公司融资交易的法律基础

The Legal Foundations of Corporate Financial Transactions

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"Wall Street plays an indispensable role providing access to capital, so US companies can lay waste to competition in world markets. And all for a modest fee (yeah right)...When the go-go market in the late 1960s got out of hand with 30% annual volume increases and clerks in back offices couldn't move paper fast enough to settle trades...many [partnerships]...went public to be able to afford mainframe computers. When Intel went public in 1971, it took more than a few phone calls to raise money for the creator of dynamic random-access memories-weird stuff back then. White shoes gave way to road shows and the hiring of analysts to pick winners and losers from new funky industries...Analysts may be obviously conflicted, but 'conflict' is endemic to all of Wall Street. Traders are worthless without some 'edge'...Brokerages buy order flow so they can see where trades are and profit." (Andy Kessler, "The Rise and Fall of Full Service", The Asian Wall Street Journal, Aug 22, 2002)

"Those falling prices...for clothing, televisions, hotel rooms and cellular phone service...are being paid for with continued corporate layoffs, lackluster stock prices and a sky-high trade deficit...it is only after supply and demand get back into some rough balance, that businesses begin hiring and investing again...This time, however, that process is turning out to be longer and more drawn out than in the past... The big culprit...was the investment boom of the late 1990s...Flush with cheap money made available by Wall Street, businesses of all sorts rushed out and expanded their capacity...Washington policymakers moved so quickly to prop up the economy when it became clear a recession was in the offing...it also meant that the necessary task of working off all that excess capacity has been only partly done." (Steven Pearlstein, "A bounty of supply, paid for in lost jobs", International Herald Tribune, Aug 26, 2002)

“华尔街在获取资本上的作用是不可或缺的，所以美国公司在世界市场的竞争中能独占鳌头。这一切收费也不高(是啊)……20世纪60年代后期的热门投机市场失去控制后，每年交易量以30%增加，后台办公室的职员为了完成交易连文件都来不及搬……许多[合伙企业]……为了买大型计算机而公开募资。1971年，英特尔公司为了筹资生产内存——当时还是新奇的玩意儿——而公开募资的时候，那可不是打几个电话就能搞定的。贵族绅士(white shoes)让位给了巡回演出，分析家被聘请去从新生时髦的行业中挑出赢家和输家……而分析家们的意见可能互相有明显的冲突，但‘冲突’就是整个华尔街的流行病。交易商如果没有某种‘优越条件’的话就一文不值……经纪商出钱购买交易流量表，这样他们就能看出交易的内容，并找到利润所在。”(Andy Kessler,《全面服务的潮起潮落》，载于《亚洲华尔街杂志》，2002年8月22日)

“服装、电视、饭店房间和手机服务……的价格不断下跌……其代价是公司不断裁员，股票价格低迷，贸易赤字节节高攀……只有供需勉强回到平衡后，企业才会重新开始招聘和投资……但这一次，削减大量供给过剩的过程变得更加漫长……罪魁祸首……是20世纪90年代后期的投资热潮……华尔街带来了大量容易得到的钱，各行各业都迅速扩大规模……华盛顿的政策制定者也迅速行动起来支持经济发展，而衰退却已很清楚地摆在眼前了……这还意味着，完全清除过剩生产规模的必要任务才刚完成了一部分。”(Steven Pearlstein,《慷慨的供给，以失业为代价》，载于《国际先驱论坛》，2002年8月26日)

Foreword

Corporate financial transactions, and the law governing the same, are more practical and more exciting than nearly anything we can imagine. These are the elements of funding. Funding transforms the plan of the imaginative scientist, the practical engineer, and the salesman-manufacturer-owner, into the reality of aircraft, satellites, power plants, computer networks, health care chains from big pharmaceutical companies and biotech to the medical profession to group health insurance, tourist industries, Section 529 and Section 401k plans (which shift resources in the US to the tax-advantaged funding of education and retirement), the industrial, commercial and residential construction and construction financing industries, oil, gas, electricity and water distribution lines, and, in general, life as we know it.

When we speak of "financial", we mean that which has cas its subject matter, the payment or valuation, in terms of money, of some goods or service delivered or rendered in the future (which means, in the modern, secular world, that there is little that is not financial, hence the spectacular rise of the financial market and the behemoth organizations that participate therein). When we speak of "law" in the physical sciences, we mean a consistent set of equations or propositions, deduced from the smallest possible number of fundamental terms and assumptions, that is able to make unique predictions about natural phenomena that are eventually confirmed, as well as give rise to many other conclusions that are already carefully observed facts without generating conclusions that deny any such facts. This set, by hypothesis, is about the world that exists prior to human choices.

By hypothesis, the law of lawyers, including the law discussed in this book, is about the world that exists only after and as a result of human choices (hereinafter, "law"). There are fundamentally two approaches to law. One school of thought is that we can and should choose our laws by evaluating the choices such laws are intended to implement-in other words, we can and should evaluate our laws (and the actions of people under such laws) by electing among alternative sets of choices (choices are real degrees of freedom and represent alternative causalities). The other school of thought is that legal discourse should restrict itself to the evaluation of whether an action complies or does not comply with "the law as it is" (meaning the

前言

公司融资交易和规范公司融资交易的法律，几乎比我们所能想象的任何事情都要更实际、更刺激。它们是筹资活动的元素。充满想象力的科学家、务实的工程师和销售员—制造商—业主等人，他们的梦想，都是靠着筹资活动才最终变成了现实，如：飞行器、卫星、发电站、计算机网络；连锁保健机构，这条庞大连锁串起了大型制药公司与生物技术、医学行业及团体健康保险；旅游产业；Section 529和Section 401k计划（这些计划使得在美国享有税收优惠的教育和退休事业得到更多的资源）；工业建筑、商业建筑和居住建筑；建筑融资行业；输油管线、输气管线、输电管线和输水管线；总之，筹资使这些变成了我们生活的方方面面。

我们说到“融资”，指的是以钱的方式来支付或估值，而支付或者估值的对象则是在未来交付或提供的货物或服务（照这样看，在如今的大千世界中，没什么东西是不融资的，于是融资市场惊人地增长，参与融资市场的大型机构也惊人地增多）。我们在自然科学中说到“法”的时候，指的是一套互不矛盾的等式或命题，这些等式或者命题从最少的基本条件和假设中推论出来，能准确预测自然现象并最终证实预测，还能引申出许多其他结论，这些结论与人们以往细心观察到的事实相符，而非相悖。但是想象一下，这些等式和命题，在还没有人的选择之前，就已经存在了。

按照假设，律师眼中的法律，包括本书所讨论的法律，都是针对有了人的选择以后的世界，是以人的选择为结果的世界（以下称为“法律”）。看待法律有两种基本方式。一种学派认为我们可以也应当如下地选择法律：先看要用法律来实现什么目的，然后通过评价和挑选这些目的，来选择法律——也就是说我们可以也应当评估我们的法律（并且评估人们在这些法律规定下的行为），而评估

written rules which, in the view of this school, exhaust the body of law), as such law is amended legislatively from time to time, and avoid the unanswerable (and hence false) questions of ① whether choice "really" exists and ② what the law "ought to be" (legislatures, insofar as they reflect human nature, will tend to enact laws maximizing utility, and choosing among choices leads to infinite regress). The two schools of thought share common ground insofar as they agree that any law generated other than by democratic processes is at best provisional.

This book began as a series of lectures I was invited to give in 2002 on the terminology, laws and contracts that are critical in the major activities of investment banks[1]. Chapters 2 and 3 of this book reflect most of the subject matter of those lectures, which emphasized the fact that it is through contracts that the risks, costs, goals and operations of businesses and their financial intermediaries are allocated, conceived, memorialized, and enforced, and without contracts, coherent, reliable business is unthinkable and would devolve into chatter, opinion and habit.

I am indebted to University of International Business and Economics, Gao Xiqing, then Vice Chairman of the China Securities Regulatory Commission and alumnus of that school, and Jiao Jinhong, Vice Dean of that school, for the honor and privilege of teaching there.

I am also indebted to the three great institutions which I have served-the New York law firm of Debevoise & Plimpton, the American investment bank of Goldman Sachs and the German universal bank Deutsche Bank—and the mentors there with whom I was privileged to work. At Debevoise we advised corporate clients on transactions and litigation involving obligations to (a) pay or repay large-scale debt and/or (b) shareholders or other principals to whom are owed fiduciary duties. At Goldman we advised corporate clients on the augmentation of their market capitalizations, primarily through operations in the public capital markets. And at Deutsche we were embarked on self-transformation, from x, a "house bank" that was providing the full range of required investment banking services to Germany Inc (including its unique mittelstand), generally adhering to a powerful, institutionalized credo of loyalty to customer, shareholder, employee and society, and also a global depositary institution of tremendous financial resources, into y, a cosmopoli-

1 Being a NY-qualified lawyer, and also observing that the investment banking industry is dominated by US firms, which for nearly 3/4 of a century enjoyed near-monopoly status in the area most critical to investment banking development (license to make markets in the US equity securities) until passage of the Graham-Leach-Bliley law, I limited my course to a discussion of US law.

的方法就是在备选的各套规则中进行挑拣，选出一套来（这些备选的规则体现了不同程度的自由，也体现了不同的因果关系）。另外一种学派则认为，在法律市场修订的情况下，对法律的探讨应该限于评价一个行为是否遵守了“实然法”（照这种想法，意味着成文法要穷尽全部法典）。这种学派还认为要避免提出一些无法回答的问题（因此成了伪命题），比如说，①是不是“真的”能有可供挑选的各套规则；②什么才是“应然法”（立法机关只要带点人之常情，就倾向于在制定法律中追求效用最大化，然后从许多套的规则中挑拣，这只会导致不断的退步）。这两种学派在一定范围内有共同点，即它们都认为，任何非经民主程序而产生的法律，顶多只能见效一时。

本书原是我于2002年应邀进行的一系列讲座[1]，内容是关于投资银行的一些主要活动中必须涉及的术语、法律和合同。本书第二章和第三章是这些讲座的主题内容所在，它们强调，企业和金融中介之间的风险、成本、目标和营运，是通过合同关系来分配、设计、请求和实施的，没有了合同，就不用指望有完整、可靠的交易，没有了合同，那些买卖只能变成天马行空的高谈阔论和商场上的客套。

我十分感谢高西庆先生，时任中国证监会副主席，对外经济贸易大学的校友们，和焦津洪副校长，感谢他们使我有幸在那里执教。

我十分感谢我曾效力过的三个伟大的机构——纽约Debevoise & Plimpton律师事务所、美国高盛投资银行和德国的全能银行——德意志银行——以及这三个机构中我曾有幸与之共事的前辈。在Debevoise我们为客户的交易和诉讼提供顾问意见，这些客户们在交易和诉讼中的义务有：①支付或偿还大规模的债务，②对股东或其他主体的信托职责；在高盛投资银行，我们向客户提供顾问意见帮助其增加资本市场总额，主要手段是靠公共资本市场里的运作。在德意

1 我作为纽约州的执业律师，并认识到投资银行业是由美国企业所主导的，美国企业在对投资银行业发展最为关键的领域中（在美国股票上的造市许可）独领风骚了四分之三个世纪，直到Graham-Leach-Bliley法的出台，因此我的课程限于对美国法的讨论。

tan institution operating in nearly every corner of the earth and attempting to compete with the "bulge-bracket" American investment banks at their most lucrative fee-generating game.

After completing the course in China in 2002, I wondered whether it would be possible to treat the law of investment banking more systematically. I realized that "the law as it is" means a wide range of things to different people. Equally, that different people make different choices. Where was one to go in order to come to some reliable common denominator with which to assess conduct in the financial markets? Would it be possible, from a minimal set of consistent fundamental propositions, to coherently and comprehensively ① describe the basic subject matter of corporate financial law, and at the same time ② prescribe the primary duties and correlative rights of parties subject to such law without merely prescribing one's own subjective choice to evaluate other choices in a circular manner? In the agent-principal relations that pervade the financial markets and above all in the meaning of a "body corporate", I found my answer.

The seemingly relentless rise of the global stock markets from the 1980s through the 1990s is no longer with us. Money is still being made on Wall Street, but primarily in trading operations. In the meantime, given Enron, Worldcom, Tyco, the research and spinning scandals, and the mutual fund trading abuses, investment banks have generally thought it wise to protect their reputations behind a coterie of lawyers skilled in the contentious and regulatory arts, because if money is not to be made, then at least they can avoid franchise-crushing judicial or administrative decisions by skillful repartee with plaintiffs' lawyers, prosecutors and regulators. Unfortunately, these measures are meant to kill germs but lack the technical content to define a tone for what the germ-free financial institution should do once germ-free, assuming the measures are successful in the first place in their antiseptic crusade.

What isolated litigation, prosecution, and the reproachful installation of bureaucracy cannot solve is the problem that the most important terms of our financial legal discourse, such as "shareholder value", mean widely disparate things to different people, culminating in a weltanschauung that anything is possible: limitless corporate value in which everyone can benefit at little cost, the Janus face of this Pollyannism of shifting standards and language, the growth of perverse incentives for managers and conflicts of interest between classes of constituents in the market (including the investment bank, or "house"). The tone of the great financial houses

志银行，我们还进行了自我转型，从原来的“看家银行”，向德国公司（包括其独有的中小企业）提供全面的投资银行业务服务，对客户、股东、雇员和社会有着深厚甚至刻板的忠诚，同时也是一家全球性的存款机构，拥有大量金融资源，后来转变为一家多元化的机构，活跃在世界的各个角落，并试图与美国投资银行中“表现最佳投行”一比高下，与那些佼佼者在他们利润最为丰厚的领域中角逐。

在中国教完了2002年的课程以后，我思考是否能更加系统化地看待投资银行业法。我知道不同的人对“实然法”有许多不同的理解。同样，不同的人也会做不同的选择。一个人要怎样才能得出可靠的基准，用来评价融资市场里的行为？是不是有可能，通过几个互不矛盾的基本命题，来前后一致、综合全面地①描述公司融资法律的基本主题，同时②规定法律下各方的主要义务和相关权利？而不是仅规定个人的主观选择、再拿这些主观选择用循环论证的方法来评价其他选择？代理人—委托人的关系，在融资市场随处可见，正是从这代理人—委托人关系中，尤其是从“法人”的含义中，我找到了答案。

全球股市从20世纪80年代到90年代，貌似节节高升，但这种日升夜涨已经离我们远去了。在华尔街上，该挣的钱还在挣，但主要是靠买进卖出。同时，由于安然、世通、泰科等事件、研究报告和违规派送新股丑闻以及共同基金交易泛滥，投资银行都认为躲在律师团身后才是保全名声的良策，因为律师的口才和协调手段高超，即使银行挣不到钱，至少也能用律师的三寸不烂之舌来对付原告律师、检察官和政府监管人员，以避免出现司法判决或行政裁决带来的排山倒海的后果。可惜这些办法只能是小打小闹，缺乏技术含量，就算能用来掸掸灰，至于一旦掸完了灰后，这些干干净净的金融机构以后该做些什么，还是没有什么明路。

有的问题却不能通过单独的诉讼、控告以及政府的追究得以解决，这个问题就是，不同的人对融资法律里的基本术语的理解实在差别太大，比如对“股东价值”等的理解就大相径庭，最后导致人们的世界观是：一切皆有可能，每个人

has been set, not by edifices of paper "controls" and adroitness in conversation with regulators and plaintiffs' lawyers (though these skills have their uses in cutting losses), but by leadership that embodies the spirit of self-control in its every act of doing the business of investment banking. Our enduring admiration is reserved for the leader revealed at the very end of this book, and if anyone in the corporate world deserves to be remunerated well (but not astronomically) it is that person, who is inspired to make the principal and her own agency what they are not yet.

Legal positivism, which accretes rules in a narrow, fact-oriented, litigation-driven process, tends to react to problems and disputes by adaptation and modus vivendi, and by reference to the status quo-increasingly, it becomes a luxury that is feasible only for tight-knit communities that really have a law in common (common law). The disconnect between the written law and financial phenomena is growing because the latter grows exponentially while the formen grows incrementally if at all. To be effective, corporate financial law must make closer reference to the actuality of the financial market, yet also find the deepest principles inherent in, and prior to, all our many actual (and often ad hoc, inconsistent, but somehow "working") rules. For this reason, this book sweeps through vast swathes of law, using the vehicle of this philosophical approach, crystallizing in several dozens of pages what the author deems to be all of the elements of US investment banking operations and its relevant laws and contracts, without lingering for a leisurely or highly technical expansion of any single topic other than for minimal illustrative purposes. Having captured the skeletal essence of the law of corporate financial transactions from the first principles, the book culminates with a series of normative consequences of this framework.

This book provides a measure of prediction as to what agents tend to survive the inescapable cyclicality of financial activity and what agents do not. In Chapter 4 it arrives at three critical choices which financial agents must make in order to be their best for their shareholding principals: be honest and precise in divulging costs; tend to minimize rather than maximize markups over all-in costs (including the cost of capital); and let the house suffer each time or loyalty to a customer would otherwise be compromised. They are the predicates of a fundamental proposition, designated as "Normative Agency", that generates a description of most investment banking activity in fact and a prescription of a standard of behavior, which are objective, testable and independent of our penchant for polling shifting

只要花很小的成本就能从巨额的公司价值中获益;盲目乐观主义者在众说纷纭中首鼠两端;管理者的不良动机增加;市场内各个阶层之间利益冲突加剧(这些阶层也包括投资银行,或者"做自营业务的投资银行")。为大型金融机构指出一条明路,不是靠纸上谈兵,也不是靠巧舌如簧来对付政府监管人员和原告律师(尽管这些技巧在减少损失上有点用处),而是靠领导能力,这种领导能力包含了投资银行业务每一个动作中的自制精神。我们对本书最后所呈现的领袖人物致以不尽的敬意,如果商界中有人能配得上高薪(但不是高到天文数字),那就是这样的领袖人物了,他们竭力使她的委托人价值上升,也竭力使自己的代理服务更上一层楼。

法律实证主义,在狭义的、以事实为导向的、并由诉讼来驱动的程序中,不断地累积着判例和规则,当它面对问题和争端的时候,则倾向于调整和暂时妥协,而且跟现状相比——它已进一步成为奢侈品,只有在确实有法律共识(普通法)的严密组织中,法律实证主义才可行。可是成文法和融资的实际情况之间的差别越来越大,因为后者呈指数增长,而前者即使增长也是简单递增。公司融资法律要有效,就必须更紧跟融资市场的实际情况,并从我们浩如烟海的(常常是不长久的、互相矛盾的,却不知怎么仍旧"管用"的)判例和规定当中,寻觅出放之四海皆准而且业已存在的大道理。为此,本书抛开法律的束缚,以哲学方法为工具,用几十页的方寸之地,写下作者心目中的美国投资银行业运作中的全部要素及其相关的法律和合同,除了少量说明需要,将不对任何一个话题进行漫话性的或极技术性的展开。本书从那些基本原理中掌握公司融资交易法律的精髓,以该框架下产生的一系列规范化的后果为高潮。

本书提出了一套预测方法,用于融资活动的必然循环中,预测怎样的代理人可以生存下来,而怎样的代理人则会被淘汰。在第四章写到融资代理人尽力地服务于他们的股东委托人时,必须做出三个重要选择:在透露成本时要诚实、准确;在总成本(包括资本成本)上的利润幅度要倾向于最小化而不是最大化;

taste and opinion. This proposition lies at the intersection of the civil and common law traditions, insofar as methodology is concerned-it is discovered by empirical observation of and induction from the American law (which largely reflects the financial marketplace) as it is, and it is applied as a prior, axiomatically indisputable first principle, logically through to consequences for all participants in the financial markets.

The fact that American corporate enterprise achieved an early maturation in terms of scale of productivity and employment of people has deeply affected the progress and migration of corporate financial transactions over the past 30 years. Perhaps the two most unique technical innovations of investment banking during this period-discussed in Chapter 3 in "Underwriting and Research" and "Off-Balance Sheet Financing"-are the discoveries and responses to the huge demands by three new uses of funds: (a) foreign governments, (b) pension obligations (as required under the ERISA of 1974) and (c) holders of illiquid receivables (ranging from the US savings and loans associations to car manufacturers to credit card companies to buyout firms). Foreign governments are exiting various previously state-owned enterprises; pension obligations have accelerated; and illiquid receivables grow with GDP and the inevitability of business cycles. The book-built, equity capital markets-led process of distribution of global privatizations and other first-time stock offerings of non-American companies to a largely international, often actively trading, institutional investor base, including mutual funds and other money managers seeking higher returns than those offered in the US, has been one innovation. The diversification and repackaging of pools of illiquid receivables into tradeable instruments has been the other.

It has not escaped the attention of US investment banks that these trends, leading them first to London, the rest of Western Europe and Japan, now bring them to China's door. It is in China that perhaps the largest potential sustainable demand for these two innovations lies today, the thorough consummation of which, if desired, will require the professionalization of decision-making in China at a number of levels. Given the dizzying pace of dissemination throughout the world of financial information and execution of financial transactions based thereon, one expects a certain convergence of ideas, and with that the consolidation of an industry can be achieved which makes it possible that increasingly homogenized services can be provided at minimal cost (provided that oligopolistic providers are not permitted to abuse pricing power). This uniformity is heralded in, among other develop-

在与客户有利益冲突时，为了实现对客户的忠诚，要自己承担损失。这三个选择是由同一个基础命题所要求的，被称作“规范化的代理”，很客观，经得起考验，不随波逐流，它们描述了现实中绝大多数投资银行的活动，也规定了行为标准。这个命题结合了大陆法传统和普通法传统，至少在方法论方面——它来源于对美国实然法（在很大程度上是融资市场的反映）的经验观察和归纳，是一条业已存在、不辩自明的基本原则，命题的逻辑结果适用于融资市场全部参与者。

美国的公司在生产力规模和就业方面成熟较早，这就深刻地影响了以往30年中公司融资交易的进展和变迁。这段期间投资银行业中两项最为独特的技术革新——在第三章中讨论的“承销与研究”和“表外融资”——可能是由于发现了资金三项新用途所导致的巨大需求，并对此予以的回应，资金是用于：①外国政府；②养老金支付义务（1974年雇员退休收入保障法的要求）；③非流动性应收款的持有人（包括美国的储蓄和贷款协会、汽车生产商、信用卡公司，以及股权收购公司）。外国政府正在从昔日各种模式的国有公司退出；养老金支付义务已经加速到期；而非流动性应收款数额，随着GDP增长和商业周期不可避免地延长，也与之俱增。革新之一就是全球私有化分配和其他的非美国公司首次股票发行的分配，分配的过程是通过竞价需求建档和资本市场运作，而接受分配的团体则主要是国际性的、通常交易活跃的机构投资人，包括共同基金和其他金钱管理人，这些金钱管理人寻求的回报要比在美国发行得到的回报高。另一革新就是对非流动性应收款组合进行分散经营和重新打包使其变成可以交易的工具。

美国的投资银行并没有忽略这些趋势，这些趋势先是把它们引到了伦敦、西欧的其他地方和日本，现在又把它们引到了中国的大门口。或许就是在中国，对这两项革新有当今最大的潜在可持续的需求，而想完全实现革新，中国就要在数个层面上都实现决策的职业化。假如融资信息以迅雷不及掩耳的速度漫天散布，并且融资交易根据这些信息飞快执行，就有望出现各种意见的汇总，有了

ments in the developing world, the tremendous strides being made in China to integrate the best of common and civil law. In China, we are witnessing the difficult, embryonic stage of the consolidation of commercial and pragmatic, decentralized, fact-oriented rulemaking on the one hand, with a deductive codification of legal experience from axiomatic first principles on the other hand. These strides run parallel to the more celebrated assimilation of modern science and technology occurring on Chinese soil today after a prolonged period of indifference to the external world, and may well result in a culture that is truly original in the world. But for that to happen, as China embarks on its experiment to integrate its hitherto state-owned economy into the world, nothing will be more critical than the emergence of authentic agents to whom the government can delegate the burdens and benefits of achieving corporate immortality.

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这样的汇总，就有望出现行业整合，使日益均一化的服务的成本最小化（前提是垄断者不滥用定价权）。这样的统一，连同发展中国家在其他领域的进步，将首先出现在中国大步整合普通法和大陆法精华部分的过程中。中国正处于整合工作的艰难初期，一边的规则制定工作是商业的、现实的、自由化的、要以事实为依据的，而另一边演绎编纂的法律经验则是从公理般的基本原则中得来。这些进步比起中国大地上更为有名的现代科技同化，可谓旗鼓相当，而现代科技的同化也是在对外界不闻不问很多年后才出现的，法律的整合还很可能产生世界上别具一格的文化。但为了实现这些，就像中国正在尝试把今天的国有经济融合到世界中去一样，最重要的莫过于出现可信的代理人，政府才能把实现公司永存的担子和好处都委托给这些代理人。

张羲淳

著于西雅图，华盛顿州