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REGULATORY SHOW AND TELL: LESSONS FROM INTERNATIONAL STATUTORY REGIMES

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ABSTRACT

Historically, the evolution and growth of American corporate law has occurred with only limited and sporadic attention to international corporate governance regimes. This article considers some possible reasons for the relative lack of attention in the United States to international corporate regimes in the past. It also discusses some interesting differences between the law relating to shareholder rights in the United States and in other jurisdictions, including common law countries such as the United Kingdom and Australia. This article argues that, in an era when there is growing skepticism about the influence of the competition for corporate charters within the United States, it makes sense for the United States to examine and test how international jurisdictions address common problems in corporate regulation.

I. INTRODUCTION

In 1985, the Delaware Supreme Court stated in the *Unocal Corp. v. Mesa Petroleum Co.*[1] decision that "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."[2] Historically, however, this evolution and growth has occurred with only limited and sporadic attention to international corporate governance regimes.[3] There was some heightened interest in the early 1990s when U.S. scholars looked towards the governance mechanisms of other jurisdictions,

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1. 493 A.2d 946 (Del. 1985).

2. *Id.* at 957.

3. For discussion of the evolution of the comparative corporate governance debate, see Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT'L L.J. 477 (2005); Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367 (1996).

such as Germany and Japan, with a view to improving America's then-languishing economic performance.[4] Yet, by the end of that decade, with globalization at its zenith,[5] the focus of debate shifted definitively to the export of U.S.-style corporate governance principles to the rest of the world.[6]

This relative lack of attention in the United States to international corporate regimes was hardly surprising for a number of reasons. First, the United States has traditionally been a regulatory leader, rather than follower. Throughout the twentieth century, commercial developments tended to originate in the United States, prior to emulation in other parts of the world. Stock options are a recent example of this phenomenon.[7] The same pattern is evident in relation to regulation. Thus, for example, in the area of executive compensation, U.S.-style disclosure rules have been adopted as a regulatory technique around the world.[8]

Second, unlike some other common law systems, such as the United Kingdom and Australia,[9] U.S. corporate law is complicated by its federalist system.[10] Within the federalist regulatory structure, it has been said that

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[4]*Cf.* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927, 1928 (1993) (explaining that the American corporate form of managers playing a powerful part in corporate activities is not inevitable, as some managers in other countries, notably Germany and Japan, share their authority with large stockholders); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2022 (1993) (arguing that there is insufficient evidence to support adapting German or Japan organizational forms in the United States).

[5]*See generally* Pinto, *supra* note 3 (analyzing the relationship between globalization and comparative corporate governance).

[6]*See generally* Jennifer Hill, *The Persistent Debate about Convergence in Comparative Corporate Governance*, 27 SYDNEY L. REV. 743, 743-44 (2005) (explaining the switch that occurred in the late 1990s during a vibrant U.S. economy from the U.S. importation of organizational reform to exportation).

[7]*See, e.g.*, Guido Ferrarini et al., *Executive Pay: Convergence in Law and Practice Across the EU Corporate Governance Faultline*, 4 J. CORP. L. STUD. 243, 294-97 (2004); David Cay Johnston, *American-Style Pay Moves Abroad; Importance of Stock Options Expands in a Global Economy*, N.Y. TIMES, Sept. 3, 1998, at C2.

[8]*See* Jennifer Hill, *Regulating Executive Remuneration: International Developments in the Post-Scandal Era*, 3 EUR. COMPANY L. 64 (2006).

[9]This statement needs some qualification in the case of Australia. Although Australia technically has a state-based system of corporate law, the Corporations Act 2001 effectively operates as a "federal" rule as a result of a reference by each state of its powers relating to corporations to the federal government. This broad referral of powers by the states to the federal government constituted an attempt to unify and harmonize corporate law rules in Australia. The referral of power was prompted by the decisions in *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511 (Austl.), and *R v. Hughes* (2000) 202 C.L.R. 535 (Austl.), which identified constitutional problems in the design and structure of the previous corporations law scheme in this regard. Thus, whereas state competition has been viewed as an essential contributor to efficiency in U.S. corporate law, in the Australian context, it was considered an obstacle to efficiency.

[10]There is a long-standing tension with regard to the appropriate roles for state and federal

"Delaware legitimately plays a national role."[11] Competition for corporate charter theory tells a story of intense competition within the United States itself, obviating the need to look abroad for regulatory innovation and inspiration. For example, in articulating the "race to the bottom" thesis, Professor William Cary noted that there was a strongly held view that each U.S. state is a laboratory for corporate law.[12] "Race to the top" theorists[13] would subsequently adopt this reasoning, lauding the competitive aspect of the federalist system as contributing to the creation and implementation of efficient corporate law rules.[14] Within this evolutionary account of U.S. corporate law, Delaware is regarded as the undisputed winner of the regulatory contest.[15]

Third, there is often an assumption that a standardized Anglo-U.S. model of corporate governance exists and that U.S. corporate law reflects the law in other common law jurisdictions. This assumption was bolstered at the turn of this decade by the "law matters" debate and convergence theory in comparative corporate governance. The "law matters" debate emanated from a highly influential empirical study published by a group of financial economists, which tracked corporate governance patterns throughout the world.[16]

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law in U.S. corporate law. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663 (1974) (suggesting that, although previous federal intervention into the corporate law arena had been limited to securities regulation, the time might be ripe to consider a different role for federal law). The relationship between state and federal law in the United States has recently shifted and increased in complexity, as a result of the post-Enron reforms. *See generally* Robert B. Thompson, *Corporate Federalism in the Administrative State: The SEC's Discretion to Move the Line Between the State and Federal Realms of Corporate Governance*, 82 NOTRE DAME L. REV. 1143, 1144-45 (2007).

[11] William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 620 (2006).

[12] *See* Cary, *supra* note 10, at 696. According to Professor Cary, "The principle of states' rights and the idea that each state is a laboratory are strong in [the United States]." *Id.*

[13] *See, e.g.*, Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 915-16 (1982); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 711-12 (1987); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254-62 (1977).

[14] *But see* Robert B. Ahdieh, *The (Misunderstood) Genius of American Corporate Law* 1, (Emory Public Law Research, Paper No. 8-35, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105904 (arguing that the role of federalism in advancing efficient corporate law rules has been systematically overstated in "race to the top" discourse).

[15] *See generally* Romano, *supra* note 13, at 709. By way of contrast, Professor Cary viewed Delaware's dominance and primacy as a reflection that a "race to the bottom" existed in relation to corporate charters. Cary, *supra* note 10, at 668. Yet, Delaware's dominance was by no means inevitable. In the early period of charter competition, it appears that New Jersey was "the state to beat." Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 324 (2007).

[16] *See generally* Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

The study argued that the structure of capital markets is directly linked to a country's corporate governance regime, and that jurisdictions with strong minority shareholder protection would develop dispersed ownership structures, such as those existing in the United States and United Kingdom.[17]

The "law matters" hypothesis had normative implications. It viewed the legal protections offered by common law countries as superior to those found in civil law systems,[18] leading some scholars to assume that international laws would ultimately converge and that a standardized Anglo-American model of corporate governance would form the point of convergence.[19] By creating a sharp distinction between common law and civil law regulation, the study tended to obscure differences within the common law world itself.[20]

This article will focus on the assumption that a standardized Anglo-U.S. model of corporate governance exists. In fact, as was noted by the doyen of English corporate law, L.C.B. Gower, more than fifty years ago,[21] fundamental differences have always existed between U.S. and U.K. corporate law.[22] This article will discuss two matters that highlight the differences between U.S. corporate law and some other common law jurisdictions in the topical area of shareholder rights. The first matter discussed is the differing international regulatory responses to the corporate scandals epitomized by Enron. The second is the corporate governance controversy which arose in 2004 between News Corporation Limited (News Corp) and some of its institutional investors, when News Corp announced its intention to move from Australia to Delaware.

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[17]Some scholars, however, dispute this hypothesis from a historical perspective in relation to the development of U.S. and U.K. capital markets. *See*, *e.g*., Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459 (2001); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001).

[18]*See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1544-45 (2004) (book review).

[19]Professors Hansmann and Kraakman pronounced at this time that "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured . . . ." Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001).

[20]*See, e.g*., Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950-2000*, 47 BUS. HIST. 267, 267 (2005).

[21]*See* L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369 (1956).

[22]*Id.* at 1370.

II. INTERNATIONAL REGULATORY REFORMS IN THE AFTERMATH OF CORPORATE SCANDALS

Historically, corporate law in Delaware has been less prone to statutory amendment than in Australia and the United Kingdom. To an outsider's eyes, the Delaware General Corporation Law (DGCL) appears to have remained remarkably stable and free from reformatory zeal compared to these other common law jurisdictions. Reforms tend to have been of a modest and incremental nature.[23] The ability of the DGCL to respond to changing commercial circumstances is aided by Delaware's judiciary, which consistently demonstrates a willingness to interpret the DGCL in a flexible way to accommodate the "evolving concepts and needs" of corporate law.[24]

In contrast, U.K. and Australian corporate law statutes have regularly experienced major overhauls and rewrites during the last century. The most recent of these is the massive U.K. Companies Act 2006, which is over 600 pages in length and contains 1300 sections.[25] In contemporary Australian corporate law, statutory regulation has overtaken the general common law in terms of importance and impact on day-to-day corporate operations.[26] Nonetheless, there has been trenchant criticism of both the pace and quality of recent statutory reforms. For example, Justice Austin of the New South Wales Supreme Court has commented that statutory reforms over the last decade have "added substantial[] . . . complexity" and "created obfuscation" in the area of corporate law.[27] Similar criticism has been levied against Australian statutory reforms in other fields, such as labor law.[28]

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[23]An example of this is the recent amendment to DGCL section 216. *See* DEL. CODE ANN. tit. 8, § 216 (2001). Although it impliedly permits shareholders to amend the bylaws to adopt a majority voting norm, the provision nonetheless retains a plurality voting default rule for the election of directors by shareholders. The revised section provides that a shareholder-adopted bylaw for the election of directors "shall not be further amended or repealed by the board of directors." *Id.*

[24]Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985). Two classic cases where the Delaware judiciary's willingness in this regard is evident in the hostile takeover context are *Unocal* and *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

[25]Companies Act, 2006, c.46, §§ 1-1300 (U.K.).

[26]Justice R.P. Austin, Supreme Court of New South Wales, Opening Commentary at the University of New South Wales Mergers and Acquisitions Conference (Oct. 24, 2007).

[27]Cally Jordan, *Unlovely and Unloved: Corporate Law Reform's Progeny* 2 (Univ. of Melbourne Legal Studies Research, Paper No. 325, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125542 (outlining the defects of Australia's Corporations Act 2001).

[28]Richard B. Freeman, for example, has compared recent Australian statutory reforms in the labor law area unfavorably, in terms of complexity and content, with analogous reforms in China. *See* Richard B. Freeman, Herbert Ascherman Professor of Economics, Harvard Univ., Address at the Centre for Economic Performance, World Bank: Labor Market Institutions (and

A dichotomy exists in corporate law theory between protecting shareholder interests and granting shareholders participatory rights.[29] Following the corporate scandals experienced at the beginning of this decade, statutory corporate law reforms were introduced in a number of common law jurisdictions, including the United States, United Kingdom, and Australia.[30] Although similar motivations underpinned these reforms in common law jurisdictions, interesting differences emerged, particularly in relation to this shareholder rights dichotomy.[31]

The post-scandal regulatory response in the United States accorded with the DGCL's reputation for stability and evolutionary, not reactive, change.[32] The response emanated not from the DGCL, but from federal law—directly, in the case of the Sarbanes-Oxley Act of 2002 and indirectly, in the case of stock exchange listing rules.[33] Against the traditional matrix of corporate governance regulation via state-based enabling legislation, the U.S. reforms effected a significant shift in the balance between federal and state regulation,[34] creating what has been described as "shadow corporation law" in the federal realm.[35]

Informal Labor Markets) Around the World (Apr. 4, 2008) (presentation *available at* http://info.worldbank.org/etools/docs/library/243360/day5Richard%20FreemanApril4Session2.pdf).

[29] *See generally* Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 42 (2000).

[30] These legislative reforms include: the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (ratified in scattered sections at 11, 15, 18, 28, & 29 U.S.C.); The Combined Code on Corporate Governance, 2006 (U.K.), *available at* http://www.frc.org.uk/documents/pagemanager/frc/Combined%20code%202006%20OCTOBER.pdf; the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act, 2004, No. 103 (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/3C7B76EF9571786CCA257434001EEF42/$file/1032004.pdf. The post-scandal reforms also encompassed governance changes by self-regulatory organizations. *See, e.g.*, NYSE, Inc., Listed Company Manual § 303A (2003) (providing corporate governance rules approved by the Securities and Exchange Commission (SEC) on Nov. 4, 2003); Australian Securities Exchange (ASX) Corporate Governance Council, Principles of Good Corporate Governance and Best Practice Recommendations (2003) (Austl.), *available at* http://asx.com.au/supervision/governance (a revised version of the principles, the *Corporate Governance Principles and Recommendations*, was released in Aug. 2007).

[31] *See generally* Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007) (noting that even where similar motivations underpin various reform agendas, it is unlikely that their long-term effects will coincide due to differences in interpretation and enforcement).

[32] *See* Bratton & McCahery, *supra* note 11, at 622-23 (viewing federal incursions into internal corporate affairs in these circumstances as predictable, and indeed inevitable, given the fact that Delaware "follows an evolutionarily stable strategy that constrains its ability to respond to shocks that create national political demands").

[33] *See* Thompson, *supra* note 10, at 1144-45 (arguing that the stock exchange listing rules have become a mechanism via which the SEC can avoid "the federalism-based limits on its authority").

[34] *See, e.g.*, Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 100-11 (2003); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*,

The position of the U.S. post-scandal reforms in relation to the shareholder rights dichotomy is unambiguous. As the preamble to the Sarbanes-Oxley Act makes clear,[36] the goal of the Act is protection of shareholder interests, not enhancement of shareholders' participatory rights. At the time of the enactment of the reforms, a number of commentators noted this conspicuous lacuna,[37] and suggested that the absence of greater participatory rights for shareholders might be the Act's forgotten element.[38]

There has subsequently been a strong backlash against the Sarbanes-Oxley Act. Critics have attacked its rapid legislative passage,[39] and the Paulson Committee expressed concern that the stringency of the reforms had reduced the international competitiveness of U.S. markets.[40] As a subtext to this argument, the Paulson Committee noted that U.S. shareholders have fewer participatory rights than their counterparts in other common law jurisdictions and recommended increasing those rights in the U.S. context as an alternative, and less intrusive, regulatory technique than rule-based regulation.[41] Nonetheless, there has been much resistance to enhancing shareholder power and an SEC proposal to increase shareholder rights in relation to nomination of directors recently foundered.[42]

REGULATION, Spring 2003, at 26.

[35] *See* William B. Chandler & Leo E. Strine, *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 973 (2003).

[36] The preamble of the Sarbanes-Oxley Act states that it is an Act "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, Pub. L. No 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.) (preamble). *See also* Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Shareholders?*, 60 BUS. LAW. 1, 2 (2004) (arguing that the Sarbanes-Oxley Act reinforces shareholder primacy norms in corporate law).

[37] *See* Chandler & Strine, *supra* note 35, at 999-1001; Langevoort, *supra* note 31, at 1829.

[38] *See* Chandler & Strine, *supra* note 35, at 999 (observing this in the context of shareholder participation in the director election process).

[39] *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528 (2005) (describing the Sarbanes-Oxley Act as "emergency legislation").

[40] COMMITTEE ON CAPITAL MKTS. REG., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION, at xi (2006), *available at* http://www.capmktsreg.org/pdfs/11.30 Committee_Interim_ReportREV2.pdf. *See also* MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE U.S.' GLOBAL FINANCIAL SERVICES LEADERSHIP (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[41] *See* COMMITTEE ON CAPITAL MKTS. REG., *supra* note 40, at xii-xiii, 93-112.

[42] In late 2007, the SEC voted against increasing shareholder participation in the director nomination process, maintaining the status quo in this regard. Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to Codify Longstanding Policy on Shareholder Proposals on Election Procedures (Nov. 28, 2007), http://www.sec.gov/news/press/2007/2007-246.htm. For general background to the shareholder access debate, see Jennifer G. Hill, *The Shifting Balance of Power Between Shareholders and the Board: News Corp's Exodus to Delaware and Other Antipodean*

In contrast to the United States, strengthening shareholder participatory rights in corporate governance was an overt theme in both the Australian and U.K. post-scandal reforms. The Explanatory Memorandum to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act of 2004 (CLERP),[43] which constituted Australia's main statutory response to the corporate scandals, stressed the desirability of improving shareholder participation and activism[44] on the assumption that enabling shareholders to "influence the direction of companies in which they invest"[45] is an unmitigated good. The theme of enhancing shareholder participatory rights was even more apparent in the United Kingdom. For example, the 2003 Higgs Committee Report, on which the U.K. Combined Code on Corporate Governance of 2003 was based,[46] introduced a range of techniques that were explicitly designed to foster active dialogue between independent directors and institutional investors, and to treat independent directors as a conduit between institutional investors and management.[47] Indeed, the reforms in the U.K. Companies Act of 2006 went even further in this regard by seeking to enfranchise indirect investors holding shares through a nominee.[48]

The goal of strengthening shareholder rights is not restricted to common law jurisdictions. It lies at the heart of the 2007 EU Directive on Shareholders' Rights (EU Directive),[49] which was also introduced in response to the

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Tales 11-13 (Vanderbilt Law and Econ. Research, Paper No. 08-06, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086477.

[43]Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act, 2004, No. 103 (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/3C7B76EF9571786CCA257434001EEF42/$file/1032004.pdf.

[44]Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, Explanatory Memorandum, paras. 4.271-4.280.

[45]*Id.* at para. 4.174.

[46]Some specific recommendations of the Higgs Committee Report were wound back in the revised Combined Code amendments. Press Release, Financial Reporting Council, FRC Issues Revised Combined Code (July 23, 2003), http://www.frc.org.uk/press/pub0311.html.

[47]*See* Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367, 391 (2005). The approach adopted by the Higgs Committee arguably conflicts with the U.S. post-scandal reforms. Under the U.S. reforms, the "pristine" quality of director independence suggests that directors should be independent, not only of management, but also of major shareholders. *Id.* at 388-91.

[48]Companies Act, 2006, c. 46, § 145 (U.K.). These reforms enable an indirect investor to receive corporate information, be appointed as proxy, or give instructions to the legal owner as to how to vote the shares. *Id.* §§ 146, 149, 153.

[49]The 2007 EU Directive on Shareholder Rights was developed as part of the European Union Commission's broader Corporate Governance Action Plan. Comm. of the Euro. Communities, *Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward*, at 8, COM (2003) 284 final (May 21, 2003). It has been said that "[t]he European Commission's corporate governance agenda occupies a unique place within the European imagination" and involves "a set of highly dynamic regulatory experiments." Peer Zumbansen,

corporate scandals.[50] For example, the preamble to the EU Directive makes clear that the reforms are designed to address current obstacles to effective shareholder voting, particularly in a cross-border context, in European capital markets.[51] The preamble states that current community legislation is insufficient to achieve the objective of strengthening shareholder rights.[52] The regulatory approach of the EU Directive is analogous to that advocated by the Paulson Committee.[53] The EU Directive was designed to promote flexibility and to increase standards of transparency and accountability in the EU without imposing layers of more formal regulation.[54] Under this approach, shareholder rights are viewed as a potential antidote to more stringent, rules-based corporate regulation.[55]

The EU Directive is informed by strong principles of shareholder democracy[56] and fairness.[57] It is interesting to note, however, that one of the

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"New Governance" in European Corporate Law Regulation as Transnational Legal Pluralism, 14 EUR. L.J. (forthcoming 2008) (manuscript at i, 1, on file with author).

[50] *See* Euro. Comm., Modernisation of Company Law and Enhancement of Corporate Governance, http://ec.europa.eu/internal_market/company/modern/index_en.htm (last visited Aug. 29, 2008).

[51] These obstacles include matters such as problems relating to proxy rules, the practice of "share blocking," costs, complexity, and legal disincentives to exercise voting rights, such as rules on "acting in concert." For a description and analysis of these obstacles, see Paolo Santella et al., A Comparative Analysis of the Legal Obstacles to Institutional Investor Activism in Europe and in the US (May 24, 2008) (professional draft, paper presented in Cagliari at conference on Shareholder Rights, Shareholder Voting and Corporate Performance), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137491. For discussion of the impact of the EU Directive on the procedural costs of shareholders exercising cross-border voting rights, see Dirk Zetzsche, *Shareholder Passivity, Cross-Border Voting and the Shareholder Rights Directive*, 8 J. CORP. L. STUD. 289 (2008).

[52] Council Directive 07/36, paras. 3-4, 2007 O.J. (L 184) 17 (EC).

[53] *See* COMMITTEE ON CAPITAL MKTS. REG., *supra* note 40, at xii-xiii, 93-114.

[54] This point was made by Pierre Delsaux, Head of the Commission's Unit for Company Law, Corporate Governance and Financial Crime, who stated:

> That is why we have decided to propose this directive on cross-border shareholder rights. We consider that having these proposals is much better than having ten directives on applying "comply or explain" principles or one single directive creating a code of corporate governance at a European level. We do not want such a code, we want flexibility but we want also to be sure that the principles will become a reality and, if we want the principles to become a reality, we need to give the appropriate rights to the shareholders.

Pierre Delsaux, Head of Unit for Company Law, Corporate Governance and Financial Crime, EU Comm'n, Address at the International Corporate Governance Network's Corporate Governance Conference, Shareholder Rights and Responsibilities: The Dialogue Between Companies and Investors (Feb. 7, 2006), *available at* http://www.icgn.org/conferences/2006/frankfurt/discussion_paper.pdf.

[55] Peter Montagnon, *Shareholder Rights Are an Antidote to Company Regulation*, FIN. TIMES (London), Mar. 9, 2006, at 17.

[56] For commentary on this aspect of the EU Directive and on the need for greater shareholder democracy among European countries, see *id.*

key mechanisms by which the Commission of the European Communities (Commission) originally intended to establish "a real shareholder democracy in the EU"[58] was ultimately jettisoned. In 2007, in what has been described as "a rare policy capitulation,"[59] the Commission decided not to pursue further its controversial "one share, one vote" proposal.[60]

Context matters in comparative corporate governance and regulatory design.[61] It has significant policy implications in relation to shareholder participatory rights. In jurisdictions with dispersed shareholdings, where the central agency problem is between management and shareholders, the granting of stronger shareholder rights may provide an important check on managerial power. In jurisdictions with concentrated ownership structures and controlling shareholders, however, similar reforms could potentially exacerbate existing agency problems between majority and minority shareholders.[62]

An examination of shareholder participatory rights is particularly interesting from a comparative perspective. It raises the question of why there is so much resistance to increasing participatory rights if shareholders have far more restricted participatory rights in the United States than in many other jurisdictions. One possible explanation is that a paradigm shift is emerging in contemporary corporate law. A traditional goal of corporate law has been shareholder protection. It is this goal that provides the theoretical basis for the post-scandal reforms in the U.K., Australia, and the 2007 EU Directive.

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[57]The Commission has stated:

> Investors, large and small, are demanding more transparency and better information on companies, and are seeking to gain more influence on the way the public companies they own operate. Shareholders own companies, not management - yet far too frequently their rights have been trampled on by shoddy, greedy and occasionally fraudulent corporate behaviour. A new sense of proportion and fairness is necessary.

Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward, at 7, COM (2003) 284 final (May 21, 2003).

[58]*Id*. at 14.

[59]Andrew Bounds & Kate Burgess, *EU Scraps Plan for "One Share, One Vote" Reform*, FIN. TIMES (London), Oct. 4, 2007, at 1.

[60]It appears that countries with a high proportion of family-owned companies, such as the Scandinavian countries, France, and Spain, were the principal opponents to the proposal. *Id*.

[61]*See generally* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006) (providing background and analysis of controlling shareholder systems).

[62]In the context of concentrated ownership, the principle of board independence becomes a particularly important check on majority shareholder power and a means to ensure impartial monitoring on behalf of minority shareholders. This point is stressed by the influential Winter Committee. *See* JAAP WINTER ET AL., REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE 59-61 (2002), http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

Nonetheless, an emerging competing goal in American academic literature is that of protecting the corporation *from* shareholders.[63] It is this competing goal which arguably underlies much of the resistance in the United States to increasing shareholder participatory rights.[64]

III. THE NONBINDING SHAREHOLDER RESOLUTION ON REMUNERATION IN AUSTRALIA AND THE UNITED KINGDOM

One high profile post-Enron reform granting shareholders stronger participatory rights in Australia and the U.K. was the introduction of a provision to allow shareholders an annual advisory vote on remuneration. Similar provisions exist in the Netherlands, South Africa, Norway, and Sweden,[65] and the Paulson Committee suggested that a vote of this kind should be considered for the United States.[66]

In Australia, the relevant provision, section 250R(2) of the Corporations Act 2001 (Corporations Act),[67] requires shareholders of an Australian

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[63]Professor Robert Clark, Opening Comments at the Sixth Annual Law and Business Conference at Vanderbilt University: Corporate Separateness (Mar. 31, 2006).

[64]For recent scholarship arguably reflecting this trend, see Margaret M. Blair, *The Neglected Benefits of the Corporate Form: Entity Status and the Separation of Asset Ownership from Control*, *in* CORPORATE GOVERNANCE AND FIRM ORGANIZATION: MICROFOUNDATIONS AND STRUCTURAL FORMS 45, 45-47 (Anna Grandori ed., 2004); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733 (2007); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789 (2007).

[65]Posting of Peter Moon et al. to The Harvard Law School Corporate Governance Blog, http://blogs.law.harvard.edu/corpgov/2008/02/12/say-on-pay-in-the-uk-and-australia-and-now-in-the-us/) (Feb. 12, 2008, 2:34 PM EST).

[66]COMMITTEE ON CAPITAL MKTS. REG., *supra* note 40, at 109. A reform proposal to this effect later became the subject of Democrat-instigated congressional consideration. Erin White & Aaron O. Patrick, *Shareholders Push for Vote on Executive Pay*, WALL ST. J., Feb. 26, 2007, at B1. In April 2007, an Act, which would accord U.S. shareholders an advisory vote on executive pay, the Shareholder Vote on Executive Compensation Act (HR 1257) (2007), was passed by the House of Representatives; however, implementation of the legislation is in doubt, due to White House opposition. *See* Kara Scannell & Siobhan Hughes, *House Clears an Executive-Pay Measure*, WALL ST. J., Apr. 21, 2007, at A3. In spite of the stalling of this legislation, institutional investors have become increasingly activist on the so-called "say on pay" issue in the United States, and during the 2007 proxy season more than forty precatory resolutions seeking an advisory shareholder vote on compensation were advanced at particular U.S. companies. Moon et al., *supra* note 65 ("A majority of shareholders backed the resolutions at Clear Channel Communications, Activision, Valero Energy, Blockbuster, Verizon, Ingersoll-Rand and Motorola, with votes as high as [sixty-nine] percent.").

[67]Corporations Act, 2001, c. 2G, § 250R(2) (Austl.). *See also* Corporations Act, 2001, c. 2G, §§ 249L(2), 300A (Austl.) (providing the notice requirements to inform shareholders of the

listed company to pass a nonbinding advisory vote at its annual general meeting, indicating whether they adopt the directors' remuneration report.[68] This reform, which was controversial at the time of its introduction,[69] was based upon an analogous provision introduced in the United Kingdom in 2002,[70] although the Australian section is broader in scope than its U.K. progenitor.[71] In spite of the nonbinding status of the resolution, the explicit goals of the Australian provision were to provide shareholders with a greater voice in relation to remuneration issues[72] and to encourage greater consultation and information flow concerning compensation policies between directors and shareholders.[73]

The annual shareholder advisory vote on compensation charted a new direction in U.K. and Australian corporate law, which, in contrast to the United States,[74] had no tradition of precatory or nonbinding shareholder voting.[75] The

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resolution referred to in section 250R(2) and the information that must be included in the annual directors' report).

[68]*See generally* Larelle Chapple & Blake Christensen, *The Non-Binding Vote on Executive Pay: A Review of the CLERP 9 Reform*, 18 AUSTL. J. CORP. L. 263 (2005). For a similar reform proposal in the United States, see Mark J. Loewenstein, *Reflections on Executive Compensation and a Modest Proposal for (Further) Reform*, 50 SMU L. REV. 201, 221-23 (1996).

[69]*See, e.g.*, BUS. COUNCIL OF AUSTL., SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES ON THE CORPORATE LAW ECONOMIC REFORM PROGRAM (AUDIT & CORPORATE DISCLOSURE) BILL 13-15 (2003), http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2002-04/clerp9/submissions/sub020.pdf (describing and criticizing the proposed shareholder advisory vote as a "no confidence vote").

[70]*See generally* Eilis Ferran, *Company Law Reform in the UK: A Progress Report* 24-28, (European Corporate Governance Inst., Working Paper No. 27, 2005), *available at* http://ssrn.com/abstract=644203. *See* The Directors' Remuneration Report Regulations, 2002, S.I. 2002/1986 (U.K.). The provision requiring shareholder approval of the directors' remuneration report is now found in section 439 of the U.K. Companies Act 2006. *See* Companies Act, 2006, c.46, § 439 (U.K.). The required content of the remuneration report is now detailed in Schedule 8 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations. *See* Director's Remuneration Report Regulations, 2002, S.I. 2002/1986 (U.K.).

[71]Under the Australian regulatory regime, the nonbinding shareholder vote encompasses remuneration of each director and certain senior executives; however, the U.K. provision only applies to directors' remuneration. Corporations Act, 2001, c. 2G, §§ 250R(2), 300A(1)(c)(i)-(iii) (Austl.). *See also* BUS. COUNCIL OF AUSTL., *supra* note 69, at 14 (comparing the Australian and U.K. regulatory regimes).

[72]Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill, 2003, Austl. H.R. Bill, Explanatory Memorandum paras. 5.434-5.435 (2003), *available at* http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r1959_ems_0d5b4e01-39a4-4b3b-b39f-8086b4c742da/upload_pdf/61332.pdf.

[73]*Id.* paras. 4.353, 5.413.

[74]Although precatory resolutions in the United States are traditionally related to social responsibility issues, they have increasingly been used in the context of executive remuneration. *See generally* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 51-52 (2004); Brian R. Cheffins & Randall S. Thomas, *Should Shareholders Have a Greater Say Over Executive Pay? Learning from the US Experience*, 1 J. CORP. L. STUD. 277 (2001).

Corporations and Securities Advisory Committee[76] had, for example, in its 2000 report entitled "Shareholder Participation in the Modern Listed Public Company," recommended against adoption in Australia of a nonbinding shareholder vote.[77] The committee considered that a nonbinding vote would enable shareholders to pass resolutions on matters outside their constitutional powers[78] and blur the boundary between managerial and shareholder decision making.[79]

Commentators have suggested that, as a result of inherent limitations in investor monitoring, shareholder voting will generally only be an effective governance tool where the corporation's remuneration practices significantly deviate from the norm.[80] International corporate codes and statutes, particularly in the aftermath of the corporate scandals, uniformly stress the need for the fine tuning of executive pay to ensure that it is performance based.[81] Yet, a potential problem associated with such fine tuning is that executive compensation packages are becoming more complicated and abstruse, increasing the barriers to effective disclosure[82] and use of shareholder approval as a governance technique in relation to executive pay.[83] Critics of section 250R(2) of the Corporations Act, such as the Business Council of Australia, argued that the provision would add nothing of substance to existing shareholder protection in Australia, while creating a host of legal problems.[84]

Nonetheless, evidence from the early years of its operation suggests that the nonbinding shareholder vote has had a greater impact on remuneration practices and excessive compensation than some critics predicted.[85] In the

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[75]*See, e.g.*, NRMA v. Parker (1986) 6 N.S.W.L.R. 517, 522 (Austl.).

[76]The Corporations and Securities Advisory Committee is now known as the Corporations and Markets Advisory Committee.

[77]COMPANIES AND SEC. ADVISORY COMMITTEE, SHAREHOLDER PARTICIPATION IN THE MODERN LISTED PUBLIC COMPANY: FINAL REPORT 38 (2000), http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Sharehold er_final_reportJun00.pdf.

[78]*Id.* at 37.

[79]*Id.*

[80]Cheffins & Thomas, *supra* note 74, at 310-11.

[81]In the Australian context, see, e.g., Corporations Act 2001, c. 2G, § 300A. *See also* ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 35 (2d ed. 2007), *available at* http://ecgi.org/codes/documents/corp_governance_principles_asx_2007.pdf (stressing the need for performance-based pay packages to reflect "a clear relationship between performance and remuneration").

[82]*See*, *e.g.*, Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309, 1316-17 (2002) (describing Enron's structured finance transactions as complex, making disclosure "necessarily imperfect").

[83]*See* REPORT TO THE INTERNATIONAL CORPORATE GOVERNANCE NETWORK, EXECUTIVE REMUNERATION—THE CAUCUS RACE 2 (2002), http://www.icgn.org/documents/ICGNExecRem.pdf.

[84]*See* BUS. COUNCIL OF AUSTL., *supra* note 69, at 15.

[85]*See* Fabrizio Ferri & David Maber, Solving the Executive Compensation Problem

United Kingdom, perhaps the best known early example of the effective use of the provision was the vote by GlaxoSmithKline shareholders in 2003 against a large severance package for its CEO, which led a number of companies to meet with investors to modify proposed packages.[86] Two years later, Lord Hollick, the outgoing CEO of United Business Media, was forced to waive a £250,000 bonus for ensuring a successful handover to his successor, after seventy-six percent of the shareholders voted against approving the company's remuneration report.[87] These examples suggest that the nonbinding shareholder vote, aided by the financial press, may operate as a powerful regulatory mechanism through "shaming."[88]

The analogous provision in Australia has followed an interesting trajectory. Although there was some initial skepticism that the shareholder advisory vote might simply be window dressing to appease populist concerns about excessive compensation, the provision now enjoys strong support from commentators and shareholder groups, particularly institutional investors.[89] The introduction of the advisory vote has been credited as pivotal to increasing levels of shareholder involvement, with one prominent institutional investor organization, the Australian Council of Super Investors (ACSI) recently stating:

Through Shareholder Votes? Evidence from the U.K. (Nov. 2007) (unpublished manuscript), *available at* http://papers.ssrn. com/sol3/papers.cfm?abstract_id=1107888; Kym Sheehan, Is the Outrage Constraint an Effective Constraint on Executive Remuneration? Evidence from the UK and Preliminary Results from Australia, (Ph.D. Research Paper, Univ. of Melbourne School of Law), *available at* http://ssrn.com/abstract=974965. Ferri and Maber conducted an empirical study into the effect of the advisory vote on executive remuneration in the U.K. from 2000–2005. Ferri & Maber, *supra*, at tbls.4-6. They found an increased degree of sensitivity of executive compensation (particularly cash compensation) to negative operating performance over this period. *Id*. at tbl.3. The implementation of the advisory vote, however, was not found to enhance the sensitivity of executive compensation to negative stock performance. *Id*. at tbl.6. In the early days of the advisory vote, some commentators were concerned that shareholders were not taking advantage of their right to vote. Jaclyn Braunstein, Note, *Pound Foolish: Challenging Executive Compensation in the U.S. and the U.K.*, 29 BROOK. J. INT'L L. 747, 792-93 (2004).

[86]*See Fat Cats Feeding—Executive Pay*, ECONOMIST, Oct. 11, 2003, at 84; Steve Thompson, *The Impact of Corporate Governance Reforms on the Remuneration of Executives in the UK*, 13 CORP. GOVERNANCE: AN INT'L REV. 19, 23 (2005).

[87]*See* Tim Burt & Sundeep Tucker, *Hollick Waives UBM Bonus of Pounds 250,000*, FIN. TIMES (London), May 17, 2005, at 21; Sundeep Tucker, *Hollick Humiliated by Rebels' Rejection of Pounds 250,000 Bonus*, FIN. TIMES (London), May 13, 2005, at 21.

[88]*See generally* Hill, *supra* note 8, at 69-71; David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). *See also* Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757, 771 (2007) (arguing for the use of shame sanctions to minimize excessive executive compensation).

[89]One financial commentator stated that, in spite of such initial skepticism, "[i]n their second season [of annual shareholder meetings] . . . the non-binding votes are having a real impact," citing increasing numbers of protest votes against remuneration reports. Stephen Bartholomeusz, *Remuneration Revolt Has an Impact in the Boardroom*, AGE, Dec. 2, 2006, at 2.

> [T]he introduction of a non-binding shareholder vote on a company's remuneration report in the CLERP 9 reforms has been one of the single biggest catalysts for improved levels of engagement between institutional shareholders and company directors. . . . ACSI has found that, since the introduction of the non-binding vote on remuneration reports and the ASX Corporate Governance Council's Principles, more companies are proactively seeking out institutional investors (and their representative organizations such as ACSI) to discuss the company's approach to corporate governance.[90]

Although only one company received a majority vote against its remuneration report in 2005,[91] the first year of operation of the annual shareholder advisory vote in Australia, approximately one-third of the largest corporations registered a protest vote of more than ten percent.[92] Institutional investors played an active role in the new procedure.[93] ACSI, for example, advised its members to vote against the remuneration report of thirty-five companies.[94] Compliance with the new provision was, however, uneven. The corporate regulator, the Australian Securities and Investments Commission (ASIC),[95] noted that many companies had failed to inform shareholders of the vote, stating tersely that "[t]he fact that the resolution is non-binding does not

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[90] E-mail from Michael O'Sullivan, President, Australian Council of Super Investors Inc. to David Sullivan, Committee Secretary, Parliamentary Joint Committee on Corporations and Financial Services, (Sept. 14, 2007), *available at* http://www.aph.gov.au/senate/committee/ corporations_ ctte/sharehold/submissions/sub11.pdf).

[91] This was against a biotech company, Novogen Ltd. *See* Damon Kitney & Fiona Buffini, *Investor Backlash on Executive Pay*, AUSTL. FIN. REV., Dec. 19, 2005, at 1.

[92] An *Australian Financial Review* analysis found that 48 of the 129 S&P/ASX 200 companies that submitted their remuneration report to the nonbinding shareholder vote received "no" votes of more than ten percent. *Id*.

[93] On the increasingly complex interaction between companies and institutional shareholders in relation to shareholder voting on executive remuneration, see Mark Lawson, *Executive Pay Debate Remains a Hot Issue*, AUSTL. FIN. REV., Feb. 16, 2006, at 14.

[94] ACSI's recommendations were based on factors such as inappropriate performance hurdles, director retirement benefits, and excessive termination benefits. *See* Kitney & Buffini, *supra* note 91. *See generally* AUSTRALIAN COUNCIL OF SUPER INVESTORS INC., CORPORATE GOVERNANCE GUIDELINES: A GUIDE FOR SUPERANNUATION TRUSTEES TO MONITOR LISTED AUSTRALIAN COMPANIES 13-20 (2005), http://www.acsi.org.au/documents/ACSI_Guidelines_ 2005_FINAL_a4.pdf.

[95] Press Release, Australian Securities & Investments Commission, 05-404 Not Good Enough–43 Listed Companies Fail to Notify Shareholders About Non-binding Vote on Director and Senior Executive Pay (Dec. 20, 2005), *available at* http://www.asic.gov.au/asic/asic.nsf/ byheadline/05-404+Not+good+enough-43+listed+companies+fail+to+notify+shareholders+about+ non-binding+vote+on+director+and+senior+executive+pay?openDocument.

mean that companies can ignore the requirement and disenfranchise shareholders."[96]

Since that time, there has been a steady rise in the number of protest votes against remuneration reports in Australia.[97] The general level of shareholder voting has also increased.[98] The 2007 annual general meeting season was something of a watershed in this regard, with protest votes registered at many major Australian companies.[99] The most high profile of these protest votes occurred at the 2007 annual general meetings of Telstra and Australian Gas Light Company (AGL). At Telstra, Australia's primary telecommunications company, sixty-six percent of votes were cast against the directors' remuneration report.[100] At AGL, sixty-two percent of shareholders took umbrage at the remuneration report.[101] Telstra had also faced shareholder dissatisfaction at its 2006 annual general meeting; however, it was then able to avoid a majority "no" vote, since the Australian government, a major Telstra shareholder at that time, voted in favor of the directors' remuneration report.

A key trigger for shareholder protest votes appears to be the perception that the incentives offered by particular executive compensation packages are insufficiently aligned to long-term performance goals. For example, the existence of short-term incentives was a problem at Telstra.[102] A new

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[96] *Id*. Furthermore, some of these companies failed to put the shareholder resolution on the remuneration report to a vote at the meeting as required. *Id*.

[97] In 2006, significant shareholder backlash was directed against Oxiana, Zinifex, Tabcorp, Tattersall's, Coles Myer, and Telstra. Oxiana and Zinifex, for example, registered "no" votes of 46% and 40.32% respectively. *See* Leon Gettler, *Directors Need to Listen, Or Else*, AGE, Nov. 1, 2007, at 1; Andrew Trounson, *Executive Pay Angers Oxiana Shareholders*, AUSTRALIAN, Apr. 21, 2006, at 21; Andrew Trounson, *Investor Revolt over Zinifex Deal*, AUSTRALIAN, Nov. 28, 2006, at 25; Andrew Trounson, *Oxiana Admits $1m Mistake in Options Granted to Execs*, AUSTRALIAN, June 21, 2006, at 24.

[98] *See* Stuart Washington, *Executive Rewards Wake a Sleeping Giant*, SYDNEY MORNING HERALD, Nov. 12, 2007, at 19.

[99] For an example of some companies whose remuneration reports attracted a protest vote from their shareholders during the 2007 annual general meeting season, see Damon Kitney & Annabel Hepworth, *Remuneration Rebels Need Information*, AUSTL. FIN. REV., Nov. 15, 2007, at 26. Significant "no" votes were recorded, for example, at the 2007 annual shareholders meeting of Telstra, Suncorp Metway, Babcock & Brown Infrastructure, Macquarie Bank, MFS, AGL, Leighton Holdings, and Toll Holdings. According to RiskMetrics Australia data, twenty-eight percent of votes were cast against the directors' remuneration report at S&P/ASX 100 companies in 2007. Brendan Swift, *Shareholders More Active*, AUSTL. FIN. REV., Feb. 1, 2008, at 4.

[100] *See* Swift, *supra* note 99, at 4.

[101] *See* Glenda Korporaal, *AGL in the Hot Seat as Pay Revolt Spreads*, AUSTRALIAN, Nov. 9, 2007, at 21; Swift, *supra* note 99, at 4.

[102] Sandy Grant, the chief executive of the superannuation fund, Cbus, which was a major Telstra shareholder, claimed with respect to the structure of senior executives' pay at Telstra that "[t]he incentive elements . . . are very short term and we think they are out of balance and they are not sufficiently aligned between executive and shareholder interests." *See* Washington, *supra* note

Australian sovereign wealth fund, the Future Fund, holding sixteen percent of Telstra stock, voted against the company's remuneration report on the basis that there was an insufficient link between long-term, equity-based executive compensation and shareholder returns.[103] At AGL, the shareholder protest vote came in response to the revelation of a $5.5 million termination payment to the company's former CEO, who had been removed from office.[104]

Another apparent factor in large protest votes against executive pay packages relates to the Australian Securities Exchange Listing Rules (ASX Listing Rules). A number of ASX Listing Rules require shareholder consent for certain transactions. ASX Listing Rule 10.14, for instance, requires shareholder consent for the issue of securities to directors under an employee incentive scheme.[105] It appears that some shareholder protest votes have been recorded at companies that were using exemptions or ASX waivers to avoid the need for shareholder consent under ASX Listing Rule 10.14 in relation to executive pay.[106]

Responses by companies to large shareholder protest votes against remuneration reports have differed. For example, the board of AGL accepted collective responsibility for the hiring and sacking of its chief executive after the negative shareholder vote, and AGL's chairman stated that the company would work closely with institutional investors to restore trust.[107] Another company, Tabcorp Holdings Ltd. (Tabcorp), withdrew an options package for its chief executive in response to shareholder concerns over the remuneration report.[108] The board of Telstra, however, was unapologetic, despite the overwhelming protest vote to its remuneration report.[109] Rather, Telstra blamed the outcome on either a lack of understanding by shareholders of the complexity of the remuneration structures or on shareholders blindly following the

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98, at 19.

[103] *See* Nick Lenaghan, *Open Season: Shareholders Put Companies on Notice*, AUSTRALIAN, Dec. 8, 2007, at 36.

[104] *See* Korporaal, *supra* note 101, at 21.

[105] Australian Securities Exchange, ASX Listing Rule Rule 10.14 (2003), *available at* http://www.asx.com.au/ListingRules/chapters/Chapter10.pdf.

[106] Washington, *supra* note 98, at 19.

[107] Korporaal, *supra* note 101, at 21.

[108] TREASURY, SUBMISSION TO THE JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES: INQUIRY INTO SHAREHOLDER ENGAGEMENT AND PARTICIPATION (Sept. 2007), at 8 n.26, *available at* http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/submissions/sub17.pdf. For details of the sequence of events that took place at Tabcorp, see Helen Westerman, *Tabcorp Cans $41m Pay Deal for CEO*, SYDNEY MORNING HERALD, Nov. 28, 2006, at 23.

[109] Tracey Lee, *Wake-up Call for Directors*, AUSTL. FIN. REV., Dec. 8, 2007, at 24. *See also* Tim Blue, *Telstra Directors Face Savage Pay Retribution*, AUSTRALIAN, Nov. 10, 2007, at 38 (reporting that Telstra's chairman stated "he is going to go on and do what he thinks is best for the company, regardless of what the shareholders say").

advice of proxy advisors.[110] There is an increasing tension in the Australian compensation context between remuneration consultants and proxy advisory firms. The influence of the latter group has grown enormously since the introduction of the advisory shareholder vote.[111] Their expanded role, however, has attracted criticism from company directors.[112]

IV. THE EVENTS SURROUNDING NEWS CORP'S REINCORPORATION IN DELAWARE

There is currently a heated debate in U.S. academic circles on the issue of shareholder empowerment.[113] The roots of this debate can be traced back to the notable absence of shareholder participatory rights in U.S. post-Enron reforms.[114] Professor Lucian Bebchuk subsequently advocated stronger participatory rights for shareholders.[115] The Interim Report of the Committee on Capital Markets Regulation also recognized that U.S. shareholders possess fewer rights than their foreign counterparts and was concerned by the

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[110]Lee, *supra* note 109, at 24.

[111]Stephen Mayne has commented on this phenomenon in the following terms: "Probably the most important development in the last 3 or 4 years has been the rising power and credibility of the proxy advisory firms, particularly ISS. ISS had a remarkable year in 2006." *See* Interview with Stephen Mayne on Executive Remuneration: The Market at Work (Feb. 2007), *available at* http://www.erc.org.au/goodbusiness/page.php?pg=0702inprofile0. On the role of ISS in advising shareholders to vote against remuneration reports, see Nick Lenaghan, *Open Season: Shareholders Put Companies on Notice*, AUSTRALIAN, Dec. 8, 2007, at 36.

[112]For example, in its report to the inquiry of the Joint Committee on Corporations and Financial Services into shareholder engagement and participation, the Australian Institute of Company Directors claimed that the "[r]ecent introduction of the non-binding vote on the remuneration report has increased the influence of advisors and intermediaries creating a further barrier to engagement between shareholder and company." *See* AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS, SUBMISSION TO THE JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY INTO SHAREHOLDER ENGAGEMENT AND PARTICIPATION 9 (2007), http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/submissions/sub25.pdf. For further discussion of the influence of proxy advisors on the advisory remuneration vote, see Alan Kohler, *Proxy Advisors Get My Vote*, SYDNEY MORNING HERALD, Dec. 9, 2006, at 47, responding to Charles Macek, chair of Telstra's remuneration committee, who stated that proxy advisers are "unaccountable, unscrutinised, too powerful and should be licensed." *Id.*

[113]The debate is elucidated in an April 2006 Special Issue of the *Harvard Law Review* and a May 2007 Special Issue of the *Virginia Law Review*. *See* 119 HARV. L. REV. 1641, 1641-813 (2006); 93 VA. L. REV. 515, 515-825 (2007).

[114]*See, e.g.*, Chandler & Strine, *supra* note 35, at 999-1001; Langevoort, *supra* note 31, at 1829-33.

[115]*See, e.g.*, Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 45 (2003); Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676 (2007).

regulatory implications of this fact.[116] Nonetheless, a number of commentators have strongly criticized Bebchuk's proposal to increase shareholder power under U.S. law.[117]

One argument sometimes used by Bebchuk's critics is that the lack of shareholder participatory rights in the United States provides evidence that they are neither wanted nor valued by investors.[118] The reincorporation of News Corp in Delaware constitutes an interesting case study for the purposes of the shareholder empowerment debate.[119] First, it highlights the extent of the legal differences in regard to shareholder rights across common law jurisdictions. Second, it suggests that, from a comparative corporate governance perspective at least, strong participatory rights are often valued highly by investors.

The issue of shareholder rights became topical in Australia in 2004 when News Corp announced its plan to shift domicile from Australia to Delaware.[120] News Corp argued that the move was prompted by legitimate commercial goals.[121] Critics of the reincorporation plan, however, argued that Delaware law provided less protection for shareholders, particularly minority shareholders, and would permit Murdoch family interests to be entrenched more easily than under Australian law.[122]

Two institutional investor organizations, ACSI and Corporate Governance International (CGI), were particularly concerned about the effect of the reincorporation proposal on shareholder rights. With the support of some major international institutional investors,[123] they launched a corporate governance campaign, urging News Corp to transplant certain Australian

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[116]*See* COMMITTEE ON CAPITAL MKTS. REG., *supra* note 40, at 16.

[117]For criticism of Bebchuk's proposals, see, e.g., Anabtawi, *supra* note 64, at 564-65; Bainbridge, *supra* note 64, at 1735-36; Lipton & Savitt, *supra* note 64, at 735-38; Stout, *supra* note 64, at 790-92; Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2006).

[118]*See, e.g.*, Bainbridge, *supra* note 64, at 1736-37; Stout, *supra* note 64, at 801-02.

[119]For a detailed discussion of the reincorporation of News Corp, see Hill, *supra* note 42.

[120]Press Release, News Corporation, News Corporation Plans to Reincorporate in the United States (Apr. 16, 2004), *available at* http://www.newscorp.com/news/news_207.html.

[121]NEWS CORP., 2004 ANNUAL REPORT (2004), *available at* http://www.newscorp.com/Report2004/ 2004_annual_report.pdf.

[122]*See* Elizabeth Knight, *Murdoch Gymnastics Good for Investors*, SYDNEY MORNING HERALD, Oct. 8, 2004, at 25; Ben Power & Neil Chenoweth, *Funds Lash News Corp's US Move*, AUSTL. FIN. REV., Sept. 28, 2004, at 1.

[123]ACSI and CGI received support from the Global Institutional Governance Network, comprising institutional investors such as British Hermes in the United Kingdom and CalPERS in the United States. *See* Stephen Bartholomeusz, *Activists Confront News on World Stage*, SYDNEY MORNING HERALD, Sept. 28, 2004, at 22; Power & Chenoweth, *supra* note 122, at 1.

shareholder protection provisions into its prospective Delaware charter. ACSI and CGI presented to News Corp a "Governance Article,"[124] containing specific provisions which they sought to include in News Corp's charter.

The Governance Article's stated purpose provides an indication of its breadth and general flavor. It clearly shows the institutional investors' desire to substitute aspects of Australian law and governance in place of Delaware law after News Corp's reincorporation. The purpose of the Governance Article was expressed as:

> To preserve, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, key Australian investor protection and empowerment provisions . . . . To render inapplicable, for the benefit of those public investors, certain presumptions of Delaware/US law and practice which are contrary to key Australian investor protection and empowerment provisions; and to include, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, other key elements of Australian and international best practice in corporate governance.[125]

The institutional investors' Governance Article also included an extensive range of specific Australian corporate law rules, including shareholder rights in relation to meetings, related party transactions, executive compensation, and takeovers.[126] Many of the institutional investors' demands reflected fundamental differences between Australian and U.S. corporate law.

There are some important ways in which Australian and U.K. corporate laws diverge from U.S. law in relation to shareholder rights, and the balance of power between shareholders and the board. Whereas the ability of shareholders to effect corporate change through amendment of the corporate constitution is seriously limited under U.S. law,[127] Anglo-Australian corporate

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[124]ACSI & CGI, Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions 32-45 (2004) (unpublished document, on file with the author). This document was not publicly available. I am grateful to Megan D. McIntyre of Grant & Eisenhofer P.A., Wilmington, DE, and Sandy Easterbrook of CGI for providing me with access to it for the purposes of this research.

[125]*Id.*

[126]For a detailed analysis of the institutional investors' demands in the Governance Article and News Corp's ultimate concessions, see Hill, *supra* note 42, at 31-44.

[127]Shareholders are precluded from initiating changes to the corporate charter under both the DGCL and the Model Business Corporation Act. Rather, the board acts as "gatekeeper" for such changes. *See* DEL. CODE ANN. tit. 8, § 242(b) (2001); MODEL BUS. CORP. ACT § 10.03 (2003). Although shareholders are permitted to initiate and to effect changes to the bylaws, see

law permits shareholders to initiate and effect changes to the constitution and allocation of power between corporate organs without board approval.[128] Also, for public listed companies, shareholder consent is required for a wide range of transactions under ASX Listing Rules.[129] Shareholders have much stronger rights to requisition meetings in Australia than under Delaware law.[130] As discussed earlier, shareholders in Australia and the United Kingdom are now required to pass a nonbinding vote at their annual general meeting, approving the directors' remuneration report.[131] In the context of hostile takeovers, Australian and U.K. law is far less deferential to managerial discretion than U.S. law,[132] and many entrenchment mechanisms are impermissible. Unlike the position in the United States,[133] staggered boards cannot be used as an antitakeover device in Australia and the United Kingdom, as a result of provisions that guarantee shareholders of public companies an inalienable right to remove directors from office, with or without cause.[134] Also, the issue of dual class stock is prohibited under the ASX Listing

DEL. CODE ANN. tit. 8, § 109(b) (2001); MODEL BUS. CORP. ACT § 10.20 (2003), the subservience of the bylaws to the charter provides an inbuilt constraint on this power.

[128] *See* Corporations Act, 2001, c.2B § 136(2) (Austl.); Companies Act, 2006, c.46, § 21 (U.K.). For a case regarding free alterability of the constitution, see *Allen v. Gold Reefs of W. Afr., Ltd.* (1900) 1 Ch. 656, 671 (Austl.) (citing Walker v. London Tramways Co. (1879) 12 Ch. 705 (Austl.)).

[129] For example, shareholder approval is required under the ASX Listing Rules in the following circumstances: the issue of more than fifteen percent of equity securities, the issue of securities during a takeover bid and the disposal of substantial corporate assets to certain associated persons. *See* Australian Securities Exchange, ASX Listing Rules 7.1, 7.9 (2005), *available at* http://www.asx.com.au/ListingRules/chapters/Chapter07.pdf; Australian Securities Exchange, ASX Listing Rule 10.1 (2002), *available at* http://www.asx.com.au/ListingRules/chapters/Chapter 10.pdf.

[130] For example, Corporations Act, 2001, c.2G, § 249(D) (Austl.) requires directors to convene a meeting upon the requisition of shareholders with five percent of votes or one hundred members by number and Corporations Act, 2001, c.2G, § 249(F) (Austl.) permits shareholders with at least five percent of votes to convene a meeting directly. In contrast, shareholders under Delaware law have no prima facie right to convene a special meeting of stockholders, unless authorized in the certificate of incorporation or bylaws. *See* DEL. CODE ANN. tit. 8, § 211(2)(d) (2001). *Cf.* MODEL BUS. CORP. ACT § 7.02(a)(2) (2003).

[131] *See* Corporations Act, 2001, c.2G, § 250(R)(2) (Austl.); Companies Act, 2006, c.46, § 439 (U.K.).

[132] *See, e.g.*, Paul Davies & Klaus Hopt, *Control Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 157 (2004). *See also* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1733-51 (2007) (exploring possible reasons for the stark differences between U.S. and U.K. takeover law).

[133] *See, e.g.*, Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 889-90 (2002).

[134] *See* Corporations Act, 2001, c.2D, § 203(D) (Austl.); Companies Act, 2006, c.46, § 168 (U.K.).

Rules,[135] and poison pills are not, it seems, possible under Australian and U.K. corporate law.[136]

Ultimately, News Corp made some significant concessions,[137] even though those concessions fell far short of the institutional investors' original demands in the Governance Article.[138] Two of these concessions are particularly noteworthy. First, News Corp agreed to include a provision in its charter stating that, after its Delaware reincorporation, the company would not request removal of full foreign listing from the ASX without majority shareholder approval.[139] This ensured that News Corp would remain subject to all ASX Listing Rules.[140] Superficially, at least, this concession appeared to be very favorable to the institutional investors, given that the Governance Article had only requested the inclusion of a limited number of ASX Listing Rules in News Corp's Delaware charter. There is an important difference, however, between the originally framed demand and News Corp's final concession. This relates to the potential for modification and waiver of the ASX Listing Rules by the ASX itself. Interestingly, it appears that in the week that the Delaware reincorporation was completed, the ASX granted News Corp a series of exemptions to specific listing rules, including rules relating to shareholder protection.[141]

A second apparently significant concession made by News Corp related to poison pills. The institutional investors' Governance Article would have included in News Corp's charter both a general and specific constraint on the board's power to implement a poison pill.[142] The concession to which News

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[135]Australian public listed companies are prohibited from issuing shares with enhanced voting power under the ASX Listing Rules, unless the rules are waived by the Australian Securities Exchange. *See* Australian Securities Exchange, ASX Listing Rules 6.9 (2005), *available at* http://www.asx.com.au/ListingRules/chapters/Chapter06.pdf (implementing a "one share, one vote" rule in relation to voting on a poll).

[136]For different possible legal explanations for the absence of poison pills in Australia, see Hill, *supra* note 42, at 51-55. These legal explanations include the general law on fiduciary duties, the "frustrating action" policy adopted by the Australian Takeovers Panel in relation to defensive board conduct, and ASX Listing Rule restrictions. *Id.*

[137]*See* Letter from Keith Brodie, Company Secretary, The News Corporation Limited, to The News Corporation Limited Shareholders and Optionholders (Oct. 7, 2004), *available at* http://www.newscorp.com/investor/download/SupplementIMCorpGov.pdf.

[138]*See* ACSI & CGI, *supra* note 124; Malcolm Maiden, *Dominant US Interests the Key to Rupert's Backflip*, AGE, Oct. 7, 2004, at 1.

[139]*See* Letter, *supra* note 137 (stating that there shall be "[n]o removal of full foreign listing on the ASX without shareholder approval").

[140]The letter states that "[t]he purpose of this change is to give shareholders in News Corp US the continued benefit of protections under the ASX listing rules." *Id.*

[141]*See* Hill, *supra* note 42, at 56.

[142]*See* ACSI & CGI, *supra* note 124, at cl. 8.1.

Corp ultimately agreed, however, was not in this form. It was narrower than the prohibition sought, and was also included in a board policy, rather than the company's charter. News Corp announced that its board had established a policy that, if any poison pill were adopted without shareholder approval, it would expire after one year, unless it was ratified by the stockholders.[143] This concession would ultimately become highly controversial. News Corp's board, in fact, implemented a poison pill shortly after the Delaware reincorporation, but subsequently deviated from the relevant board policy, by extending it without shareholder consent. This ultimately led a group of international institutional investors in News Corp to bring legal proceedings for breach of contract in *UniSuper Ltd. v. News Corp.*[144]

V. CONCLUSION

What can we learn from other statutory schemes, particularly those of common law jurisdictions, with similar legal genealogy? The answer would seem to be "quite a lot." As Professor Gower once stated, "[I]f there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful."[145]

Over time, the state "laboratories" of U.S. corporate law have tended to generate increasingly similar statutory products, revealing a "pattern of substantial uniformity"[146] between states. Today, there is growing skepticism about state competition for corporate charters. Some U.S. scholars have challenged the influence of federalism, arguing that its role has been overstated in

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[143] *See* ACSI & CGI, *supra* note 124, at 2. *See also* Press Release, The News Corporation Limited, News Corporation Adopts Additional Corporate Governance Provisions (Oct. 6, 2004), *available at* http://sec.edgar-online.com/2004/10/07/0001193125-04-168358/Section3.asp.

[144] No. 1699-N, 2006 Del. Ch. LEXIS 11 (Del. Ch. Jan. 19, 2006). For a detailed discussion of the extension of the poison pill and the *UniSuper* litigation, which was ultimately settled, see Hill, *supra* note 42, at 58-66.

[145] Gower, *supra* note 21, at 1370.

[146] William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 755 (1998). *See also id.* at 729 (noting that "the similarities vastly outweigh the differences" when comparing various annotations by states to the Model Act). The Model Business Corporation Act (MBCA) is the dominant blue-print for state incorporations, although the Delaware judiciary is immensely influential. *See, e.g.*, Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 737-39 (2001) (noting that the MBCA and DGCL do not differ markedly). Even at the time of the major 1967 revisions to the DGCL, differences between the two statutory regimes had narrowed, due to the MBCA's adoption of Delaware modernizations. *See* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success* 42 (Emory Law & Economics Research, Working Paper No 07-17, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999477.

traditional corporate law discourse.[147] Others have expressed doubts as to whether state competition for corporate charters actually exists today,[148] and, if it does, whether it benefits shareholders.[149] Also under pressure is the assumption that Delaware's dominance is attributable to the superior qualities of its legal rules.[150]

In these circumstances, it makes sense to look further afield for regulatory inspiration and to examine and test how international jurisdictions address common problems in corporate regulation. The gap between comercial developments in the United States and the rest of the world is less pronounced than it was in the last century, and therefore, comparative analysis may now provide useful regulatory lessons for all jurisdictions, including the United States.[151]

One recent event, which reflects greater interest in international regulatory regimes, was the announcement by the SEC on March 29, 2008, that it had entered into a pilot mutual recognition program with Australia in relation to securities market regulation.[152] As part of this program, the SEC and the Australian corporate regulator, ASIC, "agreed to undertake formal

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[147] *See, e.g.*, Ahdieh, *supra* note 14, at 21-22.

[148] *See, e.g.*, Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684-85 (2002) (arguing that the state competition paradigm, while representing accepted corporate law wisdom in academic literature, is little more than a tenacious myth). According to the authors, competition between states does not occur today since no other state apart from Delaware actively seeks to attract incorporation of public companies. *Id*. at 684. *See also* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 580 (2002) (arguing that there is actually an absence of state competition for corporate charters).

[149] *See, e.g.*, Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002).

[150] *See, e.g.*, Carney & Shepherd, *supra* note 146 (challenging the nexus between Delaware's dominance and the presumed superiority of its legal rules).

[151] In the topical area of executive compensation, for example, the principal in Towers Perrin's Compensation practice has been cited as stating:

> We used to say, what you see in the U.S. today, you will see in Europe tomorrow and the rest of the world the next day . . . . But performance-based equity plans have been prevalent for some time in the U.K., Netherlands and Australia, and so now U.S. companies may be in a position to learn from other countries' experiences.

Towers Perrin Study Finds a Significant Increase in Adoption of Equity Incentives Globally; Companies Around the World Have Made Long-Term Incentive Plans a Central Component of Total Remuneration, BUS. WIRE, Aug. 24, 2005.

[152] Press Release, U.S. Securities and Exchange Commission, SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Australia Mutual Recognition Talks (Mar. 29, 2008), *available at* www.sec.gov/news/press/2008/2008-52.htm.

assessment of each other's regulatory systems to determine the extent to which each jurisdiction produces a comparable level of investor protection."[153]

Corporate governance today is a complex mosaic of judicial decisions and precedent, statutory rules, securities exchange listing requirements, principles, and codes of conduct. Within this increasingly fragmented and dynamic picture of corporate governance, it is possible for jurisdictions to test, and learn from, the regulatory experiences of other jurisdictions.[154]

[153] *Id*.

[154] *See generally* Jennifer Hill, *Evolving "Rules of the Game" in Corporate Governance Reform*, *in* PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION 29 (Justin O'Brien ed., 2007).