

## The Very Uncertain Prospect of Global Convergence in Corporate Governance

Douglas M. Branson

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# The Very Uncertain Prospect of “Global” Convergence in Corporate Governance

Douglas M. Branson\*

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## Introduction

In the area of corporation law, the United States legal academy periodically falls in love with its own ideas. In the early 1990s, for example, scholars wrote about, and subsequently oversold, institutional investor activism as a means of holding corporate managers and boards of directors accountable.<sup>1</sup> In the 1980s, takeover bids and the market for corporate control

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1. See, e.g., Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991); cf. Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991) (explaining the only likely players will be a small subset of a subset of institutional investors, namely, some but not all of the public employee pension funds in the pension fund sector); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993).

occupied center stage.<sup>2</sup>

Scholars partaking in the corporate social responsibility movement of the 1970s thought government intervention was necessary to keep managers and boards responsible, whether in the form of federal minimum legal standards for corporate actors,<sup>3</sup> federal chartering of large publicly held corporations,<sup>4</sup> mandatory corporate social accounting and disclosure,<sup>5</sup> or installation of public interest directors.<sup>6</sup>

Today the academy has become much enamored with the notion of "global" convergence in corporate governance. That is to say, in the opinion of a number of the elites in the United States corporate law academy, the governance structure and practices of larger corporations all over the world soon will take on a resemblance one to another.<sup>7</sup> The telecommunications revolution, the ease of international jet travel, and pressure from law makers, stock exchanges, pension funds, and others, combine to motivate and enable those who control larger corporations to become conversant with corporate governance structures and practices. Those who

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2. Leading pieces include Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Ronald Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); see also Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775 (1982). The insight that a market exists for corporate control was developed by Dean Henry Manne. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

3. E.g., William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 700-01 (1974).

4. E.g., RALPH NADER ET AL., *CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS* (1976); Donald E. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71 (1972); Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972).

5. E.g., Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539 (1976).

6. E.g., Herman Schwartz, *Governmentally Appointed Directors in a Private Corporation—The Communications Satellite Act of 1962*, 79 HARV. L. REV. 350 (1965); Symposium, *The Corporate Machinery for Hearing and Heeding New Voices*, 27 BUS. LAW. 195, 197-208 (1971).

7. E.g., Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1145-1146 (1999); Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L L. 5, 6 (1999); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999); Jeffrey N. Gordon, *Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219 (1999); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001); Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367 (1996); see also Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999). For other convergence pieces, see Mary E. Kisanine, *Global Gadflies: Applications and Implications of U.S.-Style Corporate Governance Abroad*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 621 (1997); Gustavo Visentini, *Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?*, 23 BROOK. J. INT'L L. 833 (1998).

control large corporations feel considerable pressure to adopt the best of such practices and structures gleaned from a global inventory.

Assuming that such a convergence is taking place, the further question is toward what point are those global corporate governance vectors converging? According to United States scholars writing on the subject, with little dissent, the agreement is that the convergence will be on a set of governance parameters that will replicate the American model of corporate governance.<sup>8</sup> The only debate involves questions such as whether convergence will be "formal," in the sense of adoption of United States style corporate legal regimes throughout the world, or "functional," in the sense of a worldwide accord as to best practices.<sup>9</sup>

Increasingly, corporate directors are familiar with governance developments in other nations. An Australian company director knows not only what the Bosch Report in Australia<sup>10</sup> may dictate for her company but may also be familiar with the Cadbury Code in the United Kingdom,<sup>11</sup> the American Law Institute's *Principles of Corporate Governance and Structure*,<sup>12</sup> and the General Motors 29 Points in the United States.<sup>13</sup> The Cadbury, Hampel,<sup>14</sup> and Greenbury<sup>15</sup> Reports in the United Kingdom have influenced corporate law reform proposals in Germany<sup>16</sup> and in France.<sup>17</sup> In that manner, to a degree at least, life has begun imitating art: corporations are modeling their corporate governance practices based

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8. But 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. TRAN'L L. 213 (1999); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2036 (1993) (expressing reservations about basing corporate law change on differences in short term national productivity rates and terming "a dubious proposition" that "German and Japanese corporate governance arrangements should be emulated by U.S. firms").

9. E.g., Coffee, *supra* note 7, at 679-80; Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function* (Dec. 5, 1998) (unpublished manuscript), cited in Coffee, *supra* note 7, at 649 n.27; Hansmann & Kraakman, *supra* note 7, at 459 n.35.

10. AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS ET AL., *CORPORATE PRACTICES AND CONDUCT* (2d ed. 1993).

11. COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, *THE CODE OF BEST PRACTICE* (London 1992).

12. AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* (1994).

13. GENERAL MOTORS BOARD OF DIRECTORS, *GM BOARD GUIDELINES ON SIGNIFICANT CORPORATE GOVERNANCE ISSUES* (rev. ed. 1995).

14. COMMITTEE ON CORPORATE GOVERNANCE, *COMMITTEE ON CORPORATE GOVERNANCE: FINAL REPORT* (LONDON 1998).

15. *DIRECTORS' REMUNERATION: REPORT OF A STUDY GROUP CHAIRED BY SIR RICHARD GREENBURY* (1995).

16. E.g., Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69, 78-79, 109-16 (1998).

17. E.g., James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 CORNELL INT'L L.J. 31, 87 (1998). But see *id.* at 87 n.286 ("A cynic might also suggest that since U.S. scholars and practitioners produced their 'Principles of Corporate Governance' and their U.K. counterparts their 'Cadbury Report,' the French felt obligated to do the same, without acknowledging that they were simply following the Anglo-Saxon model . . .").

upon blueprints drawn up by academics, regulators and directors interested in the notion of corporate self-regulation.

But it is a limited phenomenon. There is no massive "global" convergence in corporate governance. At best the evidence is of some incomplete transatlantic convergence with an outlier here and there.

In other cultures and economies great resentment exists toward United States economic imperialism and Americanocentric notions of the United States as the universal nation that, as unstated premises, underlie much of the global convergence scholarship. The recent "Millennium" or "Seattle" round of trade negotiations under the aegis of the World Trade Organization (WTO), with mass anti-WTO demonstrations, and the Washington, D.C. protests at the annual meetings of the World Bank and the International Monetary Fund, tell us further that there is significant opposition to globalization of anything, whether led by the United States or otherwise.<sup>18</sup>

Part I of this article reviews the United States global convergence scholarship. Part II develops the theme that United States corporate regulation has never traveled well internationally as well as the complementary theme that prior attempts at harmonization on an international scale have failed badly. Those themes raise the question why convergence advocates believe that United States style corporate governance will travel any better.

Part III points out the relative insularity and cultural insensitivity of the United States scholarship. Convergence advocates posit convergence based upon their study of capitalism in the United States, the United Kingdom, Germany and perhaps Japan.<sup>19</sup> They ignore most of the world's remaining 6 billion people, the largest nations on earth (the People's Republic of China, India, Indonesia), and the culture beneath law and economic systems that is as or more important than law or capitalism itself. Cultural diversity militates against convergence.

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18. And that opposition continues. E.g., undated flier posted in Forbes Quadrangle, University of Pittsburgh, April, 2000 (on file with author):

Mobilization for Global Justice, Washington, D.C. In April the World Bank and the International Monetary Fund will hold their annual spring meetings in Washington. As usual, their agenda includes making the world safer for corporations—and more dangerous for people and the planet. So join us as we call for justice! Sunday, April 16, Non-violent direct action. Shut down the meetings!  
 . . . For more information: [www.al6.org](http://www.al6.org).

*Id.*; see also Mark Helm, *Seattle Protesters Target D.C.—Aiming to Disrupt Next Week's World Bank-IMF Joint Meeting*, PITTSBURGH POST-GAZETTE, Apr. 10, 2000, at A5.

19. Since the economic crisis hit Asia, many United States scholars have deleted Japan from their already artificially narrow sample of corporate governance jurisdictions. Rock, *supra* note 7, at 380-81 ("The tone of comparative corporate scholarship has changed over the last few years as the U.S. economy has bounced back and Germany and Japan have lagged."). The picture was radically different a few years earlier, with many comparisons being made between Japanese and United States corporate governance styles. E.g., J. Mark Ramseyer, *Legal Rules in Repeated Deals: Banking in the Shadow of Defection in Japan*, 20 J. LEGAL STUD. 91, 97-114 (1991); J. Mark Ramseyer, *Takeovers in Japan: Opportunism, Ideology, and Corporate Control*, 35 UCLA L. REV. 1 (1987); Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927 (1993). See generally WILLIAM S. DIETRICH, *IN THE SHADOW OF THE RISING SUN: THE POLITICAL ROOTS OF AMERICAN ECONOMIC DECLINE* (1991).

Part IV pursues the similar theme of economic, rather than cultural, insensitivity. A rich literature, ignored by the global convergence advocates, exists on capitalism in contrasting cultures. While most (but not all) nation states may now be said to have a capitalistic economic system, comparisons to United States and U.K. style capitalism are inapt. Worldwide the prevailing form of capitalism is said to be an "embedded capitalism" that serves and is integrated into the social order rather than the stand alone, highly individualistic Reagan-Thatcher style of capitalism that, for convergence advocates, constitutes the platonic form for capitalism everywhere. There are many cultures and many kinds of capitalism—family capitalism, managed capitalism, bamboo capitalism, crony capitalism, even the gangster capitalism of modern day Russia—and most of them may be ill-suited for United States style corporate governance.

Another worldwide phenomenon is backlash, chronicled in Part V. From France to Indonesia and from South Africa to Sweden there is a backlash against passing off United States culture, including its economic and legal culture, as universal ("one size fits all") culture that presents the obvious solution to national and regional problems. Coupled with the anti-American backlash is the growing world unrest with globalization, at the least in the bulldozer-like form it takes in the thinking of multinational corporations and international organizations such as the World Bank, the International Monetary Fund or the World Trade Organization, all of which the world perceives as being controlled or dominated by the United States. These powerful emerging forces of backlash militate against anything that could be said to be "global" convergence in corporate governance.

Perhaps the best argument against global convergence in corporate governance is its irrelevancy if, indeed, some convergence is taking place. The recent growth of huge multinationals is the most striking worldwide economic development of the late 1990s and the early 21st century. United States style and traditional forms of corporate governance, which respond to the Berle-Means separation of ownership from control and the ensuing agency cost problem, simply are not responsive to the problems the growth of large multinationals portend. Worker exploitation, degradation of the environment, economic imperialism, regulatory arbitrage, and plantation production efforts by the growing stable of gargantuan multinationals, whose power exceeds that of most nation states, is far higher on the global agenda than is convergence in governance. Part VI develops those ideas.

The conclusion is that, simply put, most United States scholars have a fundamental misunderstanding of what globalization is and what may be expected of it. They share the view of United States multinationals and much of the community of international organizations that globalization means elimination of all barriers and differences—the promotion of homogeneity across the face of the earth—"globalization as a bulldozer." Instead, globalization is a technological and telecommunications revolu-

tion, a phenomenon of the information age, which will not necessarily erase all differences and barriers between nations and cultures.

Globalization thus portends convergence but it will not be global. Further, what convergence does occur may not be United States dominated but may occur around several disparate loci. Most importantly, the growth of large multinational corporations renders the convergence advocacy relatively insignificant in the larger scale of things.

## I. Global Convergence in Corporate Governance Advocacy

### A. Introduction

In 1993, the author published the first United States treatise on corporate governance.<sup>20</sup> The editors conducted a copyright search to insure the title's availability. This manuscript was apparently the first, on this side of the Atlantic at least, to lay claim to the title "Corporate Governance."

Today there is a flood of corporate governance scholarship, much of it comparative. In March 2000 alone, on the Social Science Research Network, authors posted abstracts and/or drafts of eight comparative corporate governance articles, ranging from *Corporate Governance Lessons from Russian Enterprise Fiascoes*,<sup>21</sup> and *Corporate Governance in Post-Privatized Slovenia*,<sup>22</sup> to *Japanese Corporate Governance: The Hidden Problems of the Corporate Law and Their Solutions*.<sup>23</sup> Other papers do not include "Corporate Governance" in the title but do deal with some aspect of corporate governance, pursuing a comparative theme.<sup>24</sup>

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20. DOUGLAS M. BRANSON, *CORPORATE GOVERNANCE* (1993).

21. Merritt B. Fox & Michael A. Heller, *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. Rev. 1720 (2000), available at Social Science Research Network Electronic Paper Collection, abstract\_id 203368 (1999).

22. Rado Bohinc & Stephen M. Bainbridge, *Corporate Governance in Post-Privatized Slovenia*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 199548 (1999).

23. Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of the Corporate Law and their Solutions*, Columbia Law School Working Paper No. 153, available at Social Science Research Network Electronic Paper Collection, abstract\_id 163377 (1999). Other papers included Marcello Bianchi & Luca Enriques, *Corporate Governance in Italy After the 1998 Reform: What Role for Institutional Investors?*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 203112 (2001); Cheffins, *supra* note 7; Curtis J. Milhaupt, *Privatization and Corporate Governance: Strategy for a Unified Korea*, available at SSRN Electronic Paper Collection abstract\_id 203548 (1999); COMMITTEE ON CORPORATE GOVERNANCE, *CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE (KOREA)* (1999).

24. E.g., Laurence Bloch & Elizabeth Kremp, *Ownership and Voting Power in France*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 200632 (1999); Laura N. Beny, *A Comparative Empirical Investigation of Agency and Market Theories of Insider Trading*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 193070 (1999); Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 200914; Jeffrey Lawrence & G.P. Stapledon, *Is Board Composition Important? A Study of Listed Australian Companies*, available at Social Science Research Network Electronic Paper Collection, abstract\_id 193528 (1999).



None of that corporate governance scholarship postulates a global convergence. Indeed, some of it demonstrates a decided lack of convergence, such as the failure of a Westernized corporation law in Russia<sup>25</sup> or the conscious choice in post-privatized Slovenia for extensive labor involvement in governance and a statutory scheme along the lines of German co-determination,<sup>26</sup> or the empirical demonstration that in Australia at least American style boards comprised of independent directors do not increase corporate profitability.<sup>27</sup>

Undaunted, United States scholars continue to predict the hegemony of United States governance. Some of these predictions take the form of bald assertions, with little analysis or citation. For example, in France family style capitalism is the overwhelmingly dominant form.<sup>28</sup> The French government promotes dispersed ownership and United States style market capitalism as a means of strengthening an economy that has been in a protracted slump, but without great success.

Nonetheless, the very scholar who makes those observations asserts that "technological changes and the globalization of the economy are pushing corporate governance worldwide towards a United States style market capitalism."<sup>29</sup> In the same vein, after discussing the potential influence of culture on shareholder manager relationships, he concludes:

Yet, like economic destiny, corporate governance is no longer entirely under the control of any nation state. Indeed, corporate law scholars debate whether a transformation in the world business environment has [already] caused a "convergence" of corporate governance whereby cultural factors are losing their influence.<sup>30</sup>

## B. Global Convergence Based upon European Developments

A more analytical treatment reviews several manifestations of global convergence in European and European Union harmonization efforts.<sup>31</sup> Thus the Frankfurt and London stock exchanges agreed to (and later abandoned) a merger that also involved a 20 percent participation by the French.<sup>32</sup> The European Union (EU) has pushed hard for standardization of the accounting rules used in its 15 member states.<sup>33</sup> The Paris based Organization for Economic Cooperation and Development (OECD) has

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25. See, e.g., Fox & Heller, *supra* note 21.

26. Bohinc & Bainbridge, *supra* note 22, at 1-2.

27. Lawrence & Stapledon, *supra* note 24, at 27.

28. Bloch & Kremp, *supra* note 24, at 18.

29. Fanto, *supra* note 17, at 32.

30. *Id.* at 33.

31. Cunningham, *supra* note 7, at 1148-52.

32. *Id.* at 1151-52; see also Edmund L. Andrews, *London and Frankfurt Stock Exchanges Form Alliance*, N.Y. TIMES, July 8, 1998, at D4; Alan Cowell, *French Agree to a European Stock Exchange*, N.Y. TIMES, Nov. 20, 1998, at C6. But see Erik Portanger & Vanessa Fuhrmans, *How It Became a Foggy Day on the London Exchange*, WALL ST. J., Nov. 2, 2000, at C1.

33. Cunningham, *supra* note 7, at 1148.

promulgated a Code of Conduct for Multinational Corporations.<sup>34</sup> Large multinational corporations such as DaimlerChrysler list their shares both on European and United States stock exchanges.<sup>35</sup> The SEC has been working with the International Organization of Securities Commissions (IOSCO) to develop international standards for nonfinancial statement disclosure.<sup>36</sup>

Given that evidence and its largely United States-European bias, it seems a stretch to conclude that "[c]ross border alliances among businesses are leading to the articulation of a new global corporate governance template which uses existing tools to build a new corporate world order."<sup>37</sup> The statement seems disproportionately outsized for the evidence presented which is, after all, only of EU and transatlantic developments.

### C. Convergence in the Quest for Equity Capital

Professor John Coffee, an eminent scholar always in the forefront of new thought, predicts global convergence through "the backdoor," so to speak, as foreign firms seek stock exchange listings in the United States and thus make themselves subject to United States style corporate governance norms.<sup>38</sup> Foreign issuers arrive on United States shores because of the strength of United States capital markets. In turn, the strength of United States capital markets stems from the protection United States law extends to minority investors in United States enterprises.<sup>39</sup>

Foreign issuers come to United States shores, however, because that is where the money is, not because of the protection United States law may once have given to minority share interests. And the United States supply of capital is not inexhaustible and is not exclusive. There is money elsewhere in the world, lots of it in fact, in Frankfurt, London, Zurich, Johannesburg, Riyadh, Milan, Sydney and Singapore, to name a few international banking centers. In fact, in February 2000, perhaps aware of strong capital markets in East Asia, seven United States high tech firms listed their common shares on the Hong Kong Stock Exchange.<sup>40</sup>

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34. *Id.* at 1171; see OECD, *The OECD Guidelines for Multinational Enterprises*, at <http://www.oecd.org/daf/investment/guidelines/index.htm> (last modified Apr. 5, 2001).

35. Cunningham, *supra* note 7, at 1170.

36. *Id.*

37. *Id.* at 1194.

38. See generally Coffee, *supra* note 7 (stating that functional convergence in corporate governance is arriving at the level of securities regulation and stock exchange requirements). On February 21-23, 2000, Professor Coffee expounded on a similar theme in delivering the Julius Rosenthal Foundation Lectures at Northwestern University School of Law, entitled "The Public Corporation in the Global Era." John C. Coffee, Jr., Address at the Julius Rosenthal Foundation Lecture Series, Northwestern University School of Law (Feb. 21-23, 2000) (brochure on file with author).

39. Coffee, *supra* note 7, at 644, 698.

40. See *International Developments: Seven NASDAQ Stocks to be Available in Hong Kong in Pilot Program*, 31 SEC. REG. & L. REP. (BNA) 1654 (Dec. 20, 1999) (noting Hong Kong listings for Microsoft, Intel, Cisco, Dell Computer, Amgen, Applied Materials and Starbucks Coffee).

The protection of minority shareholdings in United States publicly traded ventures is also yesterday's, or the day before yesterday's, news. The odds of a minority shareholder obtaining a hearing on her complaint in the United States corporate court, the Delaware Chancery Court, are overwhelmingly against the plaintiff investor. Delaware has crafted a number of procedural obstacles to prevent an investor from ever arguing the merits of her case, let alone obtaining relief.<sup>41</sup>

Under the other principal United States corporate law regime, the Revised Model Business Corporation Act, the drafters of that statute have adopted a number of even more draconian measures designed to insure that minority shareholders' complaints never see the light of day. These measures include a universal demand rule that never excuses demand on the board of directors as "futile,"<sup>42</sup> and an absolute prohibition on court review of directors' actions refusing a demand to commence litigation.<sup>43</sup>

The reputation of the United States legal system for protection of minority investors in corporations is no longer grounded in reality. It is probably not a sustainable reputational advantage for the United States corporate governance regime. Arguably, then, neither the United States's largely historical protection of minority investors nor the existence of an inexhaustible pool of capital will induce the spread of United States style corporate governance.<sup>44</sup>

#### D. Convergence by Bald Assertion: "The End of History for Corporate Law"

A recent paper by two elites in the United States academy is a chauvinistic

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41. For example, if the investor corresponds with the corporation in any way, she may be deemed to have made a demand on the board of directors and thus have tacitly conceded the independence of the board for purposes of dealing with the demand. *Spiegel v. Buntrock*, 571 A.2d 767 (Del. 1990). If the corporation refuses the demand, a court may not review the board's decision that the minority shareholder's suit is not in the corporation's best interests. *Levine v. Smith*, 591 A.2d 194 (Del. 1991). Pursuit of another avenue to a court hearing, that demand is excused because a critical mass of the corporation's directors are not disinterested, has also been made extremely difficult in Delaware. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). Under the substantive law of Delaware, corporate directors are free to discriminate among shares of the same class, including minority held shares, because Delaware requires only "fair" treatment, not "equal" treatment of shares. *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

42. MODEL BUS. CORP. ACT § 7.40 (1993).

43. *Id.* § 7.44(a). See generally Douglas M. Branson, *Recent Changes to the Model Business Corporation Act: Death Knells for Main Street Corporation Law*, 72 NEB. L. REV. 258 (1993) (explaining in their attempt to compete with the American Law Institute Corporate Governance Project, model act drafters adopted a governance and litigation model inappropriate for small and mid sized corporations).

44. Stock market demutualization, with resulting private ownership of the London Stock Exchange, the New York Stock Exchange, or the NASDAQ, as well as others, may blunt governance initiatives by those organizations, further undercutting Professor Coffee's thesis of convergence by the backdoor. E.g., Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325, 326 & 348-52 (2001).

statement of the Americanocentric convergence thesis.<sup>45</sup> These two scholars contend that in the United States the supreme, or platonic, form of corporate governance structure has evolved. Both logic and competitive pressures to adopt the ideal United States shareholder-oriented model of corporate governance are irresistible and will result (or already have resulted) in its dominance around the globe. Thus, the authors posit an "end of history for corporate law," that is, an end for continued evolution of corporate law or of advocacy of competing governance models. The ideal has been achieved.

The evidence these two scholars set out in support of their thesis largely consists of bald assertions. Thus, "[r]ecent years . . . have brought strong evidence of a growing consensus on [convergence] issues among the academic, business, and governmental elites in leading jurisdictions."<sup>46</sup> Continuing, "at the beginning of the twenty-first century we are witnessing rapid convergence on the standard shareholder-oriented model as a normative view of corporate structure and governance. We should also expect this normative convergence to produce substantial convergence in the practices of corporate governance and in corporate law."<sup>47</sup>

After asserting on very little, if any, evidence that competing governance models (labor, stakeholder, team production, family capitalism) no longer have any role to play, the authors tell us that "[t]he shareholder-oriented model has emerged as the normative consensus,"<sup>48</sup> and that in the competition engendered by international product and financial markets, "[i]t is now widely thought that firms organized and operated according to the shareholder-oriented model have had the upper hand."<sup>49</sup>

The preferences of international equity markets and institutional investors for the shareholder model also lead to the conclusion that "[o]ver time, then, the standard [American] model is likely to win the competitive struggle . . . ."<sup>50</sup> Ergo, "no important competitors to the standard model of corporate governance remain persuasive today."<sup>51</sup>

Globally, then, we will witness the dominance of the United States model, with the "appointment of larger numbers of independent directors to boards of directors, reduction in overall board size, development of powerful board committees dominated by outsiders (such as audit committees, compensation committees, and nominating committees), closer links between management compensation and the value of the firm's equity securities, and strong communication between board members and institu-

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45. Hansmann & Kraakman, *supra* note 7. The title *The End of History* derives from either FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) or FRANCIS FUKUYAMA, *THE END OF HISTORY* (1998).

46. Hansmann & Kraakman, *supra* note 7, at 440.

47. *Id.* at 443.

48. *Id.* at 449.

49. *Id.* at 450 (citation omitted).

50. *Id.* at 451.

51. *Id.* at 454.

tional shareholders.”<sup>52</sup>

On and on, the authors progress through a series of categorical statements to the preordained conclusion that

[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured, even if it was problematic as recently as twenty-five years ago. Logic alone did not establish the superiority of this standard model or of the prescriptive rules that it implies . . . [T]he standard model earned its position as the dominant model of the large corporation the hard way, by out-competing during the post-World War II period the . . . alternative models of corporate governance . . . .<sup>53</sup>

Thus, apparently we are told, in Asia or Africa, in South America or the former Russian republics, as well as in Europe, and everywhere else on the globe, there is only one way—the American way.

#### E. A Critique of the Global Convergence Advocacy Scholarship

This section makes five points, two of them briefly and three in more detailed sections that follow. They are: (1) the existing convergence scholarship engages in a high degree of pontification, with little evidence in support of assertions made and seemingly consciously unmindful of authority to the contrary; (2) the existing scholarship is highly inbred, ignoring work of scholars at lesser known institutions or in other fields and citing almost exclusively work by a few scholars at a handful of elite institutions; (3) when the convergence scholars do assemble evidence in support of their thesis the sample is an extremely narrow one from which to postulate “global” anything; (4) the advocacy of the United States model as global demonstrates an extreme lack of cultural understanding and sensitivity, ignoring countless cultures and billions of persons for whom United States style corporate governance would never be acceptable; and (5) implicit in this advocacy scholarship is the assumption that only one economic model, that which places efficiency and profit in the ascendancy, is acceptable. The reality is that in most of the world other economic models, grouped generically under “embedded capitalism,” govern human and fictional beings’ (corporations’) lives, goals and aspirations.

##### 1. A High Degree of Pontification

In much of this scholarship we are told we must accept major and minor premise as well as conclusion because the authors say so. For example, a major premise in *The End of History for Corporate Law* is that models advocating a role for labor representation in corporate governance are now dead letters,<sup>54</sup> as are the more far ranging “stakeholder models” along similar lines,<sup>55</sup> because the authors say so.

52. *Id.* at 455. This is, of course, the American Law Institute’s model. AMERICAN LAW INSTITUTE, *supra* note 12; see BRANSON, *supra* note 20, at 227-45 (1993).

53. Hansmann & Kraakman, *supra* note 7, at 468.

54. *Id.* at 444-46.

55. *Id.* at 447-49.

Yet a substantial body of corporate law scholarship to the contrary, much of it recent, exists, in the United States alone. Recent titles include *The Place of Workers in Corporate Law*,<sup>56</sup> *Organized Labor as Shareholder Activists: Building Coalitions to Promote Worker Capitalism*,<sup>57</sup> and *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*.<sup>58</sup>

Along the lines of the broader stakeholder model, one respected scholar alone has authored *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*,<sup>59</sup> *Theories of the Corporation*,<sup>60</sup> and *Redefining Corporate Law*.<sup>61</sup> A recent, and well-received, volume of essays largely devotes itself to the stakeholder model and variants thereon.<sup>62</sup>

Statutory drafters around the world also continue attempts to impose responsibilities on workers and stakeholders, if not through their direct participation in governance, then as a matter of corporate law.<sup>63</sup> How global convergences advocates ignore this evidence of divergence, or at least divergence from their opinions, is explainable only as a matter of hubris.

## 2. Inbred Scholarship

When many of the global convergence advocates do cite to authority the leading scholars in an area are not cited unless, of course, those scholars are in the select inner circle of elites. In *End of History for Corporate Law*, the only works cited on labor participation in governance are by one of the

56. Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998).

57. Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345 (1997).

58. Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); see also O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991); David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998).

59. David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

60. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

61. David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991).

62. LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (1995).

63. In the United States, over 30 jurisdictions have adopted non-shareholder constituency statutes, directing or permitting corporate directors to take into account interests of stakeholders other than shareholders. E.g., BRANSON, *supra* note 20, § 8.03; Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 985-86 (1992); Timothy L. Fort, *The Corporation As Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 173-74 (1997). In many foreign jurisdictions, the stakeholder model has struck a responsive note. For example, recent Korean (enacted) and Indonesian (in progress) codes of best practices have chapters devoted to directors' and managers' responsibilities to stakeholders. COMMITTEE ON CORPORATE GOVERNANCE (KOREA), *CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE*, Part IV (1999); NATIONAL COMMITTEE ON CORPORATE GOVERNANCE (INDONESIA), *CODE OF GOOD CORPORATE GOVERNANCE*, Chapter 6 (2000) ("Stakeholders").

co-authors himself.<sup>64</sup> In another recent piece of global convergence scholarship by two elites, in 58 footnotes the co-authors cite to their own works 33 times. In two or three other instances they cite to publications by other scholars, but in works one or the other co-author has edited.<sup>65</sup>

### 3. *A Narrow, and Unrepresentative, Sample for Postulation of "Global Convergence"*

It is surprising just how teetering the thin base upon which the convergence hypothesis rests is. The convergence advocates presume that the United States and U.K. corporate law and corporate governance regimes are identical, or nearly so, which of course they are not. United States corporate law has become relentlessly enabling while increasingly British company law has become prescriptive, with countless substantive commands and minimum requirements.<sup>66</sup> The two bodies of law have diverged but the convergence advocates never examine the differences.<sup>67</sup>

As has been seen, examination of the Japanese corporate law model waxes and wanes.<sup>68</sup> Thus it is that the advocates of the "global" convergence hypothesis focus on developments in the United States, the United Kingdom, France and Germany.<sup>69</sup> Outliers (limited to brief mention) are the Czech Republic,<sup>70</sup> Italy,<sup>71</sup> the Netherlands,<sup>72</sup> Israel<sup>73</sup> and Korea.<sup>74</sup> That is the total sample from which it is argued that a worldwide, or

64. Hansmann & Kraakman, *supra* note 7, at 446 n.9 (citing HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996)); Henry Hansmann, *Probleme von Kollektiventscheidungen und Theorie der Firma—Folgerungen für die Arbeitnehmermitbestimmung*, in OKONOMISCHE ANALYSE DES UNTERNEHMENSRECHTS 287-305 (Claus Ott & Hans-Bernd Schafer eds., 1993); Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 589, 589-606 (1993).

65. See, e.g., Bebchuk & Roe, *supra* note 7, at 136 n.13, 137 nn.17-18, 138 nn.19-20, 22.

66. See, e.g., Douglas M. Branson, *Countertrends in Corporate Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53, 73-88 (1983); Douglas M. Branson, *Teaching Comparative Corporate Governance: The Significance of "Soft Law" and International Institutions*, 34 GA. L. REV. 669, 682-84 (2000).

67. Although one result of both legal systems is the same, that is, a pattern of dispersed share ownership and a large number of publicly held corporations per given amount of population, see Coffee, *supra* note 7, at 644 (noting that "while the United Kingdom has thirty-six listed firms per million citizens and the United States has thirty, France, Germany, and Italy have only eight, four and five, respectively") (citation omitted), convergence advocates do not ask why that is so because they presume, without examination or research, that United States corporation law and British company law are largely identical.

68. See *supra* note 19; see also Bebchuk & Roe, *supra* note 7, at 164; Coffee, *supra* note 7, at 653, 680; Cunningham, *supra* note 7, at 1142. Today, most references to Japanese style corporate governance are made in passing.

69. See Bebchuk & Roe, *supra* note 7, at 133 (focusing on the United Kingdom), 136, 140-41, 150 (focusing on Germany); Coffee, *supra* note 7, at 644, 653, 663-64 (focusing on Germany); *id.* at 644, 653, 656 (focusing on France); *id.* at 644-53 (focusing on the United Kingdom); Cunningham, *supra* note 7, at 1136-39 (focusing on the United Kingdom); *id.* at 1140-42 (focusing on Germany); *id.* at 1141-42 (focusing on France); Hansmann & Kraakman, *supra* note 7, at 445-46 (focusing on Germany); *id.* at 446-47 (focusing on France); *id.* at 447-48 (focusing on the United Kingdom).

70. Coffee, *supra* note 7, at 697.

"global," convergence on United States style corporate governance norms is occurring or, indeed, is a *fait accompli*.

The convergence advocates ignore the nature of economies, legal systems and corporate governance on the Pacific Rim or in South and Central American, even though the Pacific Rim (population 3.8 billion)<sup>75</sup> and South America (population 734 million)<sup>76</sup> are often thought to be the emerging economies of the 21st century. Convergence advocates construct competing models based upon a limited sample of, on the one hand, the United States (population 270 million), and, on the other hand, the U.K. (population 59 million), Germany (82 million) and France (59 million).<sup>77</sup> They then declare the United States the winner of the competition. Last of all, they project that winning model over a world inhabited by 6 billion people, with an endless variety of cultures, economic and legal systems, and goals and aspirations.

There is an extreme skepticism and indeed distrust born of such advocacy by United States based scholars of the notion that United States style principles are universal truths. The former Prime Minister of Singapore, speaking of the potential twilight of Occidental style capitalism and the rise of Asia and the Pacific Rim as economic powers, described the uniqueness of Asian institutions:

for America to be displaced, not in the world, but only in the Western Pacific . . . is emotionally very difficult [for American policy makers] to accept. The sense of cultural supremacy of the Americans will make this adjustment most difficult. Americans believe their ideas are universal—[for example] the supremacy of the individual and free, unfettered expression. But they are not—they never were.<sup>78</sup>

Convergence advocates' use of outliers, while laudable, may also be suspect. One advocate of convergence cites the great number of foreign listings on United States stock exchanges as evidence of forthcoming convergence.<sup>79</sup> The advocate points to a number of Israeli high tech firms that have listed shares on the NASDAQ.<sup>80</sup> Yet the greatest number of "foreign" listings on NASDAQ and the New York Stock Exchange remains listings by Canadian corporations.<sup>81</sup> Canadian firms' listings combined with one out-

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71. Bebchuk & Roe, *supra* note 7, at 165, 169; Coffee, *supra* note 7, at 644, 649, 663-65.

72. Cunningham, *supra* note 7, at 1140-41; Hansmann & Kraakman, *supra* note 7.

73. Coffee, *supra* note 7, at 675-76.

74. Hansmann & Kraakman, *supra* note 7, at 451.

75. PRIMEDIA REFERENCE, INC., THE WORLD ALMANAC AND BOOK OF FACTS 1999, at 863 (1998). The population of Asia alone was estimated to be 3,527,969,000 in 1998. *Id.*

76. *See id.* at 862-63.

77. *Id.* at 863.

78. Interview with Lee Kuan Yew, 13 NEW PERSP. Q. 4 (1996).

79. Coffee, *supra* note 7, at 673 n.107 (citing Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in A World Interacting Securities Market*, 38 VA. J. INT'L L. 563, 566 (1998) (noting that as of Dec. 31, 1996, foreign listings totaled 416 on the NASDAQ and 305 on the New York Stock Exchange)).

80. Coffee, *supra* note 7, at 675.

81. *Id.*



lier group hardly constitute robust evidence of "global" convergence.

## II. The Failure of Attempts at Export of Legal Institutions, Harmonization, and Globalization

### A. Failed Attempts at Export

United States corporate law has traveled very few places.<sup>82</sup> The drafters of the Russian corporation law took United States legislation as one starting point,<sup>83</sup> but even the drafters now admit that the Russian statute has been a failure, perhaps due as much to weak enforcement as to weak principles of law.<sup>84</sup>

By contrast, at least historically, British company law and company institutions have traveled very well.<sup>85</sup> On the Pacific Rim, for instance, Australia, New Zealand, Hong Kong, Singapore, Malaysia, Sri Lanka and India have British company law.<sup>86</sup> South Africa, which has a Roman Dutch civil law, also has British company law. So, too with former British colonies: Zimbabwe (Southern Rhodesia), Zambia (Northern Rhodesia), Malawi, Tanzania, Kenya, and Egypt have British company law. The reach of British company law has not been confined to former colonies. Namibia, the former German Southwest Africa, has a civilian legal system but British company law. Ghana is similar.<sup>87</sup>

The prevalence of British company law may be due to path dependency, but not completely. With its highly regulatory content, protection of minorities, and other features, British company law apparently adapts well to less developed countries (LDCs) and newly industrializing countries (NICs) better than does open ended "enabling" United States corporation law.

82. ALFRED F. CONARD, *CORPORATIONS IN PERSPECTIVE* 75-76 (1976) (stating that United States corporate laws have been "peculiarly inept for export."). But see Brian R. Cheffins, *U.S. Close Corporation Legislation: A Model Canada Should Not Follow*, 35 MCGILL L.J. 160, 161 (1989) ("U.S. corporate legislation considerably influenced the thinking of Canadian corporate law reformers in the 1960s and 1970s.").

83. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1935-36, 1946-49 (1996).

84. E.g., Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1752-57 (2000); see also Fox & Heller, *supra* note 21, at 1762-64.

85. Cheffins, *supra* note 7, at 6 ("The work which has been done in the United Kingdom has spurred reviews of corporate governance in markets around the world and has provided a yardstick against which investment frameworks in other countries are measured.").

86. Robert I. Tricker, *Corporate Governance: A Ripple on the Cultural Reflection*, in *CAPITALISM IN CONTRASTING CULTURES* 187 (Stewart R. Clegg & S. Gordon Redding eds., 1990).

87. Transplant of other countries' laws is highly, but not completely, path dependent. Thus, receiving countries may, to some degree, pick and choose from alternatives when a legal system is being transplanted. See, e.g., David Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, CID Working Paper No. 39, at 4, 11 (2000) (on file with the author) (analyzing forty-nine countries with "transplanted" legal systems).

The relative lack of portability for United States corporate law then should give some pause to global convergence advocates. If United States corporate law has fared so poorly, why posit that United States style corporate governance will travel so much better?

#### B. Harmonization and Standardization Failures

Attempts to harmonize corporate law, especially its governance aspects, in the EU have been a dismal failure. The Draft Fifth Company Law Directive seeks to impose German-style co-determination on the member states and corporations chartered by them.<sup>88</sup> The British have strenuously opposed mandated labor participation in governance while other EU member states are lukewarm about the prospect. The Draft Fifth Directive is permanently stalled.<sup>89</sup>

The EU has also proposed a pan-European company, the *Societas Europea*, but that proposal has also stumbled badly because of its incorporation of co-determination features.<sup>90</sup> The staff of the Council of the EU recently announced an effort to simplify and retrench on less controversial elements of company law harmonization as well.<sup>91</sup>

EU efforts have gone beyond harmonization and promotion of the four freedoms which are at the core of the Union.<sup>92</sup> Those efforts have exceeded any mandate the Council and the Commission may have had, proceeding in the direction of uniform laws and standards throughout the Union. That overzealousness has produced a backlash, making legitimate harmonization more difficult to achieve.

Professor Paul Stephan has extensively analyzed harmonization and

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88. See Proposal for a Fifth Directive, Foundation Article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Origins, 1983 O.J. (C240) 2. The draft contains two alternative but mandatory structures for providing employee representation in corporate governance. See *id.*

89. Terence L. Blackburn, *The Societas Europea: The Evolving European Corporation Statute*, 61 *FORDHAM L. REV.* 695, 735-36 & 700 (1993).

90. *Id.* at 700-01.

91. See Caroline De Vos, *The SLIM IV Project of the European Commission: Harmonization Through Deregulation of European Company Law*, Working Paper 1999\_16, Financial Law Institute, University of Gent, available at Social Science Research Network Electronic Paper Collection, abstract\_id 192136 (1999).

92. See George A. Bermann, *Comparative Law in the New European Community*, 21 *HASTINGS INT'L & COMP. L. REV.* 865, 867 (1998) ("The experience of the last forty years also shows that pursuit of a 'neutral' harmonization or convergence of national law has consistently been subordinate to the Community's pursuit of its own distinctive, policy-driven legislative agenda."); George A. Bermann, *A Commentary on the Harmonization of European Private Law*, 1 *TUL. J. INT'L & COMP. L.* 47, 48-52 (1993) (stating that the European Union has moved beyond regulating member states and regulation of their economies into defining rights and obligations of citizens of member states vis-à-vis one another). The four freedoms are the freedom of movement for goods, workers, services, and capital. *TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY*, Mar. 25 1957, 298 *U.N.T.S.* 11, 18, 36-42; see also *id.* art. 2 (establishing the European Economic Community). Preservation of the four freedoms remains a central objective of the now European Union. PETER J. GROVES, *EUROPEAN COMMUNITY LAW* 7-8 (1995).

standardization efforts on an international scale.<sup>93</sup> His work points to several reasons such efforts are fated to achieve only minimal success, at best.

### C. Lack of Political Accountability and Rent Seeking as Obstacles to Global Convergence

In the international sphere, promotional efforts on behalf of harmonization are apt to encounter skepticism at the national level. The authors of such international efforts lack the political accountability of elected and appointed officials at national and local levels.<sup>94</sup> "In free and democratic societies, we insist on . . . a right to investigate and criticize lawmakers . . . [i]nternational lawmakers largely face weaker constraints on their behavior."<sup>95</sup> When faced with international or "global" proposals akin to law, the nation state may view the proposals with a greater degree of skepticism: "The domestic decisionmaker, even if a bureaucrat, still bears some political accountability for its choices; the international lawmaker does not. What underlies the skeptical position is a belief that the more accountable decisionmaker should receive the benefit of the doubt."<sup>96</sup>

International unification and harmonization efforts also encounter skepticism because they lack the transparency of local lawmaking: "interest groups tend to have somewhat lower costs of expressing their preferences to executives engaged in international lawmaking than in conveying their wishes to domestic legislators, and . . . the general public has higher monitoring costs with respect to international lawmaking."<sup>97</sup>

Lack of transparency in turn can result in a greater rate of rent seeking in efforts such as the one to promote global corporate governance. Economic rents are returns in excess of what is necessary to keep a given resource, including a human resource, from transferring to some other occupation.<sup>98</sup> Thus, "rents are earned only by owners of resources that cannot be augmented rapidly and at low cost to meet an increased demand for the goods [or services] that are used to produce."<sup>99</sup> In every jurisdic-

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93. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999) [hereinafter Stephan, *Futility of Unification*]; Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997) [hereinafter Stephan, *Rules, Rents and Legitimacy*]; Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999) [hereinafter Stephan, *New International Law*].

94. This is because "[n]o mechanism exists for voters to pass judgment on the international lawmakers. At best they can vote for the domestic governments that in turn choose the drafters of international agreements." Stephan, *Futility of Unification*, *supra* note 93, at 752.

95. Stephan, *Rules, Rents and Legitimacy*, *supra* note 93, at 682.

96. *Id.* at 732.

97. *Id.* at 699.

98. RICHARD G. LIPSEY & PETER O. STEINER, *ECONOMICS* 341-42 (3d ed. 1972).

99. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (2d ed. 1977). Examples of rent seeking include "the very high incomes earned by a few singers, athletes, and lawyers . . . due to the scarcity of the resources they control—a fine singing voice, athletic skill and determination . . ." *Id.*

tion, there exist various kinds of rent seekers who will attempt to foil efforts at harmonization or globalization.

The cadre of lawyers who specialize in corporate law, earning rents from their ability to explain the nuances of the status quo and to manipulate existing regulatory structures, may oppose simplification and harmonization efforts. In every jurisdiction, too, there exists a more elite inner circle of attorneys and advisers who earn economic rents as the gatekeepers trusted by legislators and government ministers when harmonization and globalization efforts reach the level of the nation state. They may foil such efforts unless the way is clear for their rent-seeking to continue.<sup>100</sup> Finally, bureaucrats will decrease transparency and engage in turf protection because they will feel threatened by harmonization-unification and the end of their ability to engage in rent seeking.<sup>101</sup>

Change in corporate law and attempted imposition from above of "global" standards of corporate governance will at some point be slowed, if not stopped, by some of the same obstacles other international efforts at unification or harmonization of economic laws and structures have encountered.<sup>102</sup> The lack of transparency perceived to exist in some such efforts, the lack of political accountability, the pretentious and condescending "we know better" tone of much of the convergence advocacy, and rent-seeking (as well as perceptions that rent seeking is occurring at the global level) all may impede convergence.

#### D. The Myth of Globalization

##### 1. Introduction

The creation of the large multinational corporate organization in ways that will open up channels of communication about corporate governance,

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100. A related impediment to change in legal institutions may be a network externality. A legal institution gains value only after a critical mass of others has also decided to adapt to the new way. An "actual" network market would be for fax machines: one machine is useless, a community of them gives rise to an entire new industry. See, e.g., Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488 (1998). Network economic effects pose an impediment to refinements or more radical change of corporate law. *Id.* at 562-86. Network externalities, even if not expressed in those terms, may be excuses that rent seekers utilize to prolong adherence to the "old" ways.

101. Stephan, *Rents, Rules and Legitimacy*, *supra* note 93, at 706 (noting that, other things being equal, bureaucrats rent seek through efforts to enlarge their budgets).

102. Indeed, the elite and somewhat closed circle of global convergence advocates may be perceived as rent seekers themselves, engendering skepticism as a "one size fits all" corporate governance scheme is peddled from country to country around the globe. Rent seeking does occur at the international, as well as the local level. Stephan, *Rents, Rules and Legitimacy*, *supra* note 93, at 708-09; Stephan, *Futility of Unification*, *supra* note 93, at 793 ("An essential element of the critique of technocratic lawmaking at the international level rests on the premise that interest groups can influence the process . . . [t]hese [local] concerns about international lawmaking seem plausible precisely because a substantial body of evidence suggests that such rentseeking takes place with some frequency at the national level."). Indeed, the convergence advocates may actually be rent seekers, judging from the amount of academic resource and reputation they have invested in the "global" convergence hypothesis.

leading to convergence, and which many of the convergence advocates cite as prime evidence of their thesis, is the exception and not the rule. The Daimler-Chrysler or Deutsche Bank-Bankers Trust combinations are not representative of what empirical evidence demonstrates is occurring. In an important new book, *The Myth of the Global Corporation* (Myth),<sup>103</sup> the authors demonstrate that globalization is not taking place, or at least not occurring along the lines the legal elites assert.

## 2. "Good" Globalization Versus "Bad" Globalization

Good, healthy globalization would be characterized by technology diffusion as well as other types of decentralization. Large multinational corporations (MNCs) would be transferring research and development (R&D) efforts to satellite operations in a meaningful way. Some of those receiving satellites would be located in newly industrializing countries (NICs) and perhaps in less developed countries (LDCs) as well. MNCs would be engaged in significant direct foreign investment (DFI). Forming subsidiaries and joint ventures in countries around the globe, MNCs would be making significant investments in plant and other production facilities, in modernization efforts, and in human resources so as to be able to decentralize financial, marketing and other "nerve center" aspects of their businesses. Simultaneously, MNCs would be shaking free from their roots and national origins, converging on a global model of governance and operation.

But "[t]he global corporation is mainly an American myth".<sup>104</sup>

The . . . idea[ ] that mobile corporations freed from political interference are now somehow arbitraging diverse national structures and forcing an involuntary process of convergence or an inevitable trend toward openness . . . marks a road to discord. On the surface, there is indeed a certain process of homogenization at work in a world where Americans drive BMWs, Germans listen to Sony CD players, and Japanese eat McDonald's hamburgers. But below the surface, where the roots of leading MNCs remain lodged, our research indicates durable sources of resistance to fundamental economic convergence.<sup>105</sup>

Contrary to what global convergence advocates state, and "however lustily they sing from the same hymnbook when they gather together in Davos or Aspen, the leaders of the world's great business enterprises continue to differ in their most fundamental strategic behavior and objectives."<sup>106</sup>

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103. PAUL N. DOREMUS ET AL., *THE MYTH OF THE GLOBAL CORPORATION* (1998).

104. *Id.* at 143.

105. *Id.* at 146. In fact, the authors of *Myth* surprised themselves: "Neither liberal nor radical approaches to understanding multinational corporate behavior . . . led us to expect the degree of continuing diversity we found at the level of the firm." *Id.* at 141.

106. *Id.* at 144.

### 3. *Lack of Widespread Direct Foreign Investment or Technology Diffusion*

Worldwide DFI has expanded dramatically, from \$500 billion United States in the early 1980s to \$2.0 trillion United States in the early 1990s.<sup>107</sup> Yet, as the authors of *Myth* demonstrate, DFI remains concentrated in developed nations that are members of the OECD, or in a truncated version of that list. Japan still closes its border to significant DFI.<sup>108</sup> EU domestic content requirements discourage inward investment in EU member countries.<sup>109</sup> The spreading of wealth and the globalization that high absolute DFI numbers might portend is not occurring.

Tracking the volume of international royalty and license fee transactions, as well as other statistics, the economist authors of *Myth* ask, "Is a global technology base emerging?"<sup>110</sup> They conclude that hard evidence suggests it is not: "MNCs move R&D abroad far more slowly than production, sourcing, marketing, and other business activities . . . MNCs conduct relatively little R&D outside the home country."<sup>111</sup> Japanese foreign affiliates have "low R&D intensity."<sup>112</sup> Thus, "[d]evelopment of new technology remains centralized in the home market operations of MNCs."<sup>113</sup> The roots for future globalization, or for high quality globalization, are not being put down.

### 4. *The Resiliency of Incorporating Nation States and Their Cultures*

Even in the transnational mergers which global convergence advocates feature prominently in their writing, the authors find that one culture (belief system) extinguishes the other, rather than convergence taking place.<sup>114</sup> National differences persist—are "hard wired" into core corporate structures" and "embody distinctive and durable ideologies or, as some analysts now prefer to call them, belief-systems."<sup>115</sup> Thus, the authors note "an array of evidence documenting striking differences between the behavior of most continentally based firms and their counterparts in Great Britain."<sup>116</sup> Governance and financial structures "differ markedly" among major nations.<sup>117</sup> German firms differ markedly from firms in Scandinavia, France or the Benelux countries.<sup>118</sup> In fact, differences between German and firms in other countries seem especially persistent.<sup>119</sup>

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107. *Id.* at 74.

108. *Id.* at 77.

109. *Id.* at 78.

110. *Id.* at 84.

111. *Id.* at 85 (citation omitted); see also *id.* at 134 ("MNCs still retain the bulk of their innovative capabilities in their home markets, and technology that does flow overseas tends to stay within multinational networks").

112. *Id.* at 93.

113. *Id.* at 109.

114. *Id.* at 15.

115. *Id.*

116. *Id.* at 12.

117. *Id.* at 23.

118. See, e.g., *id.* at 13.

119. Convergence advocates seem to see what they want to see. They see in some agitation for change in Germany and in the Daimler and Deutsche Bank mergers harb-

Japanese firms operate in foreign wholesale rather than retail markets, use intrafirm investment to a great extent, and display "a comparatively low level of integration in local markets."<sup>120</sup> In turn, Korea, Taiwan, Hong Kong and Singapore each reflects great and persistent differences one from another in governance, finance, and other aspects of business.<sup>121</sup>

The strongest determinant of these differences is national origin:

[S]triking differences in firm behavior persist. These differences correlate most obviously with corporate nationality, not with sectoral characteristics or investment maturity . . . . Those differences . . . are systemic. Across firms, sectors, and in the aggregate, only one set of behavioral variations shines through—national ones.<sup>122</sup>

Continuing their conclusion, the authors of Myth remark that:

The evidence . . . suggests a logical chain that begins deep in the idiosyncratic national histories behind durable domestic institutions and ideologies and extends to firm-level structures of internal governance and long-term financing. Those structures, in turn, are then linked to continuing diversity in patterns of corporate R&D operations in the complex connections between corporate FDI and IFT [intrafirm trading] strategies . . . . [T]he basic linkage . . . [is that] [d]istinctive national institutions and ideologies shape corporate structure and vitally important policy environments in home markets. The external behavior of firms continues to be marked by their idiosyncratic foundations.<sup>123</sup>

"The Myth of Globalization" tells us what is, namely that "national roots remain a vital determinant" and that multinationals' "corporate cores remain national in a meaningful sense."<sup>124</sup> The next question is to ask is, "Why is that so?"

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ingers of German participation in global convergence in corporate governance. See, e.g., Coffee, *supra* note 7, at 664, 676-82; Cunningham, *supra* note 7, at 1169. Based upon systematic evidence, the authors of Myth see a picture of persistent difference and resistance to change rooted in national origin. The German economy is characterized by codetermination of the supervisory board of large firms, a large role played by universal banks which vote fifty percent or more of the shares in all large German firms, and a pattern of cross share holdings. The result is an absence of hostile takeovers, a comfortable safety net for managers in the event of serious managerial mistakes or unanticipated market shocks because of the availability of backup resources from the banks, stable research and development budgets and wider fluctuations in earnings than would be tolerated in other countries. DOREMUS ET AL., *supra* note 103, at 33-42.

120. *Id.* at 116.

121. Stewart R. Clegg & S. Gordon Redding, *Introduction to CAPITALISM IN CONTRASTING CULTURES*, *supra* note 86, at 14.

[I]t would be mistaken to regard these countries [Japan and the 'little dragons' of Hong Kong, Taiwan, South Korea and Singapore] as essentially similar in their patterns of economic success. They have quite distinct foundations which are sufficiently different as to counter any too easy reliance on a view of a single 'post-Confucian' way.

*Id.*

122. DOREMUS ET AL., *supra* note 103, at 139.

123. *Id.*

124. *Id.* at 145.

### III. Cultural Insensitivity: Lack of a Culture Fit for the Global Convergence Model of Governance

#### A. Cultural Traits Implicit in the United States Governance Model

Convergence advocates rely heavily, really exclusively, on the United States model of corporate governance. That model, of course, is centered on a board of directors the majority of whom are independent, that is, free of significant financial or perhaps even social contacts with the corporation's senior managers.<sup>125</sup> Indeed, a respectable school of thought is that all directors save one or two should be independent, non-executive directors.<sup>126</sup>

In turn, that independent board has a new and more focused mission. United States corporate law once provided that the "business and affairs of the corporation should be managed by a board of directors." Later, intermediate and less imperative versions of that mandate provided that the business and affairs could be managed by others "under the supervision" of a board of directors.<sup>127</sup> Today, one authoritative source for United States law provides that the senior executives are to manage the business and affairs of the corporation.<sup>128</sup> In turn, the board's role is to select, monitor, evaluate, and, if necessary, remove, the senior executive officers, including principally the chief executive officer or managing directors.<sup>129</sup>

The United States model contemplates a significant role for highly individualistic behavior. For example, if a director of a United States corporation disagrees with action taken she should clearly voice her objection. United States law commonly provides that a director is presumed to consent to action taken unless her dissent is recorded in the minutes of the meeting or filed in writing immediately thereafter.<sup>130</sup> The United States scheme contemplates a significant role for shareholder litigation. Individual shareholders who are aggrieved by corporate managers' acts should rise up, retain attorneys, and bring suit to hold those managers accountable.<sup>131</sup>

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125. E.g., *supra* note 52 and accompanying text.

126. SEC's Williams Calls for Independent Boards, Warns of Federal Intervention Into Government, SEC. REG. & LAW REP. NO. 437, Jan. 25, 1978, at A22 (noting argument by Chairman of U.S. SEC that all directors save one should be independent); BRANSON, *supra* note 20, § 5.03 (concluding that Delaware Supreme Court opinions constitute a de facto requirement of a high degree of director independence).

127. In 1974 the American Model Business Corporation Act shifted to language that "[a]ll corporate powers shall be . . . managed under the direction of] a board of directors . . . ." MODEL BUS. CORP. ACT § 35 (1975). See generally BRANSON, *supra* note 20, § 5.02.

128. See AMERICAN LAW INSTITUTE, *supra* note 12, § 3.01.

129. *Id.* § 3.02.

130. MODEL BUS. CORP. ACT § 8.24(d).

131. AMERICAN LAW INSTITUTE, *supra* note 12, Part VII, "Remedies" (seventeen sections dealing with derivative actions by shareholders).



## B. Lessons in Diversity: The United States Model in Other Cultures

1. *The People's Republic of China and the Overseas Chinese*

For example, a scheme that places significant reliance on highly individualistic forms of behavior does not mesh well, or at all, with the Confucian value system of the Chinese. The People's Republic of China is, of course, the most populous nation on earth. Through the Chinese diaspora, an additional 40 million Chinese have emigrated to other East Asian nations, where as of 1990 their family enterprises added \$200 billion to various states' gross annual domestic products.<sup>132</sup> Overseas Chinese number over 40 million,<sup>133</sup> playing significant roles in the economies of Taiwan, Singapore, Indonesia, the Philippines, Malaysia and Thailand.<sup>134</sup> These roles far exceed their number in their adopted countries. In the Philippines, for example, overseas Chinese control 47 percent of the 68 locally owned publicly held companies.<sup>135</sup> In 1990, Chinese accounted for 2.1 percent of the population but 75 percent of the private domestic capital in Indonesia.<sup>136</sup>

Although Confucianism lacks either a deity or an organized church, Confucian values permeate the lives of Chinese peoples everywhere.<sup>137</sup> From a very early age, "[i]n the school context, Confucianism is taught by the study of the main writings and the discussion of their implications. The child is encouraged to memorize the classics and to build relationships based on the Confucian principles."<sup>138</sup> Central to those relationships is a high degree of abnegation of self and tolerance and patience for others.<sup>139</sup> One has to question how a corporate governance model that entails a certain degree of confrontation and a high degree of individualistic behavior fits with beliefs that "an individual must fit into and conform with the basic social order of his surrounding world."<sup>140</sup> That order is "strongly

132. S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* 3 (1990).

133. *Id.* at 3, 18.

134. *Id.* at 2, 17.

135. *Id.* at 29.

136. *Id.* at 25.

137. There has been very little assimilation into the ambient culture by overseas Chinese. See, e.g., *id.* at 57 (noting little assimilation in Malaysia, the Philippines, or Indonesia). Other nations such as Japan and Korea are said to be influenced by "post-Confucian" values. The post-Confucian thesis is attributed to HERMAN KAHN, *WORLD ECONOMIC DEVELOPMENT: 1979 AND BEYOND* (1979). Kahn proposed "that the success of organizations in Japan, Korea, Taiwan, Hong Kong and Singapore was due in large part to certain key traits shared by the majority of organization members which were attributable to an upbringing in the Confucian tradition." Stewart R. Clegg et al., 'Post-Confucianism', *Social Democracy and Economic Culture*, in *CAPITALISM IN CONTRASTING CULTURES*, *supra* note 86, at 38.

138. REDDING, *supra* note 132, at 48.

139. "The Confucian ideal is that family, clan, and head of state take precedence over the individual." *Id.* at 63. In a series of interviews with Chinese business men, a representative answer demonstrated the Chinese principle of tolerance: "[B]e tolerant—it creates less worries. Try to put the lawyers out of business." *Id.* at 87.

140. *Id.* at 58. In the Confucian context, "the individual has a built-in sense of the legitimacy of the superior-subordinate relationship . . . it is an extension of a natural order. The open challenge of formal authority is rare." *Id.* at 61.

hierarchical" with each individual regarding himself "not only . . . as part of nature but also part of the natural order . . ."

one of the most important effects of Confucianism, and one of the principal determinants of social and economic behavior . . . is the passivity induced by a system which places the individual in a powerfully maintained family order, itself inside a powerfully maintained state order, itself seen as part of a natural cosmic order, and all dedicated to the maintenance of the status quo.<sup>141</sup>

Core values in economic behavior include a "concern for reconciliation, harmony [and] balance" coupled with "practicality as a central focus."<sup>142</sup> It is doubtful whether individuals taught from an early age that "the shiny nail is the first to feel the sting of the hammer" will confront and forcibly remove underperforming CEOs or step forward to file derivative or class action lawsuits.<sup>143</sup>

## 2. *The Republic of Indonesia*<sup>144</sup>

Other societies remain highly feudal in character. In Indonesia, the world's third largest democracy and fourth most populous nation, for example, a strong sense of permanence in the socioeconomic order, which after all still has a network of ruling sultans, may prevent the development of the cadre of independent directors and the required behavior by them or sufficiently aggressive shareholders to make United States style corporate governance take hold. The perception is widespread that it is futile to challenge one who "has the power."<sup>145</sup>

The quasi-feudal nature of Indonesian society is an impediment to United States style corporate governance. In the 1998-99 Asian economic crisis, 38 Indonesian banks, many of them publicly held, were closed, as a result of extreme mismanagement that had permitted over \$90 billion United States in loan defaults.<sup>146</sup> Indonesian corporate law clearly provides for derivative actions by shareholders.<sup>147</sup> Yet not a single share-

141. *Id.* at 52.

142. REDDING, *supra* note 132, at 76.

143. In the United States model, by contrast, the 1990s witnessed an unprecedented number of forced removals of CEOs of major United States corporations. *See, e.g., DOREMUS ET AL., supra* note 103, at 26 (noting the ouster of chief executive officers at, *inter alia*, IBM, Kodak and Westinghouse).

144. In 1999-2000, the author was a USAID consultant to the Indonesian Ministry of Justice on corporate law revision and corporate governance reform in Indonesia.

145. *See, e.g.,* KEITH LOVEARD, SUHARTO: INDONESIA'S LAST SULTAN 123-24 (1999) ("for the vast majority of Indonesians, and particularly the Javanese, . . . there was a strong sense that he had control of the power and that whatever they did to oppose it would be futile"); *see also* Clegg & Redding, *Introduction to CAPITALISM IN CONTRASTING CULTURES, supra* note 86, at 23 ("[T]he feudal nature of traditional Chinese social relationships has in some important local respects survived intact into the present day: the 'war-lords' have changed, but practices of the fief have remained remarkably constant.").

146. LOVEARD, *supra* note 145, at 380.

147. New Company Law of Indonesia ("Undang-undang Tentang Perseroan Terbatas"), Law Number 1 of the Year 1995, Articles 85 & 98 (authorizing suit against a director or commissioner who "has caused losses to the Company due to his fault or negligence.") [hereinafter *Company Law of Indonesia*].

holder suit was filed. The absence of suit may be in part explained by the weakness of the Indonesian legal system but cultural factors are also at work in a situation which in the United States would have produced a firestorm of litigation.

Another concept of Indonesian society and the legal system might be inimical to introduction of United States style corporate governance. The political and legal systems are founded on the notion of *musyawarah* and *mufakat*, translated as "discussion and consensus."<sup>148</sup> The concept places upon parties to a proceeding or transaction a duty to avoid confrontation, including a duty even to avoid pushing issues to a formal vote. Duties based upon "discussion and consensus" are reflected not only in the customary law of Indonesia but in the company law itself. For example, "[t]he resolutions of the GMS [General Meeting of Shareholders] shall be adopted based on the principle of deliberation to reach a consensus."<sup>149</sup>

### 3. *The World's Dominant Form of Economic Organization—Family Capitalism*

A third example of the lack of cultural fit for the United States style corporate governance systems first requires a brief overview of the dominant form of capitalism in many countries—family capitalism. For example, overseas Chinese firms represent "molecular organization—heavily networked family firms" that tend toward vertical integration.<sup>150</sup> In South Korea, the *Chaebol* are "family dominated, but less centralized, grow extremely large, are elaborately and formally co-ordinated . . . [t]heir environment is also patrimonial . . . [and] has a similarly Confucian moral-based government."<sup>151</sup> Indonesia has a brand of family capitalism characterized by "long term mutually enriching alliances between local military forces and Chinese businessmen."<sup>152</sup>

Turning toward Europe, France's government yearns for finance capitalism with the dispersed type of share ownership it produces.<sup>153</sup> The truth is, however, that France's economic topography is populated by family firms, including family controlled publicly held firms.<sup>154</sup> The same may be said of Italy.<sup>155</sup>

148. LOVEARD, *supra* note 145, at 114.

149. Company Law of Indonesia, *supra* note 147, Article 74(1).

150. S. Gordon Redding & S. Tam, *Networks and Molecular Organizations: An Exploratory View of Chinese Firms in Hong Kong*, in K.C. MUN & T.S. CHAN, *PERSPECTIVES IN INTERNATIONAL BUSINESS* 192-242 (1985).

151. S. Gordon Redding & Richard D. Whitley, *Beyond Bureaucracy: Towards a Comparative Analysis of Forms of Economic Resource Co-ordination and Control*, in *CAPITALISM IN CONTRASTING CULTURES*, *supra* note 86, at 101.

152. See generally RICHARD ROBINSON, *INDONESIA: THE RISE OF CAPITAL* (1986); see also LOVEARD, *supra* note 145, at 21, 33-35, 201.

153. Fanto, *supra* note 17, at 69-71.

154. Bloch & Kremp, *supra* note 23, at 18 ("Families seem to play an important role in ownership and voting power, both in unlisted firms and in the CAC 40 firms.").

155. See *Family Firms in Italy: The Generation Game*, *ECONOMIST*, March 4, 2000, at 65.

While in some families a willingness may exist to appoint independent directors and permit them to constitute a majority of the board, as the United States governance model dictates, in many other families there will not be such a willingness to relinquish power. The same observations may be made with regard to the rigorous evaluation and possible removal of senior executive officers. The culture of family capitalism will pose an obstacle to that occurring with any frequency.

The teaching of years of comparative study is that it is the culture beneath the law and behind economic and other institutions that is as or more important than law itself, legal structures, and good governance practices. "At the heart of the matter is the manner in which culture, as a process, tends, cultivates and regulates particular types of economic outcomes."<sup>156</sup> With the nearly complete absence of any discussion of varying cultures, or of the role of culture, the United States global convergence advocates seem never to have learned those basic truths about comparative study.

#### IV. Different Views of the Deus Ex Machina: Anglo-American "Ascendent" Economics Versus "Embedded Capitalism"

##### A. Embedded Capitalism

United States academic elites, including the global convergence advocates, seem to hold as universal a view of economies as free-standing machines with profit maximization as each firm and the nation's goal, market forces supreme, and the society subservient to, or at least apart from, the economy. That mind set, heavily imbued as it is with the supremacy of the individual and laissez-faire, traces its roots to the writings of John Stuart Mill, Adam Smith, Karl Marx and, later, Max Weber and Frederick Hayek, who mistook the tendencies of 19th century English markets to be universal laws and did so based upon empirical observations of a very few western economies.<sup>157</sup>

Yet, outside of the former British Empire, and even to some extent within it, the world's economies are perceived as serving the society as whole. Citizens and national leaders see the economy as but an element of the larger society. The view is that for most capitalistic countries the proper form of capitalism is "embedded capitalism."<sup>158</sup>

Certain welfare economists believe that the natural state of things is a form of constrained, regulated capitalism rather than unfettered markets. A constrained market economy is the inevitable result of the interplay of capitalism and democracy. Through politics the majority (the "have nots")

156. Clegg et al., *supra* note 137, at 32.

157. JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 169-70 (1998).

158. This phenomenon is a testament to what Granovetter has termed the "embeddedness of economic actions": "the argument [is] that the behavior and institutions to be analyzed [in economic analysis] are so constrained by ongoing social relations that to construe them as independent is a grievous misunderstanding." Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 481-82 (1985).

will elect representatives based upon platforms and programs that promise to temper or brake the Darwinian "survival of the fittest" that is the product of the unfettered market system and limit at least runaway economic success by the most fortunate in the society (the "haves").<sup>159</sup> In fact, relatively unfettered markets have existed only in two eras: Victorian times in England and the Thatcher-Reagan years in the United States and the U.K.<sup>160</sup>

## B. The Individual Versus the Society

Stronger still, the market individualism of market leaning economies is simply intolerable in many societies. The economy is embedded in the social order and social cohesion, not rugged individualism, is the value in the ascendancy.<sup>161</sup> For example, "[l]ife in a collectivist and group-dominated society means that the Chinese self is not isolated in the same sense as the Western one."<sup>162</sup> In some cultures, firms are "independent legal entities which are well bounded and distinct from their environments."<sup>163</sup> By contrast, theorists have recognized Asian business firms' "form and operation as contingent, socially contextual phenomenon varying across cultures and historical periods."<sup>164</sup>

Convergence advocates might point to the unparalleled economic success of the United States in the 1990s as predictor that United States style corporate governance will vanquish any rivals. But United States economic success, with its concomitant supremacy of the individual, is viewed in much of the world as destructive of social cohesion and to be avoided rather than emulated.<sup>165</sup> To observers and opinion makers in many countries, the United States's high divorce, murder, and incarceration rates, categories in which the United States leads the world,<sup>166</sup> together with the

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159. KARL POLANYI, *THE GREAT TRANSFORMATION* 119 (1944) (noting that Burke and Bentham, among others, "refused to defer to zoological determinism . . . [and] rejected the ascendancy [sic] of economics over politics proper").

160. GRAY, *supra* note 157, at 14-16 (noting that truly free market economy only existed in Anglo-Saxon societies in mid Victorian England (1840-70)).

161. *Id.* at 26 ("In the normal course of things markets come embedded in social life. They are circumscribed in their working by intermediary institutions [such as labor unions and professional associations] and encumbered by social conventions and tacit understandings."), 182 ("As in other economic cultures, Chinese capitalism comes embedded in the networks and values of the larger society.").

162. REDDING, *supra* note 132, at 95; see also Thomas A. Acton, *Ethnicity and Religion in the Development of Family Capitalism: Seui-Seung-Yahn Immigrants from Hong Kong to Scotland*, in *CAPITALISM IN CONTRASTING CULTURES*, *supra* note 86, at 391 ("'Economy' and 'culture' have been seen by westerners as two great independent variables or value systems while Asian cultures see them as closely intertwined or one (economy) deeply embedded in the other").

163. Redding & Whitley, *supra* note 151, at 80.

164. *Id.*; see also *id.* at 79 ("Anglo-Saxon conceptions of the legally bounded form as the basic unit of economic action are inadequate to explain the economic actions and structures of [Korean] *chaebol* and Chinese family businesses").

165. GRAY, *supra* note 157, at 101, 115-16.

166. One of every 193 United States adults is incarcerated or under restraint. The United States's rate of incarceration is four times that of Canada, five times that of the U.K., and fourteen times that of Japan. GRAY, *supra* note 157, at 116; see also Graham

obscene rates of United States corporate executive compensation,<sup>167</sup> symbolize the abandonment of social cohesion and the ascendancy of market style individualism and unbridled greed. There is no trend to homogeneity in world economics, as globalization advocates might assert. Modernization and Westernization are not converging trends, as the underlying premise of global convergence scholarship implies. For much of the world, modernization and Westernization have become diverging trends or, indeed, anathema to one another.<sup>168</sup> In the march of progress, many less affluent nation states regard themselves as ahead of, not behind, the United States.

In fact, in much of the world the belief is that, by emulating the United States and copying its economic thoughts and institutions, a sort of Gresham's Law<sup>169</sup> will prevail: bad capitalism (United States style) will drive out good capitalism (family capitalism, bamboo capitalism, guided capitalism).<sup>170</sup>

### C. Impenetrable Barriers to Western Economic Ideas

In still another part of the world in a subset of nations powerful political and religious forces cause the rejection of all Western ideology:

In China, Malaysia and Singapore, in Egypt, Algeria and Iran, in post-communist Russia and parts of the Balkans, in Turkey and India, the end of the Cold War has released powerful political movements which reject all westernizing ideologies . . . .

Only in the United States is the Enlightenment project of a global civilization still a living political faith. During the Cold War this Enlightenment faith was embodied in American anti-communism. In the post-communist era it animates the American project of a universal free market.<sup>171</sup>

Many of the Muslim nations of the world (Iraq, Iran, Saudi Arabia, Indonesia to an extent) are loathe to permit American influence of any kind to flourish within their borders. Some of that group actively block penetration of United States economic or other ideas.

United States global convergence advocates have the wrong view of capitalism and economies of the world. They have, it seems, fallen prey to the error of John Stuart Mill or Adam Smith, who also made sweeping (global) assertions based upon empirical observations of a few (a very

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Searjeant, *Economically, Jails Cost More Than Corner Shops*, THE TIMES (LONDON), Dec. 11, 1995, at 38 ("Why do we look to America for economic and social models, from deregulation and institutional investor power to workfare schemes, if they produce this kind of society?").

167. In 1989, U.S. C.E.O.s earned 160 times the pay of the average worker, while in Japan the figure was 16 and in Germany 21. GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES 205-09 (1991). In 2000, compensation consultant Graef Crystal says "it is 'north of 400 times and heading rapidly to 500 times.'" Kathleen Day, *Soldiers for the Shareholder*, WASH. POST, Aug. 27, 2000, at H1.

168. GRAY, *supra* note 157, at 121.

169. Sir Thomas Gresham explained that "bad money drives out good." LIPSEY & STEINER, *supra* note 98, at 592.

170. GRAY, *supra* note 157, at 78-79.

171. *Id.* at 101.

few)<sup>172</sup> western economies.

#### V. Backlash Against American Economic Imperialism and Globalization in Any Form as a Force Countering Any "Global" Convergence in Corporate Governance

There are two principal types of backlash inimical to any "global" convergence of corporate governance, especially governance patterned on the United States model. One form is a direct worldwide backlash against United States influence and domination in everything from product markets to ideas. The other is the growing backlash against globalization, a significant component of which is rooted in the notion that globalization is little more than a vehicle for Americanization.

Scholars who posit a convergence in corporate governance proceed on the premise that United States business, political and academic leaders can project American products and values to the last corner of the earth. As the following editorial from the *International Herald Tribune* (Paris) suggests, those leaders face significant backlash in creation of the new economy empire they predict:

It is impossible to pinpoint the moment when the successes of the United States in the 1990s moved from a topic of grudging admiration around the world to a constant source of annoyance . . . to a rationale of mistrust and resistance.

Perhaps the clincher was envy over the dramatic ascent of the Dow Jones industrial average from a little over 2,000 points at the start of the decade to more than 11,000 this year. Maybe it was the dawning realization that people around the globe are all flicking on the same Windows operating system in the morning, on their way to navigating an Internet dominated by U.S. innovations and businesses . . .

Maybe it was when the United States, in the wake of the Asian economic crisis, began offering tutorials on American-style capitalism and insisting that the financial architecture of the world be rebuilt to U.S. building codes.<sup>173</sup>

It is not only protesters against the WTO in Seattle or at the IMF and World Bank annual meetings in Washington, D.C.,<sup>174</sup> but also a significant

172. See *supra* notes 66-78 and accompanying text (noting that convergence advocates base their postulate of globalization on observations of the United States, on the one hand, and the United Kingdom, Germany and France, with brief mention of outliers from time to time).

173. David E. Sanger, *U.S. Is the "800 pound Gorilla"—Global Power Encounters Envy and Mistrust*, INT'L HERALD TRIB., July 19, 1999, at 1.

174. On disruption of the WTO meeting in Seattle, see for example Sam Howe Verhovek & Steven Greenhouse, *National Guard Is Called to Quell Trade-Talk Protests*, N.Y. TIMES, Dec. 1, 1999, at A1; Timothy Egan, *Black Masks Lead to Pointed Fingers in Seattle*, N.Y. TIMES, Dec. 2, 1999, at A1; Sam Howe Verhovek, *Seattle Is Stung, Angry and Chagrined as Opportunity Turns to Chaos*, N.Y. TIMES, Dec. 2, 1999, at A16; Michael Kazin, *Saying No to WTO*, N.Y. TIMES, Dec. 5, 1999, at 17; Timothy Egan, *Free Trade Takes on Free Speech*, N.Y. TIMES, Dec. 5, 1999, at 1; John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST, Dec. 1, 1999, at 1; Tom Hayden et al., *The Battle in Seattle: What Was That All About*, N.Y. TIMES, Dec. 5, 1999, at B1. Disruption of the IMF and World Bank annual meetings is chronicled in, *inter alia*, John Burgess, *Activists Aim*

number of thoughtful persons around the globe who see globalization of anything, including corporate governance, as a Trojan horse for United States dominance:

One of the most frequent complaints about globalization is that it is equivalent to Americanization. There are widespread fears that in today's border-less, high tech world, national differences will be overwhelmed by American economic and cultural domination . . . .<sup>175</sup>

First and foremost, according to its critics, globalization serves the agenda of large United States based multinational corporations, for whom growth of sales and profits are ascendant over all other values:

Growth, [critics of globalization] argue, can be wasteful, destructive, unjust. The jobs created by globalization are often less sustaining and secure than the livelihoods abolished by it. Weak economies abruptly integrated into the global system do not become stronger, or develop a sustainable base; they just become more dependent, more vulnerable to the ructions of ultravolatile, deregulated international capital.<sup>176</sup>

Globalization, to their way of thinking, is the imposition from above by international institutions such as the WTO, IMF and World Bank, of a worldwide Darwinian regime that will make the rich richer and the world's poor no better off:

In many countries, the benefits of economic growth [wrought by globalization] are so unequally distributed that they intensify social and political tensions, leading to increased repression rather than to greater democracy. To the hoary trope that a rising tide lifts all boats, critics of corporate-led globalization retort that in this case it lifts only yachts.<sup>177</sup>

It is easy to dismiss the concerns of protesters in Seattle, Washington, Gothenberg, or Genoa as the poorly articulated, contradictory outcry of a disorganized mob, and many do.<sup>178</sup> From their ivory tower perches in the

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to Halt Meeting of World Bank and the IMF, INT'L HERALD TRIB., Jan. 27, 2000, at 17; David Sanger, *Global Storm: Loan Agencies Under Siege*, N.Y. TIMES, Apr. 16, 2000, at 1; John Kifner & David E. Sanger, *Financial Leaders Meet As Protests Clog Washington*, N.Y. TIMES, Apr. 17, 2000, at 1; John Burgess, *Globalization and Its Discontents*, WASH. POST, Apr. 13, 2000, at A1; Helene Cooper & Michael M. Phillips, *Protests Hit World Bank/IMF Sessions*, WALL ST. J., Apr. 17, 2000, at A2.

175. Reginald Dale, *'Americanization' Has Its Limits*, INT'L HERALD TRIB., Jan. 25, 2000, at 9.

176. William Finnegan, *After Seattle*, NEW YORKER, Apr. 17, 2000, at 40, 42.

177. *Id.*; see also Michael M. Phillips, *Can World Bank Lend Money to Third World Without Hurting Poor?*, WALL ST. J., Aug. 14, 2000, at A1 (explaining that World Bank finance of open pit coal mines in India has worsened rather than bettered the lives of local citizens, and subsistence farmers have been displaced by expansion of mines).

178. E.g., Thomas L. Friedman, *Senseless in Seattle*, N.Y. TIMES, Dec. 1, 1999, at A23 (noting "a Noah's ark of flat-earth advocates, protectionist trade unions and yuppies looking for their 1960's fix"); *Global Whipping Boy: The Wrong-headed Take to the Streets to Protest the WTO*, PITTSBURGH POST-GAZETTE, Dec. 5, 1999, at E2 (noting a "kaleidoscope of interests that feel victimized by changes in the way the world functions . . . [t]hey are on the wrong side of the issue, on the wrong side of history and on the wrong side of the political tide . . . [s]o, the losers took to the streets with a vengeance"); Stephen Schwartz, *Seattle Has Gone 'Wobbly' Before*, WALL ST. J., Dec. 3, 1999, at A14 ("[I]n 'the 47 states and the Soviet of Washington' . . . it should come as no surprise that the



American academy, "global" convergence in corporate governance advocates do not even broach the subject of opposition to globalization, or any other form of backlash. They simply believe that any ideas with which they are associated, such as superior United States style corporate governance practices and structures, ultimately will prevail in some world wide marketplace of ideas.<sup>179</sup> Backlash against United States influences and against globalization cannot be quantified but they are palpable nonetheless. In both forms, worldwide backlash poses a significant impediment to "global" convergence in corporate governance.

## VI. The Simple Irrelevancy of United States Style Corporate Governance to the Pressing Problem of the New Century: The Growth and Regulation of Large Multinational Corporations

### A. Background

The inexorable growth of large multinationals has been one of the least noticed phenomena of the 1990s and, in the new century, is only now receiving the critical attention it deserves. The growth of large multinational and truly international corporations poses a number of overlapping problems, such as the irrelevancy-impotency of the nation state, the resulting field of play for economic imperialism, and resulting opportunities to engage in regulatory arbitrage, leading to problems such as environmental degradation and "plantation production," especially in the new industrializing countries (NICs) and less developed countries (LDCs) of the world. Traditional corporate governance theory, structure, and practices deal with solving problems thought to be generated by the separation of ownership from control in large publicly held corporations. They are simply irrelevant to the problems posed by the growth of large, sprawling multinational entities.

### B. The Accelerating Growth of Large Multinationals

The number and size of large multinational corporations have grown at geometric rather than arithmetical rates as of late. Predictions are that by the year 2010 the number of large multinationals will be several times the number that existed just a few years ago.<sup>180</sup> Domestic and transnational merger activity is at an all time high. Particularly in commodities areas

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Seattle street fighters attempt to obstruct a WTO summit that aims to improve the economic situation of the developing countries."); Francis Fukuyama, *The Left Should Love Globalization*, WALL ST. J., Dec. 1, 1999, at A26 ("It is ironic that the left should rebel against globalization, since globalization is one of the most progressive forces in the world today.").

179. See *supra* notes 45-53 and accompanying text.

180. Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1962 (1998) ("In the late twentieth century, the exponential growth of multinational or transnational corporate enterprise qualifies as one of the most important historical developments."). Looking to the past, multinationals accounted for 18% of the world's manufacturing output and 7.5 % of total global output in 1992. Martin Wolf, *The Heart of the New World Economy*, FIN. TIMES (London), Oct. 1, 1997, at 16.

(oil, aluminum), but also in automobile manufacture, telecommunications, food and other fields, senior corporate managers are engaged in a quest to be number one, two, or three in size—on a global rather than merely a domestic or continental (EU or NAFTA) scale.

The quest to be in a handful of the largest corporations in a given field, and on a global scale, is driving a headlong pursuit of size, manifesting itself in a worldwide merger movement. The recent acquisition by Alcoa Aluminum of Reynolds Metals Co. illustrates this trend.<sup>181</sup> Alcoa faced a situation in which three smaller foreign rivals combined to form an aluminum multinational with \$21 billion in worldwide sales.<sup>182</sup> Alcoa's CEO felt that Alcoa had no choice but to make a bear hug offer for the world's third largest producer of aluminum products, Reynolds Metals. After the acquisition, Alcoa will rival the world's largest producer, with slightly less than \$21 billion in annual sales.<sup>183</sup>

In another commodities field, oil, Exxon has acquired Mobil Oil in a \$81.2 billion combination.<sup>184</sup> The British Petroleum Amoco merger represents a \$48 billion transaction, which has been followed by a proposed BP Amoco PLC buyout of Atlantic Richfield Co. for \$30 billion more.<sup>185</sup> In the summer of 1999, France's Fina Petroleum made an offer for Elf Aquitaine, France's other large international oil company. Reminiscent of the Bendix Martin Marietta "Pac Man" affair of the 1980s, Elf countered with a bid for Fina. Later in the summer the two corporations agreed on a friendly amalgamation that will result in the world's fourth largest oil company.<sup>186</sup>

Global oligopoly seems a near certain prospect for the world's automobile manufacturing industry. Chrysler and Daimler-Benz have com-

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181. See Robert Guy Matthews et al., *Fitness Test: Alcoa-Reynolds Union Bears Stamps of Deal Rocking Commodities*, WALL ST. J., Aug. 20, 1999, at A1 (noting the "latest in a string of recent deals that have seen one commodity giant gobble up another" and "mergers reflect the confluence of three important trends: industry consolidation, convergence of once-distinct lines of products or services, and globalization."); Matthew et al., *Commodity Crunch: Alcoa-Reynolds Deal Shows the Logic of Merger Dynamics—From Aluminum to Oil, Survival of the Fittest is Now the Order of the Day*, WALL ST. J. (Europe), Aug. 20, 1999, at 1.

182. See Nikhil Deogun & Robert Guy Matthews, *Reynolds Metals Yields to Alcoa's Bid*, WALL ST. J., Aug. 20, 1999, at A3 (describing Alcoa's reaction to three way merger of Canada's Alcan Aluminum, Ltd., France's Pechiney, SA and Switzerland's Alusuisse Lonza Group.). But see Anita Raghavan & Nikhil Deogun, *Alcan's Merger Plan May Be in Jeopardy*, WALL ST. J., Apr. 12, 2000, at A3 (noting antitrust opposition by Commission of the European Union).

183. Deogun & Matthews, *supra* note 182.

184. Steve Liesman & Alexei Barrionuevo, *Exxon and Mobil Shareholders Approve the \$81.2 Billion Merger*, WALL ST. J., May 28, 1999, at A4.

185. John R. Wilke & Steve Liesman, *BP Amoco's Arco Buyout Faces Hurdles*, WALL ST. J., Nov. 2, 1999, at A2.

186. Thomas Kamm & Bhushan Bahree, *French Oil Giants Agree to \$48.7 Billion Merger*, WALL ST. J., Sept. 14, 1999, A15. Later, the Chevron acquisition of Texaco for \$38 billion relegated the combined French entity to fifth place worldwide. See, e.g., Neela Banerjee & Mary Williams Walsh, *Texaco Hopes Chevron Can Polish Fading Star*, INT'L HERALD TRIB., Oct. 18, 2000, at 15.

bined<sup>187</sup> as have Ford and Volvo.<sup>188</sup> In March 1999, Renault S.A. of France took effective control of Nissan Motor Co.<sup>189</sup> General Motors Corporation has held talks with Fiat SpA.<sup>190</sup> These latter business combinations involve not only sheer size, but also portend an age of increasing transnational takeover and merger activity.<sup>191</sup>

Carlo De Benedetti's 1988 attempt to take over *Societe Generale de Belgique* was characterized as the first major transnational takeover, hostile or friendly, in the European Union.<sup>192</sup> By that time, of course, the United States had witnessed a crazy decade of merger activity, hostile takeovers, insider trading scandals and financial excesses.

Europe and the EU member states are awakening, if not catching the United States. In summer, 1999, Bank Nationale of France made two simultaneous \$38 billion hostile offers, for Paribas and for Belgium's *Societe Generale*.<sup>193</sup> Deutsche Bank in Germany and Bankers Trust in the United States have combined.<sup>194</sup> Recently, in telecommunications, Mannesmann A.G., the largest German wireless company, has acquired Orange PLC, Britain's third largest wireless corporation, in a \$33 billion transaction.<sup>195</sup> Vodafone Airtouch, PLC then made an offer for Mannesmann.<sup>196</sup>

187. Keith Bradsher, *Effective Today, Chrysler and Daimler-Benz Are One*, N.Y. TIMES, Nov. 12, 1998, at C4.

188. Edmund L. Andrews, *Ford-Volvo: A Deal for All Sweden*, N.Y. TIMES, Jan. 30, 1999, at C1.

189. Peter Landers, *How Cable & Wireless Pulled Off an Upset in Japanese Takeover*, WALL ST. J., Nov. 10, 1999, at A1.

190. Deborah Ball, *Fiat and GM Are Holding Talks About Alliance*, WALL ST. J., Mar. 13, 2000, at A3; Keith Bradsher, *New Terrain Drives Global Auto Industry to Merge*, INT'L HERALD TRIB., Mar. 24, 2000, at 1.

191. The drug industry is another example of a sector headed toward oligopoly. See, e.g., Stephen D. Moore et al., *SmithKline and Glaxo Agree to Merger*, WALL ST. J., Jan. 17, 2000, at A3 (noting that the \$75.7 billion English-Swiss corporate combination will create the world's largest drug company); Robert Langreth, *Pfizer, Warner-Lambert Agree on Terms*, WALL ST. J., Feb. 7, 2000, at A3 (noting that the \$84 billion transaction will create the world's second largest drug company).

192. See William C. Symonds et al., *De Benedetti's Grab for a Big Piece of Belgium*, BUS. WK., Feb. 1, 1988, at 42. The De Benedetti bid may have helped hurry along the EU's efforts on the transnational merger front. See generally Nathalie Basaldua, *Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487, 491 (1989) ("Certainly the best known example [of a takeover bid] in Europe is the hostile bid in January 1988 for *Societe Generale de Belgique* . . . by the Italian entrepreneur, Carlo de Benedetti").

193. See Advertisement, *Bank National Popular (BNP)*, INT'L HERALD TRIB. (Paris), July 26, 1999, at 7 ("Shareholders of *Societe Generale* and *Paribas*—Only 5 Days Left to Maximize Your Investment—Tender Your Shares to BNP."); Thomas Kamm & Deborah Ball, *Bank Merger Speculation Grows—Europeans Expect Cross Boarder Deals*, WALL ST. J. (Europe), Aug. 17, 1999, at 1.

194. Christopher Rhoads, *Deutsche Bank's Bet Looks to Be Paying Off: In Buying Bankers Trust, German Lender Boosts Investment-Bank Profit*, WALL ST. J., Nov. 18, 1999, at A16.

195. William Boston & Anita Raghavan, *Mannesmann Agrees to Buy U.K.'s Orange For Cash, Stock*, WALL ST. J., Oct. 21, 1999, at A15.

196. Gautam Naik & Anita Raghavan, *Vodafone to Sweeten Mannesmann Offer*, WALL ST. J., Nov. 17, 1999, at A3.

The size of the acquisitions has become truly staggering. In the 1980's the RJR Nabisco transaction featured in *Barbarians at the Gate* was thought to have set a record for the size of the deal, a record that would endure, at \$24 billion.<sup>197</sup> The recent MCI World Wide Communications proposed acquisition of Sprint is a \$115 billion transaction.<sup>198</sup> The America Online (AOL) Time Warner combination is a \$165 billion transaction.<sup>199</sup> The Vodafone offer for Mannesmann, A.G. is valued at \$180 billion.<sup>200</sup>

### C. An Illustrative New Multinational

A recent business combination of two multinationals frames the issues nicely. Unilever, a Netherlands based food and consumer products company, is a mid-size multinational which has 138 subsidiaries in 71 countries worldwide: 11 in North America, 15 in the Latin America, 23 in Africa and the Middle East, 23 on the Pacific Rim, 55 in the European Economic Union, and 11 in the remainder of Europe.<sup>201</sup> Its worldwide sales are approximately \$44 billion.<sup>202</sup> It employs 2.25 million people of whom 550,000 work on corporate owned plantations.<sup>203</sup>

In May 2000, Unilever made overtures to a smaller United States based food multinational, Best Foods Co. With \$10 billion or so in worldwide sales, Best has 62 subsidiaries operating in 110 different countries, many on the Pacific Rim.<sup>204</sup> Combined, after the \$20.3 billion acquisition, with elimination of some overlap, the two multinationals will have over 200 subsidiaries in over 120 countries, with Best Foods' strong presence in Asia complementing nicely Unilever's presence in the Americas and the European Union. The combined entity is now the world's second largest food company, after Nestle of Switzerland, with Kraft Foods of the United States ranking third.<sup>205</sup>

A corporate organization such as the combined Unilever-Best organization illustrates nicely four interrelated regulatory problems: (1) power, size and the resulting irrelevancy-impotency of the nation state; (2) increased economic imperialism; (3) regulatory arbitrage; and (4) the related "plantation production" problem.

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197. BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 480 (1990).

198. Rebecca Blumenstein, *MCI Says Sprint Unit's Losses May Weigh on Firm*, WALL ST. J., Nov. 9, 1999, at B9.

199. See Saul Hansell, *America Online Agrees to Buy Time Warner for \$165 Billion; Media Deal Is Richest Merger*, N.Y. TIMES, Jan. 11, 2000, at A1.

200. Philip Shishkin & William Boston, *Vodafone Wins EU Clearance to Acquire Mannesmann in Record \$180 Billion Deal*, WALL ST. J., Apr. 13, 2000, at A14.

201. *Unilever Annual Accounts 1999* at 41-43 (2000) (noting Principal Group Companies and Fixed Investments as of December 31, 1999).

202. *Unilever Charts 1989-98* at 2 (2000).

203. *Id.* at 10.

204. Joyce Gannon, *Bestfoods: A Big Company You Never Heard Of*, PITTSBURGH POST-GAZETTE, Sept. 16, 1999, at A11.

205. Shelly Branch, *Mammoth Deals Are Expected to Spur More Consolidation in the Food Industry*, WALL ST. J., June 27, 2000, at A3.

## D. The Regulatory Setting in the Multinational Corporate Sphere

### 1. *The Power and Size of Multinationals and the Irrelevancy of the Nation State*

In the 1990s the case for regulation clearly departs from the 50 plus year search by law professors and reformers to fill the vacuum created by the separation of ownership from control Berle and Means hypothesized in 1932.<sup>206</sup> Berle's and Means's analysis implicitly assumes a large but not all powerful corporation operating, by and large, subject to the dictates of a single nation state which, in theory, possesses sufficient power to regulate should it desire to do so. Later reforms of the corporate social responsibility movement, such as federal chartering of corporations<sup>207</sup> or federal minimum standards,<sup>208</sup> hypothesized a lack of a will to regulate brought on by charter mongering, the "race to the bottom" engaged in by the states.<sup>209</sup> Those proposals still assumed, however, the power of the nation state, in the form of the federal government, to bend corporations to its will if it wished to do so.

Today, however, large corporate empires sprawl across the globe. The power of the corporation may not only exceed that of any host but also that of the incorporating state. With a combined \$54 billion in sales, the Unilever-Best entity has an annual turnover that exceeds the gross domestic product (GDP) of all but about 50 nations, including Ecuador, the United Arab Emirates, Kuwait and Kenya, ranking just behind the Republic of Ireland whose GDP is \$59.9 billion.<sup>210</sup> Often the nation states in which subsidiaries operate and in which externalities are most felt do not have the power (or the will) to regulate.<sup>211</sup> This scenario brings renewed call for the domiciliary state of the parent corporation to assert itself.<sup>212</sup>

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206. See generally ADOLF A. BERLE & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1991); ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 83, 90 (1999).

207. NADER ET AL., *supra* note 4, at 26-70; Schwartz, *supra* note 4; Note, *supra* note 4.

208. The leading piece was by the late Professor William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (positing a "race to the bottom" in states' competition for incorporations).

209. The opposing view was that competition for charters produced an efficient mix of legal rules, resulting in a "race to the top" rather than "a race to the bottom." Barry D. Baysinger & Henry N. Butler, *Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law*, 10 J. CORP. L. 431, 433 (1985); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 920-22 (1982).

210. See, e.g., CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 1999, at <http://cia.gov/cia/publications/factbook/fields/gdp.html> (last visited Feb. 28, 2001).

211. Eric W. Orts, *The Legitimacy of Multinational Corporations*, in *PROGRESSIVE CORPORATE LAW* 258-60 (Lawrence E. Mitchell ed., 1995) (noting that "multinational corporations often seem like ghosts escaping the various national and international laws that reach out impotently to claim them" and "[s]pread out among various countries, the operations of multinational corporations are often above the law of any particular country."); see also KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 39 (1995).

212. In response to which are heard replies that even domiciliary states lack the power or the will to regulate. ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OUR-*

In turn, incorporating nation states may refuse to take adequate action because of the fear that large multinationals may reincorporate elsewhere. Indeed, a multinational could move to an offshore incorporating jurisdiction (the Netherlands Antilles, the Cook Islands, Grand Cayman) in which secrecy prevails and the threat of meaningful regulation is nil.<sup>213</sup>

Observations as to sheer power and size have led many scholars to predict or proclaim the irrelevancy of corporate law and of the identity of the incorporating state.<sup>214</sup>

## 2. Economic Imperialism

On quaint Fort Street, in Victoria, British Columbia, Canada, a United States Banana Republic Store and a Burger King have displaced a Scots Tartan store and a tea shop that had been on Fort Street for decades. The main street of a middle size town in Malaysia will be lined with United States franchised fast food outlets: a Kentucky Fried Chicken, an A & W Root Beer and a Burger King. Can a GAP store be far behind? The United States based McDonalds is everywhere, its stores and its billboards despoiling the urban and the rural landscapes of countries around the globe.

In their attempts to homogenize the world, United States multinationals often attempt to march in under the banner of free trade. Monsanto has attempted to shoehorn its genetically engineered seed products into the European Union, over the objections of French farmers.<sup>215</sup> Prodded by multinational United States based producers, the United States trade representative argues for the introduction into European markets of beef fat-

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SELVES FOR 21ST CENTURY CAPITALISM 136-53 (1991) (positing "[t]he coming irrelevancy of corporate nationality"); Orts, *supra* note 211, at 253 (citation omitted).

Even when the international context is explicitly considered [by American legal academics in their writings] . . . discussion often degenerates into a neomercantilist debate over comparative models of corporate law. This debate is neomercantilist because it advances the assumption that multinational corporations will necessarily act as faithful instruments of the nation-states in which their parents are incorporated, rather than recognizing the more complex reality that multinationals are in fact becoming more and more "stateless."

*Id.*

213. A vexing conundrum has been precisely why so few, if any multinationals have moved to an offshore incorporating state. Scholars have raised the possibility of a "bandit" multinational moving off shore but it seems not to have occurred. ERIC HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD 1914-1991*, at 278 (1996) ("[a] suitably complex and ingenious combination of the legal loopholes in the corporate and labour laws of kindly mini-territories—for instance, Curacao, the Virgin Islands and Liechtenstein—could do wonders for a firm's balance-sheet").

214. See *supra* note 30; see also Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 (1996).

215. Sam Lowenberg, *For American Businesses Lobbying the European Union Has Become a Priority*, AM. LEGAL TIMES, Nov. 8, 1999, at 1 (noting that Monsanto hired former U.S. Trade Representative to lobby EU and to overcome French opposition to genetically engineered seed products); Bill Lambrecht, *World Recoils at Monsanto's Brave New Crops*, ST. LOUIS POST-DISPATCH, Dec. 27, 1998, at A1; Sam Loewenberg, *Cultivating Allies in Genetic Food Fight*, LEGAL TIMES, Dec. 13, 1999, at 14.

tened using human growth hormones.<sup>216</sup>

This is the new economic imperialism. That imperialism views the eradication of all barriers as tantamount to globalization. That imperialism wants a world without borders so that the same products and services dominate market after market. That imperialism uses globalization as a bulldozer to crush resistance to achievement of those goals by the multinational corporations that are the progenitors of economic imperialism.

### 3. *Regulatory Arbitrage by Multinationals*

The need to regulate, based upon the global scenario, is buttressed by a refinement, the notion of "regulatory arbitrage."<sup>217</sup> A multinational may locate activities in nation states in which the regulation poses the least, or no, obstacle to the activity in which the multinational wishes to engage. For example, the multinational may locate a polluting facility in a former Soviet Republic in which environmental law or enforcement is not only lax but non-existent. The same multinational might locate a "knockoff" manufacturing facility in a nation with a large market for the product and little or no protection for intellectual property, such as the People's Republic of China. With labor intensive manufacturing the multinational may seek out a developing nation eager for employment at any cost and locate a facility there. Through time, the multinational may shift activities from country to country, depending upon the regulatory obstacles that spring up in the multinational's path, usually as the standard of living and expectations rise.<sup>218</sup>

A combined Unilever-Best, with 200 separate operations already existent in 120 countries around the globe, and on every continent save Antarctica, illustrates the potential for regulatory arbitrage open to managers of a far flung multinational.

### 4. *The Plantation Production Problem*

Multinationals may move activities to host nations in which working conditions are substandard to atrocious and in which wages paid do not rise even to the level of a living wage. Over decades a manufacturer might move

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216. In retaliation, the United States put punitive tariffs on Roquefort cheese, French mustard, and other luxury foods, sparking destruction of a McDonald's in France and elevation of the French farmer who led the raid to the status of anti-globalization folk hero. Suzanne Daley, *French Turn Vandal into Hero Against U.S.*, N.Y. TIMES, July 1, 2000, at A1; Suzanne Daley, *French See a Hero in War on 'McDomination'*, N.Y. TIMES, Oct. 12, 1999, at A1.

217. See Orts, *supra* note 211, at 250 ("Multinational flexibility allows firms to perform *regulatory arbitrage*, that is, to shift operations among countries to take advantage of differing legal requirements, for example, lower labor costs due to absence of minimum wage laws or unions, more flexible antitrust or tax law, or weaker environmental law.") (emphasis in original) (citing Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993)).

218. Nike is an example a multinational that has engaged in regulatory arbitrage over time. As wages and expectations rise and requirements for better working conditions are adopted by host nations, Nike has moved its athletic shoe manufacturing facilities—from Korea to Thailand, then to Indonesia, and, currently, to Vietnam.

a facility from Korea to Malaysia to Indonesia to Vietnam. Newly industrializing countries (NICs) of Africa could be next in the parade of host states. In other instances, a manufacturer may move manufacture or assembly activities from facility to facility in the same country, as in the *maquiladora* phenomenon that has occurred in Mexico and has accelerated under NAFTA.<sup>219</sup>

Host states often welcome roving multinationals, despite the exploitation of their citizens involved. In competition for economic growth, other states that may be prone to regulate at least more extreme forms of worker exploitation do not do so, fearing a competitive disadvantage. Among nation states a collective action problem exists that may be solved by international organizations such as the World Bank or the World Trade Organization. Within the WTO, however, the NICs and the LDCs resist, perceiving WTO efforts to regulate plantation production as a ploy by wealthier states to keep NICs and LDCs in their place.<sup>220</sup> Given the economic disparities among nations around the globe, the plantation production problem seems an intractable one,<sup>221</sup> certainly not susceptible to traditional corporate governance analysis.

#### E. The Irrelevance of Traditional Corporate Governance to the Multinational Sphere

In 1932 Adolph Berle and Gardiner Means published their empirical findings with regard to the publicly held corporation.<sup>222</sup> Berle and Means found that with modern communications, well-organized stock exchanges and a proliferation of investors the owners of incorporated business had become dispersed and their shareholdings had become, for the most part, atomized. The modern corporation represented a new form of property. Those who owned the property, the shareholders, no longer controlled it. Instead, self-perpetuating boards of directors and senior corporate manag-

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219. *Maquiladoras* assemble motor vehicle parts, electric capacitors, stuffed animal toys, apparel, televisions sets, electric motors, and a host of other products, often for multinationals, using low cost labor in tilt up construction facilities that may change products on a sixty or ninety-day basis. See generally, KHOSROW FATEMI, *THE MAQUILADORA INDUSTRY: ECONOMIC SOLUTION OR PROBLEM?* (1990); KATHRYN KOPINAK, *DESERT CAPITALISM: MAQUILADORAS IN NORTH AMERICA'S WESTERN INDUSTRIAL CORRIDOR* (1996); LESLIE SKLAIR, *ASSEMBLING FOR DEVELOPMENT: THE MAQUILA INDUSTRY IN MEXICO AND THE UNITED STATES* (1989).

220. Compare Jonathan Peterson, *Leadership Struggle Reflects Growing Schism in WTO Trade*, L.A. TIMES, July 21, 1999, at C1, with Tyrone Beason, *WTO in Seattle: Herman Bids to Put Labor on Agenda—Clinton Administration Official Promotes Worker Rights*, SEATTLE TIMES, Oct. 26, 1999, at E1.

221. In addition to the potential for oppression of less developed countries, law making in the international context brings another set of problems. The bureaucrats, trade representatives, and others who make law in the international sphere lack accountability to any electorate. See *supra* notes 94-97 and accompanying text. See generally Stephan, *Rules, Rents and Legitimacy*, *supra* note 93, at 681. Critics "assert that the establishment of NAFTA and the World Trade Organization (WTO) will mean that state and federal legislatures no longer may decide what kind of environmental safeguards or standards of consumer and worker protection we will have." *Id.* at 681.

222. BERLE & MEANS, *supra* note 206.



ers controlled the property. Berle and Means hypothesized and then proved the existence of the fabled "separation of ownership from control."<sup>223</sup>

Due to what we today call collective action problems, even when shareholders detect that corporate managers are underperforming, or performing in other undesirable ways, shareholders find it very difficult to unite and then reassert themselves. Collective action problems include the difficulty in many public corporations of identifying who fellow shareholders are in the first place and then the costs of communicating with them. The latter costs include regulatory costs, most specifically the cost of complying with the SEC's rules governing proxy solicitation, which permit the corporation and its managers to sue the activist shareholder for mere slips of the pen in their communication with others. Another collective action problem is the "free rider" problem. A certain number of fellow shareholders may support the activists in spirit, but not financially, or in other meaningful ways. They will watch closely, but only as bystanders who "free ride" on the efforts of their activist brethren.

Traditional corporate governance analysis deals with what regulatory or market forces should fill the "vacuum" created by the separation of ownership from control. Most "reforms" propose insertion of substitute monitors, who will supply the monitoring the dispersed shareholder no longer can provide. Substitute monitors include governmental (Ralph Nader's proposed Federal Chartering Agency), reinvigorated shareholders (expanded SEC shareholder proxy proposal rule), auditors and enhanced audits (corporate social accounting), public interest directors, or activist institutional investors.

Another approach is to use those and other devices such as performance based compensation to re-align managers' interests with shareholders' interests. Economists would posit that any agent, whether it be the property manager for an absentee landlord or the senior executive of a major corporation with dispersed shareholders, has a different agenda than does the owner and will not take care of the property in the same manner as the owner would if she were present. Thus agents may engage in shirking (laziness, playing excessive amounts of golf) or opportunistic (self serving, self dealing) behavior. The central problem of corporate law, and especially corporate governance, is to reduce these agency costs.<sup>224</sup>

The current vogue in United States style corporate governance emphasizes use of boards of directors comprised of truly independent directors.<sup>225</sup> Instead of managing the corporation's business and affairs, those independent directors have a changed mission. Their focus should be to

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223. *Id.* at 112-116.

224. The seminal piece is Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); see also Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

225. See AMERICAN LAW INSTITUTE, *supra* note 12, § 3A.01 ("The board of every large publicly held corporation should have a majority of directors who are free of any significant relationship with the corporation's senior executives . . .").

hire, evaluate, and, if necessary, replace the corporation's senior executive officers.<sup>226</sup> Independent directors, assisted by a committee structure (audit, nominating and compensation committees),<sup>227</sup> reduce agency costs and represent the substitute monitor yearned for since Berle and Means published their book.

In the multinational sphere, however, the evils imagined result from managers over performing, relentlessly pursuing profit through economic imperialism, excessive regulatory arbitration, degradation of the environment and plantation production. The United States style corporate governance model, which convergence advocates say should or already does dominate on global fronts, contemplates an underperforming or self dealing manager, not an over performing one. Put another way, in the international sphere, the senior managers and dispersed owners share an interest in financial returns that is less hampered, or not hampered at all, by an agency cost problem. Their interests are in alignment rather than out of alignment, as traditional corporate governance theory hypothesizes. Why this is so is a matter for conjecture. Perhaps it is because of the larger stakes and the absence of significant obstacles, the "easy pickings" as it were in the multinational sphere.

Professor Lawrence Cunningham labels what traditional United States style corporate governance analysis and debate deals with as "vertical" corporate governance.<sup>228</sup> Assessments are made along a vertical line running up from shareholders through boards of directors and other monitors (such as auditors) to senior executive managers. The alignment, or lack of alignment, of various groups' interests along that vertical line is a central subject for discussion.

The large multinational corporation poses a completely different set of potential problems. Economic imperialism, degradation of the environment, regulatory arbitrage, and plantation production are problems of "external" corporate governance.<sup>229</sup> How a large multinational corporation interacts with the multitudinous societies and nation states in its far flung empire is a subject on which corporate governance, of the type the United States global convergence advocates know and write about, has very little if anything to say.

The self-anointed corporate governance experts, elite as they may be in the United States corporate law academy, are not cognizant of the real issues of the twenty first century. Their advocacy of "global" convergence, and that along the lines of United States style corporate governance, is not based upon "global" developments, is culturally chauvinistic, and is anach-

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226. See *id.* § 3.02(a)(1) ("The board of directors of a publicly held corporation should perform the following functions: (1) Select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives . . .").

227. See *id.* §§ 3A.03, .04, .05.

228. Cunningham, *supra* note 7, at 1134 ("Internal governance mechanisms are classified as vertical when they address the relationship between those in control of the corporation and all other constituents (including shareholders, workers, lenders . . .)").

229. *Id.* ("external corporate governance" defined).

ronistic. With the looming menace of gargantuan multinationals roaming the earth, events have moved swiftly past the elites' "global" convergence advocacy. As described above, in the larger scheme of things, "global" convergence in corporate governance is simply beside the point.

### Conclusion

Convergence in corporate governance may occur in discrete areas, such as financial accounting or disclosure standards. That convergence is far more likely to be regional rather than "global." In East Asia, for example, the ten SEAN states, perhaps lead by Singapore, could encourage direct foreign investment in the region, although at present there is no evidence of such a development beginning, let alone occurring.

Seldom will one see scholarship and advocacy that is as culturally and economically insensitive, and condescending, as is the "global" convergence advocacy scholarship that the elites in United States academy have been throwing over the transom. Those elites have oversold an idea that has little grounding in true "global" reality.

Instead those academics should turn their not inconsiderable talents to the issues of the new century. The astounding growth of huge multinational corporations, the impotence or lack of will among nation states to regulate them, the role of international organizations in the regulation of multinationals, and the relevance or lack of relevance of traditional corporate governance regimes—not "global" convergence in corporate governance—are the corporate law issues to which we *must* devote our time and our thoughts in the twenty first century.