The Persistent Debate about Convergence in Comparative Corporate Governance

Jeffrey N Gordon & Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (2004)

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Comparative corporate governance is an area of law where the descriptive, the normative and plain wishful thinking often coalesce. The idea of using comparativism as a 'tool of law reform',[1] via the process of legal transplantation has great allure in this field.[2] On the premise that good corporate governance can improve national economic performance, major international organisations, such as the OECD and the World Bank, have developed model corporate governance codes for ready international transplantation.[3] Nonetheless, there is debate in comparative corporate governance literature as to whether this development represent a true panacea to global economic ills, or rather a new variety of snake-oil.[4]

The path of recent comparative corporate governance has been both a curious and circuitous one.[5] In the early 1990s, the debate was characterised by US interest in improving its own economic performance, through adoption of governance mechanisms from other jurisdictions, such as Germany and Japan.[6] By the mid to late 1990s, however, with the US economy buoyant and the globalisation debate in full swing,[7] the flavour of comparative corporate governance changed

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1 See Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Mod L Rev* 1.

2 According to Professor Rock, the allure of comparativism lies in the idea that 'one can fruitfully transplant legal rules or institutions from one system to another … The temptation is to try to get something for nothing, or at least at a discount'. See Edward Rock, 'America's Shifting Fascination with Comparative Corporate Governance' (1996) 74 *Wash U LQ* 367 at 368.

3 See, for example, OECD *Principles of Corporate Governance* (2004): <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

4 See, for example, Amir Licht, 'Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform' (2004) 22 *Berkeley J Int'l L* 195 at 196, arguing that, in the 'long and checkered' history of legal transplantation, 'direct transplantation efforts were largely futile in generating Western-like economic growth'.

5 For discussion of some of the twists and turns in the evolution of comparative corporate governance debate, see Arthur Pinto, 'Globalization and the Study of Comparative Corporate Governance' (forthcoming, 2005 *Wisconsin Int'l L J*): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=764844> at 7ff.

6 Compare Mark Roe, 'Some Differences in Corporate Structure in Germany, Japan, and the United States' (1993) 102 *Yale LJ* 1927; Roberta Romano, 'A Cautionary Note on Drawing Lessons from Comparative Corporate Law' (1993) 102 *Yale LJ* 2021.

7 For an interesting discussion of the relationship between globalisation and comparative corporate governance, see generally, Pinto, above n5.

significantly. It was no longer concerned with the idea of grafting foreign governance mechanisms onto US law, but rather about the export of US-style corporate governance principles internationally.

Within comparative corporate governance, a divide is presumed to exist between jurisdictions with dispersed ownership structures, such as the US, and those with concentrated ownership structures, such as those traditionally found in continental Europe and Asia.[8] Two major theoretical positions emerged in comparative corporate governance at the end of the last decade in the form of the convergence-divergence debate.

A number of intersecting themes and insights are evident in this debate. The scholarship of corporate finance scholars, La Porta, Lopez-de-Silanes, Shleifer and Vishny, proved to be extraordinarily influential in defining the structure of the debate. Their scholarship, based upon an empirical study that tracked governance patterns throughout the world, postulated that the structure of capital markets is directly linked to a country's corporate governance regime.[9] Specifically, they argued that jurisdictions with a high level of minority shareholder protection would develop dispersed ownership structures, such as those existing in the US and UK. Key insights from the study were that law (and legal origins) matter. The 'law matters' hypothesis had strong normative overtones, viewing the legal protections offered by common law legal systems as superior to those found in civil law legal systems.[10]

The 'law matters' hypothesis provided support for a convergence theory of corporate governance. This theory assumed that corporate governance rules around the world were likely to converge, since jurisdictions with substandard legal rules would succumb to the siren song of economic efficiency, by adopting superior legal rules.[11] Nonetheless, many viewed the 'convergence' thesis as code for 'global Westernization'[12] or 'Americanization'.[13]

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8 See generally Brian Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 *J Legal Stud* 459; John Coffee Jr, 'The Future as History: The Prospects for Global Convergence of Corporate Governance and its Implications' (1999) 93 *Nw U LR* 641 at 707; William Bratton & Joseph McCahery, 'Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference' (1999) 38 *Colum J Transnat'l L* 213; Gustavo Visentini, 'Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?' (1998) 23 *Brooklyn J Int'l L* 833.

9 See, for example, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, 'Law and Finance' [1998] 106 *J Political Economy* 1113; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 *J Fin* 471.

10 See David Skeel Jnr, 'Corporate Anatomy Lessons' (2004) 113 *Yale* 1519, at 1544–1545.

11 See generally Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn J Int'l L* 983 at 985–990.

12 Amartya Sen, 'How to Judge Globalism', in Frank Lechner and John Boli (eds), *The Globalization Reader* (2004) at 16.

13 See, for example, Karl Moore & David Lewis, *Foundations of Corporate Empire: Is History Repeating Itself?* (2000), Chap 17, 'Should the World Become American?' at 287.

The idea that 'law matters' is unlikely to be quite the epiphany for lawyers that it apparently was for some financial economists. Yet, even on the assumption that law matters, commentators from Montesquieu's time onwards[14] have warned about the unpredictability and dangers inherent in transplanting elements of one legal system to another.[15] It is within this tradition that 'path dependence',[16] based on the scholarship of Mark Roe, emerged as a clear counterpoint to the 'law matters' hypothesis. The path dependence hypothesis traced differences in corporate governance structures throughout the world to divergent historical, political and social factors, which operate in conjunction with law.[17] Recognition of these complex factors at play in any regulatory system render convergence, or successful transplantation of elements of one legal system to another, far less likely.

It is against this broad theoretical backdrop that *Convergence and Persistence in Corporate Governance*[18] takes its place. The book, which is edited by Jeffrey N. Gordon of Columbia Law School and Mark J. Roe of Harvard Law School maps out the contours of contemporary debate, and includes contributions from prominent US and European scholars. Their chapters range across the full spectrum of the convergence-divergence debate, comparing and contrasting the approaches of different legal regimes.

The book uses as its starting point, the provocative article by Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law'.[19] Their famous and controversial 2001 pronouncement that '[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured',[20] assumes that convergence is virtually a fait accompli.

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14 Montesquieu, *The Spirit of Laws* (1748). Montesquieu, the acknowledged father of comparative law, considered that geographical, sociological and economic factors made the successful transplantation of laws extremely difficult.

15 See, for example, Otto Kahn-Freund, above n1 at 1; Licht, above n4; Paredes, 'A Systems Approach to Corporate Governance Reform: Why Importing US Corporate Law Isn't the Answer' (2004) 45 *William and Mary L Rev* 1055; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Mod L Rev* 11.

16 See, for example, Mark Roe, 'Path Dependence, Political Options, and Governance Systems', in Klaus Hopt & Eddy Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (1997) 165; Helmut Kohl, 'Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sidelines' (Third Frankfurt-Columbia Symposium on Comparative Law' (1999) 5 *Colum J Eur L* 189.

17 See, for example, Karl Moore & David Lewis, *Foundations of Corporate Empire: Is History Repeating Itself?* (2000) at 291, stating that '[t]he lesson of history…is that while markets have always been there, they have always operated in the context of geography, religion, language, folkways, families, armies, and governments, never in a vacuum'.

18 Jeffrey Gordon & Mark Roe (eds), *Convergence and Persistence in Corporate Governance* (2004).

19 Id at 33.

20 Id at 67. The authors originally made this statement in Henry Hansmann & Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Geo LJ* 439 at 468.

Many of the other authors do not share this view. For example, Lucian Bebchuk and Mark Roe, in their chapter, entitled 'A Theory of Path Dependence in Corporate Ownership and Governance'[21] focus on differences in legal systems and seek to explain the origins, and continued resilience of, these differences. Reinhard Schmidt and Gerald Spindler extend this inquiry, by adding to the analytical mix the concept of 'complementarity', which relates to the internal consistency or 'fit' of the institutional components in a governance system.[22] They warn that piecemeal transplantation or convergence may result, not in efficiency gains, but rather in the creation of an 'inconsistent and disfunctional' governance system.[23] Curtis Milhaupt, in his interesting comparative analysis of the US, Japan and South Korea,[24] offers an alternative hypothesis for continuing differences in legal systems – namely, that diversity is rooted in fundamental differences in property rights institutions. Professor Milhaupt's conclusions on convergence accord, however, with those of path dependence theorists. He considers that, in spite of the existence of homogenising influences, any convergence of national corporate governance systems will be 'slow, sporadic, and uncertain'.[25] Ronald Gilson notes that the very concept of 'convergence' is ambiguous,[26] with an important distinction between convergence of form and function, and that it is impossible to make any general prediction about what modes of convergence may, or may not, occur.[27]

La Porta *et al's* 'law matters' hypothesis has been the subject of numerous critiques since its publication.[28] Many of the flaws identified in these critiques appear as central themes in *Convergence and Persistence in Corporate Governance*.

A fundamental criticism of the 'law matters' hypothesis is that it creates a Manichean universe, where perceived differences between the civil law and common law are stark, ahistorical, generalised and often inaccurate.[29] It has also been argued that the dominant role played by financial economists in this area has

21 Gordon & Roe (eds), above n18 at 69.

22 Reinhard Schmidt & Gerald Spindler, 'Path Dependence and Complementarity in Corporate Governance', in Gordon & Roe (eds), above n18, 114 at 119. See also Bratton & McCahery, above n8 at 219.

23 Schmidt & Spindler, id at 122.

24 Curtis Milhaupt, 'Property Rights in Firms', in Gordon & Roe (eds), above n18 at 210.

25 Id at 213.

26 Gilson identifies three possible forms of convergence – formal convergence, functional convergence and contractual convergence. See Ronald Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function', in Gordon & Roe (eds), above n18 at 128. This theme also underlies Professor Sabel's examination of changes in US production organisation, designed to mimic aspects of Japanese collaborative production methods. See Charles Sabel, 'Ungoverned Production: An American View of the Novel Universalism of Japanese Production Methods and their Awkward Fit with Current Forms of Corporate Governance', in Gordon & Roe (eds), id at 310.

27 Gilson, id at 158.

28 See generally, Skeel, above n10 at 1545ff.

resulted in the removal of comparative corporate governance from its traditional comparative law rubric, and its transformation into a numeric area of study, where intangible factors, such as political and cultural matters,[30] are rendered inconsequential or invisible.[31] A welcome aspect of *Convergence and Persistence in Corporate Governance* is the extent to which these factors are included to create a more complex and textured picture of legal regulation. The influence of political factors, and their potential to obstruct convergence, is a particularly strong theme in the book, with Part II of the book devoted to discussion of 'Government players'.[32] Professors Milhaupt and Charny, for example, are both sceptical of convergence, on the basis that 'corporate governance cannot be separated from political governance'[33] and that 'corporate law rules are the products of collective action'.[34]

Another criticism of the 'law matters' hypothesis relates to the fact that the focus of the study was 'law on the books', rather than law as it actually operates and is enforced.[35] This can result in two forms of tunnel-vision. First, it ignores the importance of other regulatory and behavioural constraints that may operate, not through laws, but rather through social norms.[36] Secondly, law enforcement may be weak or non-existent, or the impact of the law may be subverted by the other factors in the overall legal and commercial environment.[37] The important theme of enforcement is taken up in *Convergence and Persistence in Corporate Governance* by Gérard Hertig, who stresses that true convergence depends upon the extent to which legal rights and duties are enforced to an equivalent degree across jurisdictions.[38]

One assumption that is often made by commentators on both sides of the convergence-divergence divide, is that a standardised 'Anglo-US' model of

29 See, for example, David Skeel, id at 1546; Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark West, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23 *U Pa J Int'l Econ L* 791 at 799 fn27; Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn J Int'l L* 983, 1005, fns 66–68 (arguing that judges in civil law jurisdictions possess more discretion and autonomy than is often recognised and that conversely, corporate law in common law jurisdictions relies strongly on civil law-style codification).

30 For discussion of the significance of cultural sensibilities, see Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn J Int'l L* 983 at 994–995; Licht, above n4.

31 See Pinto, above n5 at 10–11.

32 Chapters in Part II of the book include Jeffrey Gordon, 'The International Relations Wedge in the Corporate Governance Debate' 161; Curtis Milhaupt, 'Property Rights in Firms' 210; Mark Roe, 'Modern Politics and Ownership Separation' 252.

33 Curtis Milhaupt, 'Property Rights in Firms', in Gordon & Roe (eds), above n18, 210 at 251.

34 David Charny, 'The Politics of Corporate Convergence', in Gordon & Roe (eds), above n18, 293 at 296.

35 See Skeel, above n10 at 1543; Katharina Pistor & Chenggang Xu, 'Incomplete Law' (2003) 35 *NYU J Int'l L & Pol* 931 (arguing that the 'incompleteness' of law has important implications for its enforcement).

36 See John Coffee Jr, 'Do Norms Matter? A Cross-Country Evaluation' (2001) 149 *U Pa L Rev* 2151.

corporate governance currently exists. Nonetheless, the law relating to takeovers, which forms a recurrent theme in *Convergence and Persistence in Corporate Governance*,[39] provides a challenge to this view[40] and, at a deeper level, to convergence generally.

Curiously, Professors Hansmann and Kraakman, while adopting a convergence view of takeover law,[41] are ambivalent about the direction in which convergence is likely to occur. They recognise that European and Delaware law differ regarding the permissible use of defensive conduct by management in the face of a takeover. Nonetheless, they consider that 'current differences in takeover law are more apparent than real',[42] and that convergence could occur in either direction.[43]

This viewpoint seems overly sanguine. Fundamental differences are apparent in takeover regimes around the world. The allocation and balance of power between shareholders and directors in the takeover context will differ, depending upon which underlying theory of the corporation is adopted[44] and who is viewed as the greater threat – a predatory raider or the target company's own board of directors.[45]

The UK paradigm, which forms a blueprint for the takeover laws of many countries, is unequivocally suspicious of board power in the post-bid period.[46] It severely constrains board discretion and autonomy, and elevates shareholder decision-making power, during a takeover. This approach also underpins the recent

37 For an example of the operation of this phenomenon in the context of director liability, see Bernard Black, Brian Cheffins & Michael Klausner, 'Outside Director Liability' (November 2003), Stanford Law and Economics Olin Working Paper No 250: <http://ssrn.com/abstract=382422>; Bernard Black, Brian Cheffins & Michael Klausner, 'Liability Risk for Outside Directors: A Cross-Border Analysis' (2005) 11 *European Financial Management Journal* 153: <http://ssrn.com/abstract=682507>.

38 Gérard Hertig, 'Convergence of Substantive Law and Convergence of Enforcement: A Comparison', in Gordon & Roe (eds), above n18, 328 at 328.

39 Authors who discuss takeover law in their chapters include Professors Hansmann, Kraakman, Hertig & Gordon.

40 See, for example, Paul Davies & Klaus Hopt, 'Control Transactions', in Reinier Kraakman, Paul Davies, Henry Hansmann, Gérard Hertig, Klaus Hopt, Hideki Kanda & Edward Rock (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004) 157 at 172 stating that regulation of control transactions is 'a timely reminder that 'Anglo-American' company law is not the unity that is sometimes assumed'.

41 Henry Hansmann & Reinier Kraakman, 'The End of History for Corporate Law', in Gordon & Roe (eds), above n18, 33 at 54.

42 Ibid.

43 According to Hansmann & Kraakman, '[w]hile we cannot predict where the equilibrium point will lie, it is a reasonable conjecture that the law on both sides of the Atlantic will ultimately converge on a single regime'. Id at 55.

44 See generally William Allen, Jack Jacobs & Leo Strine, 'The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide' (2002) 69 *U Chi L Rev* 1067.

45 See Robert Thompson, 'Takeover Regulation after the 'Convergence' of Corporate Law' (2002) *Syd L Rev* 323, 324, 327. See also *Unocal Corp v Mesa Petroleum Co*, 493 A 2d 946, 954 (Del, 1985), referring to the 'omnipresent specter' of self-interest when directors act to impede a takeover.

EU developments in takeover law[47] and Australia's somewhat idiosyncratic takeover regime.[48]

The contrast between this model of takeover regulation and Delaware law is striking. Rather than constraining board autonomy in the takeover context, US corporate law legitimises and expands it, by accepting a 'gatekeeper' role for the board.[49] Views differ on the extent to which Delaware law in fact provides protection for shareholders in accordance with its prophylactic rhetoric.[50]

The controversial 2004 change in domicile by News Corporation from Australia to Delaware, and the company's subsequent adoption of a 'poison pill' under Delaware law, epitomises the fundamentally different paradigms operating in the takeover realm.[51] The idea that these differences are 'more apparent than real', and that convergence is imminent, seems improbable in the light of these factors.

Convergence and Persistence in Corporate Governance is impressive in its theoretical and jurisdictional breadth. Nonetheless, there is a range of significant developments in comparative corporate governance, which receive relatively short shrift in the book. These developments cast further doubt on a strong convergence stance. Application of the theoretical insights in the book to these developments would have provided fascinating reading, and their virtual absence from discussion may constitute a missed opportunity to extend the convergence-divergence debate further.

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46 See Paul Davies & Klaus Hopt, 'Control Transactions', in Kraakman, Davies, Hansmann, Hertig, Hopt, Kanda & Rock (eds), above n40, 157 at 164ff.

47 See generally id at 164; Zumbansen, 'European Corporate Law and National Divergences: The Case of Takeover Regulation' (2004) 3 *Wash U Global Stud L Rev* 867.

48 Australia's takeover laws are based upon an influential set of principles, the Eggleston Principles, which explicitly promote minority shareholder protection and equal treatment of shareholders. It has been argued that lends a 'uniquely Australian' flavour to the takeover regime, whereby principles of equity, rather than market efficiency, prevail. See Justin Mannolini, 'Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M & A Environment?' (2002) 24 *Syd L Rev* 335 at 359. See also Robert Thompson, 'Takeover Regulation after the 'Convergence' of Corporate Law' (2002) 24 *Syd L Rev* 323 at 326.

49 See generally Lucian Arye Bebchuk, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 *U Chi L Rev* at 973, arguing against 'mandated deference' to the board.

50 See, for example, Paul Davies & Klaus Hopt, 'Control Transactions' in Kraakman, Davies, Hansmann, Hertig, Hopt, Kanda & Rock (eds), above n40, 157 at 172, arguing that it is difficult to justify the Delaware takeover law model as an efficient regulatory regime for agency problems in the takeover context. Compare Bainbridge, 'Unocal at 20: Director Primacy in Corporate Takeovers' (September 2005). UCLA School of Law, Law-Econ Research Paper No. 05–19: <http://ssrn.com/abstract=796224>.

51 In October 2005, it was announced that major institutional investors had commenced legal proceedings against News Corporation in relation to a decision by the company to extend the duration of the poison pill, without seeking the consent of shareholder. See Sundeep Tucker & Aline Van Duyn, 'Funds sue News Corp after failure to honour pledge for vote on "poison pill"' *Financial Times* (8 Oct 2005) at 1.

The first of these developments is the great corporate governance transplantation experiment, which occurred in Russia in the early 1990s.[52] A 'shock therapy' model of reform was adopted,[53] with the goal of transforming Russia from a socialist regime into a capitalist economic system with a dispersed shareholder base. Key elements of the reform program included mass privatisation[54] and the introduction of a new system of corporate law and governance.[55]

The Russian privatisation experiment failed spectacularly.[56] It has variously been described as a 'fiasco',[57] 'ruinous'[58] and 'a corporate governance nightmare'.[59] In spite of laws that looked good 'on the books', Russia's oligarchs were able to engage in a grafting exercise of their own. The experiment highlighted the 'conundrum' of corporate governance[60] – the fact that the transplantation of demonstrably good laws may be totally ineffective.[61]

Another important development, raised in the book's 'Introduction', but discussed only briefly and tangentially in the text, is the impact on comparative corporate governance of the spate of international corporate collapses and scandals, epitomised by Enron and WorldCom in the US, and by HIH and One.Tel in Australia. The title of the book, *Convergence and Persistence in Corporate Governance*, is interesting in this regard. The reference to 'persistence', rather than 'divergence', suggests that the primary focus of the book us to assess whether preexisting legal differences will subsist. However, post-Enron regulatory developments are a potent reminder that corporate events of this magnitude can generate new divergence in laws.[62] A number of jurisdictions have passed reactive post-Enron legislation, such as the *Sarbanes-Oxley Act* 2002 in the US and the

52 See generally, Jennifer Hill, 'Comparative Corporate Governance and Russia – Coming Full Circle', in Guenther Doeker-Mach & Klaus Ziegert (eds), *Law and Legal Culture in Comparative Perspective* (2004) 394 at 398ff.

53 See John Lloyd, 'The Russian Devolution' *New York Times* (15 Aug 1999) at 34. See also Merritt Fox & Michael Heller, 'Corporate Governance Lessons from the Russian Enterprise Fiascos' (2000) 75 *NYU L Rev* 1720 at 1747–1748.

54 See Joseph Stiglitz, *Globalization and Its Discontents* (2002) at 143.

55 See generally Bernard Black & Reinier Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 *Harv L Rev* 1911.

56 See generally Merritt Fox & Michael Heller, above n53.

57 Ibid.

58 Licht, above n4 at 196.

59 Richard Cunningham, 'Corporate Governance and Foreign Investment Nightmares in Russia: A Case Study of Unified Energy Systems' (2002) 42 *Va J Int'l L* 889. See also Joseph Stiglitz, above n54 at 151. Even supporters of the original program agree that the expected, and actual outcomes, of the process differed dramatically See, for example, Bernard Black, Reinier Kraakman & Anna Tarassova, 'Russian Privatisatization and Corporate Governance: What Went Wrong?' (2000) 52 *Stanford L Rev* 1731.

60 See generally Cally Jordan, above n30.

61 Some commentators suggest that the *way* in which laws are transplanted, and particularly whether they are received voluntarily by the population, may be more critical than the legal family from which the rules derive. See Daniel Berkowitz, Katharina Pistor & Jean-François Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 *European Economic Review* 165.

CLERP 9 Act 2004[63] in Australia, which address these collapses. The architecture of these laws often directly tracks the contours of local scandals.[64] Also, the scandals have resulted in varying levels of attention to issues of corporate social responsibility across different jurisdictions.[65] In Australia, for example, the recent James Hardie scandal[66] has led to two major inquiries government inquiries into corporate social responsibility.[67]

Differences in post-Enron regulatory responses have also affected debate concerning cross-listing. At the high-point of the convergence-divergence controversy, it was often assumed that the trend towards cross-listing of foreign firms in the US was itself a 'new and desirable form of regulatory competition',[68] which would further drive convergence of corporate governance practices.[69] Nonetheless, the stringency of the *Sarbanes-Oxley Act* 2002 has affected this assumption. Some high profile Asian companies recently bypassed cross-listing on the NYSE in favour of other international exchanges,[70] suggesting that overly stringent corporate governance rules may repel, rather than attract, cross-listing.[71] The NYSE now appears, however, to be actively seeking to reverse this trend, particularly among Asian companies,[72] by stressing the valuation benefits that can flow from cross-listing.[73]

62 See generally Jennifer Hill, 'Regulatory Responses to Global Corporate Scandals' (forthcoming, 2005, *Wisconsin Int'l L J*): <http://papers.ssrn.com/abstract=828624>.

63 *CLERP (Audit Reform and Corporate Disclosure) Act* 2004 (*CLERP 9 Act*).

64 See, for example, Larry Ribstein, 'Market vs Regulatory Responses to Corporate Fraud: A Critique of the *Sarbanes-Oxley Act* 2002' (2003) 28 *J Corp L* 1, commenting on the close fit between the particular facts of Enron and the provisions of the *Sarbanes-Oxley Act*. Similarly, in Australia, aspects of the *CLERP 9 Act* 2004 are closely related to the HIH collapse and subsequent Royal Commission. See The Commonwealth Treasurer, Press Release, *Government's Response to the Recommendations of the HIH Royal Commission*, 12 September 2003: <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/082.asp?pf=1>.

65 In the aftermath of Enron, corporate social responsibility appears to have become a more significant theme in UK law than in US law. See, for example, Cynthia Williams & John Conley, 'An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct' (UNC Legal Studies Research Paper No 04–09, December 2004): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347>; Paul Davies, 'Enlightened Shareholder Value and the New Responsibilities of Directors' (Inaugural WE Hearn Lecture, Melbourne Law School, 4 October 2005).

66 See generally, Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27 *Syd L Rev* at 339.

67 See Corporations and Markets Advisory Committee (CAMAC), *Reference in Relation to Directors' Duties and Corporate Social Responsibility* (March 2005): <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument>; Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Corporate Responsibility* (2005): <http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/>.

Convergence and Persistence in Corporate Governance is a valuable and high quality snapshot of contemporary corporate governance debate. While recognising economic forces driving convergence, the book provides sophisticated analysis of other constraining forces within a broader regulatory ecosystem. This analysis supports continued diversity in comparative corporate governance. As Albert Hirschman stated over 30 years ago, 'convergence in one area will be paralleled by renewed divergence in another'.[74] Even identical reforms across jurisdictions are unlikely to deliver identical regulatory outcomes, given underlying differences in corporate governance systems, legal cultures and enforcement mechanisms.[75] The book is timely reminder of the depth and complexity of legal regulatory systems.

68 John Coffee Jr, 'Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance' (2002) 102 *Colum L Rev* 1757.

69 See generally, Amir Licht, above n4 at 196–198.

70 See, for example, Daniel Hilken, 'New York Shy', *The Standard* (Hong Kong) (30 April 2005); 'New Rules in the Global Fight for Listings', *Financial Times* (11 March 2005) at 15.

71 See Amir Licht, 'Cross-Listing and Corporate Governance: Bonding or Avoiding?' (2003) 4 *Chi J Int'l L* 141. See also Maitland, 'BT Chairman Criticises US Governance', *Financial Times* (23 Nov 2004) at 22. The NYSE has itself recognised this trend. See 'Foreign Firms Cross-Listed in US Valued Higher: Study Shows Average Premium of 13.9 Percent', *The Exchange*, Vol 12 No 10, October 2005, stating that '[s]ince the enactment of the *Sarbanes-Oxley Act* … many non-US companies have shied away from the US capital markets': <http://www.nyse.com/about/publication/1127731093408.html)>.

72 Megan Davies, 'Cross-listing in US Boosts Value – NYSE Study' *Reuters News* (13 Oct 2005).

73 See Craig Doidge, Andrew Karolyi & René Stulz, 'The Valuation Premium for Non-US Stocks Listed in US Markets', 16 September 2005: <http://nyse.com/pdfs/Stulz_091505.pdf)>.

74 Albert Hirschman, 'Ideology: Mask, or Nessus Shirt?' in Alexander Eckstein (ed), *Comparison of Economic Systems: Theoretical and Methodological Approaches* (1971) at 289 (cited in Curtis Milhaupt, 'Property Rights in Firms' in Gordon & Roe (eds), above n18, 210 at 250).

75 See generally Gunther Teubner, above n15; Reinhard Schmidt & Gerald Spindler, 'Path Dependence and Complementarity in Corporate Governance', in Gordon & Roe (eds), above n18 at 114.