘convergence’ or ‘divergence’ (Bratton and McCahery, 1999; Coffee, 2000; Gordon and Roe, 2004; Yoshikawa and Rasheed, 2009). The ‘convergence’

claim revolves around the notion that, as a consequence of economic globalization, the economic institutions and legal and regulatory frameworks – governing processes and practices relating to capital markets, information flows, transportation, and trade – are increasingly converging around a set of comparatively homogeneous formal rules and regulations across jurisdictions (Sikavica and Yoshikawa, 2012: 212). More specifically, the claim is that such institutions and frameworks have been moving towards a shareholder-oriented model of corporate governance (Gelter, 2009: 185; Goyer, 2011: 92; Ireland, 2005: 49–50); and that the pressure emanating from such forces is reducing institutional diversity (Deakin et al., 2006; Lane, 2003: 80; Noelke, Overbeek, and Van Apeldoorn in Overbeek et al., 2007: 207). Despite differences amongst them, advocates of the convergence thesis contend that ‘the deeper tendency is towards convergence, as it has been since the nineteenth century’ (Hansmann and Kraakman, 2001: 1).

The ‘divergence’ claim, in contrast, doubts that there has been substantive ‘convergence’. Its exponents stress how corporate governance designs and practices are embedded, and in use, in the particularities of nation-states (Albert, 1993; Gospel and Pendleton, 2003; Goyer, 2011; Hall and Soskice, 2001; Morgan and Whitley, 2012), as well as in concrete workplace arrangements (Goyer, 2011). Five types of divergence have been distinguished: ‘the importance of labour interests, time-frames, strategy types, financial measures of performance, the use of market-based instruments to secure commitment and the extent of employer co-ordination’ (Gospel and Pendleton, 2003: 566). Advocates of the divergence thesis conclude that the cultural and historical distinctiveness and associated capabilities of national governance systems enable greater adaptation and persistence of practices and institutions than claimed by advocates of convergence (see Gilson, 2001). Further undermining the case for convergence, the argument has been made that local forces can hinder governance changes or create “hybrid” practices (Bednar, 2012; Bratton and McCahery, 1999; Fiss and Zajac, 2004; Jansson, 2013; Larsson-Olaison, 2014; Yoshikawa and Rasheed, 2009). Since ‘institutions of all national systems [a]re shaped not only by efficiency, but also by history and politics’ (Gilson, 2001: 330), it is suggested that the framing of notions of corporate governance by relevant stakeholders (e.g. media, businesspeople, politicians, and NGOs) results in practices that differ quite markedly from the situation claimed in ‘convergent’ notions of corporate governance, even when the latter are formally adopted in codes, standards, and regulations. Those standards and regulations may suggest theoretical adherence to a ‘convergent’ norm but, as a consequence of their interpretation and implementation in specific cultural, legal, economic, and political contexts, it is concluded that their practical operation betrays divergence (Aguilera and Jackson, 2010; Branson, 2001: 324; Gilson, 2001: 329; Larsson-Olaison, 2014; Sikavica and Yoshikawa, 2012; Varottil, 2017; Yoshikawa and Rasheed, 2009). Rejecting claims of a movement towards convergence that are considered to lack support (Aguilera and Jackson, 2010; Bratton and McCahery, 1999; Campbell and Pedersen, 2014; Cuomo et al., 2016: 234; Gilson, 2001; Gospel and Pendleton, 2003; Goyer, 2011; Larsson-Olaison, 2014), advocates of divergence contend that the challenge for students of comparative corporate governance is to pay closer attention to nuanced descriptions of the operation, and (relative) strengths and capacity for transplantation of norms, systems, rules, regulations, structures, and processes in prevalent economic and political orderings, and also in relation to governance processes within organizations (Campbell and Pedersen, 2014; Gelter, 2009; Goyer, 2011; Jackson, 2000; Jacoby, 2008; Keay and Zhao, 2015; Morgan and Whitley, 2012; Rasheed and Yoshikawa, 2012).

In our engagement with this debate, we conceive of corporate governance as ‘the whole set of legal, cultural and institutional arrangements that determine what publicly traded corporations can do, who controls them, how control is exercised, and how the risk and returns from the activities they undertake is allocated’ (Blair, 1995: 3). Reflecting this broad definition, we interpret the stabilization and institutionalization of notions of corporate governance as essentially political acts (see Aguilera and Jackson, 2010: 29). Accordingly, we will argue that whatever may be the respective merits of the ‘convergence’ and ‘divergence’ theses (e.g. by showing the comparative corporate governance glass to be half full or half empty), adoption and advocacy of specific notions of corporate status and architecture has a *performative* effect, and, notably, that this performative effect may be explained in relation to outcomes in terms of political economy. This conjecture is framed and developed by conceiving of the modern corporation as a social construct that relates to multiple referents (and, relatedly, of knowledge claims about the status, architecture, and purpose of the modern corporation, including claims about ‘convergence’ and ‘divergence’) as radically contingent, inescapably contested, and inextricably woven into claims to power and political economy (Glynos and Howarth, 2007; Ireland, 2018; Veldman and Willmott, 2017). Our conception of the modern corporation as a social construct with inherently unstable attributions of status, architecture, and purpose, and of the act of stabilization as connected to the contested practices of political economy, underpins our attentiveness to the contribution that theory may make to bringing about the world, rather than merely explaining or understanding it.

The focus on performativity developed here underpins three contributions that we aspire to make to the study of (comparative) corporate governance. Our first contribution is the introduction of the notion of performativity to (comparative) corporate governance studies. Scholars of comparative corporate governance, we contend, have been insufficiently alert to how theories (e.g. of corporate governance) contribute to *making* the worlds that they ostensibly *report*, and so may become (partially) self-fulfilling (see MacKenzie et al., 2007; Merton, 1948). Our second contribution is to address the relation of performativity to the contingent stabilization of theoretical assumptions about corporate status and architecture. Accordingly, we commend a focus on the political economy outcomes of specific stabilizations, and so introduce an explicitly political dimension to the operation of performativity in the domain of corporate governance. Our third contribution is to apply this political dimension of performativity to the convergence/divergence debate. Although we concur with the proponents of ‘divergence’ that institutional diversity is still present, and that a cautious approach to ‘convergence’ must be maintained, we contend that supporters of divergence take inadequate account of the performativity of a widespread assumption of the value and inevitability of convergence. In this light, we note how a divergence approach, focusing upon epistemological concerns may risk dimming awareness of the convergent politico-economic ‘wood’ as a consequence of its attentiveness to diversity amongst the ‘trees’.

We start with a brief discussion of performativity and its relation to theories of corporate governance. To demonstrate its relevance for the debate on convergence/divergence, we deploy the criteria and boundary conditions recently identified in an article by Marti and Gond (2018). In the ‘Discussion’ section, we elaborate on the significance of performativity for the practice of corporate governance, with specific reference to its consequences in terms of political economy. Finally, we reflect upon the relevance of our argument for the convergence/divergence debate.

## Performativity

There is considerable academic debate about the way in which shifting notions of the status, architecture, and purpose of the modern corporation have affected the theory and practice of corporate governance (Aglietta and Reberieux, 2005; Bratton, 1989a; Davis, 2009; Fligstein, 1993; Fourcade and Khurana, 2017; Khurana, 2007). These contributions, we suggest, can be connected and thematized through a theory of performativity derived from Austin's description of speech acts as 'acts that "bring about what they say"' (Gond et al., 2016: 442–3).<sup>1</sup> Theories are, from this perspective, endowed with the capacity to participate in the making of worlds that they aspire to *report*, and so 'make a difference' by becoming (partially) self-fulfilling and changing practice (Guérard et al., 2013; MacKenzie et al., 2007: 18; Marti and Gond, 2018: 493).

Students of performativity attend to how engagements of theory reshape 'the language, social norms, and institutional designs of traders, managers, policy-makers, or other actors' (Marti and Gond, 2018: 487). Insofar as theories nurture and generate a shared practical understanding that gives meaning to practices, they *may*, as a consequence of being engaged and applied by actors, change the world, or make the world more congruent with the theory that interprets it. To the extent that, to adapt Thomas's aphorism, what is defined as real is (also) real in its consequences, there is the distinct possibility, and indeed the likelihood, of theories of the corporation and its governance contributing to 'shap[ing] the patterns of social interaction that *constitute* social reality' (Marti and Gond, 2018: 488, emphasis added). The assumptions of a discipline are then no longer apprehended as just reporting, but also as (at least partially) making, the world as they contribute to shaping, formatting, and performing the field that they purport simply to describe (Mitchell, 2005). That said, it is prudent to underscore how, when assessing claims that theory is performative, the operation of performativity is contingent, not necessary or absolute. In practice, the performative power of a theory depends on its appeal, adoption, and realization in relation to the attraction of other, 'competitor' knowledge claims. Where there are rival theories and multiple channels of communication between theoretical propositions, concrete, confirmatory effects are not automatically given. As multiple types and degrees of performativity may be distinguished (Gond et al., 2016: 447), and generic performativity is a rare occurrence (Marti and Gond, 2018), the link between performativity and change must be demonstrated, not just postulated.

Recognition of the operation of performativity is problematic for subscribers to traditional, dualist epistemologies. In general, subscribers to both 'divergence' and 'convergence' positions on corporate governance assume the posture of independent and impartial observers who aspire to 'capture' reality, rather than acknowledging their involvement as participants in the reproduction and transformation of the world that they strive to represent. When (scientific) actors who are ostensibly describers of the field are seen to acquire the capacity to create the phenomenon they report (MacKenzie and Millo, 2003: 108), scientific statements are no longer credibly conceived to be 'outside the world(s) to which they refer' (Gond et al., 2016: 447). Knowledge of the system itself, as well as of the elements and relations within such a system, may then be placed in question: '[T]he truth or falsehood . . . depends . . . on its capacity to construct worlds in which its claims can hold together, not on any natural adequacy of these claims to their external objects' (Muniesa, 2008). The presence of recursive effects, where theory – or popularized, selective versions of it – is conceived also to (re)make aspects of the world, invites critical reflection not only on the consequences

of the stabilization of a particular view of a phenomenon but also, and crucially, on the agency and interests of the actors involved in accounting for changes in corporate governance. Amongst those actors are the social scientists who generate ostensibly value-free scientific knowledge about the divergence or convergence of corporate governance.

To address and illuminate performativity within the world of corporate governance, we adopt a framework developed by Marti and Gond (2018) that comprises three steps and six boundary conditions. The three steps are: first, the appearance of a theory that prompts actors to ‘... explore new ways of doing things’; second, the identification of anomalies in the form of ‘observable events that violate widely shared expectations’; and, third, a shift induced by the first two steps that is manifest in ‘changes in how most actors do things that confirm the new theories’ (Marti and Gond, 2018: 488). The six boundary conditions are: (i) the use of material devices, (ii) the presence of powerful initial backers that determine whether theories will lead to experimentation, (iii) ‘discontent with the status quo’, (iv) ‘sensegiving by convinced actors’ which determines whether anomalies will lead to a widespread shift in practices in line with the newly proposed theories, (v) a ‘visibility of effects’, and (vi) ‘counteracting behavior’ that ‘determine whether experimentation will produce anomalies’ (Marti and Gond, 2018: 488).

We now apply these three steps and six boundary conditions, beginning with an interrogation of the historical development and adoption of theories inherent in claims about the status and architecture of the modern corporation. Highlighting the contingency inherent to claims to the status and architecture of the modern corporation as a social construct, we note how the establishment and maintenance of any theory of corporate governance requires an active and continuous process of stabilization. Turning to consider the currently dominant theory of corporate governance, we conjecture that stabilization is achieved by inserting specific notions of status and architecture within a broad set of disciplinary fields and institutions. Finally, we address how these theoretical notions and their effects currently persist despite considerable contestation.

### *The status of the modern corporation as a social construct*

The ‘modern corporation’ is widely regarded as a core social construct for economic organization that, historically, has been contested, and continues to be disputed (Veldman and Willmott, 2017b). It has been theorized within multiple frameworks that include concession theory, natural entity theory, and aggregate theory amongst others (Biondi et al., 2007; Gindis, 2009; Harris, 2006; Robé, 2011). At the same time, its unsettled theoretical status, resulting from the simultaneous use of multiple frameworks, has been defended by invoking the ‘pragmatism’ of a pluralistic approach and/or rejecting the ‘dogmatism’ (Hallis, 1978: 45; Pollock, 1911) of commitment to a singular approach (Hessen, 1979; Osborne, 2007).

The indeterminacy of the social world is manifest in the difficulty, and perhaps the impossibility, of reconciling the numerous theories that confer meaning upon the ‘modern corporation’. The unfeasibility and perhaps the futility of definitively specifying and/or testing ascriptions of status, architecture, and purpose to this construct in a rigorous fashion (Allen, 1992; Blair, 2015; Gamble et al., 2000; Naffine, 2003) – in which we would include endeavours to inform, if not resolve, the question of ‘convergence’ and ‘divergence’ – has led one commentator to conclude that ‘There is perhaps nothing in U.S. society that is both more pervasive and yet less understood than the business corporation’ (Schrader, 1993: 1). Our suggestion here is that understanding the modern corporation as a social construct with

an unsettled theoretical status can be enhanced by reflecting more deeply upon how the development and adoption of particular notions, or theories, of corporate governance can, intentionally or inadvertently, change the world that they aspire to represent. We now briefly illustrate this point by considering the emergence of the ‘modern corporation’ in the 19th century and subsequent attempts at the stabilization of its status and architecture.

### *Corporate status and architecture: From entity to agency theory (AT)*

Conditions of possibility that facilitated the emergence, and some degree of stabilization, of the ‘modern corporation’ as a social construct included the generation of novel ideas and institutions, such as perpetual recognition as a separate legal entity, limited liability, transferable joint stock with fully paid up shares, a secondary share market, the removal of ultra vires, and delegated centralized management under a board structure (Hansmann and Kraakman, 2001; Kraakman and Hansmann, 2004; Ireland, 1999; Talbot, 2008; Tricker, 2015). Animated by political will, the development of these elements relied on assumptions that reified the corporation as a legal construct, and so permitted ascriptions of ownership, liabilities, agency, and rights to this ‘entity’ (Veldman and Willmott, 2017b). The development of this reified social construct in turn enabled the contested development of a new organizational ‘architecture’ in which the status and relative claims and rights of organizational constituencies – such as the board, shareholders, and employees – were radically reconstituted compared to their role and position in the (unlimited liability) partnership form (Millon, 2014). To the extent that this ‘entity’ could be interpreted as a representation of the corporation *in toto*, its constitution has also enabled an ‘entity view’ in which a board-centric perception of corporate architecture accords the corporate board with discretionary space as well as the duty to consider claims pertaining to diverse actors, interests, and time-frames (Blair and Stout, 1999; Millon, 2014; Segrestin and Hatchuel, 2011).

The establishment of the new corporate architecture resulted from processes of theoretical innovation that were at some odds with, and would increasingly influence, the socio-political structure of society. Notably, the contentious separation of investment and (personal) liability benefited, and stimulated the growth of, *rentier* shareholders who have been able to make relatively low-risk investments while avoiding the burden of management responsibility. The new architecture has also permitted the development of liquid shares and a secondary share market, the capacity to integrate horizontally and vertically, and the development of corporate groups (Ireland, 1999; Millon, 2014; Talbot, 2008; Veldman and Willmott, 2017a; Veldman, 2018). As a consequence, *rentier* shareholders grew rapidly over the next centuries, and this growth has been accompanied by social and political contestation (Bowman, 1996; Bratton and Wachter, 2008; Hannah, 2010).

When established during the 19th century, the form and privileges associated with the ‘modern corporation’ were contested where they were seen to be incongruent with mainstream political and economic theory in which a ‘morality of the market’ presumed the necessity of unlimited liability by investors comparable to the unlimited liability of partners in a partnership (Bowman, 1996; Djelic, 2013; Djelic and Bothello, 2013; Freeman et al., 2011; Johnson, 2010; Perrow, 2002). Towards the end of the 19th century, opposition was aroused by successive merger waves, culminating in oligopolistic ‘corporate capitalism’ in economies that included the US and the UK (Bratton and Wachter, 2008; Hannah, 2010; Sklar, 1989; Talbot, 2008). Following the Wall Street Crash, a significant legitimation crisis



was met by a pragmatic response distilled in Berle and Means' *The Modern Corporation and Private Property* (1932).

Without denying the problematic role of the corporation in relation to oligopolistic economic organization, Berle and Means defended the need for the use of the modern corporation. In *the Modern Corporation* they argued that the 'atom of ownership and control' had been split, resulting in the rise of distant and foot-loose (rentier) shareholders who cannot be expected to perform a role equivalent to investor-partners with unlimited liability (Mizruchi and Hirschman, 2010). Moreover, because the judiciary and the state were not in a position to exercise de facto control, Berle and Means argued that an emerging class of managers had effectively assumed control over (increasingly dominant) corporations but lacked the legitimacy previously ascribed, but no longer due, to shareholders. Accordingly, Berle and Means articulated the case for the inscription of the corporation as a *social* institution in the sense that its function and significance increasingly extended beyond maximizing the return of surplus or 'value' to shareholders and identified managers as 'stewards' who are, or should be, in possession of the expertise necessary to take into account the interests of multiple constituencies (Berle and Means, 1932: 309–313; Bratton and Wachter, 2008; Mizruchi and Hirschman, 2010: 8; Moore and Rebérioux, 2007; Weinstein, 2012). The broadly corporatist notions of corporate status and governance advanced by Berle and Means provided the design principles for building and sustaining the distinctively corporatist features of the post-Second World War economy (Bratton and Wachter, 2008; Davis, 2016; Fourcade and Khurana, 2017: 353; Khurana, 2007; Mizruchi and Hirschman, 2010: 3; Weinstein, 2012).

Berle and Means' model for corporate governance was inspired by pragmatism, and so the deeper social and legal issues with the rise of the modern corporation as a social construct were never effectively cemented in legal institutions (Ireland, 2018). Lacking this basis, the views brought forward by Berle and Means were vulnerable to dilution and displacement. In the post-war era, a residual, subterranean conception of corporate status and architecture remained present in corporate law (Bratton and Wachter, 2008; Rock, 2013). When, during the 1970s, economic crises deepened, the 'managerialist' views on corporate governance, including those pioneered by Berle and Means, were criticized for (illegitimately) positioning unaccountable managers as corporate 'statesmen'. Legal, economic, or political justification for such claims, and the direction of a significant share of corporate proceeds to constituencies other than shareholders on the basis of such claims, was seen to be lacking or suspect (Aglietta and Rebérioux, 2005; Fourcade and Khurana, 2017: 353; Friedman, 1970; Khurana, 2007; Tsuk, 2003). Critics who took aim at the Keynesian post-Second World War settlement condemned the institutionalization of such claims for fostering collectivism and nurturing a nanny state through increasing government regulation and government power (Foucault, 2008: 216, 323; Ptak, 2009; Van Horn, 2011: 1534). These challenges formed the background for more visible and vocal expressions of dissent and advocacy of alternative policies, as fostered and promoted by right wing pressure groups, think tanks, and the Chicago Schools of Law and Economics (Mirowski and Plehwe, 2009; Peck, 2010; Jones, 2012), who advocated and developed a comprehensive and prescriptive reconceptualization of the status and architecture of the modern corporation that has come to dominate the field of corporate governance (Davis, 2009; Fourcade and Khurana, 2013, 2017; Khurana, 2007; Van Horn, 2009).

The most visible and influential product of the intellectual movement has been AT. In stark contrast to entity theory and the notion of the corporation as a quasi-public

institution with managers acting as ‘mediating hierarchs’, AT conceives of the corporation as a nexus of contracts – a view that had been nurtured by the Chicago Schools of Law and Economics from the late 1940s onwards, and came to ‘open up a new line of microeconomic inquiry’ (Bratton, 1989b: 415; see also Van Horn, 2011). Notably, it advanced the notion of the *status* of the modern corporation as a private and generic type of legal form (and organizational representation) in relation to which the organizational *architecture* is conceived as an exclusively dyadic and contractual relation between ‘principals’ and ‘agents’ (Ireland, 2018; Lan and Heracleous, 2010; Segrestin and Hatchuel, 2011). Its principal implication is that the discretionary space, or prerogative, of directors and executive managers is circumscribed by the requirement to execute the contractual bond with a ‘principal’; the shareholder is conceived as the primary, if not sole, claimant upon the corporation for whom short-term market value maximization is assumed to be the priority; and the *purpose* of managerial agency is restricted to the reduction of agency costs (i.e. monitoring costs, bonding costs, and residual losses that cannot be eliminated by contractual mechanisms) (Aguilera and Jackson, 2010: 521; Cremers and Sepe, 2016: 142; Gelter, 2009: 7; Ireland, 2005: 49–50; Millon, 2014: 7). Fulfilment of this priority is best accomplished, when framed by AT, by strengthening the operation of a market for corporate control that punishes and/or removes ‘agents’ that are considered by their ‘principal’ not to fulfil the latter’s direct or implicit expectations (Aglietta and Rebérioux, 2005; Davis, 2009; Van Horn, 2009, 2011).

An exclusive focus on the interests of the ‘principal’ has relegated consideration of the interests and risks of actors and of time-frames outside the core dyadic relation to the status of an ‘externality’ (Fourcade and Khurana, 2017) covered by contractual and legal protections beyond the domain of corporate law (Gelter, 2009; Hansmann and Kraakman, 2001). Rights and claims of broader ‘stakeholders’, notably those of employees, but also those relating to broader risks, interests, and time-frames – such as resource overuse, environmental degradation, social inequality, and political instability – are *structurally* excluded by AT from the orbit of managerial agency (Aglietta and Rebérioux, 2005; Bratton and Wachter, 2008; Bruff and Horn, 2012; Friedman, 1970; Jackson, 2000; Jacoby, 2008; Lan and Heracleous, 2010; Segrestin and Hatchuel, 2011; Vitols, 2015). Hence, to the extent that AT informs executive practice, ‘The interests of stakeholders other than shareholders are usually left on the sidelines, descriptively and sometimes even normatively’ (Gelter, 2009: 2). The AT view of corporate status and architecture has been articulated through multiple ‘material devices’. These include stock option compensation schemes and redefinitions of notions of contract, the corporate entity, corporate architecture, and fiduciary duties (Aglietta and Rebérioux, 2005; Bratton, 1989a, 1989b; Davis, 2009) that, in concert, have engendered broad institutional changes.

### *Performativity in action: The rise of AT and the reformation of corporate governance institutions*

Currently ‘the bulk of corporate governance research around the world has been and continues to be inspired by agency theory’ (Aguilera and Jackson, 2010: 13). The rise and grip of this theory is not accidental. Its development and propagation has received financial support from institutions like the Ford Foundation and the Volker fund (Fourcade and Khurana, 2017; Van Horn, 2009); and AT has been adopted by highly influential interest groups such as the Business Roundtable (Khurana, 2007; Mizruchi and Hirschman, 2010) as well as popularized in the business press and by consultants (Fourcade and Khurana, 2017;

Williams, 2000). In the academic world, journals have been established to foster and distribute agency theoretic ideas (Fourcade and Khurana, 2017), while leading academic institutions, notably the Chicago Graduate School, have influenced business education through the promulgation and dissemination of AT assumptions (Dobbin and Jung, 2010; Fourcade and Khurana, 2017; Khurana, 2007: 268).

In the associated field of corporate law, the annual ‘Pareto in the Pines’ retreats, started in the 1970s, have educated legal scholars about ‘the applicability of neoclassical ideas to antitrust law, corporate law, and other fields’ (Jacoby, 2008: 33), with the expectation that its participants would become ‘norm entrepreneurs’ and adopt deregulation as well as shareholder primacy. Under Reagan’s presidency, about half of the federal judges in antitrust law enforcement were drawn from alumni of the Chicago Trainee Program (Wigger, 2007: 107). The adoption of ideas that conceive of the corporation as a generic type of contractual ‘nexus’ in an essentially self-regulating market (Van Horn, 2009), and embrace the related notion of a ‘market for corporate control’ (Manne, 1965) have been translated into legislative change as anti-trust measures were repealed (Fourcade and Khurana, 2017); merger guidelines were changed (Davis, 2011: 1128); and takeover protections were restricted, eventually providing the basis for the creation of the LBO market of the 1980s (Ireland, 2009). They also became visible in the adoption of the use of incentives for management to direct their energies to interventions aimed at stock price increases (Avi-Yonah, 2011: 25). In the *Edgar v. MITE Corp* case, for example, the work of Easterbrook and Fischel was cited in support of the complaint that ‘Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered’ (*Edgar v. MITE Corp* 457 U.S. 624 (1982) 643-44).

AT ideas and practices travelled beyond the US. In the UK, the ascendancy of an AT-inspired notion of corporate governance was evident in the development of the UK Companies Act 2006 where directors’ duties were established in a way that promoted ‘the ideology of shareholder primacy’ (Talbot, 2008: 191, see also Collison et al., 2014: 5, 15). In Germany, the influence of AT has become apparent in a large number of economic reforms that occurred between 1998 and 2000, including the legalization of stock options, share buybacks, a semi-voluntary corporate governance code, the exemption from tax payments of sales of blocks of shares and the 1998 KonTraG Act which introduced a comprehensive set of changes to securities regulation, company law, and taxation (Cioffi, 2002: 389; Lane, 2003: 88). In relation to the EU, Van Apeldoorn and Horn (2007) have noted ‘the role of transnational private “expert” groups in providing the “epistemic” underpinnings... of the marketisation of corporate control’ (91), in the form of the strengthening of shareholder rights, and the strengthening of the role of the market by ‘... removing “technical” obstacles such as multiple voting rights or facilitating cross-border transactions’ (94). A key institution that introduced ‘... shareholder value, and shareholder capitalism generally, into the European political economy’ (Cioffi, 2002: 381) was the 1989 draft EU Takeover directive that favoured ‘the Anglo-Saxon style of organizing private market conduct...’ (Wigger, 2007: 116; see also Van Apeldoorn and Hager, 2010). And globally, the major accounting regulation bodies, notably the FASB and IASB, have been ‘fostering an accounting revolution’ guided by AT (Biondi, 2011: 2). More specifically, the notion of ‘fair value’ has involved a shift away from ‘the functioning of the firm as a more autonomous entity’ (Nölke and Perry, 2007: 135) by replacing it with ‘[...] the firm as a financial trust devoted to the cash enrichment of shareholders as its beneficiaries and trustees’ (Biondi, 2011: 37).

Finally, a shift towards AT is evident in the formulation and spread of codes of corporate governance that, in general, are ‘seen as contributing – although perhaps to different degrees – to the development of the prominence of shareholder value’ (Goyer, 2011: 93). As these codes typically focus on monitoring mechanisms that are meant to protect, to be evaluated by, and to be enforced by, market actors through market-based responses, such as negative share-price reactions (Seidl, 2007: 7096); and they thereby promote an agenda of minimizing statutory regulation (Haxhi et al., 2013: 539), the design of these codes is aligned with AT views of corporate status and architecture (Veldman and Willmott, 2016).

The recursive effect of these theoretical shifts on corporate governance practice becomes apparent when we consider their relation to political economy. Marti and Gond (2018: 495) observe how ‘[T]heories on shareholder value maximization (Jensen and Meckling, 1976; Rappaport, 1998) and stock-market reactions have fostered the expectation that companies will only be successful if they primarily focus on increasing profits and delivering returns to their shareholders’. The establishment of the expectation that success is related to an exclusive alignment between executives and shareholders is correlated historically with significant shifts in the allocation of value produced by corporations (Veldman, 2018). The continuous rise in the proportion of corporate profits allocated to dividends and share buybacks in the US and the UK (Lazonick, 2013, 2014) is mirrored in a continuous rise in executive remuneration in the US (Aguilera and Jackson, 2010: 48; Deakin et al., 2006; Rebérioux, 2007: 510–511; Shin and You, 2017: 109; Zajac and Westphal, 2004: 449). Over the same period, the focus of managerial attention on short-term market value induced by AT correlates with a marginal rise in the labour share, despite productivity growth in the sectors affected (Jacoby, 2011: 295; Turbeville, 2015), and with the broad adoption of a ‘downsize and divest’ model (Lazonick and O’Sullivan, 2000: 13) that comprises strategies of reducing long-term and non-financial investments (e.g. R&D budgets and promotion ladders) and the use of outsourcing and lay-offs to ramp up corporate profits in the short-term (Davies et al., 2014; Deakin et al., 2006; Dobbin and Zorn, 2005; Jacoby, 2005; Krier, 2009).

These examples and shifts indicate how the ‘provocative, contrary to conventional wisdom’ nature of AT (Davis, 2011: 1128) has exerted a deep and pervasive influence on the status and architecture of the ‘modern corporation’ and upon attendant conceptions of accountability, transparency, compliance, disclosure, and materiality across disciplinary fields (Aglietta and Rebérioux, 2005; Davis, 2009; Eccles and Youmans, 2016; Fourcade and Khurana, 2017; Van Horn, 2009, 2011)<sup>2</sup>; and has thereby contributed to a transformation of the theory and practice of corporate governance in the past 30 years. In terms of Marti and Gond’s boundary conditions, the ‘discontent with the status quo’ (iii) that was prevalent in investor and academic circles led ‘powerful initial backers’ (ii) to provide means that prompted and incentivized actors to ‘... explore new ways of doing things’ (Marti and Gond, 2018: 488). The ‘sensegiving by convinced actors’ (iv) provided ‘material devices’ (i) that influenced the subsequent formation of institutions and practices in line with the newly proposed theories, providing the basis for ‘changes in how most actors do things that confirm the new theories’ (Marti and Gond, 2018: 488). Notably, the conceptual shifts commended by AT have served to augment and prioritize the claims and rights of shareholders, while at the same time diminishing the rights and claims of other stakeholders, including employees. The outcome has been ‘... a dramatic evolution from managerial capitalism to investor capitalism’ (Davis, 2009 in Aguilera and Jackson, 2010: 48) and a concomitant redistribution of corporate value (v) (Veldman, 2018; Lazonick, 2013, 2014; Reich, 2016).

## *Anomalies*

We now consider the remaining boundary conditions by addressing how a ‘visibility of effects’ may lead to ‘counteracting behavior’ that determines ‘... whether experimentation will produce anomalies’ (vi) (Marti and Gond, 2018: 488). Legal and management scholars who are critical of AT contend that its claims about corporate status, architecture, and purpose have ignored and displaced assumptions about the status and architecture of the modern corporation that were previously entertained in company law (Biondi et al., 2007; Bratton, 1989a; Ireland, 2003; Lan and Heracleous, 2010; Millon, 2014; Stout, 2012; Weinstein, 2012). Millon (2014), for example, has declared that

However accurate it might have been in the earlier nineteenth century in an age of closely held firms, an agency characterization of management’s relation to the shareholders has been completely inaccurate as a descriptive matter since the turn of the twentieth century and was still so in the later 1970s when corporate law academics first began to insist on it. Against this backdrop, the emergence of the agency claim and its widespread embrace as an assumed legal requirement are nothing short of astonishing. (32–33)

Other critics of AT address the rationale that propelled the advancement of AT: its broad claim to social utility based on claims to greater efficiencies (Gelter, 2009: 3; Hansmann and Kraakman, 2001: 449) and related corporate-level and macro-economic effects (Coffee, 2000). AT, it is argued, has led to more value extraction than value creation. Continuous increases in executive remuneration, share buybacks, and dividend payments are considered to have resulted in the hollowing out of corporations – an outcome that is linked to a decrease in the longevity and increase in the delisting of public corporations in the US (Hopt, 2011; Jacoby, 2008; Lazonick, 2014; Stout, 2012). In broader economic terms, the adoption of a ‘downsize and divest’ model correlates with a broad deterioration of pay, pension, and contract conditions and a general stagnation of wage increases for employees (Veldman, 2018). As trickle-down redistribution has failed to materialize on the basis of the adoption of AT, much evidence is unresponsive of its claim to deliver efficiencies and related social utility, either within corporations or in capitalist economies (Davies et al., 2014; Fligstein and Shin, 2007: 401). Apart from debunking such claims to efficiencies and overall social utility, critics of AT argue that its adoption has had a detrimental impact on the legitimacy of the modern corporation as a social construct (Baars and Spicer, 2017; Bratton and Wachter, 2008; Kay, 2015; Mayer, 2013; Reich, 2016). Despite such critiques of the failure of AT to deliver on its core promises, its tenets continue to be inserted into institutions worldwide.

We have noted how a ‘discontent with the status quo’ arising mainly from a reduction in shareholder power and proceeds (Fourcade and Khurana, 2017), prompted actors to ‘... explore new ways of doing things’ (Marti and Gond, 2018: 488). The establishment of a new corporate governance theory based on AT displaced entity theoretical foundations for the modern corporation in company law as well as pragmatic considerations for the establishment of the corporation as a quasi-public institution as commended by Berle and Means. Subsequently, AT has exerted boundary and agenda-setting effects in the formation of policies and institutions that, in turn, served to ‘confirm the new theories’ (Marti and Gond, 2018: 488). The adoption of these theoretical assumptions and their institutionalization is visible in significant changes in political economy – notably, in the continuous rise in the percentage of corporate profits assigned to dividends and share buybacks, increases

in the total remuneration of executive managers, and a corresponding continuous decline of the share of corporate proceeds allocated to all other interests and stakeholders (Veldman, 2018; Lazonick, 2013, 2014; Reich, 2016). As the outcomes of the adoption and institutionalization of an AT-based notion of corporate governance have not delivered the promised overall social utility, the institutionalization of this new theory has fallen short of ‘widely shared expectations’ (Marti and Gond, 2018: 488). In turn, this has stimulated ‘counter-acting behavior’, including more vocal contestation by academic and practitioner communities (Kay, 2015; Khurana, 2007; Reich, 2016; Veldman et al., 2016). As the remaining boundary conditions for establishing the operation of performativity are accordingly met, we conclude that the historical development and institutionalization of a theory of corporate governance based on AT exhibits all of the steps and boundary conditions identified by Marti and Gond (2018). We conclude that the entrenchment of AT is performative in its shaping of corporate governance theory and practice.

## Discussion

To engage with the convergence/divergence debate in comparative corporate governance we have focused on the modern corporation as a social construct with inherently unstable attributions of status, architecture, and purpose. In relation to this construct, we conjectured that attentiveness to performativity can shed light on patterns of institutionalization of corporate governance, that is the role of ideas about corporate governance in bringing about the world that they seek to explain or understand. Furthermore, we have connected such performativity to politico-economic consequences. This exploration of performativity has contributed to the study of corporate governance in three ways.

Our first contribution has been to introduce the significance of performativity to the study of corporate governance. We have indicated how key elements underlying theories of corporate governance – notably the status and architecture of the modern corporation – relate to multiple and mutually exclusive theoretical points of departure. From this perspective, ‘at any particular time, corporate governance contains a number of contradictory pressures and points of conflict’ (Aguilera and Jackson, 2010: 48), the implication being that stabilization of notions of status and architecture can be credibly interrogated as a contingent activity. By illuminating the formation of ideas about status, architecture, and purpose, as well as the agency of actors involved in the (de-)stabilization of established notions of the modern corporation and its governance (Djelic and Quack, 2012; Fourcade and Khurana, 2017; Haxhi et al., 2013), our consideration of performativity has added to ‘... discussions of how organizations are performed and how performativity is organized...’ which up till now ‘... remain embryonic’ (Gond et al., 2016: 441). Specifically, we have explored ‘how organizations are performed into being’ (Gond et al., 2016: 458) by being attentive to how theories have the potential to bring ‘... social reality closer to the assumptions or predictions of that theory, which means that the theory becomes self-fulfilling’ (Marti and Gond, 2018: 488).

Second, we have sought to show how the performativity inherent in the stabilization of notions of corporate status and architecture can be linked to political economy. Approaching corporate governance as the study of ‘the structures, processes, and institutions within and around organizations that allocate power and resource control among participants’ (Davis, 2005: 143), we have highlighted how the performativity underlying stabilizations of the modern corporation as a social construct shapes and constrains the

conditions of possibility in which the validity of rights, claims, and obligations of actors, interests, and time-frames, including those of diverse kinds of shareholders, directors and executive managers, employees, and other types of stakeholders, such as communities, states, actors in global value chains, the environment and future generations are negotiated (Aguilera and Jackson, 2010; Cioffi, 2002; Gourevitch and Shinn, 2005). We have also noted how the stabilization provided by AT displaced earlier stabilizations – notably a broadly stakeholder-oriented stabilization provided by Berle and Means – and subsequently directed corporate value to short-term, market-value oriented shareholders and managers, while structurally excluding ‘externalities’ from the ambit of managerial agency. Beyond the corporation, we related this new stabilization to the occurrence of multiple systemic risks, including rising social inequality in advanced capitalist economies and an impending ecological crisis (Veldman, 2018; Kay, 2015; Reich, 2016).

In the light of these outcomes we argue that neither the theoretical stabilization of notions of status and architecture, nor their practical stabilization through enactment in national and transnational rules, regulations, policies, and institutions (Fligstein and Shin, 2007; Haxhi et al., 2013: 535; Rock, 2013), can be studied as purely functional processes or credibly considered in terms of an apolitical explanandum (Nölke et al., 2007: 202). Rather, as the stabilization of knowledge claims relating to corporate status and architecture remains inescapably contested (Veldman and Willmott, 2017a; Veldman, 2018; Ireland, 2009, 2018; Lazonick and O’Sullivan, 2000; Nölke and Perry, 2007: 135; Reich, 2016), we argue that the performativity resulting in the stabilization of theory formation in corporate governance invites explication in terms of political economy.

Returning to the convergence/divergence debate, our attention to performativity does not reject the view that there is institutional diversity. Indeed, we share the assessment of the subscribers to the divergence thesis that declarations such as ‘There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value’ (Hansmann and Kraakman, 2001: 439) are hyperbolic. Exponents of the divergence perspective have, in our view, been persuasive in showing that, for the foreseeable future, distinctive institutional arrangements continue to act as buffers against pressures towards a convergence of corporate governance systems. Accordingly, we favour a nuanced formulation of the convergence thesis, in which invocations and assertions of ‘convergence’ should not be considered in exclusively epistemological terms as providing more or less credible representations of reality. Rather, an attentiveness to the performative effects of the stabilization of the theory and practice of corporate governance – whether it is Berle and Means’ corporatism or AT’s claims that lead to the (unidirectional) privileging of shareholder primacy as a self-evident necessity – leads us to argue that the operation of ‘convergence’ should be understood in relation to shaping and legitimizing for conditions that lead to concrete outcomes in terms of political economy.

To the extent that the development and stabilization of a particular theory of the status and architecture of the modern corporation is linked to far-reaching political economy outcomes, we submit that invocations of convergence in relation to such theories facilitate, more or less intentionally, ‘...rent-seeking by those favored by *the particular points of convergence*’ (Gevurtz, 2011: 520 – emphasis added; see also Goyer, 2011: 170; Haxhi et al., 2013: 535; Noelke, Overbeek, and Van Apeldoorn in Overbeek et al., 2007: 217–219). Consistent with this assessment, we have explored how AT presents a theory and a model for corporate governance that acts to delegitimize alternative models of corporate governance (Deakin et al., 2006); reduces institutional diversity (Lane, 2003) and supports a

‘retreat of existing path dependencies’ (Siems, 2007: 399) in company law; marginalizes countervailing institutions, such as those that seek to promote and safeguard the interests of broader actors, interests, and time-frames, including employee rights (Bratton and McCahery, 1999: 62) effectively resulting in ‘deregulatory capture’ (Jacoby, 2008: 28); and remains largely impervious to broad academic and practitioner critiques as it fails to acknowledge and address ‘anomalies’ that include the failure of expected overall social utility to materialize and the heightening of systemic risks associated with the institutionalization of its assumptions. To the extent that these performative effects are attributable, in substantial part, to the hegemony of AT, we regard AT as an example of ‘convergence’ in action.

## Conclusions

We have sought to advance the convergence/divergence debate in the comparative study of corporate governance by directing attention to the performativity of theoretical assumptions. This has involved a shift in orientation from addressing corporate governance as a social fact that is assessed to exhibit convergence or divergence, to reflection upon how ideas about the nature and architecture of the modern corporation do not just report, but actively shape, their object of study. Instead of striving to provide an improved assessment of its credibility as a descriptive account of the contemporary state of corporate governance, our suggestion is that the study of comparative corporate governance might usefully incorporate consideration of claims about corporate governance as potentially performative statements that function to stabilize particular ideas of status and architecture of the modern corporation with substantive outcomes for political economy, thereby influencing the shape of the institutions comprising the field of corporate governance, and so, contribute to ‘bring[ing] about what they say’ (Gond et al., 2016: 442–443).

Our performative focus has involved a move ‘up-stream’, as it were, where analytical attention is directed to the (precarious) constitution, stabilization, and dissemination of knowledge claims about corporate status, architecture, and purpose. Specifically, we have explored how AT has legitimized and advanced a (unidirectional) privileging of shareholder primacy, and how this has significant outcomes in terms of political economy that include stakeholder claims as well as rights and environmental protections in relation to accountability, transparency, materiality, and compliance.

In commending a more nuanced formulation of the convergence thesis, we have suggested that the study of comparative corporate governance should attend to claims of convergence as performative statements that operate to stabilize concrete outcomes that have social and environmental significance. We conclude that the predominantly epistemological preoccupations of participants in the convergence/divergence debate could be usefully refined and supplemented by giving closer attention, empirical as well as theoretical, to the relation between performativity, convergence/divergence, and political economy.



## Notes

1. Since Austin coined the term, 'performative' has been assigned many other meanings, including '... *searching for efficiency* (Lyotard); *constituting the self* (Butler, Derrida); *bringing theory into being* (Callon, MacKenzie); and *socio-materiality mattering* (Barad)' (Gond et al., 2016: 442–443).
2. Beyond the examples mentioned here, these views travelled into broader institutions, including trade law, tax law, securities regulation, investment treaties and listing rules; listing rules, and banking regulation (Aguilera and Cuervo-Cazurra, 2004; Botzem, 2014; Collison et al., 2014; Du Plessis and Low, 2017; Ireland, 2010; Ireland and Pillay, 2010; Keay and Loughrey, 2015; Yoshikawa and Rasheed, 2009).

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