The end of the ‘End of History for Corporate Law’?

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Henry Hansmann and Reinier Kraakman’s article ‘The End of History for Corporate Law’ has been highly influential in corporate law scholarship since its publication in 2001. Our contribution revisits the theory advanced in that article and examines both the significant contribution it made and the key criticisms that can be levelled against it. The theory espoused by Hansmann and Kraakman can be criticised because in many respects it does not fit the changing reality of corporate law. Indicators of this include the continued importance of the stakeholder model, the impact of transnational regulation on national corporate laws and, in some jurisdictions, the acceptance of a public role for corporate law. In addition, contrary to their convergence thesis, national corporate governance laws are thriving and company law and corporate governance codes continue to reflect the cultural heritage, public policy choices and prevailing ideological and political principles of the states enacting them.

Introduction

In this contribution we revisit ‘The End of History for Corporate Law’ by Henry Hansmann and Reinier Kraakman, a highly influential article published in 2001.[1] We consider both the contributions this article has made to corporate law scholarship and key criticisms made of it. We argue that there remain important areas where Hansmann and Kraakman’s theory does not fit the changing reality of corporate law. These areas include the continued importance of the stakeholder model, the impact of transnational regulation on national corporate laws and, in some jurisdictions, the acceptance of a public role for corporate law.

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1 H Hansmann and R Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown Law Journal* 439.

These areas challenge the neatness of Hansmann and Kraakman's argument on the end of history of corporate law. They demonstrate that complex questions rarely beget simple solutions. Our analysis supports the conclusion that certain aspects of the arguments put by Hansmann and Kraakman have already ended, in particular the dominance of economic analysis of corporate law, the normative consensus about shareholder primacy, the superlative claim about US economic performance and the denial of national differences in corporate law. However, the Hansmann and Kraakman article generated many beginnings. These include a sophisticated comparative corporate law literature, a recognition that stakeholders' interests can 'belong' in corporate law, greater recognition of the role of transnational law and an appreciation that corporate law has, at least in some respects, adopted characteristics usually associated with public law.

We are at 'an unusual and potentially pivotal moment in the intellectual history of corporate law',[2] therefore it is a good time to measure the salience of Hansmann and Kraakman's predictions. Contrary to their convergence thesis, national corporate governance laws are thriving[3] and company law and corporate governance codes continue to reflect the cultural heritage, public policy choices[4] and prevailing ideological and political principles of the states enacting them.[5] Hansmann and Kraakman's view that 'governance practice is largely a matter of private ordering',[6] has been challenged by scholars who have argued that greater attention should be paid to political and constitutional theory.[7] This involves a reconsideration of the corporation as a public body, going well beyond the limited operation of concession theory.

To develop these arguments, Part 1 of the article summarises 'The End of History for Corporate Law' and comments upon aspects of the controversy generated by it. Part 2 examines the continuing vitality and complexity of European corporate law, which, with its combination of labour-orientation, stakeholder and state-orientation modelling of corporate governance, would have been categorised as a failure by Hansmann and Kraakman.[8] The third part of the article considers the role of transnational law in the framing of corporate law and convergence theories. Part 4 illustrates the public nature of

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2 K Greenfield, 'The Third Way: Beyond Shareholder or Board Primacy' (2014) 37 *Seattle University Law Review* 749 at 749.

3 J Dine and M Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity. Corporations, Globalisation and the Law*, Edward Elgar Pub Ltd Cheltenham, 2013, p vi.

4 P Gourevitch and J Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance*, Princeton University Press, Princeton, 2005, p 3.

5 Dine and Koutsias, above n 3, p 313. China is an important example as it is poised to overtake the United States as the world's largest economy. Although China transplanted many Western corporate laws, the anticipated convergence between Chinese and Anglo-American corporate governance has not occurred, predominately due to the dominance of the state in large listed companies both as a shareholder and as the regulator, see generally R Tomasic, 'Corporate Governance in Chinese-Listed Companies Going Global' (2014) 2 *The Chinese Journal of Comparative Law* 155 at 155 and A Monaghan, 'China poised to overtake US as world's largest economy', *The Guardian*, 30 April 2014.

6 Hansmann and Kraakman, above n 1, at 455.

7 S Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance*, Ashgate Publishing Company, Burlington, 2007, p 11.

8 Hansmann and Kraakman, above n 1, at 461.

corporate law in the context of enforcement activity by the Australian Securities and Investment Commission (ASIC).

1 The 'End of History' in a nutshell

Hansmann and Kraakman argued that corporate law has achieved a high level of uniformity across developed market jurisdictions, with its core features being essentially identical. These features are separate legal personality; limited liability for owners and managers; shared ownership by investors of capital; delegated management under a board structure; and transferable shares.[9] These features create a firm that is strongly responsive to shareholder interests.[10]

They contended that there will be a continuing convergence towards a single standard of corporate governance due, in particular, to the dominance of the shareholder-centred ideology of corporate law amongst business, government, and legal elites in key commercial jurisdictions. They considered that 'there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value'[11] and there is a 'broad normative consensus'[12] that shareholders alone are the parties to whom corporate managers should be accountable. Although thoughtful people believe that corporate enterprise should be organised and operated to serve the interests of society as a whole, there is consensus that the best means to this end is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.[13] This shareholder-oriented model was subsequently named the standard shareholder model (SSM).[14] They considered that most efficacious legal mechanisms for protecting non-shareholder constituencies lie outside of corporate law.[15]

Hansmann and Kraakman examined and dismissed other models of the corporation, that is the manager-oriented, labour-oriented, state-oriented and stakeholder models. They considered that the SSM is an important antidote to the manager-oriented model whereby managers enjoy considerable discretion to determine corporate policies.[16] Regarding the labour-oriented view, Hansmann and Kraakman examined employee participation on boards in Germany through the system of co-determination, concluding that worker participation in corporate governance has 'steadily lost power as a normative ideal'.[17] In discussing the state-oriented model, Hansmann and Kraakman looked at the models used in post-war France and Japan,[18] but ultimately considered that the model has been discredited due to the move away from

9 Hansmann and Kraakman, above n 1, at 439–40.
10 Ibid, at 440.
11 Ibid, at 439.
12 Ibid, at 441.
13 Ibid, at 441.
14 H Hansmann and R Kraakman, 'Reflections on the End of History for Corporate Law' in A Rasheed and T Yoshikawa, *The Convergence of Corporate Governance: Promise and Prospects*, Palgrave Macmillan, 2012, p 32
15 Hansmann and Kraakman, above n 1, at 442.
16 Ibid, at 444.
17 Ibid, at 445.
18 Ibid, at 446.

state socialism as a popular intellectual and political model and the relatively poor performance of the Japanese corporate sector after 1989. They conclude: 'today, few would assert that giving the state a strong direct hand in corporate affairs has much normative appeal'.[19] Hansmann and Kraakman's analysis of the new stakeholder models[20] revealed that these models are, at heart, just variants on the older manager-oriented and labour-oriented models.

Hansmann and Kraakman argue that SSM emerged, not only as a consequence of the failure of alternatives but also because important economic forces have made the virtues of that model increasingly salient. This model of corporate governance has come to be recognised as superior due to the force of logic, example, and competition. Critical to their argument was the strong performance of the American economy in comparison with the weaker performance of the German, Japanese and French economies[21] and the rapid expansion of share ownership into broad segments of society leading to the emergence of coherent shareholder interest groups that present an increasingly strong 'countervailing force' to the organised interests of managers, employees and the state.[22]

The authors recognised that there may be some inefficiencies associated with convergence. In particular, they point to the rules that limit shareholder liability for corporate torts which they regard as encouraging inefficient risk-taking and excessive levels of risky activity.[23] They also regarded that the SSM model might not fully protect shareholders against managerial interests and therefore considered that the SSM model would need to have a slight 'managerialist tilt'.[24]

Hansmann and Kraakman concluded that:

> the ideological and competitive attraction of the standard model will become indisputable . . . as the goal of shareholder primacy becomes second nature . . . convergence in most aspects of the law and practice of corporate governance is sure to follow.[25]

Shareholder primacy and general social welfare

An important claim made by Hansmann and Kraakman was that shareholder primacy leads to general social welfare. This was linked to their observation that share ownership had expanded into broader segments of society and had created powerful shareholder interest groups.

There is no doubt that share ownership has expanded in Australia and the United States, although it is currently on the decline.[26] Moreover, after the

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19 Ibid, at 447.
20 For example, M Blair and L Stout, 'A Team Production Theory of Corporation Law' (1999) 85 *Virginia Law Review* 247.
21 Hansmann and Kraakman, above n 1, at 449–51.
22 Ibid, at 452.
23 Ibid, at 466.
24 Ibid, at 467.
25 Ibid, at 468.
26 The ASX Share Ownership survey shows that direct and indirect shareholding ('total shareownership') in Australia fell from 43% in 2010 to 38% in 2012. Direct share ownership fell from 39% in 2010 to 34% in 2012: see ASX, *Australian Share Ownership Study*, 2012, <http://www.asx.com.au/documents/resources/asx-sos-2012.pdf> at p 3 (accessed 3 May

Global Financial Crisis (GFC) a powerful coalition of shareholders and employees were brought together under a unifying banner of US 'middle class' interests which created a populist backlash against the all-powerful corporate manager.[27] However, Blair commented that equating the maximising of share value with the maximising of the *total social value* created by the firm 'seems obviously wrong'.[28] Its wrongness is illustrated by Ireland's work, which shows that the distribution of financial wealth in general and share ownership in particular continues to be skewed, so that shareholder primacy is in reality the primacy of a small, privileged elite.[29] Ireland argues that the spread of the SSM is a triumph, not for economic logic or efficiency, but for the political power of the interests of finance.[30]

Stout has convincingly argued that there is a shortage of reliable results showing that shareholder primacy actually delivers better returns for shareholders,[31] and several commentators have emphasised that the corporate law doctrine does not require corporate managers to maximise shareholder wealth.[32] This is probably recognised by most corporate law practitioners and academics but Khurana points to the perpetuation of shareholder primacy rhetoric in US business school education.[33]

As stated above, Hansmann and Kraakman surmised that 'economic forces' made the virtues of the SSM model increasingly salient.[34] Although they subsequently emphasised that the SSM was not to be identified with the widely-held American model of the corporation,[35] they relied substantially upon the positive performance of the US economy in 'The End of History' to support their descriptive and normative claims about the SSM. Correspondingly negative claims made about German corporate governance based upon the performance of the German economy have proved to be embarrassingly hubristic as the effects of the GFC spread through the US economy and threatened the stability of the global economy. Conversely, board-level employee representation and 'preponderantly friendly'

2014). See generally, P Spender 'Securities Class Actions: A View from the Land of the Great White Shareholder', (2002) 31 *Common Law World Review* 123. A Gallup Poll conducted in the US on 8 May 2013 stated that total shareownership in the US is now 52%, down from 65% in 2007. See L Saad, 'US Stock Ownership Stays at Record Low', Gallop Economy, <http://www.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx> (accessed 3 May 2014).

27 C Bruner, 'Corporate Governance Reform in a Time of Crisis' (2010) 36 *Journal of Corporation Law* 309 at 335–6.

28 M Blair, 'Shareholder Value, Corporate Governance and Corporate Performance: A Post-Enron Reassessment of the Conventional Wisdom' in *Corporate Governance And Capital Flows in a Global Economy*, P Cornelius and B Kogut (Eds), Oxford University Press, New York, 2003, p 53 at 57.

29 P Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68 *Modern Law Review* 49 at 52.

30 Ibid, at 52–3.

31 L Stout, *Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, Berrett-Koehler Publishers, San Francisco, 2012, p 48.

32 Ibid, p 25.

33 R Khurana, *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession*, Princeton University Press, Princeton, 2010.

34 Hansmann and Kraakman, above n 1, at 449–51.

35 Ibid, at 45.

employer-employee relations was one of the factors that allowed Germany to recover quickly from recent financial crises.[36]

Why has convergence theory been so influential?

'The End of History' was published in 2001 after a decade-long expansion of the American economy. It has been described as 'the high water mark for shareholder value thinking',[37] although shareholder value ideology has been evolving since the 1970s when neoliberal and economic theory were first applied to corporate law. On this account, corporations were theorised as a private nexus of contracts. Over time, economic analysis became the default theoretical standard for corporate law, influencing academics, practitioners, policymakers and judges alike because it appeared to be underpinned by a politically neutral, transhistorical, market-based, purely 'economic' rationality or logic, which Ireland has described as economic determinism.[38]

In 2002 Enron collapsed and the first few years of the twenty-first century were a 'sobering time' for scholars and policymakers interested in corporate governance[39] as one financial scandal surfaced after another. A number of jurisdictions passed reactive, divergent post-Enron legislation, such as the Sarbanes-Oxley Act 2002 in the United States and the CLERP 9 Act 2004[40] in Australia, which directly tracked the contours of local scandals.[41]

The GFC marked the end of the glory days of *homo economicus*.[42] Contractarian theories of the corporation are now in decline and are often spoken of in the past tense.[43] However, writing originally in 1997, Hansmann and Kraakman followed this approach by portraying corporate governance and corporate law as simple, depoliticised expressions of economic and technological imperatives.[44] Their argument consisted mainly of assertions based upon selective sources which created a binary between their posited goal of shareholder primacy and everything else. The 'everything else' was not only the 'fine structures' of corporate law (which did not reflect the reality that was asserted by the authors), but many of the features of corporate governance in action. The boldness and clarity of their assertions operated to

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36 For a discussion of recent appraisals of German corporate governance and co-determination, see J Du Plessis, B Großfeld, C Luttermann, I Saenger, O Sandrock and M Casper, *German Corporate Governance in International and European Context*, 2nd ed, Springer, Berlin, 2012, p 196. However, German corporate governance is also affected by European corporate law and in turn the German approach has been particularly influential in the European Union, the significance of which is considered in the section on Europe below.

37 Stout, above n 31, p 21.

38 Ireland above n 29, at 73.

39 Blair above n 28, p 53.

40 CLERP (Audit Reform and Corporate Disclosure) Act 2004 (Cth).

41 J Hill, 'The Persistent Debate about Convergence in Comparative Corporate Governance' in *Convergence and Persistence in Corporate Governance*, J N Gordon and M J Roe (Eds), (2005) 27 *SydLR* 743 at 751.

42 Greenfield above n 3, at 757.

43 Ibid, at 756.

44 P Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837 at 838.

'spare us from the complexity of the world and shield us from its randomness'.[45]

2 A European perspective

The next two sections provide a commentary from a European perspective on both the original article from Hansmann and Kraakman and a further iteration of their thinking in their contribution to the text of the *Anatomy of Corporate Law*.[46] Hansmann and Kraakman argued that corporate governance models are converging towards an exclusively SSM model and that this model was inherently more competitive than other models such as the 'labour-oriented model' and the 'state-oriented model' which are closer to the European approach.[47] Yet the European model of corporate governance (derived from both European policy documents[48] and European legislation) has proven to be much more robust[49] than the failure predicted by Hansmann and Kraakmann in their original article. Unsurprisingly, given their subsequent interaction with corporate governance scholars in Europe, Hansmann and Kraakman became more agnostic about convergence between 'The End of History for Corporate Law' and even the first edition of the *Anatomy of Corporate Law*, written in 2004:

> Likewise, we take no strong stand here in the current debates on the extent to which corporate law is or should be 'converging,' much less on what it might converge to. That is a subject on which reasonable minds can differ. Indeed, it is a subject on which the reasonable minds that have written this book sometimes differ.[50]

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45 N Taleb, *The Black Swan: The Impact of the Highly Improbable*, Random House, New York, 2007, p 69.

46 See further H Hansmann and R Kraakmann, 'What is Corporate Law?' in *The Anatomy of Corporate Law*, H Kraakman et al (Eds), 1st ed, OUP, 2004. A later contribution is also found in J Armour, H Hansmann and R Kraakman, 'The Essential Elements of Corporate Law: What is Corporate Law?' in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, R Kraakman et al (Eds), 2nd ed, OUP, 2009.

47 Hansmann and Kraakman, above n 1.

48 At the time the Lisbon Agenda documents were predominant in the European Social Policy sphere. See further *Report of the High Level Group on the future of Social Policy in an enlarged European Union*, European Commission (DG for Employment and Social Affairs), May 2004. *Working Together For Growth And Jobs: A New Start For The Lisbon Strategy*: Communication from President Barroso in agreement with the Vice-President Verheugen COM (2005) 24 and COM (2005) 33 *The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations*.

49 I Lynch Fannon, *Working Within Two Kinds of Capitalism*, Hart Publications, Oxford 2003; I Lynch Fannon, 'Employees as Corporate Stakeholders: Theory and Reality in a Transatlantic Context' (2004) 27 *Journal of Corporate Law Studies* 155. See further I Lynch Fannon, 'The European Social Model of Corporate Governance: Prospects for Success in an Enlarged Europe' in *International Corporate Governance after Sarbanes-Oxley*, P Ali and G Gregoriou (Eds), John Wiley & Sons, New Jersey, 2006, Ch 20; I Lynch Fannon, 'From Workers to Global Politics: How the Way we Work Provides Answers to Corporate Governance Questions' in *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Markets*, J O' Brien (Ed), Wiley Publications, London, 2005; I Lynch Fannon, 'Corporate Responsibility and European Corporate Governance: The View from Now' in *The Impact of European Law on the Corporate World*, A Beck and P Sheehy Skeffington (Eds), Irish Centre for European Law, Dublin, 2009.

50 See further H Hansmann and R Kraakmann, 'What is Corporate Law?' in *The Anatomy of Corporate Law*, R Kraakman et al (Eds), 1st ed, OUP, 2004, p 5. Reference is made by the

Nevertheless there are two particular precepts to which the authors seem to be committed:

- First an approach to comparative study which seems to be driven by a resistance to different ways of doing things rather than an openness to the possibilities of cross fertilisation of different systems, an idea which depends on the acceptance that other systems might have some solutions to offer to particular problems or issues. This view drives their assertions regarding convergence.
- Second, a very particular and narrow view of the ambit of corporate law. The argument is that this view is so narrow that it is almost irrelevant to current efforts to redevelop corporate governance theory as it seeks to address the current financial crisis.

In doing so, a word of clarification is necessary regarding what is meant by a 'European approach'. The common elements of a European approach are derived from European policy documents and European legislation, namely, Regulations and Directives which apply in all 28 member states in the European Union. As with other areas of substantive law, there will be a continuing debate within the European Union as to where agreement will be reached on continued harmonisation. Nevertheless, the already harmonised body of law, together with characteristics of domestic legislation which are the subject matter for debate, indicate a uniquely European understanding of corporate governance matters.[51]

Comparativism and stakeholder theory

This critique focuses on the approach to comparative study and the impact on stakeholder theories in particular. There are two English speaking common law countries in the European Union. Ireland is the only English speaking common law country in the further integrated Eurozone. The European Union is a federation of states with independently developed domestic legal systems engaged in a harmonisation of these systems leading to further integration of the Union. Accordingly, as with all member states of this recently created federation, comparativism and harmonisation is very much a part of the development of Irish and UK corporate law, even though these two relatively similar systems display significant and interesting points of divergence, particularly in relation to securitisation, lending and insolvency.[52] The development of domestic company law is subject to regulation by the European Union through Directives and Regulations. Accordingly, the corporate law of these two common law countries is open to European influence and in both jurisdictions it is common place to look at other common

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authors to a range of scholars who have disputed the convergence theory. The original version of the article which was subsequently published in the *Georgetown Law Review* was published as part of the Working Paper Series of the Center for Law and Economics and Business at Harvard Law School. This working paper emphasised the position that corporate governance systems were more or less competitive in terms of macro-economic effect that others, a position which has not been maintained by the authors subsequently. See this Working Paper Series: Discussion Paper No 280 3/2000.

51 See further Lynch Fannon (2006), above n 49, pp 424–8.

52 I Lynch Fannon and G Murphy, *Corporate Insolvency and Rescue*, 2nd Ed, Bloomsbury Professional, Dublin, 2012.

law countries such as Australia and New Zealand to compare approaches and principles with a view to deriving best practice outcomes. In particular it is common to take particular pieces of legislation[53] as examples of desirable paradigms or refer to particular judgments which will point the way to innovative approaches regarding particular outcomes.[54]

In particular, Hansmann and Kraakman's approach seems to be an exercise in pointing out how other systems are different but ultimately incorrect in their differences, hence the insistence on convergence of corporate systems in a fallaciously linear mode of reasoning. However, just because all corporate law systems have similar elements, does not lead one neatly to a conclusion that this similarity is a particular point of a linear journey continually moving towards ultimate convergence.

A cursory glance at the wealth of legislation emanating from the European Union, which clearly indicates a different approach and understanding of corporate function, underpinned by a very different philosophy, must counteract the assertion of a failed social model. Employees have always had a central stake in the European conception of the company, even to the point of mandating worker directors on boards of certain companies. In a pan-European context, legislation which has harmonised this approach includes the provisions of the European Company or Societas Europaea recognising alternative structures for including stakeholder representation.[55] Over the years the European Union has passed legislation mandating the consultation of workers on plant closures and terminations and has mandated the creation of Works Councils in cross-border companies of a particular size.[56] A recent initiative on employee share ownership further internalises the employee as stakeholder.[57] Similarly, the radical proposal mandating quotas

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53 For example, reckless trading provisions in Irish company law are modelled both on the recommendations of the Cork Committee (1985) which resulted in the wrongful trading provisions under the UK Insolvency Act 1986 and from the NZ provisions on reckless trading. New Zealand Companies Act 1993 ss 135 and 136. Irish Companies Act 1990 ss 135–137.

54 Examples include the extension of directors' duties to creditors when the company is insolvent following Australian decisions of *Walker v Wimborne* (1976) 137 CLR 1; 50 ALJR 446; 3 ACLR 529; (1975-76) CLC 40-251 and *Kinsela v Russell Kinsela Property Ltd* (1986) 4 NSWLR 722; 10 ACLR 395; (1986) 4 ACLC 215 in the Irish High Court and Supreme Court in Re Frederick Inns Ltd [1991] IRLM 582 and [1994] ILRM 387; See also the English decision of *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512; [1987] 1 All ER 114; [1987] ANZ ConvR 163.

55 This regulation provides a standard form structure for incorporation at a European level. Although not a particularly popular option, the structure currently embodies a commitment to co-determination. See Societas Europaea (SE Regulation 2157/2001 SE [2001] OJ L 294/1 and the accompanying Directive 2001/86 [2001] OJ L 294/22) which allows for 'either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system).

56 See further Lynch Fannon (2003), above n 49, for a full description of EU provisions such as the Works Councils Directive, (94/95 EC [1994] OJ 254/64) Worker Directors (Draft 5th Company Law Directive on co-determination) and other European documents concerning employee stakeholding.

57 *Conference Taking Action: Promotion of Employee Share Ownership — Debating concrete policy options:* 'Employee share ownership schemes already have a successful tradition and track record in many Member States. Research conducted in preparation for the 2011 Green Paper and responses to it indicate that employee share ownership schemes could play an

for women on boards of listed companies throughout the European Union is yet another example of the view that the corporation is a social actor with responsibility to respond to social concerns such as gender equality which has been an overt aspect of the European project since the original treaties in the 1950s.[58] It is clear that over time even systems with very distinctive characteristics can and do benefit from cross-fertilisation. This is particularly true of the 'Anglo' part of the much vaunted 'Anglo-American' corporate governance system. The convergence hypothesis put forward by the authors underestimates the complexity of nuanced variation even within apparently similar systems.

In relation to treatment of creditors, European policy and regulations have accommodated both the two-tier board system which allows not only for worker directors, but also for bank representatives to take their place internally on board structures — a 'relational finance model' — and the one tier system where the finance relationship is described as being at 'arms-length' or external to the company. At this point in the European debate, there is recognition both of the dynamics of path dependency[59] and of the fact that particular governance models answer different concerns. Moreover, the challenges of federalism in the European Union must clearly indicate an oversimplification which any assertion of convergence entails. Currently, the recognition of difference is central to the European approach, even when grappling with the most basic of constructs, namely the roles of non-executive directors in a unitary system and directors on supervisory boards in a two-tier system:

> Today there is a very significant discussion concerning convergence versus divergence in the field of corporate governance.[60]

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important role in increasing the proportion of long-term oriented shareholders. Since there are many angles to this issue (for instance taxation, social security and labour law) the commission finds it important to analyse this subject in more detail, in particular as regards its internal market dimension. In light of this analysis, it will identify which initiatives may be appropriate to encourage the development of trans-national employee share ownership schemes in Europe.' European Commission: 30 January 2014.

58 Proposal for a Directive on improving gender balance among non-executive directors of companies listed on stock exchanges. COM (2012) 614 final. European Commission, 'Women on the Board Pledge for Europe', 2011a, <http://europa.eu> European Commission Green Paper: The EU Corporate Governance Framework, 2011b, <http://europa.eu>. See further European Commission, 'DG Internal Affairs: Gender Quotas in Management Boards'.

59 For a path dependency approach to corporate law, see M Roe, 'Some Differences in Corporate Structure in Germany, Japan and the United States' (1993) 102 *Yale Law Journal* 1927; L Bebchuk and M Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127; O Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 *Iowa Law Review* 101; R Posner, 'Path Dependency, Pragmatism and a Critique of History in Adjudication and Legal Scholarship' (2000) 67 *University of Chicago Law Review* 573.

60 See C Jungmann, 'The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems' (2006) 4 *European Corporate Finance Review* 426 discussing Recommendations of the European Commission of 15 February 2005 on the Role of the Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, (2005/162/EC) OJL 52. See further, K Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in *Comparative Corporate Governance: The State of the Art and Emerging Research*, K Hopt et al (Eds), Oxford University Press, Oxford, 1998;

The European harmonisation agenda continues to work with and accommodate significant divergence in member state systems.[61] Key goals of further harmonisation include *inter alia* increasing transparency regarding board diversity and risk management policies; improved corporate governance reporting, strengthening voting and engagement practices for institutional investors.

A narrow conception of corporate governance theory and corporate law

For Hansmann and Kraakman corporate law seems to be about supporting a limited view of both corporate function and corporate governance, the former concerned solely with shareholder wealth creation and the latter concerned solely with ensuring that management are accountable to shareholders in relation to this function. There are two objections to this position:

First, corporate law is about regulation of the corporation from its inception to end. In any system this will include rules about establishment and creation, recognition of the corporate form by the state (and market), the ability of the corporation to generate corporate wealth and the stewardship of the corporation's wealth. Hansmann and Kraakmann note and list the many similarities between rules in different jurisdictions which address these concerns.[62] They conclude that the 'triumph of the shareholder-oriented model is now assured'.[63] However, the generation and preservation of corporate wealth is not the same thing as the generation of shareholder wealth. This distinction between corporate wealth and its preservation and shareholder wealth is reflected in many rules of corporate or company law, for example:

- The rules relating to capital, its creation and maintenance are concerned with the preservation of corporate wealth with a particular emphasis on creditor welfare.
- Disclosure requirements which address not only the interests of shareholders participating through shareholders' meetings but also address creditor interests and, in some systems, the interests of other stakeholders.
- Rules regarding restructuring of corporations always typically require agreement by shareholders and creditors at the very least.[64]

K Hopt and P Leyens, 'Board Models in Europe-Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy' (2004) 1 *European Corporate Finance Review* 135; K Hopt, 'Corporate Governance of Banks after the Financial Crisis' in E Wymeersch, K Hopt, G Ferranin (Eds), *Financial Regulation and Supervision, A post-crisis analysis*, Oxford University Press, Oxford, 2012, pp 337–67.

61 See generally Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan: European Company Law and Corporate Governance- a modern legal framework for more engaged shareholders and sustainable companies 12 December 2012. COM (2012) 740 final.

62 Hansmann and Kraakman, above n 1, at 440.

63 Ibid, at 468.

64 See, eg, provisions regarding schemes of arrangement under the Companies Act (UK) 2006, similar to Irish provisions on schemes of arrangement under the Companies Act 1963 and Pt 5.1 of the Australian Corporations Act 2001 (Cth). See further calls for a revamped approach

Second, in their concern to narrowly define the role of corporate law and hence corporate governance law and theory, there does not seem to be room for the possibility that these are two distinct areas of enquiry — the latter being a broader umbrella of which substantive company law is a part. Corporate law and corporate governance becomes about internal corporate governance only. It becomes ever more focused on the shareholder-management relationship. In dismissing a broader understanding of corporate governance which might include a stakeholder-oriented approach we are left with a very narrow field of study. In contrast, the view can be taken that corporate governance is the broader framework under which different systems of company law provide answers to specific questions. Anglo-American company law, as it is broadly understood,[65] provides answers to questions regarding the relationships of management to shareholders and in some cases answers to questions regarding the relationship of management to creditors, but nothing else. The European understanding of company law is broader. Through its acceptance of relational finance models and worker co-determination, in addition to accepting divergence between a one-tier or two-tier board system, it has a completely different starting point.[66]

Therefore the Hansmaan and Kraakman field of enquiry is quite narrow and the claim that there is consensus around the parameters of this enquiry is quite audacious:

> The principal elements of this consensus are that ultimate control over the corporation should be in the hands of the shareholder class; that the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; that other corporate constituencies, such as creditors, employees, suppliers, and customers should have their interests protected by contractual and regulatory means rather than through participation in corporate governance.[67]

We can pause here to consider why these theorists are motivated to so narrowly define their field of study. In considering this question we come to a better understanding of the issues involved. It is very possible that at that particular point in time, the motivation to narrowly define corporate governance and the laws affecting the shareholder management relationship

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to corporate restructuring under EU proposals, *Commission Recommendations on a New Approach to Business Failure and Insolvency* SWD (2014) 61 final. See further B Becker and P Strömberg, 'Fiduciary Duties and Equity-Debtholder Conflicts', Harvard Business School Finance Working Paper No 10-070; European Corporate Governance Institute — Finance Working Paper No 330/2012.

65 I Lynch Fannon (2006), above n 49, pp 424–8 where the classification of UK Company Law and corporate governance as rightfully being Anglo-American in nature is queried given continued membership of the United Kingdom in the European Union and continued adoption of European Regulations and Directives by the United Kingdom. The argument is that the Anglo-American model is in fact a hybrid model when it relates to the United Kingdom.

66 The co-determination model is present in some domestic systems of continental European countries such as Germany, The Netherlands and Italy, but in addition European statutes which take the same approach at a pan-European level also recognise the value of co-determination.

67 Hansmann and Kraakman, above n 1, at 442.

was to resist a particular kind of regulation, primarily increased regulation of corporate governance at federal level. ‘The End of History’ essay is quite possibly about an American political problem raised during this period of scandals such as Enron which heralded a debate regarding the importance of federal legislation. Although written before the enactment of the Sarbanes Oxley Act 2002 it is arguable that the writing was on the wall by the time the authors delivered their defence of the shareholder oriented approach of Delaware. This approach was beginning to seem ineffective and there was a perception that Federal regulation was necessary. It may very well be simply an argument about States’ rights versus Federal regulation and consequently about choice of law (the laws of Delaware rather than Federal regulation) and choice of forum (State court as a preference to Federal court). Regulation of insider trading at federal level might have heralded the beginning of a period of federalisation of corporate law which was viewed with some alarm.[68] ‘The End of History’ also takes an anti-regulatory approach favoured by particular political interests in the United States.[69] Private ordering presents a theoretical justification for this resistance. Other US commentators have taken up similar battle lines.[70]

This section challenged Hansmann and Kraakman’s claim that European corporate law had failed. The convergence claim made by the authors can be critiqued further on the ground that it fails to take account of the development and impact of transnational law. We explore this in the following section.

3 Transnational regulation and convergence

At the heart of Hansmann and Kraakman’s work is the argument that there is increasing convergence in both the ideology and the ‘fine structures’ of corporate law.[71] The fine structures they refer to are the national corporate laws dealing with legal personality, limited liability, transferable shares, delegated management and investor ownership.[72] Convergence arguments such as these tend to ignore the impact of transnational regulation on national

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68 See also S Bainbridge, ‘Incorporating State Law Fiduciary Duties Into the Federal Insider Trading Prohibition’ (1995) 52 *Washington & Lee Law Review* 1189; ‘Sarbanes-Oxley: Legislating in Haste, Repenting in Leisure’ (2006) 2 *Corporate Governance Law Review* 69.

69 See R Gilson and R Kraakman, *Market Efficiency after the Financial Crisis: It’s Still a Matter of Information Costs*, Stanford Law School Working Paper Series No 458 and Columbia Law School Center for Law and Economic Studies Working Paper Series No 470 at <http:// ssrn.com/abstract=2396608>, where the authors complain about the politicisation of the Efficient Capital Markets Hypothesis (ECMH). In this interesting article Gilson and Kraakman describe the politicisation of the ECMH and complain that ‘when economic theory moves from academics to policy, it also enters the realm of politics, and is inevitably refashioned to serve the goals of political argument’. The paper goes on to consider how the ECMH can be refined post crisis to provide a valuable theoretical tool.

70 W Cary, ‘Federalism and Corporate Law: Reflections Upon Delaware’ (1974) 83 *Yale LJ* 663; S Bainbridge, ‘The Creeping Federalization of Corporate Law’ (2003) *Regulation* 26; S Bainbridge, ‘Dodd-Frank: Quack Federal Corporate Governance Round II (2011) *Minnesota Law Review* 1779.

71 Hansmann and Kraakman, above n 1, at 439.

72 Ibid, at 440. See also an extended discussion of these characteristics in J Armour, H Hansmann and R Kraakman, ‘The Essential Elements of Corporate Law: What is Corporate Law?’ in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, R Kraakman et al (Eds), 2nd ed, OUP, 2009.

law reform at the same time as they assume that globalisation and the spread of foreign multinational corporations are forcing a convergence in corporate law. While it is true that globalization creates pressure for the homogenisation of law, a study of transnational regulation and, in particular the ways in which legal and political issues interact in this context, demonstrates that this process is complex and inevitably met by levels of resistance and negotiation.

One of the key criticisms that can be made of Hansmann and Kraakman's work therefore is that it focuses almost exclusively upon developments in national law.[73] This approach is consistent with the dominant methodology of comparative theorists, who tend to adopt a formalistic approach to identifying the similarities and differences between corporate laws in key jurisdictions. Typically these jurisdictions include the United States, the United Kingdom, Europe and Japan.[74] Using this methodology, some studies seek to identify the most effective and efficient legal rules dealing with common regulatory problems.[75] Others, such as the work of Hansmann and Kraakman, aim to classify corporate governance systems according to key attributes, relationships or historical origins.[76]

The almost exclusive focus on national law within these studies masks the impact that transnational regulation is having on the harmonisation of rules governing corporations. 'Transnational regulation' in this context includes the rules, standards, guidelines, doctrines and systems that operate alongside the international and state laws that govern private actors. Over the last three decades, the role of inter-governmental, regional and private organisations such as the United Nations, World Bank, IMF, OECD, ASEAN, NGOs and professional and industry organisations in the development of transnational regulation has grown significantly.[77] In particular, these actors have sought to identify commonality in the principles governing global corporations. The priority accorded this work has been based on the assumption that harmonisation of commercial laws is central to economic growth, and stable and effective governments and markets.[78] While initially the focus of transnational harmonisation efforts was on key areas of trade law such as arbitration, sale of goods and intellectual property, they now include important areas of corporate law such as corporate governance, security interests and

73 R Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' in *Convergence and Persistence in Corporate Governance*, J Gordon and M Roe (Eds), Cambridge University Press, Cambridge, 2004, p 128.

74 See the general discussion in D Clarke, '"Nothing but Wind"? The Past and Future of Comparative Corporate Governance' (2011) 59 *The American Journal of Comparative Law* 75 at 77.

75 See, eg, Gilson, above n 74, p 128. Gevutz calls these studies 'economic Darwinism' as they are based on the idea that the forces of economic competition are driving corporations and corporate laws toward an equilibrium point marked by maximum efficiency: F Gevurtz, 'The Globalisation of Corporate Law: The End of History or a Never-Ending Story' (2011) 86 *Washington Law Review* 475.

76 M Roe, 'Some Differences in Corporate Structure in Germany, Japan and the United States' (1993) 102 *Yale L J* 1927. For a general discussion of path dependency and other approaches see Gevurtz, above n 76.

77 See generally K Hall, 'Strategic Privatisation of Transnational Anti-Corruption Regulation' (2013) 28 *Aust Jnl of CorpLaw* 60.

78 P Le Golf, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 *Indiana Journal of Global Legal Studies* 119 at 120.

insolvency.[79] As a result, today's corporations, whether operating within or outside national borders, are regulated under an umbrella of intersecting transnational and state rules.[80]

These developments not only challenge Hansmann and Kraakman's focus on national law, but also the narrowness of their articulation of the core elements of corporate law. Hansmann and Kraakman argue that convergence is occurring in the five central areas of corporate law, namely, legal personality, limited liability, transferable shares, delegated management and investor ownership.[81] However, developments in transnational regulation demonstrate that the articulation of complementary legal principles across jurisdictions is occurring in other areas of corporate law including insolvency law, corporate governance and security interests.[82] For example, as a result of extensive negotiations over the last two decades between international financial organisations, governments, and regional and professional organisations (including the International Bar Association and International Federation of Insolvency Practitioners), global principles have been identified for the regulation of cross-border and domestic insolvency.[83] These principles are now incorporated into UNCITRAL's Model Law on Cross-Border Insolvency, its *Legislative Guide on Insolvency Law* and the World Bank's *Principles for Effective Creditor Rights and Insolvency Systems*. The form of these instruments is deliberately flexible, focusing on principles and recommendations rather than detailed rules.[84] Since their introduction, a significant number of countries have reformed their state laws in line with these principles. These countries include the United States, Japan, the United Kingdom, Australia, Canada, South Korea, Brazil, China, South Africa, Mexico and Indonesia.[85]

Other examples also demonstrate the impact that transnational regulation is having upon corporate governance standards. One such example includes the wide range of regulatory instruments now operating at the transnational level

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79 See generally P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 *European Law Journal* 400; G-P Calliess, 'The Making of Transnational Contract Law' (2007) 14 *Indiana Journal of Global Legal Studies* 469; UNCITRAL, *Modern Law for Global Commerce Proceedings of the Congress of the United Nations Commission on International Trade Law*, Held on the Occasion of the Fortieth Session of the Commission, 1–12 July 2007, at <https://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf> (accessed 17 March 2014) .

80 See generally T Buthe 'Private regulation in the Global Economy: A (P)Review' (2010) 12 *Business and Politics* 1469.

81 Buthe, above n 80.

82 See UNCITRAL, above 79.

83 For a detailed discussion of this process see T Halliday and B Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis*, Stanford University Press, Stanford, 2009.

84 S Block-Lieb and T Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42 *Texas International Law Journal* 1.

85 Discussed in S T Kargman, 'Emerging economies and cross-border insolvency regimes: missing BRICs in the international insolvency architecture (Pt I), at <http://www.kargmanassociates.com/pdf/IBA--Insolvency_and_Restructuring_International--S.Kargman_article_%28Sept._%2712%29.pdf> (accessed 12 March 2014). As Kargman notes, a number of these emerging countries have only reformed their domestic insolvency laws in line with transnational regulation, not their cross-border insolvency rules.

to guide and regulate board activity in the context of corruption. These instruments include rules, guidelines, and standards created under the *OECD Convention on Corruption*, the *United National Convention on Corruption* (UNCAC) and powerful extraterritorial laws such as the Foreign Corruption Practices Act 1977 (US) and the Bribery Act 2010 (UK).[86] The result is an increasingly clear articulation of the high standards of conduct expected of corporate boards, particularly in the context of risk management, implementing compliance processes and monitoring management.[87]

It follows that transnational regulation must now be seen as both an instrument and an outcome of globalisation.[88] By omitting it from consideration in convergence studies, a narrow and outmoded view of the scope of corporate law remains. In addition, convergence studies fail to recognise the powerful influence that transnational rules and principles are having on national law reform.[89] As Halliday and Caruthers write:

> In many areas of commercial law, national law reforms can no longer be purely national. To one degree or another, the momentum for reform, the content of reform, and the trajectory of reform proceed from or respond to transnational and global contexts. Recursively changing commercial law within the nation-state therefore must be held in dynamic tension with the enterprise of norm making by global actors.[90]

This circularity of reform between national and transnational rules and regulation is a complex process that is inevitably affected by political and economic issues. For example, as Dine and Koutsias conclude after reviewing the impact of global regulation on corporate governance law in the United States, the United Kingdom and Germany, such reform ultimately reflects the key ideology and political principles prevailing in each society.[91] It is also a process that involves resistance and creative adaptation.[92] This is particularly the case when transnational regulation is used as a template for law reform in developing countries. Over the last three decades, international financial institutions such as the IMF and World Bank have required many developing countries to reform their corporate laws as a condition of receiving financial

86 See, eg, Transparency International, *Business Principles for Countering Bribery: A Multi-stakeholder Initiative led by Transparency International*, p 6; H Wang and J Rosenau, 'Transparency International and Corruption as an Issue of Global Governance' (2001) 7 *Global Governance* 25.

87 In the context of monitoring, the Principles recommend establishing internal processes designed to support the continuous improvement of programs. Corporate boards are also encouraged to use external verification of its anti-bribery policies and systems to enhance their effectiveness.

88 See generally the discussion of J Dine and M Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity. Corporations, Globalisation and the Law*, Edward Elgar Pub Ltd, Cheltenham, 2013.

89 T Halliday and B Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112 *American Journal of Sociology* 1135. See also T Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Sociology* 263.

90 Halliday and Carruthers (2007), above n 89, at 1173.

91 Above n 88, p 313.

92 See Clarke (2011), above n 74, at 95.

assistance.[93] Yet often this process has highlighted the ideological incompatibilities and practical challenges with harmonizing corporate law. For example, when Indonesia engaged in extensive reform of its insolvency laws in the 1990s, it removed the right of secured creditors to unilaterally have a company wound up.[94] This law clashed with the dominant practice in Indonesia where large banks often controlled the process of liquidation. The result was ongoing cycles of negotiation, reform and creative adaption that lasted almost two decades.[95]

As a result, it is argued that studies such as Hansmann and Kraakman's are at odds with the way global corporate law reform is occurring, particularly the impact and growth of transnational regulation. While proponents of convergence often locate their studies in the context of continued economic and financial globalisation, they rarely recognize that the impact of globalisation on national corporate law is not only fragmented and contradictory but also shaped and contested by developments at the transnational level. While the convergence claim can be critiqued on the basis that it fails to take account of transnational regulation, it can also be challenged because the SSM model, as defined by Hansmann and Kraakman, does not always reflect the realities of substantive corporate law. The following section draws on some aspects of Australian corporate law to illustrate this point.

4 The standard shareholder model (SSM): Accounting for the realities of Australian corporate law

An aspect of Australian corporate law that does not fit comfortably within the SSM model is the statutory directors' duties and the civil penalty regime that supports them. These provisions depart from the model described by Hansman and Kraakman because they give the state, through the corporate regulator, the ASIC, the ability to enforce provisions that regulate corporate governance structures.[96] If a suspected breach of the statutory duties has occurred the civil penalty regime allows ASIC to take court based enforcement proceedings against the directors. The public enforcement regime that is available in Australia for contraventions of the statutory directors' duties is unusual. Similar public enforcement regimes are not available in the United States and the United Kingdom for example, where contraventions of the directors' duties are enforced privately, usually by the company or via a shareholder derivative suit.[97] The Australian public enforcement regime has been available since 1993 and ASIC's use of the regime has not been limited to the

93 Halliday and Carruthers (2007), above n 89, at 1156.

94 Ibid, at 1156.

95 Ibid, at 1158–62.

96 M Whincop and M Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25 *Federal L Rev* 51 at 81.

97 For a comparison of the enforcement of directors' duties in Australia and the United States, see R Jones and M Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45(2) *Vanderbilt Journal of Transnational Law* 343. The directors duties were codified in the United Kingdom in 2006 in ss 171–177 of the Companies Act 2006 (UK), however a public enforcement regime was not introduced.

furtherance of shareholder interests. There are many examples where ASIC has acted to protect the interests of a much wider group of corporate constituencies.

The characteristics identified by Hansmann and Kraakman largely conform to the law and economics approach which, as stated above, essentially views corporate law as a private law nexus of contracts between managers and shareholders.[98] Corporate law provides standard terms designed to deal with agency problems that may arise, if the interests of managers and shareholders are not perfectly aligned. Those standard terms include the general law directors' duties that promote the traditional shareholder primacy norm by requiring directors to exercise their powers and discharge their duties for the benefit of the company, which is interpreted as the shareholders as a collective group.[99] The company, and not the state, is the proper plaintiff to enforce those duties.

The shareholder primacy view and the law and economics approach maintain that corporate law, and in particular directors' duties, embody private rights that are enforceable by the corporation, not the state. However, not all scholars accept the law and economics characterisation of corporate law as private law. For example, scholars that adopt a progressive approach argue from both descriptive and normative perspectives that corporate law is and should be considered to be a branch of public law.[100] In 1997 Whincop and Keyes stated that at that time Australian corporate law was increasingly adopting characteristics associated with public law.[101] One of the areas identified by the authors was the statutory directors' duties and the civil penalty regime that supported them. Whincop and Keyes argued that this enforcement regime 'effectively makes the Commonwealth a party to contracts that establish corporate governance structures'[102] and it provides the 'prospect of a much wider scope for the judicial review of corporate management decisions, at the instance of a wider range of constituencies'.[103]

Whincop and Keyes argued that the way that the public potential of

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98 As noted above the description of corporations as a 'nexus of contracts' is losing favour with some commentators. See above n 38 and surrounding text.

99 See, eg, M Jensen and W Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305; E Fama and M Jensen, 'Agency Problems and Residual Claims' (1983) 26 *Journal of Law and Economics* 327; E Fama and M Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301.

100 See, eg, K Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*, University of Chicago Press, Chicago, 2006, which argues that the proper view of corporate law is that it is a branch of public law. Some authors argue that rather than solely being focused on shareholder interests, companies should be required to take into consideration a wide group of stakeholders, including employees and the environment. See, eg, J Parkinson, *Corporate Power and Responsibility: Issues in Theory of Company Law*, Clarendon Press, 1995; D Attenborough, 'How Directors Should Act when Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339; E Weiss, 'Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse' (1981) 28 *UCLA Law Review* 343; L Mitchell (Ed), *Progressive Corporate Law*, Westview Press, 1995.

101 Whincop and Keyes, above n 96.

102 Ibid, at 81.

103 Ibid, at 55.

Australian corporate law would develop was dependent upon the types of civil penalty applications issued by the regulator and the interests it sought to represent.[104] The law's public potential may be realised if the regulator decides to 'represent a wider cross-section than shareholders'.[105] Arguably, ASIC is obliged to represent wider constituencies by its enabling legislation which requires it to take into consideration other interests, namely, 'commercial certainty, reducing business costs, and the efficiency and development of the economy'.[106] Harris, Hargovan and Austin argue that the statutory duties should be interpreted in such a way as to allow them to serve a public interest, beyond allowing ASIC to protect and enforce shareholder's rights.[107] The authors stated that 'ASIC is not charged solely with protecting the company's current shareholders. The statutory duties provide a set of minimum norms of corporate managerial behaviour and thereby serve the interests of the community at large'.[108]

Statements issued by the regulator indicate that it does not perceive its role as one that is restricted to the promotion of shareholder interests. For example in a 2012 article, Belinda Gibson, the then Deputy Chairman, ASIC and Diane Brown, Senior Executive, ASIC commented about the enforcement actions issued by ASIC alleging that the statutory directors' duty provisions had been contravened:

> ASIC commenced these cases to assure the integrity of Australia's capital markets and that the interests of corporations are not adversely and seriously jeopardised by directors failing in their duties. The proceedings commenced by ASIC recognise the responsibilities and powers of directors to manage the company, and the impact that a failure to exercise those responsibilities in accordance with the law can have on the company, its shareholders, other stakeholders of the company and, more broadly, confidence in Australia's capital markets . . .[109]

> ASIC has taken proceedings against directors of listed companies where a breach of their duties has eroded market integrity, adversely affected the interest of the corporation or where it was necessary to demonstrate the conduct expected of such directors. ASIC will not shy away from future action necessary to maintain market confidence.[110]

The civil penalty regime has been in operation for 21 years and an examination of ASIC's use of it in response to alleged contraventions of the statutory directors' duties tells us something about the nature of corporate law in Australia.[111] It indicates that Australian corporate law does not conform to the SSM described by Hansmann and Kraakman and in particular it appears

104 Ibid, at 88.
105 Ibid, at 88.
106 Australian Securities and Investments Commission Act 2001 (Cth) s 1(2)(a) (ASIC Act).
107 J Harris, A Hargovan and J Austin, 'Shareholder Primacy Revisited: Does the Public Interest have any Role in Statutory Duties?' (2008) 26 *C&SLJ* 355 at 356.
108 Ibid, at 376.
109 B Gibson and D Brown, 'ASIC's Expectations of Directors' (2012) 35(1) *UNSWLJ* 254 at 254.
110 Ibid, at 265.
111 For a detailed examination of ASIC's use of the civil penalty regime between 1993 and 2013 see M Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *FL Rev* 217 (forthcoming).

that the state, through ASIC, has not principally acted to serve the interests of shareholders at the expense of the interests of other corporate constituencies.

The orders that ASIC can seek under this regime are a declaration of contravention, pecuniary penalty, disqualification and compensation orders. If ASIC was acting for the purpose of promoting shareholder primacy we would expect to see it focusing on compensation orders for the corporations that suffered a loss as a result of the contravention in question. A search of the ASIC media releases indicates that between 1993 and 2013 ASIC commenced civil penalty proceedings alleging a contravention of the statutory directors' duties on 38 occasions.[112] Compensation orders were sought in 11 of these cases only. Disqualification orders were sought in a total of 32 cases and pecuniary penalties in a total of 26 cases. There has been one application only where neither disqualification orders nor pecuniary penalties were sought.[113] Clearly ASIC is focused on obtaining these orders, rather than being focused on obtaining compensation orders.

Further evidence of the fact that ASIC does not act to promote shareholder interests can be gleaned from a closer examination of the 11 applications where ASIC sought compensation orders. The regulator was successful in nine of those 11 applications.[114] In seven of these nine applications the companies in whose favour the compensation orders were sought were in liquidation.[115] Therefore, the compensation that was obtained was of no benefit to shareholders, but rather was sought for the benefit of these companies' unsecured creditors. Often corporate insolvency is a factor in the civil penalty applications issued by ASIC. Since 2000 a little over half of ASIC's civil penalty applications were issued against directors of insolvent companies. Arguably, ASIC's focus in these cases will not be solely on the promotion of the interests of shareholders of these insolvent companies, but will also be on the promotion of the interests of creditors and other wider corporate constituencies.

In recent years ASIC's civil penalty applications have become very complex. Increasingly the civil penalty applications that allege that the statutory directors' duties have been contravened also allege that other provisions of the Corporations Act have been contravened. These other

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112 ASIC, Media Releases and Advisories (February 1993–June 2013) <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Media%20and%20information%20releases%20Home%20Page>.

113 In *ASIC v Warrenmang Ltd* (2007) 63 ACSR 623; 25 ACLC 1589; [2007] FCA 973; BC200705499 the only order sought against the defendant director was a declaration of contravention.

114 One of the cases where ASIC's application for compensation was unsuccessful was *Forrest v ASIC* (2012) 247 CLR 486; 291 ALR 399; [2012] HCA 39; BC201207489. The other was *ASIC v McIntyre* [2008] 1 Qd R 26; [2007] QSC 139; BC200704453 where ASIC's application against one defendant was dismissed for want of prosecution. ASIC subsequently withdrew its application against the second defendant.

115 The remaining two cases include QLS Superannuation Pty Ltd (QLS) where the compensation paid by the directors was for the benefit of the members of the superfund. ASIC, 'ASIC Secures Compensation for Super Fund Members', Media Release, 02/255, 16 July 2002. The other was against the directors of GIO Australia Holdings Ltd and is the only application where the compensation obtained was for the indirect benefit of the shareholders. ASIC, 'Court Imposes Penalties on Former GIO Directors and Clarifies Role of Company Executives', Media Release, MR 06/261, 2 August 2006.

provisions include: the continuous disclosure requirements; the insider trading provisions; the provisions governing misleading and deceptive conduct in relation to shares and financial products; provisions governing the operation and promotion of illegal or unlicensed property financing schemes or managed investments schemes; various financial services laws and provisions governing the promotion of investment schemes without required disclosure documents. Many of these provisions are not aimed solely at the protection of shareholder rights, but are also aimed at maintaining confidence in the market more generally.

An interesting development in the public enforcement of directors' duties that has occurred in recent years is that increasingly ASIC has issued civil penalty applications alleging that directors have breached their duty by allowing their companies to breach other provisions of the Corporations Act.[116] Anderson and Herzberg called this approach the 'stepping stone' approach and argued that it provided the regulator with a means of subjecting directors to personal liability for the wrongdoing of their companies.[117] These cases illustrate that ASIC's use of the civil penalty regime has increased the scope of judicial review of management decisions and in many cases the reasons for issuing proceedings would have included factors other than a desire to promote the interests of shareholders.

The public nature of corporate law in Australia has developed over the last 21 years to the point that ASIC's enforcement of the statutory directors' duties is largely focused on cases where directors are alleged to have contravened their duty by allowing their company to breach other provisions of the Corporations Act.[118] Many of the companies at the centre of ASIC's civil penalty applications were insolvent and it appears that ASIC is not focused on obtaining compensation that will ultimately be of benefit to shareholders. The reality of corporate law in Australia does not support Hansmann and Kraakman's view that we are converging on a private model of corporate law under which the sole role of corporate law is to serve the interests of those shareholders and the state's role should be limited to facilitation of the corporate form. Australian corporate law departs from Hansmann and Kraakman's shareholder-oriented or standard model in that it gives the public regulator standing to take court-based proceedings to enforce directors' duties, not for the purpose of promoting shareholder primacy, but for the wider public benefit.

Conclusion — The legacy

By making an ideological or normative claim about the SSM, Hansmann and Kraakman inevitably invited controversy. The 'End of History' is an audacious article and it seems inescapable that it was intended as a provocation or a polemic. By arguing that convergence had occurred, anointing the model that had prevailed (at least at that time), then portraying the convergence as based on an ideological or normative consensus about that

116 A Herzberg and H Anderson, 'Stepping Stones — From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 *FL Rev* 181.
117 Ibid.
118 Welsh, above n 111.

model, the authors created a binary between convergence and divergence, thereby provoking an intense response as readers rushed to assert not only the fact of continuing divergent approaches to corporate law but the ideological significance of that divergence.

On balance, Hansmann and Kraakman have probably enriched corporate law scholarship by their audacity. By stripping away some of the complexities associated with corporate law and its proper ambit of operation, by comparing the SSM archetype of the corporation with other models, the authors invited us not only to describe corporate law for ourselves but to stake our ideological claim. This is important at this pivotal moment as corporate law scholarship emerges from a period of domination by proponents of law and economics analysis. Clearly we are hungry for new models of the corporation which can explain not only its role in furthering shareholder interests, but also its relationship to the state and stakeholder interests.[119] 'The End of History' has allowed us not only to embrace a wider understanding of the corporation in many cultural and political contexts, it has also prompted us to articulate and explain the multifaceted nature of the divergences.

119 For examples of work already undertaken on new models of the corporation see Blair and Stout above n 20; Bottomley above n 7; Greenfield, above n 100; and Mitchell above n 100. Recent contributions to this area include D Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 *The American Political Science Review* 139; D Millon, 'Shareholder Primacy in the Classroom After the Financial Crisis' (2013) 8 *Journal of Business & Technology Law* 191 and J Veldman and H Willmott, 'What Is the Corporation and Why Does It Matter?' (2013) 16(5) *M@n@gement* 605 (1 December 2013).