GLOBALIZATION AND THE STUDY OF COMPARATIVE CORPORATE GOVERNANCE*

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I. INTRODUCTION

The study of comparative corporate governance has arrived, at least for publicly traded corporations. The amount of scholarship produced over the last several years by both lawyers and financial economists is evidence of the focus. Many factors have driven this increased interest and effected the change in scholarship. Globalization has both fostered the scholarship and development of corporate governance. In addition, in my view, the scholarship itself has become part of the globalization debate; that is, some of the significant issues of comparative corporate governance reflect the debates over globalization. Critics of globalization, particularly in trade, have argued (among other things) that it causes considerable harms to labor, undermines national sovereignty, damages the environment, and supports a particular cultural hegemony at the expense of the local. These criticisms can also be directed at the comparative corporate governance scholarship.

The particular comparative corporate governance scholarship that is part of the globalization debate involves two significant issues: first, whether the model of corporate governance should include a role for stakeholders other then shareholders (hereinafter "the stakeholder model");[1] and second, how and why two particular ownership patterns for publicly traded corporations, that of either widely dispersed shareholders or concentrated shareholdings (hereinafter "ownership models"), developed in certain countries and whether one ownership model will prevail.[2] Further, if either of these models is, in fact, optimal,

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1 A shareholder model does not necessarily suggest stakeholders are irrelevant but not part of the internal corporate governance. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law,* 89 GEO. L.J. 439, 443 (2001).

2 A related issue involves the role of the State in corporate governance either as a direct investor or through its indirect influence on corporate decisions. While

then arguably the competition from globalization may cause some convergence toward one model. While the role of stakeholders and the ownership structure can be viewed as separate and distinct issues, there is a connection between them. Arguments for a stakeholder model of corporate governance seem more prevalent in countries where there is concentrated ownership.[3] Thus, if dispersed ownership ultimately means shareholder primacy, then the extent to which it becomes the standard model could have an impact on the future role of stakeholders.

As will be discussed, globalization has fostered the study of comparative corporate governance within both the stakeholder and ownership models and may suggest that a model will prevail. As a result, the studies themselves are also part of the debates about globalization.

II. The Focus of Comparative Corporate Governance Scholarship

The study of comparative corporate governance has evolved[4] such that both the stakeholder and the ownership models are now major foci of comparative corporate governance scholarship. The general study of comparative corporate governance has primarily focused on the publicly held corporation.[5]

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privatizations have lessened the ownership role of the State in many developed countries, state ownership in developing countries remains an issue. *See* James Fanto, *The Transformation of French Corporate Governance and U.S. Institutional Investors*, 21 Brook. J. Int'l L. 1, 57-58 (1995) (discussing French privatization and the use of golden shares owned by the government to potentially veto a takeover); Guanghua Yu, *Using Western Law to Improve China's State Owned Enterprises: Takeover and Securities Fraud*, 39 Val. U. L. Rev. 339 (2004) (discussing state ownership in China). Even where there is no ownership, the State can try to influence corporate decisions through regulation or influence. *See* Floyd Norris, *France Backs the Merger of Two Drug Companies*, N.Y. Times, Jan. 27, 2004, at C2 (describing the recent role of the French government to encourage a takeover opposed by a French company in order to create a large a French pharmaceutical giant). The recent takeover attempt by a Chinese oil company of Unocal has raised the issue of state ownership. Kate Linebaugh, *How Favorable is Oil Bid's Financing*, Wall St. J., June 30, 2005, at A10.

[3] *See, e.g.,* discussion *infra* Part V (*History and politics matter*).

[4] *See* discussion *infra* Part III.

[5] The closely held corporation is a somewhat neglected subject from a comparative point of view, although there has been some research on the comparative process of going public and venture capital. *See, e.g.,* Luca Enriques & Jonathan R. Macey, *Creditors Versus Capital Formation: The Case Against the European Legal*

The publicly held corporation can be viewed in purely economic terms as a means by which capital is raised from a large number of public savers and used by businesses. Under that focus, corporate governance may concentrate on the suppliers of capital (creditors and shareholders) and the managers or those who control management. Since shareholders are owners, this view usually gives them primacy. Given the economic significance that many of these corporations have in different countries, however, a broader view has long been advocated by some because the governance of these large economic units has an impact on other interests who do not supply capital to the business.[6] In some countries, these interests, including labor (which invests human capital) and other interests in the society where the business operates, have a role to play in corporate governance.[7]

If we accept that corporate governance focuses on suppliers of capital, and particularly shareholders, we must consider how corporate governance can or should protect shareholder interests while preserving freedom in decision making for managers. In looking at publicly traded corporations around the world, two

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Capital Rules, 86 CORNELL L. REV. 1165 (2001) (discussing how European legal capital rules affects venture capital and going public).

[6] *See, e.g.,* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PRINCIPLES OF CORPORATE GOVERNANCE 11-13 (2004). The role of stakeholders can be viewed from an external or internal perspective. An external perspective sees stakeholders as outside the internal corporate governance and may suggest that their interests be protected by the concept of corporate social responsibility. In addition, corporations should also be accountable and to account to society for the implications of corporate actions. Cynthia Williams, *Corporate Responsibility in an Era of Economic Globalization,* 35 U.C. DAVIS L. REV. 705, 712-20, 722-724 (2002). An internal perspective will look to include stakeholders more directly in corporate governance. *See* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 *passim* (1998). Some scholars have suggested viewing the corporation as a "team production model" where the board serves as a mediating hierarchy among all interests. *See, e.g.,* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Amir Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style,* 29 DEL. J. CORP. L. 649 (2004) (a good discussion of the history of the United States stakeholder debates).

[7] Germany remains a prime example because of its dual board and co-determination where labor serves on the supervisory board of publicly traded corporations. Susan Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures*, 17 ARIZ. J. INT'L & COMP. L. 555, 561-62 (2000).

ownership models have emerged. One model has widely dispersed ownership where no shareholder or group of shareholders owns a significant percentage of shares. The other has more concentrated ownership where there are groups of shareholders such as family, corporate groups, or financial institutions owning significant percentages of shares. Widely dispersed ownership is found in a few countries such as the United States[8] and United Kingdom[9] while much of the rest of the world has concentrated ownership. Further, the widely dispersed model relies more on markets and the importance of liquidity, while the concentrated model relies on financial institutions for both finance and monitoring.

III. The Evolution of the Comparative Corporate Governance Scholarship

The study of comparative corporate governance has been greatly influenced by the study of United States corporate governance. The first major influence on the study in the United States was the famous book by Professors Berle and Means, *The Modern Corporation and Private Property*, first published in 1932. In their landmark study of the United State's publicly

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[8] The United States story is more complex. There are significant publicly traded corporations in which there is a control group and the public are minority shareholders. They range from traditional family owned businesses like the major newspapers (New York Times and Wall Street Journal) to high tech companies (Microsoft and Google) where control remains in the original owners. It may be more accurate to describe the United States publicly traded corporation as a mixture of both dispersed and concentrated owners.

[9] Both the United Kingdom and the United States have widely dispersed ownership but with the presence of large institutional investors who are influential but were not in control of the corporation. The United Kingdom had this for a longer period than the United States. *See, e.g.,* Bernard S. Black & John C. Coffee, *Hail Britannia?: Institutional Investor behavior Under Limited Regulation*, 92 Mich. L. Rev. 1997 (1994). In the United States, the increased ownership by institutional investors was a later development. In 1950, ninety-one percent of shares were held by households while in 1996, the figure was approximately forty-eight percent. Pension funds held twenty-two percent of shares. New York Stock Exchange, Fact Book for the year 1996 59 (1997). Given the rise of institutional investing, it is more accurate to say that shares are now often owned in large numbers by these institutions although not concentrated enough to actually control the corporations. Some of these institutional investors (particularly public pension funds) have been active in corporate governance issues. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 U.C.L.A. L. Rev. 811, 828 (1992).

traded corporation in the 1920s, the authors observed that many large publicly traded corporations had evolved from concentrated, and often family, ownership to widely dispersed ownership lacking a large shareholder presence in order to raise large amounts of capital. Usually, ownership equates with control, but in publicly traded corporations, the lack of concentrated shareholder ownership meant that those who managed the corporation actually controlled it because dispersed shareholders were rationally apathetic.[10] This separation of ownership from control was viewed as beneficial because of the diversification effects of dispersed ownership and the specialization of managerial expertise in running the business. The negative aspect of this separation, however, was the concern that managers may not always serve the interests of the dispersed owners who were usually beyond their control. Berle and Means demonstrated that economics drives law, ownership patterns matter from a policy point of view, and dispersed ownership could evolve as the norm.

It was Professors Jensen and Meckling who provided a framework to analyze shareholder-manager relations in their groundbreaking work on agency costs.[11] By viewing the relationship between the shareholders and the managers in publicly traded corporations with widely dispersed ownership from an economic perspective as one of agency, the issue became how to best lower the costs of the agency relationship by limiting the agent's (manager's) ability to mismanage or self-deal and harm the principal (shareholders). Further, the agency perspective tended to exclude other stakeholders from the corporate governance perspective.[12] The subsequent rise of the law and economics movement in the United States further enshrined this perspective

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[10] ROBERT CLARK, CORPORATE LAW 390-96 (1986).

[11] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 *passim* (1976).

[12] A broad definition of stakeholder creates difficulty in ensuring that the corporation is meeting its obligation to all related interests. Thus some view stakeholders more narrowly to only those who contribute firm-specific assets (suppliers, customers and labor), which fits better into a contractual theory of the firm. Maria Maher & Thomas Andersson, *Corporate Governance: Effects on Firm Performance and Economic Growth*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 386, 387-88 (Joseph A. McCahery et al. eds., 2000).

in both corporate scholarship and law.[13] In addition, financial economists in the United States used the agency cost perspective to do empirical studies on corporate governance. These studies looked at a variety of issues, including internal governance such as board structure and the functioning of external governance mechanisms such as takeovers.[14]

The study of United States corporate governance did not have a direct impact on the early approaches to comparative corporate governance scholarship. That early scholarship had more of a micro approach that focused on particular countries and differences in corporate law systems. For example, it concentrated on differences in the approach to issuance of shares (legal capital rules) or board structure in a specific country.[15] There was a tendency to look at differences in particular legal rules formally and not in an overall systematic way. Additionally, there were some attempts to use the study to influence the development of rules in other countries.[16]

Eventually the Berle/Means focus on ownership and the agency costs perspective on corporate governance became integral parts of the scholarship on comparative corporate governance from both a theoretical and empirical perspective. Some theoretical scholarship moved the arguments in the United States overseas.[17] The empirical research also used American studies of corporate governance mechanisms in country-specific contexts.[18]

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[13] *See generally* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Generally, the law and economic approach prefers market solutions over regulatory approaches as a means to lower agency costs. The rise of hostile takeovers in the 1980s became a focal point for this point of view. *See, e.g.,* Arthur R. Pinto, *Corporate Takeovers through the Public Markets in the United States,* 42 AM. J. COMP. L. 339 (Supp. 1994).

[14] Diane Denis & John McConnell, *International Corporate Governance*, (ECGI – Finance, Working Paper No. 05, 2003).

[15] *See, e.g.,* ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 75-93 (1976); Andre Tunc, *A French Lawyer Looks at American Corporation Law and Securities Regulation*, 130 U. PENN. L. REV. 757 (1982).

[16] *See, e.g.,* Tunc, *supra* note 15, at 771.

[17] *See*, *e.g.,* Clas Bergstrom et al., *The Regulation of Corporate Acquisitions: A Law and Economic Analysis of European Proposal for Reform,* 1995 COLUM. BUS. L. REV. 495 (discusses the market for corporate control and Europe).

[18] *See, e.g.,* Denis & McConnell, *supra* note 14 (described this research as the first generation on international corporate governance while the second generation involved exploring the reason for differences).

A significant shift in the focus of comparative corporate governance began in the United States in the early 1990s.[19] The United States was experiencing a recession and poor corporate performance, which resulted in some commentators looking at the more successful economies of Japan and Germany. This scholarship raised the issue of whether those countries' corporate governance systems might have contributed to their success and thus were significant from an economic perspective.[20] This eventually led to a shift to studies that began to look in a broader context for corporate governance rules as part of the overall financial system, a more macro approach.[21] The role of stakeholders and share ownership became an issue because in countries outside the United States, there were concentrated ownership and stakeholder models.[22] These studies went further and suggested looking to see if corporate governance was, in fact, a factor in economic competitiveness. If so, then the study of comparative corporate governance mattered from a policy point of view.

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[19] During the hostile takeover era in the 1980s, there was some attention focused on the ownership of foreign corporations because concentrated ownership meant that a hostile takeover was virtually impossible. One corporate raider, T. Boone Pickens, failed in an attempted takeover of a Japanese company, which raised the issue of open markets and corporate governance. *See* Bernard Wysocki Jr. & Jacob M. Schlesinger, *For U.S., China Is A Replay Of Japan*, WALL ST. J., June 27, 2005, at A2.

[20] *See, e.g.,* MARK J. ROE, STRONG MANAGERS WEAK OWNERS (1994).

[21] *See, e.g.,* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt et al. eds., 1998); THE LEGAL BASIS OF COMPARATIVE CORPORATE GOVERNANCE IN PUBLICLY HELD CORPORATIONS (Arthur Pinto & Gustavo Visenti eds., 1998).

[22] This added another level of agency costs to the comparative corporate governance scholarship. In the United States, there was the problem of potential mismanagement or self-dealing by managers at the expense of the widely dispersed shareholders; while the agency issue, with concentrated ownership, provided the potential for self-dealing by the concentrated owner at the expense of the public minority shareholders. Some suggest that there could be a third level of agency problem between the corporation and other constituencies like labor, creditors or its consumers. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 22 (2004). Most research particularly by financial economists focus on the shareholder agency problems, but leave out or minimize the issue of other stakeholders. However, a broader level of agency costs involving other constituents would keep them in the corporate governance debate.

The fact that the research involved comparative corporate governance rather than comparative law demonstrates the broad context of the study beyond legal systems.[23] Traditionally, any comparative study should look at both differences and similarities and try to provide reasons or explanations for both. By looking at developments in the relationships between legal systems, one may observe convergences or divergences.[24] Any such study requires a deep understanding of the humanities and social sciences. Since law can be embedded in human culture, an understanding of other disciplines will help explain similarities and differences in systems. A deep understanding of these different systems could lead to lessons to be learned from each system that could influence the development of law. It can lead to emulation and practical attempts to unify or harmonize law.[25]

The leading role played by financial economists in the study of comparative corporate governance using empirical research has helped remove the study from traditional comparative law[26]

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[23] At a basic level the study focuses on the legal rules that deal with the formation (and dissolution), financing, structure (board of directors and shareholders), powers and relationships among the participants. The source of the law can be statutes, cases, government or stock market rules. Furthermore, the law relating to corporate governance is not limited to traditional corporate law rules but also securities laws. The securities laws focus on both the selling of and the market for securities. Beyond corporate law, there are other factors that influence corporate governance, such as banking, tax, labor, and bankruptcy law. Because enforcement of the law is also significant, issues of criminal and civil litigation are important. In addition, corporate governance can be affected by firms' choices that may serve as a substitute for legal protection. For example, a firm opts for regulation when it decides to list in a particular stock market where its rules provide further protection.

[24] Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405 *passim* (1999). KRAAKMAN ET AL., *supra* note 22, at 29-31 (2004), emphasizes the similarities among developed economies finding similar solutions to problems even if there are different legal rules.

[25] John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 625 (1998).

[26] Traditional comparative law scholars also deal with the issue of legal transplants, i.e., how and if law can be exported. This issue becomes important especially with corporate governance issues being raised in developing non-Western countries. Comparative corporate governance scholars have also tried to approach the transplant issue. *See, e.g.,* Troy A. Paredes, *A Systems Approach to Corporate Governance: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055 (2004); Katharina Pistor et al., *The Evolution of Corporate Law: A Cross Country Comparison*, 23 U. PA. J. INT'L. ECON. L. 791 (2002).

and lessened the importance of unquantifiable subjects that foster a system.[27] Unlike traditional comparative law, financial economists have looked to see if a particular model is better or optimal. The financial economists' influence has both broadened and narrowed the study. It has broadened the study by showing corporate governance in the larger context of financing business and economic performance. It has narrowed the study by using the agency perspective to exclude non-finance issues such as the role of the corporation in society and other non-financial stakeholders.[28] In addition, empirical research does not tell a complete story of a complex issue because it is difficult to consider non-economic factors, such as culture or societal norms, that may be significant for certain governance issues.[29]

IV. Globalization and the Study of Comparative Corporate Governance

The study of comparative corporate governance and the development of corporate governance standards was influenced and fostered by globalization. As will be discussed in Part VI, it has become part of the globalization debate. Globalization has had a long history of affecting the development of the corporation. For example, the development of chartered companies in the sixteenth and seventeenth centuries arose out of increased trade and discovery of the New World.[30] While globalization itself is a modern term, the idea has a long history.

The globalization story, and its impact on comparative corporate governance, usually focuses on the economic aspects of globalization such as trade, capital markets and multinational

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[27] *See* Mathias M. Siems, *Numerical Comparative Law - Do We Need Statistical Evidence in Law in Order to Reduce Complexity?* (Feb. 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=514142.

[28] *See* Licht, *supra* note 6, *passim* (asking why the debate over stakeholders even takes place and criticizes the economic approach of singular profit maximization with one of optimization over several factors).

[29] *See, e.g., infra* note 65.

[30] John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea 17-24 (2003).

corporations.[31] Part of the story is that trade increases competition, which has the effect of breaking down local barriers resulting in increased competition in the products market.[32] This open competition directly affects the performance of a country's firms, raising the issue of whether a particular corporate governance model is a factor in a firm's performance. Another economic aspect of globalization is the internationalization of the capital markets. With the expanded markets resulting from trade, firms raise capital and investors invest globally.[33] Competition for capital means that corporations seeking capital need to provide good governance practices attracting investment.[34] In addition, investors demand such practices as a condition of investment.[35] If certain corporate governance rules or practices can attract capital more cheaply, then these rules may provide an economic advantage in the firm's performance and a country's overall economic well-being.[36] Thus, studying and comparing different approaches to corporate governance may provide a means of enhancing competitiveness.

Economic globalization not only fostered the study of comparative corporate governance but also raised the issue of

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[31] Multinational corporations in the early part of the twentieth century were usually domestic firms with subsidiaries abroad. Today multinationals tend to be organized globally along product lines. While held together by control and ownership, they may in the future be controlled more by strategy, and thus, ownership may not be as important as the resultant alliances. Peter Drucker, *The Next Society*, ECONOMIST, Nov. 1, 2001, at S3.

[32] Some view this as an important determinant of the ownership model. *See infra* notes 63-64 and accompanying text.

[33] For example, foreigners now own twenty-four percent of all Japanese shares traded, compared to 8.1 percent ten years ago. Yuka Hayashi & Andrew Morse, *At Japan Inc., Shareholders Grow Restless*, WALL ST. J., June 21, 2005, at C1.

[34] James A. Fanto & Roberta S. Karmel, *A Report on the Attitudes of Foreign Companies Regarding a U.S. Listing*, 3 STAN. J.L. BUS. & FIN. 51, 64 (1997). *But see* Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141 *passim* (2003) (questioning the bonding role of cross-listing and suggesting, instead, an avoiding hypothesis with negative implications).

[35] For example, United States institutional investors have sought changes in corporate governance practices. *Governing the Modern Corporation*, ECONOMIST, May 5, 2001, at S30.

[36] The flow of capital may also push for harmonization because of interdependence and the desire to lower costs. *See, e.g.,* Floyd Norris, *Accounting Rules in U.S. A Bit Lacking, Europe Says*, N.Y. TIMES, Apr. 28, 2005, at C4 (the use of International Accounting Standards in Europe and possibly in the United States).

whether a particular model (either the stakeholder or ownership model) is better and will predominate. It also locates the study as part of the debate about the benefits and detriments of globalization. Thus, the studies are both product of and part of the debate over globalization. If we look at globalization in a broader context than economics, we can see how that broader focus also influenced the study and development of comparative corporate governance. A broader globalization definition is as follows:

> Globalization can be conceived as a process (or set of processes) which embodies a transformation in the *spatial* organization of social relations and transactions, expressed in transcontinental or interregional flows and networks of activity, interaction and power (see Held and McGrew, et al, 1999). It is characterized by four types of change. First, it involves a *stretching* of social, political and economic activities across frontiers, regions and continents. Second, it is marked by the *intensification*, or the growing magnitude, of interconnectedness and flows of trade, investment, finance, migration, culture, etc. Third, it can be linked to a *speeding up* of global interactions and processes, as the development of world-wide systems of transport and communication increases the *velocity* of the diffusion of ideas, goods, information, capital and people. And, fourth, the growing *extensity, intensity* and *velocity* of global interactions can be associated with their deepening *impact* such that the effects of distant events can be highly significant elsewhere and specific local developments can come to have considerable global consequences. In this sense, the boundaries between domestic matters and global affairs become increasingly fluid. Globalization, in short, can be thought of as the widening, intensifying, speeding up, and growing impact of world-wide interconnectedness.[37]

This broader definition, focusing on not just economics but the interconnectedness of globalization with its "extensity, intensity and velocity," has influenced the study of comparative corporate governance. For example, the globalization of people was

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[37] David Held & Anthony McGrew, Globalization, Oxford Companion to Politics of the World 324 (Joel Krieger ed., 2001).

important to the study.[38] Much of the early comparative law scholarship in the United States was fostered by European immigrants.[39] Further, some of the significant scholarship on ownership models, especially by finance professors, has also been done by immigrants. Unlike earlier immigrants, it would seem that these new immigrants are not fleeing persecution but are being hired by elite universities. In addition, foreign law and finance professors, who are providing much of the research in this area, studied in the United States. The number of foreign students studying in the United States at law and business schools has also increased. This process provides an opportunity for networking by elites with increased interaction between opinion makers and hopefully a learning experience derived from both.[40]

Networking can take place when corporate managers have an international perspective. The law and economics school has discussed how the market for managers in the United States serves as an important market-monitoring device in corporate governance. Managers compete in a market for positions, and that competition creates incentives for good management.[41] While one can question whether that market really achieves this goal, the fact is that the market for managers has been globalized. Recruitment of top managers is increasingly becoming an international process; top management in many large companies

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[38] The globalization of services such as law firms, accounting firms, investment banks and consulting firms provides cross-fertilization and influences the development of corporate governance standards. *See, e.g.,* Halina Ward, *The Interface Between Globalization, Corporate Responsibility, and the Legal Profession*, 1 U. ST. THOMAS L.J. 813 (2004).

[39] Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637, 639-40 (1998).

[40] Given the lack of United States graduate students studying abroad one must question whether there is cross-fertilization or whether it is more of a one way street. It raises the question of whether this is another example of United States hegemony or a triumph of the United States model. *See infra* notes 75-77 (discussing convergence).

[41] Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law,* 76 NW. U. L. REV. 913, 919-20 (1982).

is not from the country where the business is headquartered.[42] This globalization may have an impact on the development of corporate governance issues[43] and perspectives on the stakeholder and ownership models.

Additionally, there is the globalization of information. The ability of information to have a global presence has been fostered by new and cheaper forms of communication like the Internet. While faster communication has economic consequences, such as the integration of financial markets, it has also enhanced the exchange of ideas. The ease of finding information about comparative corporate governance has been transformed by the Internet. It facilitates communications among those pursuing research and provides an inexpensive means to provide information. The increased number of websites dealing with corporate governance[44] plus the Social Science Research Network's listings of current scholarship and studies have increased the flow of information.[45]

Part of this globalization of information is the globalization of ideas. Through globalization, one learns more quickly about problems and solutions.[46] For instance, given the globalization of capital, a financial scandal involving a particular firm can have a broad impact because investors may be global.[47] Even scandals

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[42] Sony recently hired a non Japanese chairman and chief executive, Howard Stringer. James Sapsford & Martin Fackler, *Directors' Roles Shift in Japan*, WALL ST. J., Mar. 10, 2005, at A15.

[43] Compensation is one corporate governance topic that raises interesting issues as a result of globalization. Executive compensation in the United States has traditionally been significantly higher than other developed countries. *See* Randall S. Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?,* 57 VAND. L. REV. 1171 *passim* (2004) (finding that the gaps are based upon markets). Globalization may create some convergence possibly towards the United States model. But issues of compensation are not only a financial or governance issue but also raise significant social and political questions and may have a significant cultural component.

[44] *E.g.,* European Corporate Governance Institute, http://www.ecgi.org.

[45] Social Science Research Network, http://www.ssrn.com.

[46] The globalization of law enforcement in the capital markets through cooperation and memorandums of understandings between regulators reflects the internationalization of capital markets but also provide for the exchanges of ideas about investor protection. *See* James Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. 577, 582-85 (1992) (discussing enforcement cooperation).

[47] Recent European examples were the accounting problems at Shell and Ahold and Parmalot. *See* Luca Enriques, *Bad Apples, Bad Oranges: A Comment from*

that seem local because the primary investors are local can have worldwide resonance and implications.[48] For example, the Maxwell scandal in the United Kingdom in the 1990s had broader implications because the resulting Cadbury Report, which among other things recommended enhancing board independence, had wide circulation and influence.[49] The resulting reports and studies around the world are noticed and read. Thus, increased exposure to information has not only influenced the study of the models but has placed them into the debate over a better model.

There is also a globalization of culture. Some suggest that there is movement toward a single culture because of the communication of ideas, travel, spread of popular culture and widespread use of English for business and popular culture.[50] The use of a common language also facilitates the globalization of ideas. If part of this spreading of culture means a "shareholder culture" with its shareholder primacy, then it also directly affects issues of corporate governance and the models.[51]

Old Europe on Post-Enron Corporate Governance Reforms, 38 WAKE FOREST L. REV. 911, 913-915 (2003) (suggesting that the scandals had less public reaction in Europe because of state aid to failing corporations, absence of public opinion and a higher degree of disenchantment plus lessened personal greed compared to the United States).

[48] The Enron and WorldCom scandals went well beyond the United States and both the fraud and its aftermath were communicated globally. Jennifer Hill, *Regulatory Responses to Global Scandals*, 23 WIS. INT'L L.J. 367 (2005) (discussing Australia); *Decade of Greed? Wave of Corporate Scandals Could Tilt World Business Away from American Model,* WALL ST. J. CLASSROOM EDITION, Sept., 2002, http://www.wsjclassroomedition.com/archive/02sep/INTL.htm.

[49] REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, Dec. 1, 1992, *available at* http://rru.worldbank.org (follow "Papers and Links" hyperlink; then follow "Principles of best practice and codes" hyperlink; then follow "Cadbury Report" hyperlink).

[50] *See, e.g., The Triumph of English*, *a World Empire by Other Means,* ECONOMIST, Dec. 22, 2001, at 65.

[51] The primary role of spreading shareholder rights at home and abroad has been led by United States pension funds such as CalPERS. While Europe has no equivalent, there are shareholder associations and foreign funds involved in promoting shareholders' interests. *Good Heavens, Good Governance,* ECONOMIST, Apr. 29, 2000, at S13. Globalization in trade has also led to a tremendous rise in the number of international nongovernmental organizations (NGOs) that have created global networks to work for common goals. In terms of interest groups in corporate governance it may be inevitable that local shareholder advocacy groups will join forces and create transnational groups to foster their agenda or that other groups form to counter that agenda.

The globalization of politics has also influenced the study. While the nation-state remains the primary political community, there has been an increase in politics beyond those boundaries. Intergovernmental institutions coordinate both private and public activities.[52] Both the OECD and World Bank play important roles in globalization and fostering corporate governance.[53] They have been identified with the overall process of economic globalization and, more particularly, with encouraging corporate governance norms. While not specifically endorsing a stakeholder or an ownership model, the focus on improving corporate governance raises those issues in developing countries.

V. The Ownership Stories

Within comparative corporate governance scholarship, significant theoretical and empirical work has been designed to explain the outcome of dispersed and concentrated ownership. The

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[52] The European Union is both a political and economic institution that has played a role in harmonizing and fostering securities and corporate laws in Europe. *See* EUROPA, Company Law & Corporate Governance, http://www.europa.eu.int/index_en.htm (follow "Institutions: European Commission" hyperlink; then follow "Internal Market" hyperlink; then follow "Company Law & Corporate Governance" hyperlink).

> Harmonisation of the rules relating to company law and corporate governance, as well as to accounting and auditing, is essential for creating a Single Market for Financial Services and products. In the fields of company law and corporate governance, objectives include: providing equivalent protection for shareholders and other parties concerned with companies; ensuring freedom of establishment for companies throughout the EU; fostering efficiency and competitiveness of business; promoting cross-border cooperation between companies in different Member States; and stimulating discussions between Member States on the modernization of company law and corporate governance.

Id.

[53] Magdi R. Iskander & Nadereh Chamlou, Corporate Governance: A Framework for Implementation (2000), *available at* http://www-wds.worldbank.org (follow "advanced search" hyperlink; then type "20829" into the "Report" field; then follow "Corporate governance: a framework for implementation Vol. 1 (English)" hyperlink; then follow "PDF" hyperlink); Organization for Economic Co-Operation and Development, Principles of Corporate Governance (2004), *available at* http://www.oecd.org (follow "Browse By Topic" hyperlink; then follow "Corporate Governance" hyperlink; then follow "Publications & Documents" hyperlink; then follow "Best Practices" hyperlink; then follow "OECD Principles of Corporate Governance: 2004" hyperlink; then follow "Download a free copy of the Principles in English" hyperlink).

widely dispersed ownership model usually relies more on market financing while the concentrated ownership model looks more to private financing. Because concentrated ownership seems connected with the stakeholder model, studies on concentrated ownership also relate to that model. A number of different stories have tried to explain the reasons for the different ownership patterns, and some have concluded that dispersed ownership has advantages over concentrated ownership. These stories can be broadly described as law matters, history and politics matters, interests groups, and deep causation. Globalization has fostered these studies, and as discussed in Part VI, the research itself is now part of the broader debate about globalization.

Law matters. Leading financial economists did empirical research comparing countries with dispersed and concentrated ownership. Their empirical evidence found significant differences in the legal protection of investors between countries. They initially told a story of the absence of law to protect shareholders in many countries. Without laws guaranteeing shareholders' rights (particularly dispersed shareholders' rights), shareholders had little choice but to maintain control, which was one way to monitor managers and protect their investment. The financial economists concluded that law determines the ownership structure and systems of corporate finance and governance. The more protective the law, the more likely is the emergence of widely dispersed ownership.[54] Thus, law was a significant determinant as to whether there was a market-based widely dispersed ownership system, like those in the United States or United Kingdom,[55] or a

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[54] *See* Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 511-13 (1999); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1114-17 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1131-32, 1149 (1997). *But see* Frank Easterbrook, *International Corporate Differences: Market or Law?*, 9 J. APPLIED. CORP. FIN. 23, 26-27, 29 (1997) (Judge Easterbrook argues that different corporate structures are efficient, otherwise they would not survive and that the law follows the market). The irony is that the law story came from economists—often foreign-born, such as Professors Lopez-de-Silanes, Shleifer, Vishny and La Porta—not lawyers.

[55] *But see* Brain R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom,* 30 J. LEGAL STUD. 459, 472-75 (2001) (suggesting instead that significant determinants were: financial intermediaries who organized public offerings, the London Stock Exchange, and the role of London's financial district, "the City" as a leading financial center including its which fostered homogeneity, and shared values and the tradition of self regulation).

concentrated ownership system that compensates for inadequate legal protection.[56] While one can challenge the studies as incomplete and limited,[57] they set the agenda for much of the current significant comparative corporate governance scholarship.

Later studies using the *law matters* story elaborate further on the relationship between ownership and corporate performance. While concentrated ownership deals with the agency problem of the managers and shareholders by providing close monitoring of management, there was a different agency problem of controlling shareholders taking advantage of the minority shareholders in publicly traded corporations. Subsequent research has suggested that increased legal protection and dispersed ownership is in fact beneficial compared to the concentrated ownership system.[58] Increased legal protection encourages not only dispersed ownership but also the related depth of the capital markets, which can lower the cost of capital for corporations.[59] The message is that concentrated ownership can have a negative effect on the economy and does not provide the best financing for companies.

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[56] Initially, Rafael La Porta et al. thought that at least as to the major Western economies (United States, United Kingdom, Japan and Germany), they all seemed to perform well with different ownership structures. *See* authorities cited *supra* note 54. They later expanded their research and further refined their study to show that the legal tradition—common or civil—was important, with generally common law systems generally being more protective than civil law, and that most of the world had concentrated ownership. Rafael La Porta et al., *Investor Protection and Corporate Governance,* 58 J. FIN. ECON. 3, 8-9, 12 (2000). The adaptability of the common law system, versus the civil law where judicial decision-making created a flexible response to new developments, created law that protected shareholders better. *Id.*

[57] *See* John C. Coffee, *Do Norms Matter? A Cross-Country Evaluation,* 149 U. PA. L. REV. 2151, 2154-56 (2001); Pistor et al., *supra* note 26, at 805; Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, (John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper No. 490, 2004), *available at* http://ssrn.com/abstract=623286 (finding mechanisms that interfere with or substitute for the criteria used by La Porta et al. and suggesting that common law may not be superior to civil law in investor protection).

[58] *See generally* Brian R. Cheffins, Corporate Law and Ownership: A Darwinian Link? 1-2 (June 2002) (unpublished manuscript), *available at* http://ssrn.com/abstract=317661.

[59] *See* Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147, 1147-48 (2002). *But see* Andre Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997) (suggesting available evidence does not indicate which system is best).

Thus, law matters not only in creating dispersed shareholders but for economic development. Concentrated ownership is often a poor substitute for markets, and the solution for both developed and developing countries may be a legal one.

The other stories are responses to the *law matters* story. They all recognize a role for law but see other explanations for why dispersed ownership does or does not emerge.

History and politics matter. A contrary explanation initially came from Professor Mark Roe, who concluded that law was not determinative of corporate governance and ownership structures but that politics mattered. Roe initially looked at the United States and its dispersed ownership and argued that political factors in this country prevented the rise of strong owners.[60] He then takes his position outside the United States in his later works focusing particularly on Europe.[61] The key to his understanding of Europe is social democracy, which tends to favor other stakeholder interests, particularly labor. Social democracy is a political outlook that promotes welfare of all citizens and prevents wide disparities among citizens, and it can be viewed as a reaction to the historical rise of fascism and communism. Social democracy usually results in considerable control by government to address social inequalities such as unemployment. Given the ever-present possibilities of government interference with an enterprise, owners enter into pacts with labor and government to maintain favorable social policies, often in return for protection of management interests, and the market-based capitalism of dispersed owners is impossible, despite the existence of market-friendly laws. Thus, politics matters and determines the law and policies that encourage concentrated ownership.[62]

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[60] ROE, *supra* note 20, at 276. For example, the American hostility toward bigness in government and in business rises periodically in American history. Any effort at concentration of ownership, or ownership through financial institutions, is limited by politics. *Id.* In Roe's view, corporate governance is strongly "path dependent," i.e., that certain political forces push a country down a particular path, and it then becomes difficult for the country to pull itself out of the path when local interests and institutions develop connections to and affinities for the path. *See infra* text accompanying note 77.

[61] *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE (2003).

[62] A private ordering story is told by Professor John Coffee. *See* John C. Coffee Jr., *The Rise of Dispersed Ownership: The Role of Law and the State in the Separation*

Interest groups. A different political story comes from two other financial economists, Luigi Zingales and Raghuram Rajan. They relate the issue of widely dispersed shareholders to the creation of liquid securities markets and how open a country is to outside investment.[63] They do not find Roe's historical explanation convincing. If one looks at the past, they argue, many socially democratic countries were much more advanced, from a capitalist and legal framework, than countries like the United States. These social democratic countries were in fact on the road to dominance and looked nothing like what one sees today. So if politics and history matter, why is there not a consistent vision in a particular country? What these financial economists see is a history of financial reversals where vibrant financial markets decline. While politics may be relevant, it is not social democracy but rather the protectionism of local interests that keeps markets closed from competition.[64] According to Rajan and Zingales, the key to dispersed ownership, raising capital and improved corporate governance, is a market-based system and open competitive trade.

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of Ownership from Control, 111 YALE. L. J. 1 (2001). For him, Roe's story paints too broad a picture. *Id.* at 7. Some countries, like the United Kingdom, with a social democratic background, developed dispersed capitalism. *Id.* at 44. In his view, what matters is private ordering, and while some countries, like the United Kingdom, developed systems of private ordering, while others did not. *Id.* at 9. He sees law as a secondary phenomenon, which often comes to solidify or formalize activities created by the local interests. *Id.* at 7. Thus, private actors, when allowed, will provide optimal substitutes for formal law. *Id.* at 10. Under this view, law matters if it allows for private ordering and in his view the common law is more adaptive and accepting of such ordering. *Id.* at 9. The political implications of history are that private ordering and self regulation can have the effect of constraining society. *Id.* at 4.

[63] Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5 *passim* (2003). Rajan and Zingales have now developed their "great reversal" thesis into a book aimed at a more popular audience. *See* RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY (2003).

[64] This is because certain countries cut back on openness to finance, which generally goes hand- in- hand with, and even precedes, openness to trade. Rajan & Zingales, *supra* note 63. New financial entrants threaten established, local interests and can cause short-term disruption by supporting new firms that threaten the established order. *Id.* The established companies and financial providers use the popular political opposition generated by this disruption strategically, (e.g., to cut

Deep causation. In looking at explanations for the development of ownership structures and the law matters thesis, some commentators have explored whether there are correlations between the law matters thesis and culture or other "deep" factors. This deep approach has been advocated by Professor Licht, working with anthropologists and social psychologists. His approach is to identify cultural types, including cultural factors, and then study the correlations between these factors and the law.[65] His work fits into the empirical approach of financial economists while others try to be more descriptive in analyzing deep factors.[66]

VI. The Globalization Debate and Comparative Corporate Governance

Globalization helps us understand how the study of comparative corporate governance has evolved. If globalization is about

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down on the access to financial capital by local companies). *Id.* The country becomes worse off and declines, as local, (particularly new,) businesses lose competitively priced capital, but the established elites guard their privileged position. *Id.*

[65] Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems,* 26 DEL. J. CORP. L. 147 *passim* (2001). Culture also influences the stakeholder model. Licht, *supra* note 6, at 687, 734-40. Culture may also have an impact on particular approaches to corporate governance issues. For example, compensation differences may have a cultural basis. Thomas, *supra* note 43, at 1218-23.

[66] While Professor Licht's empirical studies try to measure cultural factors, it remains difficult to quantify cultural attributes that may not be easily calculated numerically. In a more traditional approach, Professor Francis Fukuyama, a social scientist, has written about how economics and business organizations can be viewed as the product of trust. FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1st Free Press Paperback 1996) (1995). In the tradition of Alexis de Tocqueville's *Democracy in America,* his observations about different societies are thoughtful and provocative but not based upon empirical studies. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., Schocken Books 1961) (1835). In this current age of financial economics and empiricism, I doubt whether even Alexis de Tocqueville's much cited observations about the United States would have much credibility if written today. For an example of a thoughtful non-empirical article on explaining Chinese corporate law history, see Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000). *See generally* CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000) (for numerous perspectives on how culture affects economic development from a non-empirical perspective).

interconnectedness, then comparisons and influences are bound to result. If globalization is also about competition, then not only firms and people compete; related systems and ideas do as well. Thus, the study of comparative corporate governance not only explains why models developed but also suggests a more optimal system in a globalized world. Further, it suggests a move towards some kind of convergence, making the studies part of the debate on advantages and disadvantages of globalization.

People who criticize globalization in areas such as trade[67] do not view it as a beneficial development. Critics of trade globalization argue, among other things, that it harms labor, undermines national sovereignty,[68] damages the environment and supports a particular cultural hegemony at the expense of the local.[69] To some extent, these criticisms mirror debates within comparative corporate governance studies.

The stakeholder and ownership models, discussed previously, can be viewed as part of this debate. If globalization results in a particular model of corporate governance that excludes

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[67] On a broad level, one could look at corporate governance issues as a trade-like issue, especially if governance rules or ownership precludes the transfer of firms. In the 1980s, the issue of barriers to takeovers overseas was raised by some as an impediment to trade. *See supra* note 19 and accompanying text. In the European Union, the free movement of capital has also been raised in some corporate governance issues, especially as it concerns takeovers. For example, recent cases in the European Court of Justice have restricted the use of golden shares that allow the State to retain a minority interest in a firm with the right to veto a takeover. *See* Christine O'Grady Putek, Comment, *Limited but not Lost: A Comment on the ECJ's Golden Share Decisions,* 72 Fordham L. Rev. 2219, 2251 (2004).

[68] For example, the Asian Financial crisis in 1997 had global implications and raised reform issues including corporate governance. But the International Monetary Fund's actions raised numerous issues including national sovereignty. *See* Catherine H. Lee, Comment, *To Thine Ownself be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis,* 24 U. Pa. J. Int'l Econ. L. 875 *passim* (2003).

[69] *See* Teresa Edwards, Comment, *The Relocation of Production and the Effects on the Global Community,* 13 Colo. J. Int'l Envtl. L. & Pol'y 183, 198-200 (2002); Danielle S. Petito, Comment, *Sovereignty and Globalization: Fallacies, Truths, and Perception,* 17 N.Y.L. Sch. J. Hum. Rts. 1139, 1160-61 (2001). *But see* Amy Chua, World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability (Doubleday 2003) (2002) (discussing how global markets and democratization may promote ethnic hatred and violence); *Globalization: Threats or Opportunity?*, IMF Issue Brief, Apr. 12, 2000 (corrected Jan. 2002), *available at* http://www.imf.org/external/np/exr/ib/2000/041200.htm.

stakeholders then, like trade globalization, labor may be harmed and other non-shareholder interests are sacrificed. Further, if globalization means dispersed ownership, the state has less of a role in the control of these economic actors because concentrated ownership usually allows for more state influence. The triumph of both the shareholder and dispersed ownership models may also be viewed as another example of United States hegemony undermining local norms and culture.[70]

A. Optimal Models

The stories in Part V describe how and why a particular ownership pattern developed and, to some, suggest an optimal model with dispersed ownership and shareholder foci. These stories have a significant import in the globalization debate if a particular ownership or stakeholder model matters for economic development. That is, if market capitalism with dispersed shareholders and a shareholder focus are the best outcome for enhancing a country's economy in a globalized world, then the stories matter very much. If policymakers in a country looking to enhance its economic position, often the case with developing countries, are convinced that it makes sense to approximate market capitalism, then the stories give them different policies and predict different outcomes.

The *law matters* approach would argue in favor of significant legal reform to institute shareholder-friendly measures toward a market-friendly system, which it also views as a better system.[71]

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[70] *See* Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 Cornell Int'l L.J. 321, 350-52 (2001); Lan Cao, *The Ethnic Question in Law and Development*, 102 Mich. L. Rev. 1044, 1056-82 (2004) (suggests that cultural norms are subject to change).

[71] If one concludes that law can lead to a dispersed ownership system with preferred economic benefits, then the law is the way to move in that direction. This is particularly instructive to developing countries that can and arguably should improve their governance. Given this world of globalization where knowledge flows easily, as does trade and finance and people, and where countries are acutely aware of developments elsewhere, a major focus is the existence of any trends to convergence or harmonization. This is both an empirical issue and a practical one. The practical side is to study how transnational organizations, like the OECD and the World Bank, promote corporate governance reform and whether, in doing so, they adopt one story or the other. I think it is fair to say that it is influenced by financial economists who are generally promoting market capitalism with a *law matters* approach, although for political reasons, they do not advocate too

Its market approach, which may exclude other stakeholders but is viewed as optimal, makes it part of the globalization debate. While the *history and politics matters* approach also recognizes the need for financial openness and the availability of market capitalism, it suggests that not much can be done in certain countries to move to a different outcome. Short of a cataclysm, it is often hard to change paths. As a result, dispersion of ownership is not inevitable, preserving a broader view of corporate governance with both a stakeholder model and concentrated ownership. The emphasis on politics and social democracy may also suggest an anti-globalization story often associated with its critics. Further, if *deep causation* with culture or other factors are the reason for particular corporate governance mechanisms, then change may be more difficult. However, if globalization can affect cultural change, as some critics claim, then one will see changes and potentially hegemony. The *interest groups* approach, while not opposed to the influence of law or politics, would argue strongly in favor of financial and trade openness to break down the local elites, as opposed to legal reforms *per se*. This story is very much a globalization story and suggests that if globalization has the effect of opening markets, then that may lead to a change in ownership structure with a corollary effect on the issue of stakeholders. Thus, each story can be seen as part of the globalization debate.

B. Convergence

If globalization has to some extent placed the stakeholder and ownership models in competition, then it not only asks whether one particular model is better in this globalized environment but whether some form of convergence will result.[72] The

strongly market capitalism and allow for other corporate governance systems (i.e., concentrated ownership). The persistence of concentrated ownership in developing economies may be the result of the lack of intermediaries and thus the need for conglomerates with concentrated ownership. *Monsters Still, but Prettier*, Economist, Jan. 5, 2002, at 59. In addition, the inefficiency of the local market put a premium on networking. *The End of Tycoons*, Economist, Apr. 29, 2000, at 67. But globalization could result in the creation of intermediaries and a more efficient market.

[72] Convergence can mean different things and have different effects. Convergence could move towards one rule or system or create a hybrid. The convergence could be formal with legal rules converging or functional equivalents. With a functional convergence, legal rules may not have converged, but firms may decide to opt for

debates about convergence usually revolve around whether the movement is toward an Anglo-American model,[73] although it can also focus on a hybrid model. Convergence is also part of the comparative corporate governance scholarship, and if globalization moves toward any particular model, then convergence studies are also part of the globalization debate.

Professors Hansmann and Kraakman, in their article *The End of History for Corporate Law,* see a consensus developing that the interests of shareholders should be the focus of mangers and controlling shareholders.[74] They conclude that the other primary models of managerial power, including labor influence or state control, have failed. They see the shift as a result of global economic developments and competition and the emergence of a shareholder class. Inevitably, a United States model of shareholder primacy has and will continue to prevail. They recognize

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certain rules (e.g. stock market rules) that functionally may have a similar effect. Even with formal convergence, the similarities may be limited. *See, e.g.,* 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, 653 (1999) (suggesting that securities laws have converged more than corporate law). Convergence could be the result of harmonization, which may be the result of globalization, but usually involves a political process with compromises in order to reach a particular result. The harmonization process in the European Community is an example. *See, e.g.,* Jeffrey N. Gordon, *The International Relations Wedge in the Corporate Convergence Debate, in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 140, 140-49 (Jeffrey N. Gordon & Mark J. Roe eds., 2004) (he also suggests that a country's convergence depends on its commitment to transnational economic and political integration which will lead to diffused ownership). Convergence may also be limited to large multinational corporations in developed economies and may be inapplicable to developing economies.

[73] Convergence may not be a one-way street. For example, the shareholder primacy model is often described as an Anglo-American model but there may be convergence away from that model particularly in the United Kingdom. Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, (UNC Legal Stud., Research Paper No. 04-09, 2004), *available at* http://ssrn.com/abstract=632347.

[74] Hansmann & Kraakman, *supra* note 1, *passim*. Francis Fukuyama described how the fall of communism removed ideological competition from the contemporary world in FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 45 (1992). Fukuyama spoke too soon about the triumph of ideology given the rise of religious ideology. The same question can be asked if shareholder primacy has won or that diffuse ownership is the natural order for publicly traded corporations.

that, even with a convergence toward shareholder primacy, different countries may approach larger societal issues differently, but believe that interests are better protected outside the parameters of corporate governance. However, a convergence toward this model raises similar issues surrounding the anti-globalization debates.

There are voices that do not see convergence the same way.[75] One such prominent perspective is the view of Professors Roe and Bebchuk that neither shareholder primacy nor dispersed ownership has or will easily converge. Path dependence has set up structures that are not easily changed, and there may be forces within a country with powerful interests in preserving the system in place. In addition, as a result of a particular path, complementary institutions make it more difficult to foster change. Thus, keeping existing systems may, in fact, be an efficient result.[76] This lack of convergence allows for diversity and suggests that globalization will not easily change these models.

Issues of corporate governance are now found on the political agenda in most countries.[77] Many of the issues such as independent directors, compensation, auditing, accounting rules,

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[75] There are a number of different voices in the convergence debate. *E.g.,* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE, *supra* note 72; Branson, *supra* note 70, at 321; William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference,* 38 COLUM. J. TRANSNAT'L L. 213 (1999); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance,* 84 CORNELL L. REV. 1133 (1999); Brett H. McDonnell, *Convergence in Corporate Governance-Possible, but not Desirable,* 47 VILL. L. REV. 341, 350-53 (2002); Gustavo Visentini, *Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?,* 23 BROOK. J. INT'L L. 833 (1998).

[76] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance,* 52 STAN. L. REV. 127 *passim* (1999).

[77] Many other countries have opted for optional rules and governance codes. These codes ask corporations to either comply with its requirements or explain why it decided not to. Burkard Eberlein & Dieter Kerwer, *New Governance in the European Union: A Theoretical Perspective*, 42 J. COMMON MKT. STUD. 121, 123 (2004). *See* Silvia Ascarelli, *Corporate Europe Is Skeptical About Tougher Governance Codes*, WALL ST. J., Oct. 7, 2004, at C3 (providing a survey of European officers and directors who were skeptical about whether these codes made any difference). If the adoption of legal responses means following particular legal rules that help create a particular model then it raises the issue of legal transplants. *See supra* note 26 and accompanying text. *See also* Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in*

voting, takeovers, and stock market regulation seem to suggest that the shareholder primacy agenda and investors' protection are getting attention.[78] Both developing and developed countries seem at least to accept the importance of improving their corporate governance rules with a shareholder-focused model.[79] The rise of shareholder primacy calls into question the role of other stakeholders,[80] and the prevalence of concentrated ownership[81] arguably pushes an American-style system, further suggesting decreased power of the State.[82] There remains, however, a

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Japanese Corporate Law, 51 AM. J. COMP. L. 887 *passim* (2003). It is interesting that the United States reacted to it scandals by enacting Sarbanes-Oxley Act, which took a clear mandatory regulatory approach. Such an approach may be related to the need for greater protections in a market based system.

[78] Even if certain goals have converged, it does not mean that the law or functional equivalents will converge. The recent wholesale adoption of rules may be a reaction to the crisis created by different scandals. They may, in fact, not be productive, especially when adopted without regard to the local conditions such as the ownership structure. Enriques, *supra* note 47, at 934-45. The adoption of particular rules may suggest that these changes are aspirational or cosmetic. It may also be a recognition of the evolution towards a particular model, like dispersed ownership. Some commentators suggest that given the fact that each country's system had interdependencies and are tied together by complex incentive structures may mean that corporate reforms may have disappointing results. *See* Bratton & McCahery, *supra* note 75, at 258-65.

[79] Optimal corporate governance mechanisms may be more contextual and vary by industries and activities. Identifying what constitutes good corporate governance practice is complex. One needs to identify the strengths and weaknesses in the system but also the underlying conditions upon which they depend. Maher & Andersson*, supra* note 12, at 411-12.

[80] Even where shareholder protection is the focus of the agenda in some countries the role of stakeholders is part of the focus. *See* Licht, *supra* note 6, at 745-46; Janis Sarra & Masafumi Nakahigashi, *Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Structure and Norms*, 24 LAW & POL'Y 299 *passim* (2002) (discussing corporate law changes and suggests that Japan may both enhance investor protection while still retaining other goals like long-term employment).

[81] Changes in rules with increased shareholder protection may not mean a change in ownership structure.

[82] While privatization, at least in the developed countries, has lessened the direct role of the State as owners, there are still indirect ways the State plays an important role in governance. Even in countries that have little state ownership, the State's potential control of its significant economic actors will not be easily trumped. Further, it is not clear that in developing countries the role of the state will eventually decline. *See supra* note 2.

persistence of diversity in corporate governance,[83] and it is unclear what type of convergence may result, and whether convergence is either desirable or inevitable.[84]

VII. Conclusion

The study of comparative corporate governance is a globalization story. Globalization initially fostered the study, and now significant studies are themselves a part of globalization and the related debates. The issues of comparative corporate governance involving the stakeholders and ownership models have something to contribute to our understanding of both how a particular system developed and the extent to which the systems can be influenced by each other. Globalization has raised the issues of whether a particular model is optimal and, whether given competition, there may be some form of convergence. Just as trade globalization has raised significant economic and policy issues, comparative corporate governance studies raise similar issues. To the extent that corporate governance systems influence good economic decisions and enhances investor confidence, one would expect it to have some effect on the models.[85] However, corporate governance is one piece of the complex puzzle of what makes economies work. Whether a particular model of ownership or focus of corporate governance is necessary, adaptable or

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83 *See* Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 Comp. Lab. L. & Pol'y J. 5, 7 (2000). Convergence could also be viewed as involving related issues beyond corporate governance like unionization. There is a divergence of approaches to that issue in the developed economies with both costs and benefits associated with it. *One True Model?*, Economist, Apr. 8, 2000, at 86.

84 While globalization may seem inevitable, many thought it was inevitable before World War I. Niall Ferguson, *Sinking Globalization*, Foreign Aff., Mar./Apr. 2005, at 64. The age of terrorism and religious ideology have the capacity to limit or halt globalization. As the world becomes more interrelated financially, it may lessen the possibility, but a pullback from globalization could affect this convergence. *Id.*

85 Professor Bernard Black suggests that in developed countries firm-specific corporate governance have little or no effect on market values. But his review of Russian corporate governance practices suggested that a firm's practice can have a significant effect on market value where other restraints are weak. Bernard Black, *Does Corporate Governance Matter? A Crude Test Using Russian Data*, 149 U. Pa. L. Rev. 2131, 2131 (2001).

optimal remains unclear given the complexity of law, society and related issues.[86]

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[86] Each system has advantages and disadvantages. Capital markets often have a short-term perspective, and can be volatile and create speculative bubbles. The high tech boom of the 1990s in the United States and subsequent market crash is an example. But the markets can also respond quickly and adapt more easily. Bank-centered finance can take a longer-term view and provide capital in times when markets are volatile. But banks can be subject to political influence, over investing, and also cannot react as quickly to changes in assets market value. The Asian financial crisis in the 1990s is an example. *When Capital Markets Rule*, ECONOMIST, May 5, 2001, at S32. Of course what is considered optimal or superior can involve different criteria. While efficiency is often the focus, there are other criteria one could use such as distributional equity and participation. McDonnell, *supra* note 75, at 350-353 (2002). Given the difficulty of doing a complete cost-benefit analysis given all the factors involved, it is also difficult, if not impossible, to conclude superiority of one model. *See* Jacoby, *supra* note 83, at 21.