

2003

Adapting Corporate Governance for Sustainable Peace

Timothy L. Fort

Cindy A. Schipani

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Commercial Law Commons](#)

Recommended Citation

Timothy L. Fort and Cindy A. Schipani, Adapting Corporate Governance for Sustainable Peace, 36 *Vanderbilt Law Review* 377 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol36/iss2/2>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Adapting Corporate Governance for Sustainable Peace⁺

Timothy L. Fort*
Cindy A. Schipani**

ABSTRACT

Acts of violence toward multinational corporations have important consequences for the way these companies will need to structure their approach to international business. This Article proposes four contributions that corporations can make to sustainable peace. By incorporating sustainable peace as a business objective, multinational corporations may be able to blend extant corporate governance principles with a goal that can significantly contribute to the reduction of violence in society.

TABLE OF CONTENTS

I.	INTRODUCTION	378
II.	THE ROLE OF BUSINESS AND SUSTAINABLE PEACE	382
	A. <i>The Contemporary Context: Balance of Power and the State</i>	382
	B. <i>The Parliamentary Models: Germany, Japan, and the United States</i>	385
	C. <i>Benefits of Democracy</i>	392
	D. <i>The Role for the Corporation</i>	393
	1. <i>The Paradox of Globalization and Democracy</i>	393

⁺ Copyright 2002. Timothy L. Fort & Cindy A. Schipani. All rights reserved.

* Associate Professor Business Ethics and Business Law, University of Michigan Business School; Co-Area Director for Corporate Governance and Corporate Social Responsibility, The William Davidson Institute at the University of Michigan Business School.

** Professor of Business Law, University of Michigan Business School; Co-Area Director for Corporate Governance and Corporate Social Responsibility, The William Davidson Institute at the University of Michigan Business School. The Authors wish to gratefully acknowledge the research support of the University of Michigan Business School and The William Davidson Institute and the valuable research assistance of Avec G. Gomez Lee, Elizabeth Peirce, and Jill Van Dalen.

	2.	The Huntington Thesis and the Spillover Effects of Corporate Behavior	396
III		IMPLICATIONS FOR CORPORATE GOVERNANCE	399
	A.	<i>Corporation Governance Regimes of Competing Market-State Models</i>	400
		1. The U.S. Model	400
		2. The German Model	404
		3. The Japanese Model	407
	B.	<i>Corporate Governance Regimes and Sustainable Peace</i>	410
		1. A Comparative Assessment	410
		a. Citizenship and Voice	411
		i. Citizenship	411
		ii. Voice	412
		b. Mediating Institutions and Lessons to Counteract Cynicism....	413
		i. Mediating Institutions	413
		ii. Lessons to Counteract Cynicism.....	414
		c. Comparative Assessment	414
	2.	A Proposed Model of Corporate Action....	415
		a. Fostering Economic Development..	416
		b. Adopting External Evaluation Principles.....	418
		c. Nourishing a Sense of Community	421
		d. Mediating Between Potentially Conflicting Parties	423
IV.		CONCLUSION	425

I. INTRODUCTION

In May 2002, as President Bush was preparing to embark on a trip to Germany in an attempt to convince European countries to back tougher action against Iraq, large protests sprung up in the city of Berlin.¹ The fear of unrest prompted the German government to call over 10,000 police, the largest contingent ever assembled, into the city.² A large composite protest group composed of 240 smaller organizations, including such diverse ideologies as anarchists and

1. Toby Helm, *Bush Protests Off to Early Start*, LONDON DAILY TELEGRAPH, May 22, 2001, at B1.

2. *Id.*

environmentalists, which referred to itself as the Axis of Peace (in response to the labeling by President Bush of Iran, Iraq, and North Korea as the "Axis of Evil" in his 2002 State of the Union Address), targeted corporations with U.S. ties in order to express their disapproval of the current U.S. foreign policy.³ Police had earlier thwarted an attempted firebombing on a Wal-Mart store in Bonn, and they feared further attacks against the retail giant, as well as against McDonald's restaurants and DaimlerChrysler offices.⁴

Of course, such protests are not limited to those groups expressing displeasure with U.S. policy. In January 2002, Argentinian protesters ransacked Spanish and U.S. banks, and a McDonald's restaurant in Buenos Aires.⁵ These violent acts arose from an initially-peaceful protest aimed at the economic reforms of the new and unstable Argentinian government in a financial system where most of the investment is obtained from foreign sources.⁶

The above examples point toward an increasing trend in current global politics: the targeting of local branches of international corporations, especially U.S. corporations, to express disapproval with the policies of the corporations' home or host country, or both. U.S. corporations, such as Wal-Mart, McDonald's, Nike, and Coca-Cola, are prime targets because of their size, business practices, and the way that these companies symbolize the capitalist free market to the rest of the world. The problem has become so troublesome and widespread that before the 2001 Summit of the Americas in Quebec City, a McDonald's restaurant in that city shut down for the duration of the event and removed all identifying signs in an attempt to escape now-routine protester outbursts.⁷

These acts of violence toward multinational corporations have important consequences for the way these companies will need to structure their approach to international business. It has thus become apparent that companies need to assure that their international business relationships are profitable on both sides. This has become important in this era of increasingly destabilized and fluid international relationships, where the perceived dominance of one country leaves its multinational corporations subject to violent reprisals. The companies that are likely to be targeted are often the largest and most visible, and those that are also perceived as being

3. *Id.*

4. *Id.*

5. Anthony Faiola, *Argentine Peso Quickly Sinks After Government Lets it Float; Protests Against Economic Changes Turn Violent in Capital*, WASH. POST, Jan. 13, 2002, at A23.

6. *Id.*

7. *Protesters in Quebec Tear Down Part of Barricade, Throw Objects at Police*, ST. LOUIS POST-DISPATCH, Apr. 21, 2001, at 6.

uncaring about the conditions that they create in their host country. This has been evidenced by the ongoing debate over “sweat shop” labor that has resulted in protests against Nike both in the United States and abroad.⁸ Therefore, it becomes vital for these companies to strive to foster peaceful relations in the countries in which they conduct business and to use their influence in a positive way to attempt to create a peaceful environment in which to conduct beneficial business relations.

Violence is not limited to the international front, however. The United States has one of the highest rates of workplace violence in the world, with over 2 million instances reported.⁹ In 2000, 11 percent of the 5,914 fatal work injuries experienced in the United States were due to some form of violence.¹⁰ The increasing pressure of a global recession has ignited new rounds of workplace violence throughout the world. In Japan, the sagging economy has led to rapidly-increasing instances of “bullying” of white-collar workers, as the idea of an individual remaining with one company for his or her entire working career is rapidly becoming a thing of the past.¹¹

These incidences take a toll on the workers themselves as well as on the countries’ economies. In the United States alone, instances of workplace violence are estimated to cost U.S. companies over four billion dollars each year.¹² In Germany, the direct psychological effects of workplace violence are estimated to cost over USD \$112,000 for every company with 1,000 workers.¹³ The indirect costs are estimated to be around USD \$58,000.¹⁴

In previous work, we argued that a link exists between corporate governance and the reduction of violence.¹⁵ In this Article, we further explore that link, focusing on how corporations can work toward the goal of reduction of violence in the societies in which they operate.¹⁶

8. Nicholas Stein, *No Way Out*, FORTUNE, Jan. 20, 2003, at 102.

9. Detis T. DuLart, *Violence in the Workplace*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, Dec. 2001, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf>.

10. BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (2001), at <http://www.bls.gov/iif/oshwc/foi/cfnr0007/pdf>.

11. DUNCAN CHAPPELL & V. DiMARTINO, *VIOLENCE AT WORK* (Int’l Lab. Org., 2d ed. 2000).

12. *Id.* at 150.

13. *Id.*

14. *Id.*

15. Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT’L L. 389 (2002).

16. See, e.g., Caryn L. Beck-Dudley & Steven H. Hanks, *On Virtue and Peace: Creating a Workplace Where People Can Flourish*, 36 VAND. J. TRANSNAT’L L. 427 (2003); Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT’L L. 449 (2003); Dana Muir, *Groundings of Voice in Employee Rights*, 36 VAND. J. TRANSNAT’L L. 485 (2003); Terry Morehead Dworkin & Cindy A. Schipani, *Gender Voice and Correlations*

Here, we pose the question of how well-suited various corporate governance regimes are to face these complexities, and how they may cope in ways that are consistent with their fundamental principles. We focus on the corporate governance regimes of the United States, Germany, and Japan. A common denominator of the political entities addressed is a commitment to a political regime of democracy. At least in the post-World War II era, and particularly in the post-Cold War era, all of these countries have been committed to democratic governments and principles.

This Article is thus organized as follows. Part II outlines our thesis that corporations are in a position to make contributions to peace in society because of shifting political balances of power. Part III analyzes comparative models of corporate governance and considers the extent to which contemporary corporate governance

with Peace, 36 VAND. J. TRANSNAT'L L. 527 (2003); Thomas W. Dunfee & Timothy L. Fort, *Corporate Hypergoals, Sustainable Peace, and the Adapted Firm*, 36 VAND. J. TRANSNAT'L L. 563 (2003); Tara J. Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT'L L. 619 (2003); O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L L. 673 (2003); Michael J. O'Hara, *Governing for Genuine Profit*, 36 VAND. J. TRANSNAT'L L. 765 (2003); Thomas K. Capozzoli, *The Organizational Model for Workplace Security*, 36 VAND. J. TRANSNAT'L L. 781 (2003); Jeannette Jackson & Maria Coolican, *Healthy Organizations and the Link to Peaceful Societies: Strategies for Implementing Organizational Change*, 36 VAND. J. TRANSNAT'L L. 787 (2003); Lee A. Tavis, *Novartis and the UN. Global Compact Initiative*, 36 VAND. J. TRANSNAT'L L. 735 (2003); Marina v.N. Whitman, *Corporate Governance and Sustainable Peace: An Insider's View*, 36 VAND. J. TRANSNAT'L L. 723 (2003); Linda Groat, Building Values into Corporate Space, Presentation at 2002 William Davidson Institute Conference, Corporate Governance and Sustainable Peace (November 22-24, 2002) [hereinafter 2002 William Davidson Institute Conference]; Jane Dutton, Building Compassion Capacity in Organizations as a Pathway for Fostering Peace, Presentation at 2002 William Davidson Institute Conference; Kim Cameron, Organizational Virtuousness and Peace: The Case of Forgiveness, Presentation at 2002 William Davidson Institute Conference; Gretchen Spreitzer, Implications of Organizational Leadership and Employee Voice for Peace, Presentation at 2002 William Davidson Institute Conference; Frances J. Milliken, Understanding Dynamics of Voice and Silence in Organizations, Presentation at 2002 William Davidson Institute Conference; Tom McCormick, Ethics and Compliance at Dow, Presentation at 2002 William Davidson Institute Conference; James Walsh & Joshua Margolis, Misery Loves Company: Whether Social Initiatives by Business? Presentation at 2002 William Davidson Institute Conference; Tara Rangarajan, Defining the Role of the Corporation in Sustainable Peace, Presentation at 2002 William Davidson Institute Conference; Eric Orts, From Corporate Social Responsibility to Global Citizenship, Presentation at 2002 William Davidson Institute Conference; C.K. Prahalad, Enabling the Poor to Move into the Market Economy, Presentation at 2002 William Davidson Institute Conference; Susan Finston, The Role of Intellectual Property as Part of a Rule of Law Culture Needed for Economic Growth and Political Stability in the Developing World, Presentation at 2002 William Davidson Institute Conference; George Siedel, The Role of Business Negotiation and Dispute Resolution Processes in Contributing to Sustainable Peace, Presentation at 2002 William Davidson Institute Conference.

models may be adapted to consider peace as a goal they should achieve. Concluding remarks follow in Part IV

II. THE ROLE OF BUSINESS AND SUSTAINABLE PEACE

It can be difficult to understand how corporations might be engaged in issues of building democracy and sustainable peace. Economic imperatives and competitive pressures seem to make consideration of such political and moral goals beyond the scope of corporate responsibility. Historically, there may be some justification for this reticence, but it is important to see that the 21st century may not replicate the geopolitical conditions of the previous several centuries. In large part, this may be due to the balances of power that exist among various institutions including nation-states and multinational corporations, and the relationship corporations have with governments and nongovernmental organizations (NGOs). Thus, this Section (1) addresses the contemporary geopolitical set of conditions that add complexity to the balances of power; (2) delineates the newly-emerging alternate forms of democracies that may account for this reality; and (3) articulates various reasons why these alternatives are important to sustainable peace. It then suggests how corporations might foster the stabilizing benefits of democracy, as well as how they might unwittingly undermine those benefits.

A. *The Contemporary Context: Balance of Power and the State*

Particularly in developed countries, there can be an understandable tendency to think of corporations as private organizations with relatively-autonomous authority through state chartering. Under this conception, businesses may act to maximize profits, provided they do not violate laws enforced by a government. There is confidence in this model because, at least in first-world countries, governments have the capability to enact and enforce regulations. It is not so clear, however, whether governments of developing countries have the same power vis-à-vis corporations, particularly when considering the transcendence of multinational corporations beyond geographical borders. The comfortable and traditional characterization of corporations as profit maximizers within the confines of the law might be insufficient in today's world.

A key reason for the concern is the increasing complexity of the world in light of the number of states that now exist, the proliferation of NGOs, the power of multinational corporations, and perhaps most

profoundly, the changing nature of the nation-state.¹⁷ In an ambitious book, constitutional law scholar Philip Bobbitt examines the changes in the state throughout history.¹⁸ Bobbitt argues that the construction of legal constitutions has historically resulted from the necessities of war.¹⁹ Implicit in this argument is that basic legal frameworks rest on balances of power to assure competitive advantage and sustainable peace.²⁰ As creations of law, corporations are thus inevitably affected by factors of war and peace.

Bobbitt traces primarily-European history to describe transitions from princely states to kingly states, territorial states, state-nations, and finally to nation-states.²¹ The key determinant accounting for each transition was a need to organize society to compete effectively with military advances and challenges.²² For example, Bobbitt notes that prior to Napoleon's rule, most armies were relatively small, consisting of fewer than 25,000 men.²³ Armies were professional and therefore expensive, so warfare was largely about avoiding their destruction.²⁴ Napoleon's leadership was an exception with his desire to create clashes in opposing countries to break morale and ultimately induce them to surrender extant economic resources.²⁵ The French Revolution, however, gave rise to popular involvement in politics, and by 1794, Napoleon took advantage of popular passion to

17. See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

18. *Id.*

19. See generally *id.*

20. See generally *id.*

21. *Id.* at 215-16. Bobbitt describes the differentiation as follows:

The princely state promised external security, the freedom from domination and interference by foreign powers. The kingly state inherited this responsibility and added the promise of internal stability. The territorial state added the promise of expanding material wealth, to which the state-nation further added the civil and political rights of popular sovereignty. To all these responsibilities the nation-state added the promise of providing economic security and public goods to its people. The failure of the Soviet Union to live up to this expectation, as much as any other cause, contributed to its delegitimation in the eyes of its nation. Very simply, the strategic innovations of the Long War will make it increasingly difficult for the nation-state to fulfill its responsibilities. That will account for its delegitimation. The new constitutional order that will supercede the nation-state will be one that copes better with these new demands of legitimization, by redefining the fundamental compact on which the assumption of legitimate power is based.

Id.

22. *Id.* at 216-19.

23. *Id.* at 162.

24. *Id.* at 187.

25. *Id.* at 187.

create massive armies of almost 1.2 million men who, although untrained, were able to overwhelm smaller, professional armies.²⁶

Warfare required popular sacrifice and therefore required a different kind of political apparatus as well as more-detailed laws to describe the basis for government, taxation, and conscription.²⁷ Thus, while Napoleon is known for his military characteristics of ambitious and strategic innovation, he is also famous for his ability

to obligate the mass of persons to the French state. Among this vast people various groups from the bourgeoisie were employed in the service of the state; for their members there were lower taxes extracted by France from her conquered neighbors; working men found in the state an employer of last resort—the army (whose mass employment would not have been possible under the strategic and tactical constraints of the armies of the territorial state); and for every class a new meritocracy arose that measured status according to services rendered to the State.²⁸

According to Bobbitt's thesis, this example is one of law relating to military strategy and military strategy to law because they mutually reinforce the state's capacity for warfare.²⁹

In the 20th century, this relationship manifested itself in the nation-state, which Bobbitt argues drew its legitimacy—a core concept necessary to any state—from its ability to satisfy the welfare of the constituents it governed and from whom it demanded sacrifices.³⁰ Coming out of World War I, there were three contenders for the nation-state system that would best accomplish constituent welfare: fascism, communism, and parliamentary democracy.³¹ Bobbitt views the era of 1914-1990 as “The Long War,” fought to settle the dispute regarding which of these alternatives best benefited the welfare of citizens with parliamentary democracy successively defeating fascism (in World War II) and communism (in the Cold War).³² Yet, the conclusion of each “epochal war” also brings with it a new set of challenges. Out of the Cold War, Bobbitt argues that a new kind of state is emerging—the market state—whose legitimacy is not based on providing welfare for its citizens (particularly in the form of welfare entitlements, pensions, etc.) but whose *raison d'être* is to provide opportunities for its citizens through market opportunities and education.³³ These opportunities allow individuals to participate

26. *Id.* at 175.

27. *Id.* at 175.

28. *Id.* at 539.

29. *Id.* at 5-17.

30. *Id.* at 5-6.

31. *Id.* at 24-25.

32. *Id.* at 24-64.

33. *Id.* at 222 (citing in particular the U.K. policies of Tony Blair as well as the U.S. policies).

and to compete effectively in a global economy. This environment recognizes the proliferation of nongovernmental powers, which although undermining the traditional nation-state, insist on respect for human rights regardless of the nation-state's historical stand. It further recognizes the increasing power of multinational corporations that may provide economic opportunity regardless of the nation-state's traditional economic regulations.³⁴

Bobbitt identifies three models to describe the way these market states are taking shape. They are the U.S. model, the German model, and the Japanese model. More will be said about the specific governance regimes these models reflect. If Bobbitt is correct, the question becomes whether there is a way for these market-state systems to evolve so that they may (1) confront violent threats to them collectively (as through challenges from terrorism or from non-democratic regimes), and (2) provide economic innovation shaped through law to make key border-crossing institutions, such as multinational corporations, instruments of sustainable peace.

B. *The Parliamentary Models: Germany, Japan, and the United States*

In general, democracies operate according to the wishes of a body of citizens electing representatives to govern them. In Spencer Weart's historical analysis, a democracy is defined first in terms of a republic.³⁵ A republic's defining feature is that "political decisions [are] made by a body of citizens who have equal rights."³⁶ These decisions are made in light of "public contestation" of choices with political officials, who are accountable to the citizens for their actions.³⁷ To have public contestations, there must be free political expression, rule of law, and toleration of politically-dissenting minorities.³⁸ The exact implementation of these features can vary significantly. Weart also differentiates between oligarchic republics and democratic republics. An oligarchic republic features voting by only one-third of citizens, whereas democratic republics feature voting by two-thirds of citizens.³⁹ Interestingly, oligarchic republics rarely make war on other oligarchic republics and, according to

34. *Id.* at 222-29.

35. SPENCER R. WEART, NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER 11 (1998).

36. *Id.* at 11.

37. *Id.*

38. *Id.* This designation of democracy has been applied to situations where two-thirds of men vote. It may be desirable to think more broadly of citizenship as democracies developed in the 20th century with increased universality of suffrage.

39. *Id.* at 12.

Weart's analysis, democratic republics never make war on other democratic republics.⁴⁰

The specific characteristics of equal rights, toleration of dissent, voting, and free expression suggest that there is a different character of political solidarity in a democracy than might exist in other kinds of political regimes. Indeed, at the heart of Weart's analysis of republicanism is the idea of political culture.⁴¹ A republican political culture, and particularly a democratic political culture, not only embraces ideas of equal rights, public contestation, and toleration of political dissent, but also values the political process and resolves disputes among citizens by negotiation and mutual accommodation rather than by coercion.⁴²

Benjamin Barber builds upon similar notions when he argues that democracy requires the foundation of civil society.⁴³ This foundation is not built quickly as the evolution of democracy in Britain and the United States shows, but rather slowly; nearly three quarters of a millennium passed between the Magna Carta to the Declaration of Independence.⁴⁴ As Barber argues, civil society is not about voting and buying and selling, it is about an environment "where we talk with neighbors about a crossing guard, plan a benefit for our community school, discuss how our church or synagogue can shelter the homeless, or organize a summer softball league for our children."⁴⁵ Civil society, therefore, provides a foundation for democracy because it trains people to organize themselves to solve public issues in a non-coercive way on the basis of respect, persuasion, and negotiation—the hallmarks of a republican political culture. These activities are not about political organizing as much as they are about being part of a small group within which individuals are empowered to affect the norms of the community, or what is also known as a mediating institution.⁴⁶ These activities and institutions are "public" just as the government is public, but they

40. *Id.* at 14. Weart provides a caveat that these republics must be "well-established." By this, he means that toleration of dissent has persisted for at least three years. *Id.* at 21. He indicates that the differentiation feature between oligarchic and democratic republics is that oligarchic republics suppress a "crucial domestic enemy" whereas democracies are more embracing of them. *Id.* at 18.

41. *Id.* at 15.

42. *See id.* The designation of these features being particularly prevalent in democracies is the Authors' addition to Weart's argument.

43. BENJAMIN R. BARBER, *JIHAD VS MCWORLD: HOW GLOBALIZATION AND TRIBALISM ARE RESHAPING THE WORLD* 276 (1995).

44. *See id.* at 278.

45. *Id.* at 281.

46. *See* PETER BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE* (1977) (noting that in small, mediating structures, human beings find their public face).

“make no claim to exercise a monopoly on legitimate coercion.”⁴⁷ That is, mediating institutions do not seek merely their own self-advancement as a for-profit corporation might, but instead, they are concerned with issues concerning the common good.⁴⁸

There is a direct link to peace resulting from these societies because leaders who deal with equals at home by non-coercive negotiation and compromise are likely to deal with similarly-inclined leaders of other nations through negotiation and compromise.⁴⁹ This does not mean that democratic (or oligarchic republican) cultures are incapable of warfare; but rather that they do not engage in warfare with similar kinds of political cultures.⁵⁰ Thus, democratic societies can be defined by public contestation, equal rights, free expression, negotiation, compromise, election of representatives, and accountability of those representatives to voters. Underlying those societies is civil society where people voluntarily engage in quests for public goods that define their mediating institutions, but which also reach beyond special interests to embrace the common good.

This kind of political system has, according to Bobbitt, defeated fascism and communism in the The Long War.⁵¹ Yet, with the end of The Long War, the creation of market-states poses new kinds of variations for optimal organization. Significantly, all three variations—the German, Japanese, and U.S. models—provide for a system where economic transactions of multinational corporations have a central role.

As noted above, Bobbitt has coined the term “market-state” to describe a new kind of state that is emerging. Bobbitt argues that market-states make the maximization of opportunities for citizens the basis of their legitimacy.⁵² But each differs according to how it creates those opportunities. In the United States, it means

providing infrastructure (including intangible infrastructure like education and the means of enforcing agreements) and relying on private enterprise to maximize the abundance of consumer choice and minimize the costs to the consumer of exercising choice. In Tokyo, by contrast, maximizing opportunity means protecting domestic industries so that future generations will have a full array of employment opportunities, subsidizing research and development so that future opportunities for innovation will be practicably exploitable, and restricting the import of capital so that the government remains in control of its capital allocation. In Berlin, maximizing opportunity means social and economic equality among citizens so that opportunities available to communities, workers and future generations

47. BARBER, *supra* note 43, at 281.

48. *Id.*

49. WEART, *supra* note 35, at 16.

50. *Id.* at 16-17

51. BOBBITT, *supra* note 17, at 24 and accompanying text.

52. *Id.* at 669.

are maximized rather than maximizing the short-term profits of shareholders.⁵³

Bobbitt characterizes the differing models used by democracies as (1) the Entrepreneurial Model; (2) the Mercantile Model; and (3) the Managerial Model.⁵⁴

The "Entrepreneurial Model," which Bobbitt uses to characterize the U.S. approach but which is not used exclusively by the United States, is a model that stresses autonomy, individual achievement, and consumption where "citizens of these states 'invent' their citizenships, identifying themselves with those subgroups within the state with whom they share a consumption pattern."⁵⁵ Labor relations in this model tend to be confrontational, and immigration is generally welcomed.⁵⁶ Thus, the Entrepreneurial Model is more libertarian and less socially cohesive, with protections of citizens coming more from media exposure of wrongdoing than from government.⁵⁷ This, however, exacerbates the problems of social cohesion that every market-state faces.

This model also stresses guarantees for human rights, free press, and political dissent, which tend to support individualism.⁵⁸ The Entrepreneurial Model has proponents outside of the English-speaking world including, for example, Thailand and Peru.⁵⁹

In the "Mercantile Model," which Bobbitt uses to characterize the Japanese approach but which is not exclusively used by the Japanese, immigration is discouraged in favor of maintaining "cultural homogeneity," and labor relations tend to be more familial.⁶⁰ This model also "retain[s] conscription for military service (though with force levels vastly reduced from those of the twentieth century), affirmative action for certain social groups, and varying degrees of state control of the media."⁶¹ The Mercantile Model provides that human rights are more communitarian rather than individualistic and that "harmony rather than division" and "respect and reverence are a truer expression of its cultural values."⁶² These states, therefore, "attempt to minimize the public expression of opposition."⁶³

Finally, Bobbitt's third model, the "Managerial Model," characterizes the German approach, although it is not exclusively

53. *Id.*
 54. *Id.* at 283.
 55. *Id.* at 670.
 56. *Id.* at 671.
 57. *Id.* at 670-71.
 58. *See id.* at 292-93.
 59. *Id.* at 675.
 60. *Id.* at 671.
 61. *Id.* at 670.
 62. *Id.* at 675.
 63. *Id.*

German. This model also retains conscription for military service, affirmative action, and some control of the state media.⁶⁴ With regard to labor relations, the Managerial Model “is ambivalent: open to ‘guest workers’ but hostile to new citizens.”⁶⁵

From the snapshots of these models, predictions can be made about some of the salient features of corporate governance systems that these models would promote. The Entrepreneurial Model would stress agility subject to free choices.⁶⁶ Thus, an underpinning legal infrastructure of this model would stress transparency, fluid labor movement, and a predominant emphasis on protecting investment capital.⁶⁷ Indeed, these are features of the U.S. model. Yet, the 2002 corporate scandals demonstrate that this model also runs great risks of insufficiently accomplishing its goals. In 2002, the United States found that corporate executives and boards could be opaque rather than transparent with devastating effects for investors as well as employees.

The Mercantile market-state typically has a strong central government that partners with business concerns in order to enhance national industries and subsidize crucial research and development while deemphasizing consumption.⁶⁸ Social cohesion is maintained by suppressing income disparities and subsidizing public housing and access to education with the important proviso, according to Bobbitt, that these benefits are available only for those who are eager to work.⁶⁹ Mercantile market-states, such as Singapore, Hong Kong, Taiwan, and South Korea, have had impressive growth, although their efficiency and productivity levels are more in the range of those of Egypt, Greece, Syria, and Cameroon.⁷⁰ Thus, the Mercantile Model faces the challenges of

opening up domestic markets to foreign competition; reforming the banking sector to bring greater scrutiny to credit transactions; allowing access to cheaper credit for smaller firms that are usually restricted to relatively high priced domestic finance and letting the cost of capital to dominant firms rise . . . the Korean Model is characterized by the concentration of power in four great companies (Samsung, Hyundai, Lucky-Goldstar, and Daewoo). . . . In Japan, the largest six companies account for over half the total assets of all listed enterprises. Furthermore, some three-quarters of all shares are mutually held between companies and their financial institutions.⁷¹

64. *Id.* at 674.

65. *Id.* at 671.

66. *Id.* at 670-71.

67. *Id.* at 671 (noting that the principal economic model would be libertarian).

68. *Id.*

69. *Id.*

70. *Id.* at 672.

71. *Id.*

From this, it can be predicted that the Mercantile Model will encourage a corporate governance system that is less concerned with transparency and its concomitant fluidity and more focused on social cohesion.⁷² In such a system, one would expect tight, opaque control of capital with an offsetting corporate culture stressing loyalty to a corporate community.⁷³ Indeed, these are features of this model.⁷⁴ Yet, the 1990s show that this model also brings with it significant limitations on creativity and growth, which can undermine the corporate goals. Lifetime employment may not be achievable under this system, and capital investment returns may be dampened.⁷⁵

The Managerial market-state, according to Bobbitt, "consists of three basic elements: free and open markets within a regional trading framework, a government that provides a social safety net and manages a stringent monetary policy, and a socially cohesive society."⁷⁶ Protections are provided for ownership of private property, but ownership also must contribute to the public good.⁷⁷ Labor and management are required to share power on corporate boards.⁷⁸ This system creates the "stakeholder company," that attempts to balance all of the actors affected by a corporate action, although corporate ownership is typically closely held through a centralized commercial bank.⁷⁹ Bobbitt describes the goal of the Managerial Model as being that of social equality whereas the goal of the Mercantile Model is social stability.⁸⁰ Governmental intervention tends to be more aligned with labor in the Managerial Model as opposed to capital in the Mercantile Model.⁸¹ Although cohesion is also as important for the Managerial Model as it is for the Mercantile Model, the states following the Managerial Model, according to Bobbitt, tend to pay productive workers well and provide generous welfare benefits for those who do not have a job.⁸² Beyond Germany, practitioners of the Managerial Model include India, Turkey, and Egypt.⁸³

It follows that corporate governance regimes under a Managerial Model would encourage long-term goals of justice and consensually-endorsed notions by the affected stakeholders.⁸⁴ This system would

72. *See id.*

73. *Id.* at 671-72.

74. *Id.*

75. *Id.* at 672 (noting the limits to this system).

76. *Id.* at 672-73.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 283-91.

81. *Id.*

82. *Id.* at 674.

83. *Id.*

84. *See generally supra* notes 51-81 and accompanying text.

be fortified by equipping stakeholders, particularly employees, with power to influence decisions.⁸⁵ In fact, this is a hallmark of the Managerial Model.⁸⁶ Yet, this approach also limits creativity and, paradoxically, limits the influence of the actors affected because the number of actors is so large that a delegation of responsibility is inevitable.⁸⁷ Thus, it is questionable whether this model can achieve its goals.

Admittedly, there is not a perfect system; any organizational and political theory will carry with it contradictory elements. Yet, there are at least three reasons for why each model needs to be open to influences from each other as well as to those other models that attempt an overarching synthesis.

First, each model is potentially a target of terrorism. For example, Japan suffered from attacks via sarin gas and the United States suffered via the attacks of September 11, 2001. If a sense of justice mitigates some of the passions that might trigger such an attack, then each system needs to consider how to mitigate its weaknesses. This is not to argue that mitigating weaknesses will prevent terrorism or that the weaknesses caused terrorism. It is hard to see, for instance, how the better enforcement of generally accepted accounting principles and Securities and Exchange regulations had anything to do with the horrific events of September 11. Yet, improving the perception of the justness of capitalism and democracy may help moderate social frustration.

Second, each model contains concerns for its own constituents. As Bobbitt argues,

each model must contend with its own sort of alienation: the lowest paid workers in the United States are vastly worse off than high wage earners, while the unemployed in Europe can get by on welfare benefits alone but have little prospect of a job. By contrast, the Mercantile Model maintains artificially high employment rates, at wages that reflect far less disparity between the highest and lowest paid. The unavoidable cost is in productivity and efficiency, which sets the stage for a new kind of alienation, that of the young from the old.⁸⁸

Finally, the framework implicit in this tri-partite delineation is that to prevent the models from becoming too ideological and competitive

it is to be hoped that informal private networks that cross international lines—for example, the large multinational corporations developed in the twentieth century, or the extensive social networks developed by overseas Chinese in East Asia and the United States, or global nongovernmental organizations—will supply the links necessary to

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 675.

prevent the growing divergence of the three models of the market-state.⁸⁹

The next question is how to accomplish this. Given the realities that the major governing paradigms are variations of democracy, it seems appropriate to examine the benefits that democracy may offer as well as corporate interaction with democratic institutions.

C. *Benefits of Democracy*

Immanuel Kant thought that free peoples were inherently peaceful.⁹⁰ The historical record, however, is mixed; democracies can be as warlike as any other regime.⁹¹ Yet, the fact remains that democratic countries do not fight each other. Spencer Weart reviews historical data and establishes the claim that "well-established democracies have never made war on one another."⁹² Corroborating that claim, Dean Baps studied wars fought since 1500 and found no wars (involving at least 50,000 troops or fought to cause territorial transfer, a change in government, or eradication of a state) had occurred between freely-elected, independent governments.⁹³ Three reasons for this have been offered.

First, democratic republics are more pluralistic than authoritarian regimes.⁹⁴ The mediating institutions that proliferate in civil society cut across various social ties so that no one group's anger can automatically lead to belligerence.⁹⁵ The multiple ties any one person might feel toward a particular neighborhood, church, or political party create an internal check on political processes and make it more difficult for a central authority to claim the need to go to war to vindicate the interests of a particular group.⁹⁶

Second, Weart writes that the theory "that republicans generally behave more peacefully toward other nations than do autocrats has been confirmed about as reliably as anything can be in statistical studies of human communities."⁹⁷ In a democracy, a leader has little choice but to compromise, and this leadership style tends to extend to those outside of one's borders, assuming that a preference for negotiation also exists on the other side.⁹⁸

89. *Id.*

90. *See* WEART, *supra* note 35, at 3.

91. *Id.* at 3.

92. *Id.* at 13.

93. Dean V. Baps, *A Force for Peace*, 14 INDUS. RES. 55 (1972).

94. WEART, *supra* note 35, at 44.

95. *Id.* at 44.

96. *Id.*

97. *Id.* at 89.

98. *Id.* at 90. Although the first two reasons why democratic governments do not engage in conflict with each other are in terms of pluralism and compromise, the

In order for Weart to make his argument about the benefits of democracy vis-à-vis peace, he creates a few basic definitions. These definitions are helpful in beginning the process of transferring democratic principles to a corporate context. Weart argues that the distinguishing features of a republican culture are equal rights among citizens and the toleration of dissent.⁹⁹ Moreover, a culture does not become an established republic simply by a declaration; instead, to meet this classification, toleration of dissent must have persisted for at least three years.¹⁰⁰

Thus, one way businesses might be able to contribute to peace is to support the establishment of democratic regimes wherever they do business.¹⁰¹ This would require more than rhetoric, it would also require support of equal rights and tolerance of dissent. Even if a corporation cannot nudge a political regime toward democracy, it can implement some of the practices that define a democracy in its own governance structure.¹⁰² By doing so, it may well provide a model for democratic-like attributes that could spill over into the political culture and nourish experiments in democratic decision-making.¹⁰³

D. *The Role for the Corporation*

1. The Paradox of Globalization and Democracy

Benjamin Barber has argued that democracy is under attack from two very different sources. One source is Jihad, which typically is thought in terms of Islamic extremism, but which Barber argues is a metaphor for all parochial groups reacting against globalization.¹⁰⁴ The other source is McWorld, which transcends traditional borders and boundaries to link people together in a quest for consuming goods and achieving profitability. As different as they are,

third reason is not so flattering. Weart argues that a country that is not republican can be characterized by a democratic republic as an “outgroup” that is “inherently treacherous and aggressive.” *Id.* There is an extensive literature demonstrating that violence often accompanies the characterization of another group of people as an “outgroup.” Thus, it is important to recognize that democratic republics are not themselves more peaceful, but they may be more peaceful toward like-minded political regimes. *See id.*

99. *Id.* at 15.

100. *Id.* at 20.

101. *See generally id.*

102. *See generally id.*

103. Fort & Schipani, *supra* note 15, at 434 (noting anthropological studies of peaceful societies that have characteristics of face-to-face interaction, non-hierarchical decision-making, gender equity, being relatively small in population, and the practicing of non-violent dispute resolution).

104. *See BARBER, supra* note 43.

Jihad and McWorld have this in common: they both make war on the sovereign nation-state and thus undermine the nation-state's democratic institutions. Each eschews civil society and belittles democratic citizenship, neither seeks alternative democratic institutions. Their common thread is indifference to civil liberty.¹⁰⁵

Barber argues that Jihad is committed to bloody politics of identity whereas McWorld is a bloodless pursuit of profitability.¹⁰⁶ Jihad reacts against the homogenization of culture by fighting global business and, as Barber makes clear, Jihad's disdain is more with capitalism than it is with democracy.¹⁰⁷ McWorld has little argument with democratic institutions, but undermines the community ties necessary for individuals to understand their connection to the common good as opposed to a market where self-interest only is the necessary consideration.¹⁰⁸ Moreover, the "twin assault on democratic citizenship from the fractious forces of Jihad and the spreading markets of McWorld in effect undercuts democratic institutions."¹⁰⁹ The paradox is that corporations thrive on democratic virtues, but simultaneously undercut them.¹¹⁰

In response to this paradox, Barber claims that one must rebuild civil society, including the traditional mediating institutions that bridge commonly-made distinctions between public and private life.¹¹¹ Barber argues that we too often rely on a "two-celled" distinction between government and the private sector, but the middle ground of civil society is where we voluntarily come together to talk about what is necessary for the common good—be it the softball league, religious outreach, or neighborhood crossing guards.¹¹² Unlike governmental affairs, there is no coercion present—actions are voluntary—but unlike the private sector, there is concern for the common good.¹¹³ It is in this realm, populated by

105. *Id.* at 6.

106. *Id.* at 8.

107. *Id.* at 20.

108. *Id.* at 243.

109. BARBER, *supra* note 43, at 219.

110. WEART, *supra* note 35, at 81. Economist Jane Jacobs, for instance, argues that political beliefs can be divided into two categories in which one focuses on hierarchy, discipline, obedience, and vengeance and the other focused on collaboration, negotiation, avoiding force, and respecting contracts. These commercial virtues seem similar to republican virtues, but present a series of issues. For example, can commerce thrive without stability? More deeply, if respect for contracts and property is a central requirement for capitalism to flourish, is not the market dependent upon things like the rule of law, which arise in a manner more complex than via economic rationality? And if stability and the rule of law are nourished by democratic virtues, then what can be done if markets undermine notions of citizenship? See BARBER, *supra* note 43, at 14.

111. BARBER, *supra* note 43, at 276-92.

112. *Id.* at 281.

113. *Id.*

schools, churches, public interest groups, and other civic organizations, where citizenship is developed.¹¹⁴ That space, however, has been squeezed, as corporations encroach on the space of civil society, as governments react to check the rise of corporate power, and as individuals begin to think of themselves as consumers rather than citizens.¹¹⁵

Barber's analysis begs the question, however, of whether business is part of civil society. Barber suggests that the answer is no, noting that it may be unfair to ask a corporation to be committed to a vision of justice or democracy.¹¹⁶ He argues instead that businesses wade into political issues if only to create a middle class that can purchase their goods.¹¹⁷ Businesses, he argues, are not designed to do what democratic polities do—they are contractual rather than communitarian.¹¹⁸ Yet, this account misses two important points.

First, although markets may not be designed to create democratic polities, businesses draw people to work for them and invest in them, usually on a voluntary basis. In doing so, they require people to work together for a common good, even if that good is simply profitability. Profitability does not occur without significant practices of human cooperation within the organization. Thus, businesses have the essential features Barber recognizes as emblematic of civil associations.¹¹⁹

Second, Barber follows Edmund Burke in arguing that human solidarity is formed by "resemblances, by conformities, by sympathies" rather than by contracts.¹²⁰ Yet, experimental psychological testing shows that association can be as arbitrary as whether a person has a dot on his or her nose.¹²¹ In other words, human solidarity is not trapped by ethnic, religious, or genetic characteristics, but by any kind of affiliation, which could include people of differing ethnic origins working together.¹²² The so-called private sector is not as private as one might think and within a business organization lies the potential, even the necessity, for

114. *Id.*

115. *Id.* at 282-83.

116. *Id.* at 282.

117. *See id.*

118. *Id.* at 242.

119. *Compare id.* (noting that markets are not designed to do what democracies do).

120. *Id.*

121. *See* David M. Messick, *Social Categories & Business Ethics*, 1 BUS. ETHICS Q. 149 (Special Issue: Ruffin 1998) (explaining that the arbitrary selection of who belongs in an in- or an out-group could be contractual rather than one based on Burke's sense).

122. *See id.*

working together for some common good. Thus, while Barber argues that the reinvigorating of a variety of mediating institutions in society would be worthwhile, we also emphasize that business institutions themselves possess resources for encouraging individuals to exercise voice in working for a common good.¹²³ The freedom to exercise voice entails a need to tolerate dissent; otherwise only a narrow range of voices will be heard. Within this exercise of voice and toleration of dissent lay the seeds for a business organization to foster a sense of democracy within its own borders. This does not mean that businesses always or even frequently actualize this potential. Yet, the potential is there. Governance regimes are not far from supporting that actualization, and the steps necessary to actualize that potential lie in a commitment of business to peace. That commitment not only breeds the stability on which business thrives, but also lays the groundwork for democratic republics to rise. If multinational corporations in democratic countries do this, they may have provided a way to overcome challenges raised against them by appealing directly to the source of democratic liberal tradition.¹²⁴

2. The Huntington Thesis and the Spillover Effects of Corporate Behavior

In his book, *The Clash of Civilizations*, Samuel Huntington, like Bobbitt, argues that the end of the Cold War has triggered a new balance of power among state actors.¹²⁵ The Cold War, he argues, was able to submerge the ambitions for nationhood desired by a variety of ethnic groups but without the bipolarity of Soviet-U.S. competition, so that these groups now have a freer reign to pursue goals of creating their own nation-states.¹²⁶ These desires are not new, but the desire to bring all ethnic cousins under one state may spark terrible conflicts including, at the extreme, ethnic cleansing.¹²⁷ Huntington argues that the world will increasingly organize itself along these lines of identity rather than by nation-state.¹²⁸ Thus, the world will tend to be grouped in terms of North American, South American, European, Russian, Muslim, Indian, African, Chinese, and Japanese peoples.¹²⁹ As the 1990s Balkans conflicts demonstrate,

123. Compare Barber, *supra* note 43, at 276.

124. See *supra* note 119 with respect to how markets and democracies do different things. Although this may be true descriptively, it does not mean that they could not be made more similar).

125. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS* (1996).

126. *Id.* at 20-29.

127. *Id.* at 21.

128. *Id.* at 32-33.

129. *Id.* at 36.

however, not only might there be nation-states in conflict with each other, but because regions contain differing ethnic groups, there will also be potential for internal conflict.¹³⁰ Because Muslims in Egypt might identify with Muslims in Bosnia and Russians might identify with Slavs in Serbia, internal conflict can also exacerbate severe external tensions.¹³¹

The location of ethnic linkages around the world is nothing new. The Balkans have long struggled with this problem, and the presence of Germans outside of Nazi Germany was one of Hitler's pretexts for triggering World War II.¹³² More benignly, China considers someone of Chinese heritage (such as an adopted child) as Chinese with an assumed identification with the Middle Kingdom¹³³ and the Czech Republic allows its president to be someone of Czech origin, even if not a "citizen."¹³⁴ Globalization, however, fosters additional immigration and immigration may further engender domestic conflicts in the countries to which the immigrants locate. It may also spark conflicts between the immigrants' home and new countries if it is perceived either that the emigrees are not being treated well or, alternatively, that the emigrees are undermining the new country's identity.

Finally, this has implications for governments. Bobbitt argues that governments that are able to successfully adapt to new global conditions are not only successful, but are duplicated by others.¹³⁵ As we have seen, he notes the prevalence of powerful parliamentary democracies practiced by the United States, Germany, and Japan as three distinguishable models.¹³⁶ If it is true that democracies are more prone to resolving disputes nonviolently, at least vis-à-vis other democracies, it may be important for corporations to engage in practices that contribute to democracy to foster a system that is more nonviolent than authoritarian alternatives and to provide a model for countries to emulate. This, in turn, may reinforce commitments to both democracy and sustainable peace.

The "market-states" of the democratic, liberal tradition are in a position to engage in the creation of models that link the world through both democratic principles and economic enterprise, but they are also in the position to recreate rivalries. To avoid the problems

130. *Id.* at 272-91.

131. HUNTINGTON, *supra* note 125, at 126-27.

132. HENRY KISSINGER, *DIPLOMACY* 311-12 (1994).

133. *See id.* at 129 (noting the differences with which Chinese treat Chinese foreigners and non-Chinese foreigners).

134. For example, U.S. Secretary of State Madeleine Albright was offered the presidency of the Czech Republic.

135. BOBBITT, *supra* note 17, at 67.

136. *See supra* notes 26-69 and accompanying text.

Benjamin Barber finds endemic to capitalism and inimical to democracy, multinational corporations and the states that authorize their existence through requisite governance regimes must consider how corporate behavior can enhance, rather than undermine, the democratic basis on which they are formed.

To make this argument more concretely, we engage in an analysis of leading, extant corporate governance frameworks in the United States, Germany, and Japan. These countries account for over 50 percent of the world's gross product, and if there is to be leadership in corporate governance along the lines we propose, it will likely be through these countries. The universe of the largest corporations of the world is primarily populated by firms belonging to one of these three economies.¹³⁷ Moreover, the governance systems of Germany, Japan, and the United States have substantial spillover effects beyond their respective borders.¹³⁸ Many countries in Europe, such as Austria, Belgium, Hungary, and to a lesser extent, France and Switzerland, and much of Northern Europe evolved their governance systems along Germanic, rather than Anglo-American, lines.¹³⁹ The spillover effects are also evident in Asia, where Japanese firms have been the largest direct foreign investors during the past decade.¹⁴⁰ Variants of the Anglo-American system of governance are evident in countries such as the United Kingdom, Canada, Australia, and New Zealand.¹⁴¹ Given these significant spillover effects, it becomes important for these models to evolve in such a way so that they may confront violent threats to them collectively, and provide economic innovation to make them instruments of sustainable peace. The following Section considers the current regimes.

137. Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 51 (1999).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

III. IMPLICATIONS FOR CORPORATE GOVERNANCE

Corporate governance has been defined as a top management process that, when operating correctly, should manage value creation and value transference among various corporate claimants in a way that ensures accountability toward those claimants.¹⁴² Claimants can be broadly defined to include all of those with a stake in corporate operations, including shareholders, customers, employees, suppliers, creditors, and the local community.¹⁴³ This definition emphasizes both efficiency and fairness.

There are different ways to approach issues of corporate governance. In the United States, dating at least back to 1919 and the famous case of *Dodge v. Ford*,¹⁴⁴ the approach has been a model that has focused primarily on the shareholder, the residual claimant of the corporate form. In *Dodge*, the court specifically stated that a "business corporation is organized and carried on primarily for the profit of the stockholders."¹⁴⁵ In other regimes, such as Germany and Japan, the interests of society and employees have historically been the first focal point. All three regimes have had both prosperous as well as trying times.

This Part examines these three models in the context of a search for incorporating the goal of peace into local corporate governance thinking. Although all models, in some way or another, consider interests of various constituencies, including society at large, these models do not focus on the goal of peace itself as a general aspiration. We propose that consideration of peace as a goal is not a far stretch from what the regimes are already doing, and has the potential for far-reaching effects not only for society at large, but also for business itself.

142. Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829, 832 (2000); Bradley et al., *supra* note 137, at 61.

143. See, e.g., Fort & Schipani, *supra* note 142, at 833; Bradley, et al., *supra* note 137, at 11.

144. *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919).

145. *Id.* at 684.

A. Corporation Governance Regimes of Competing Market-State Models

1. The U.S. Model

First and foremost, throughout U.S. history, corporate governance has focused on the rights of shareholders.¹⁴⁶ The concern in the United States has been fear that, because of separation of ownership from control that exists in large-scale corporations, there is the possibility that management will act in its own self-interest to the detriment of the firms' owners.¹⁴⁷ To address this concern, the law has imposed fiduciary duties on corporate officers and directors, including the fiduciary duties of care and loyalty.¹⁴⁸ The fiduciary duties are said to run to the corporation and its shareholders.¹⁴⁹ These duties require corporate officers and directors to exercise the degree of care in the conduct of corporate affairs as the reasonably diligent person would exercise in similar circumstances, as well as to act in good faith and in the "honest belief that the action taken is in the best interests of the corporation."¹⁵⁰ They also require officers and directors to put corporate interests ahead of personal interests, avoiding conflicts of interest.¹⁵¹ Shareholder protection is a paramount objective expressed in the legal realm of corporate governance.¹⁵²

The U.S. model is, however, multi-faceted. According to the American Law Institute (ALI) Principles of Corporate Governance, even if corporate profit is not enhanced, corporations may also take into account "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business."¹⁵³ A corporation may attain this objective by "devot[ing] a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes."¹⁵⁴ Most states endorse this position by

146. See, e.g., *Smith v. Van Gordan*, 488 A.2d 858 (Del. 1988); *Dodge*, 170 N.W. at 64.

147. See, e.g., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1 (1989).

148. *Id.*

149. *Id.*

150. R. Franklin Balotti & Mark J. Gentile, *Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 14 (1987); Bradley & Schipani, *supra* note 147, at 25.

151. Bradley & Schipani, *supra* note 147, at 25.

152. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994).

153. *Id.* § 2.01(b)(2).

154. *Id.* § 2.01(b)(3).

statutorily permitting corporations to take into account the interests of various stakeholders when making corporate decisions. The New York statute, for example, expressly provides that interests of other constituencies, including current employees, retired employees, customers, and suppliers, can be considered when making corporate decision.¹⁵⁵ Connecticut even requires that the interests of other constituencies be taken into account in decision-making.¹⁵⁶ Connecticut appears to be somewhat of an aberration, though, because most states simply permit rather than require these considerations.¹⁵⁷

Yet, the stakeholder constituency statutes are not without controversy. On their face, they appear to promote goals of corporate social responsibility, even if the goal of shareholder gain might not be served. As such, they have come under fire.¹⁵⁸ Some commentators prefer a more-direct anchor to shareholder interests. Nicholas Wolfson,¹⁵⁹ Oliver Williamson,¹⁶⁰ James W. Walker, Jr.,¹⁶¹ and James D. Cox¹⁶² have expressed this view, criticizing, in particular, the ALI approach. According to Wolfson, there is no empirical support for the ideas in the ALI model, and inclusion of these other objectives compromises efficiency and invites various tradeoffs.¹⁶³ Perhaps even more troubling is M.J. Pritchett, III's argument that the ALI's optional approach might give management a free reign to promote its own self-interest under the guise of promoting social responsibility.¹⁶⁴

The U.S. approach to corporate governance is an approach based in shareholder primacy, but with a fair amount of built-in flexibility. That is, although shareholders still appear to be the most important

155. N.Y. BUS. CORP. LAW § 717(b)(1) (McKinney 2002).

156. CONN. GEN. STAT. §33-756 (2002).

157. See, e.g., N.Y. BUS. CORP. LAW § 717(b)(1) (2002); Fla. Stat. Ann. § 607.030(3) (West 2002).

158. See *infra* notes 159-64 and accompanying text.

159. Nicholas Wolfson, *A Critique of the American Institute Draft Proposals*, 9 DEL. J. CORP. L. 629, 631 (1984).

160. Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1219 (1984).

161. James W. Walker, Jr., *Comments on the ALI Corporate Governance Project*, 9 DEL. J. CORP. L. 580, 580 (1984).

162. James D. Cox, *The ALI, Institutionalization, and Disclosure: The Quest for the Outside Director's Spine*, 61 GEO. WASH. L. REV. 1212, 1212-13 (1993).

163. Wolfson, *supra* note 159.

164. M.J. Pritchett III, Comment, *Corporate Ethics and Corporate Governance: A Critique of the ALI Statement on Corporate Governance Section 2.01(b)*, 71 CAL. L. REV. 994, 1001, 1007 (1983). Others have criticized the ALI Project for opposite reasons. These detractors contend that the ALI approach simply articulates current business practice and is thus unnecessary. See, e.g., Donald E. Schwartz, *Defining the Corporate Objective: Section 2.01 of the ALI's Principles*, 52 GEO. WASH. L. REV. 511, 514 (1984).

constituent, the interests of other constituencies are significantly recognized.

In furtherance of the goal of providing value to shareholders, corporate law in the United States puts a great deal of emphasis on removing any hint of bias on the part of corporate directors.¹⁶⁵ This has manifested itself in the increasing popularity of the "independent director."¹⁶⁶

Irrespective of the arguments surrounding the weight U.S. corporate boards can place on stakeholder interests, the U.S. shareholder primacy model has created a corporate governance system that values transparency and disclosure. These values of transparency and disclosure are evident in both the federal and state securities laws and federal insider trading rules.

Federal and state securities laws are based on the premise that shareholders are entitled to full and fair disclosure regarding the nature of their investments. To effectuate full and fair disclosure, the federal securities regime, pursuant to the Securities Act of 1933¹⁶⁷ and the Securities Exchange Act of 1934,¹⁶⁸ requires corporations to disclose all significant aspects of their business before they may issue securities to the public.¹⁶⁹ The Securities Act of 1933 mandates this disclosure by requiring any corporation wishing to sell its securities to the public to register its securities with the Securities and Exchange Commission.¹⁷⁰ As part of the registration process, the corporation must prepare a prospectus, which discloses to potential investors the material aspects of the corporation's business.¹⁷¹ Information disclosed in the prospectus includes not only the price of the securities to be sold, but also detailed financial information about the corporation.¹⁷² The corporation must also disclose information concerning its management and key shareholders.¹⁷³ After a corporation's securities have been registered, the duty to disclose information continues on an annual basis¹⁷⁴ or in the event of a major

165. See, e.g., DEL. CODE ANN. tit. 8, § 144 (2002); *Alpert v. 28 St. Williams Corp.*, 473 N.E.2d 19 (N.Y. 1984).

166. See Grover C. Brown et al., *Director and Advisor Disinterestness and Independence Under Delaware Law*, 23 DEL. J. CORP. L. 1157 (1998).

167. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2002).

168. Securities Exchange Act of 1934, 15 U.S.C. § 78a-hh (2002).

169. *Id.*

170. See Securities Act of 1933 § 5(a), 15 U.S.C. § 77(e).

171. See *id.*; Regulation S-K, 17 C.F.R. § 229 (2002).

172. *Id.* § 229.200, 229.300.

173. *Id.*

174. Securities Exchange Act of 1934 § 12(g)(1) (requiring the annual filing of a Form 10-K that discloses much the same information as required in the Securities Act registration).

change within the corporate structure.¹⁷⁵ If the corporation decides not to sell its securities in a public offering—but instead in a private transaction—registration is not necessary, but in certain circumstances the corporation must still make similar disclosures to the purchasers of its securities.¹⁷⁶ To supplement the federal rules, each state has its own disclosure rules concerning the sale of a corporation's securities within the boundaries of its state.¹⁷⁷

Strict penalties for noncompliance attempt to ensure that U.S. corporations take these disclosure and transparency rules seriously. A corporation that issues securities under a registration statement containing omissions or material misstatements exposes its officers, directors, underwriters, and certain experts to civil liability.¹⁷⁸ In addition, a corporation can be liable in the form of damages for any loss sustained by a purchaser of securities issued under a registration statement with omissions or material misstatements.¹⁷⁹ In certain circumstances, a corporation may also be subject to criminal fines and penalties.¹⁸⁰

The ban on insider trading also highlights the importance U.S. corporate governance regimes place on transparency and disclosure.¹⁸¹ The purpose of insider trading rules is to prevent any person from selling securities based on material, nonpublic information.¹⁸² The classic case of insider trading arises when a corporate insider buys or sells shares of the corporation using confidential information obtained through the insider's corporation position and, as a result, earns a profit or avoids a loss.¹⁸³ Federal common law has expanded the notion of insider trading, however, to include "outsider trading." Outsider trading occurs when a corporate insider learns that his firm (or a related firm) will do something that affects the value of another corporation's stock and trades using this

175. *Id.* (requiring the filing of a Form 8-K disclosing specified events such as bankruptcy, merger, or a director's controversial resignation).

176. *See* Rule 502(b)(2) (requiring an issuer selling to any non-accredited investors in 505 or 506 exempt transactions to furnish its most recent annual report and any subsequent Exchange Act filings, along with a brief description of the particular offering; otherwise, the disclosure requirements vary with the size of the offering).

177. *See, e.g.*, DEL. CODE ANN. tit. 6 § 7301-30 (2002).

178. *See* SEC. EXCH. ACT R. 10b-5.

179. Securities Exchange Act of 1933, 15 U.S.C.S. § 771(a)(1) (2001).

180. *Id.* § 77(x) (2001) (penalties); Federal Sentencing Guidelines, 18 U.S.C.S. Appx. § 2B1.1 (2001).

181. *See infra* notes 182-87 and accompanying text.

182. This is should be compared with the absence of a duty of candor by corporate insiders to shareholders in anonymous trading markets as explained in *Goodwin v. Agassiz*, 186 N.E. 659 (Mass. 1933) (rejecting a duty of insiders to shareholder except in face-to-face dealings).

183. *See O'Hagan v. United States*, 521 U.S. 642 (1997).

information.¹⁸⁴ Thus, insider trading emphasizes the notion of disclosure by imposing on corporate insiders the duty to “abstain or disclose.”¹⁸⁵ As part of this duty to “abstain or disclose,” a corporate insider who possesses confidential information must either abstain from trading or disclose the information to the investing public.¹⁸⁶ Failure to adhere to federal insider trading rules subjects the trader to liability under the Securities and Exchange Act Rule 10b-5.¹⁸⁷ Indeed, the emphasis on transparency and disclosure has been reaffirmed in light of the corporate accounting scandals of 2002 and the passage of the Sarbanes-Oxley legislation, the implications of which for corporate governance have yet to be determined.

2. The German Model

The corporate governance model in Germany emanated from very different roots than the U.S. model. German corporate law, as originally enacted in 1935, did not mention the shareholder as a constituency to be served by the corporation. Instead, it provided that “[t]he managing board is, on its own responsibility, to manage the corporation for the good of the enterprise and its retinue (*Gefolgschaft*), the common weal of the folk (*Volk*) and realm demand (*Reich*).”¹⁸⁸ It was not until 1965 that shareholders were mentioned.¹⁸⁹ Shareholders are only one of many constituencies served by the German corporate form.¹⁹⁰

Unlike in the U.S. model, the constituency of employees appears to have some prominence in the German corporate governance model. Firms with more than 500 employees are required to utilize a two-tier board structure, with a supervisory board providing oversight and general corporate strategy, and a management board providing a day-to-day management oversight function.¹⁹¹ If the firm has more than 2,000 employees, 50 percent of the supervisory board members must consist of employee representatives.¹⁹² The remaining 50 percent of

184. *Id.*

185. *See* Sec. Exch. Comm’n v. Texas Gulf Sulphur, 401 F.2d 833 (2d Cir. 1968).

186. *See* Dirks v. Sec. Exch. Comm’n, 436 U.S. 646 (1983).

187. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2002).

188. Bradley, et al., *supra* note 137, at 52; Detlev F. Vagts, *Reforming the ‘Modern’ Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 40 (1966) (parentheticals added).

189. Vagts, *supra* note 188, at 40-41.

190. *Id.*

191. Bradley et al., *supra* note 137, at 52.

192. *Id.* at 53 (indicating that the other 50% of the supervisory board consists of shareholder representatives).

the members consists of shareholder representatives.¹⁹³ The management board consists almost entirely of the senior management of the company.¹⁹⁴ Board members tend to possess technical skills related to the product, in addition to considerable firm- and industry-specific knowledge.¹⁹⁵ This is because careers are often built up from the ground level and are focused on building asset-specific skills through extensive apprenticeship systems.¹⁹⁶ The result of the two-tiered board structure is explicit representation of employee interests—no major decisions are made without the input employee representatives.¹⁹⁷ This is in stark contrast to the structure of corporate boards in the United States where the board structure is single-tier and labor has no specific right of representation.¹⁹⁸ In fact, board members in the United States are required to act in the best interest of the corporation and its shareholders and thus may not specifically represent any particular constituency.¹⁹⁹

Banks play a large role in German corporate governance—approximately 14 percent of corporate shares in Germany are owned by banks.²⁰⁰ More importantly, a substantial portion of equity is in the form of bearer, rather than registered stock,²⁰¹ and these shares are left on deposit with the *Hausbank* of the corporation, which handles dividend payments and record keeping.²⁰² German law grants banks a proxy right to vote in connection with these shares, unless depositors explicitly instruct banks to do otherwise.²⁰³ It appears inertia “work[s] in favor of banks having proxy votes.”²⁰⁴ The power that banks hold in German corporations is compounded by the provision in many company charters that disallow non-bank

193. *Id.*

194. Stephen Prowse, *Corporate Governance in an International Perspective: A Survey of Corporate Control Mechanisms Among Large Firms in the United States, the United Kingdom, Japan, and Germany*, in BANK FOR INTERNATIONAL SETTLEMENTS ECONOMIC PAPERS NO. 41, 43 (July 1994).

195. *Id.*

196. *Id.*

197. *Id.*

198. *See, e.g.*, Revised Model Business Corporation Act § 2.05 (2001); Del. Code Ann. tit. 8, §§ 141(b) (2002); Del. Code Ann. tit. 8, § 606 (2002).

199. *See, e.g.*, Revised Model Business Corporation Act § 8.30 (2001); Del. Code Ann. tit. 8, § 141, 144 (2001).

200. ORG. FOR ECON. COOPERATION AND DEV., ECONOMIC SURVEYS: GERMANY 88 (1995) [hereinafter OECD GERMANY].

201. MITSUHIRO FUKAO, FINANCIAL INTEGRATION, CORPORATE GOVERNANCE, AND THE PERFORMANCE OF MULTINATIONAL COMPANIES 27 (1999).

202. *See* OECD GERMANY, *supra* note 200, at 95.

203. FUKAO, *supra* note 201, at 27.

204. Bradley et al., *supra* note 137, at 54.

shareholders to exercise more than five to ten percent of the total votes, regardless of the proportion of shares they own.²⁰⁵

The role of the bank in German corporate governance is also strengthened by financing patterns. German companies, taken as a whole, are more leveraged than their U.S. counterparts.²⁰⁶ Moreover, instead of relying on public debt financing, German companies finance their debt through bank or intermediated loans.²⁰⁷ Bank financing of long-term debt has averaged around 50 percent, and this percentage has remained fairly stable throughout the past two decades.²⁰⁸

Creditor interests are also protected through corporate governance regimes.²⁰⁹ Dividend payout rules are designed to protect creditor interests.²¹⁰ German law stipulates that dividends may not be paid out from paid-in capital, even if the paid-in capital includes a premium over the face value of equity.²¹¹ This provision makes it difficult for German corporations to undertake share repurchases,²¹² and consequently, also makes it difficult for German shareholders to cash out of the corporation.²¹³

The incorporation of other stakeholder interests in corporate decision-making affects governance issues like management compensation. Unlike in the United States, the shareholders must approve the compensation of German board members.²¹⁴ This approval affects the amount and structure of compensation. In 1997, CEOs of listed German companies earned about half of what their U.S. counterparts earned,²¹⁵ and their compensation usually took the form of fixed salaries and bonuses.²¹⁶ Providing stocks or stock options as part of top-management's compensation packages is still fairly rare.²¹⁷

Compared to U.S. firms, the quality of disclosure in German firms is poor.²¹⁸ The legal and regulatory framework for disclosure is considered relatively lax compared to that in the United States.²¹⁹

205. FUKAO, *supra* note 201, at 27.

206. Bradley et al., *supra* note 137, at 54.

207. Prowse, *supra* note 194, at 94.

208. See OECD GERMANY, *supra* note 200, at 93.

209. German bankruptcy law is also skewed toward protecting creditor interest. See FUKAO, *supra* note 201, at 123.

210. Bradley et al., *supra* note 137, at 55.

211. FUKAO, *supra* note 201, at 120.

212. *Id.*

213. See, e.g., Bradley et al., *supra* note 137, at 54.

214. FUKAO, *supra* note 201, at 46.

215. KEVIN J. MURPHY, 3 HANDBOOK OF LABOR ECONOMICS tbl. 4 (1999).

216. Bradley et al., *supra* note 137, at 53.

217. *Id.*

218. *Id.* at 55.

219. *Id.*

An OECD survey of disclosure quality states that, as of 1989, none of the German firms in their sample had complied fully with OECD disclosure guidelines.²²⁰ Similarly, until recently, Germany had no insider-trading laws; if insider trading was discovered, the penalty was simply to turn over the profits.²²¹

3. The Japanese Model

The traditional corporate governance model in Japan has, like the German model, emphasized protection of employee interests, as well as creditor interests. There has been little incentive to be concerned with shareholder value per se. This may be due in large part to Japan's corporate ownership structure. Historically, firms in Japan have been networked in the form of *keiretsus*, groups of firms that own reciprocal, minority interests in each other.²²² Although the firms in *keiretsus* are usually independent, they do have relational and implicit contracts with each other on matters such as ownership, governance, and commercial contracts.²²³

Like Germany, banks also play a significant role in Japanese corporate governance structures.²²⁴ For example, a large main bank that conducts business with all of the member firms and holds minority equity positions in each will be a member of a horizontal *keiretsu*.²²⁵ Although a single bank is not allowed to hold more than five percent of a single firm's stock, a group of four or five banks typically may control between 20 and 25 percent of the company's stock.²²⁶ More importantly, the corporation's largest bank shareholder is often the largest creditor.²²⁷ Thus, the interest of the shareholder is in effect the same as the interest of the creditor. Banks, as creditors and shareholders, are more concerned about credit risk than return on the stock investment, and thus are more interested in long-term growth than short-term profits. Thus, the interest of the shareholder is in fact aligned with the interest of the

220. See Prowse, *supra* note 194, at 29.

221. Bradley et al., *supra* note 137, at 56.

222. Fukao translates *keiretsus* as "a series of things organized to perform a function." FUKAO, *supra* note 201, at 2. For more details on the Japanese *keiretsu*, see generally W. CARL KESTER, JAPANESE TAKEOVERS: THE GLOBAL CONTEST FOR CORPORATE CONTROL 54-55 (1991); Erik Berglof & Enrico Perotti, *The Governance Structure of the Japanese Financial Keiretsu*, 36 J. FIN. ECON. 259 (1994); David Flath, *Shareholdings in the Keiretsu, Japan's Financial Groups*, ECON. PERSP., Jan.-Feb. 1991, at 20.

223. See Bradley et al., *supra* note 137, at 57.

224. See Berglof & Perotti, *supra* note 222.

225. See KESTER, *supra* note 222, at 54-55 (describing the workings of a *keiretsu*).

226. FUKAO, *supra* note 201, at 15.

227. See *id.*

creditor. This proportion has remained fairly stable over the past 15 years, and these closely-held shares rarely, if ever, make it into the financial marketplace.²²⁸ Japanese corporations are also typically more leveraged than corporations in the United States. The largest bank shareholder also is usually the largest debtholder in the company.²²⁹

Quite apart from the lending and the direct intervention roles they play, banks also may facilitate the governance process. They are likely to have a great deal of access to inside information and hence can perform a monitoring role very effectively.²³⁰ Given the governance role of the banks, resolution of financial distress is a much more informal process as compared to the United States. This is also true in Germany.

In addition to protection of creditor interests, Japanese corporate governance is also concerned with employee interests. Japan has also been historically known for the practice of "lifetime employment."²³¹ Employees have remained at their firms due to the grant of responsibility and benefits this has provided.²³² The early retirement age in Japan, at 55, may also contribute to this practice of "lifetime employment."²³³

The structure of boards in Japan is similar to that in the Anglo-American system with single-tier boards.²³⁴ However, in terms of membership, the Japanese board is similar to the German board. A substantial majority of board members consist of current or former senior and middle management of the company.²³⁵ Fukao notes that nearly 78 percent of Japanese directors are promoted from among employees.²³⁶ Thus, unlike in the United States, outside directorships are rare. The one exception to outside directorships is the main bank. Main bank representatives usually sit on the boards of the *keiretsu* firms with whom they do business.²³⁷ However, unlike in Germany, where employees and sometimes suppliers tend to have explicit board representation, the interest of stakeholders other than

228. *Id.*

229. *Id.*

230. *Id.*

231. Masahiko Aoki, *Toward an Economic Model of The Japanese Firm*, 28 J. ECON. LITERATURE 1, 11-12 (1990); Ronald J. Gilson & Mark J. Roe, Essay, *Lifetime Employment: Labor and Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 509 (1999).

232. See Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 630 n.223 (1997).

233. Gilson & Roe, *supra* note 231, at 530.

234. Prowse, *supra* note 194, at 42.

235. FUKAO, *supra* note 201, at 13-14.

236. *Id.*

237. *Id.* at 25.

management or banks are not directly represented on Japanese boards.²³⁸

In addition, management compensation is not a matter for shareholder approval. Compensation, including that of top management, relies on salaries and bonuses.²³⁹ Stocks or stock options are rarely used as a basis for remuneration.²⁴⁰ Total compensation of top managers, including bonuses, is about six to eight times the compensation of the most highly paid blue-collar worker and about 17 times that of the average worker.²⁴¹ A managerial labor market along U.S. lines, especially for mid-career workers, is thin.²⁴²

Share ownership in Japan is concentrated and stable. Individual share ownership in Japan, like in Germany, has steadily declined.²⁴³ Thus, in a typical Japanese firm, approximately two-thirds of the equity is owned by banks, insurance companies, and other corporations.²⁴⁴ Internal management styles and control systems in Japanese firms rely on building long-term, consensus-based relationships and are characterized by a great deal of informal interactions, personal relations, and information-sharing among relatively culturally homogeneous individuals.²⁴⁵ There is an apparent reliance on trust, reputation-building, and face-saving considerations as the basis for contracting,²⁴⁶ in part because the corporation is seen by its employees as much as a social entity as an economic entity.²⁴⁷ Companies thus rely on face-to-face contacts to resolve issues.²⁴⁸ Japanese firms in the larger, organized sector of the economy emphasize lifetime employment and building of human capital by maximizing asset-specific and relation-specific skills.²⁴⁹ Lateral inter-functional transfers of managers and horizontal information flows among functions and departments, both within the firm and across firms within the network, are common.²⁵⁰ Upward mobility within Japanese organizations is carried out through a

-
238. Bradley et al., *supra* note 137, at 58.
239. OECD GERMANY, *supra* note 200, at 107 fig. 27.
240. *Id.*
241. See FUKAO, *supra* note 201, at 17-18.
242. *Id.* at 57.
243. FUKAO, *supra* note 201, at 12-20.
244. Bradley et al., *supra* note 137, at 60.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 61.

process of moving up through a cross-functional spiral rather than through a series of promotions within a particular functional area.²⁵¹

Disclosure quality, although considered superior to that of German companies, is poor relative to that of U.S. firms. Although there are rules against insider trading and monopolistic practices, the application of these laws is, at best, uneven and inconsistent.²⁵²

B. Corporate Governance Regimes and Sustainable Peace

1. A Comparative Assessment

It is important to remember that the corporate governance models of the United States, Germany, and Japan are rooted in democratic political entities. To frame this in Bobbitt's terms, the Entrepreneurial, Managerial, and Mercantile Models are embedded in parliamentary democracies.²⁵³ The question becomes to what extent the descriptions of the varying regimes raise the concerns expressed by Barber that corporations themselves tend to undermine the very democratic virtues that lead to sustainable peace.²⁵⁴ To analyze these issues, we compare these alternatives on the basis of (1) the corporation's sense of citizenship; and (2) the extent to which corporations equip citizens with voice in the affairs that affect them. In doing so, a model emerges that suggests that corporations of each parliamentary democracy might wish to consider (1) the creation of authentic communities that encourage peace rather than a solipsistic notion of community; and (2) the opportunities and dangers in extended beneficial attributes of voice and citizenship to groups not typically accorded those attributes as well as how these extensions can best be accomplished. After sketching these cross-cutting notions, we propose four contributions corporations can make to sustainable peace—not in the sense of a universal model for corporate governance, but as a set of criteria that corporate regimes might generally aim toward, within the context of their own cultural histories and realities.

251. *Id.*

252. *Id.*

253. BOBBITT, *supra* note 17, at 219.

254. BARBER, *supra* note 43, at 219; *see also supra* notes 104-24 and accompanying text.

a. Citizenship and Voice

i. Citizenship

For several years, corporate governance scholarship has focused on a debate between contractarian and communitarian approaches.²⁵⁵ In an important sense, this debate is related to Barber's concern as to whether corporations create a McWorld that undermines democratic values by undermining a sense of citizenship.²⁵⁶ In a contractarian paradigm that underscores the U.S. version of the Entrepreneurial model, notions of citizenship are likely to revolve around legally-enforceable duties, such as obeying laws generally and, more particularly, obeying those laws that protect investors, including the laws of fiduciary duty, securities laws, and other regulation.²⁵⁷ Thus, according to Bobbitt and Barber, the notion of citizenship in this model is thinner than in other models.²⁵⁸ Yet, the U.S. variant on this model has been flexible enough to accommodate various notions of citizenship, as evidenced by adoption of statutes in a majority of states that explicitly permit management to consider the interests of other constituencies in addition to shareholders when making decisions.²⁵⁹

The notions of citizenship may be more pronounced in the German (Managerial) and Japanese (Mercantile) models, however.²⁶⁰ In both models, there is an expectation that corporations serve a societal good. In Germany, this is explicit in a stakeholder model that directs the company to be concerned with society generally as well as employees and creditors.²⁶¹ In Japan, this is tied to cultural notions of solidarity and employee enmeshment with work.²⁶² In both regimes, there is a clear understanding that corporations are part of a greater social fabric and that their duties include maintenance of that fabric. It would seem that the introduction of a commitment to a public good, such as sustainable peace could be incorporated into these models.

255. See Bradley et al., *supra* note 137 (providing a comprehensive analysis of the various arguments for competing styles of contemporary corporate governance).

256. BARBER, *supra* note 43, at 223; see also *supra* notes 105-15 and accompanying text.

257. See *supra* notes 247-48 and accompanying text (with respect to free-market arguments from Hayek and Friedman, which focus on the importance of laws).

258. BOBBITT, *supra* note 17; BARBER, *supra* note 43.

259. See *supra* notes 153-57 and accompanying text.

260. See *supra* notes 60-87 and accompanying text.

261. See *supra* note 76-87 and accompanying text.

262. See *supra* note 68-83 and accompanying text.

ii. Voice

The extent to which the key democratic virtue of voice is fostered also varies according to each model. Although citizenship notions seem to be more akin to German and Japanese models, the U.S. model may have greater sensitivity to voice. As we have seen, the U.S. model emphasizes transparency and disclosure.²⁶³ Both equip a recipient with the capability to exercise voice. This voice is particularly important insofar as investors are concerned, but disclosure and transparency have other significant beneficial effects with respect to sustainable peace as demonstrated below.²⁶⁴ They give other stakeholders information from which they can more powerfully exercise their own voice, even if it is simply in criticism of the corporation. Unfortunately, as demonstrated by the 2002 corporate scandals, the Entrepreneurial Model is not perfect in its disclosure of information and there is a need for even better transparency and disclosure. In addition, the scandals highlight another powerful constituent voice: the voice of management.

Management's voice is also heard strongly in the Mercantile and Managerial Models. In the Mercantile Model, the strong voice of management, together with that of other corporate leadership represented through cross-ownership mediated through creditors dominates corporate affairs.²⁶⁵ Similarly, the Managerial Model also emphasizes the voice of creditors and senior management.²⁶⁶ In addition, however, the Managerial Model features the institutionally-empowered voice of employees through board representation.²⁶⁷ Yet, given the diminished degree of transparency and disclosure in both of these models, the capability of dissent is minimized. Only a few individuals have access to the information necessary to exercise voice meaningfully.²⁶⁸ Thus, although the Managerial and Mercantile Models are both more communitarian and thus theoretically more conducive to a goal of peaceful stability, they lack a central attribute, of voice, which is essential to stability.

263. See Bradley et al., *supra* note 137.

264. See *infra* notes 270-77 and accompanying text.

265. See *supra* notes 221-52 and accompanying text (discussing the Japanese version of the Mercantile Model).

266. See *supra* notes 188-220 and accompanying text (discussing the German version of the Managerial Model).

267. See *supra* notes 191-99 and accompanying text (discussing the German approach).

268. See *supra* notes 260-67 and accompanying text.

b. Mediating Institutions and Lessons to Counteract Cynicism

i. Mediating Institutions

In previous work, we argued for a blended model of corporate governance.²⁶⁹ That model featured enhanced notions of transparency and disclosure for German and Japanese regimes and a greater sense of community for the U.S. system.²⁷⁰ Yet a common problem for each of the regimes, regardless of whether they were considered to be more communitarian or more contractarian, was the potential diminishment of the individual in a large society.²⁷¹ Indeed, we began that Article with a comment by Vaclav Havel, where he notes that both capitalist corporations and socialist plants share the common problem of being so large so as to dwarf the individual working for it.²⁷² This can be true of a large U.S. company, but it can also be true of an organization that is devoted to the entire nation-state of Germany or Japan.²⁷³

In opposition to the model of a corporation as a megastructure, we proposed the model of business as a mediating institution. The mediating institution should be small enough so that individuals interact with others in their organization on an interpersonal basis, experience the consequences of their actions, and develop their moral identity.²⁷⁴ This is not to suggest that corporations be limited in size, but it is to suggest that corporations might consciously attempt to structure themselves to have communities within their overall corporate structure.²⁷⁵ Such a model could preserve and even enhance an authentic community identity of the corporation while at the same time also require the kind of transparency and disclosure that supports voice.²⁷⁶ Moreover, as discussed below, anthropologists have found that the traits of mediating institutions—relatively small, face-to-face interactions, reduced hierarchy and consensual decision-

269. See generally Fort & Schipani, *supra* note 142.

270. *Id.*

271. *Id.*

272. *Id.*

273. See *id.* (arguing that large communities can inhibit the capacity of an individual to feel that she makes an authentic contribution to the welfare of that community).

274. *Id.*

275. See *id.* (arguing for the need of relatively small groupings within the corporation to address the human need for relatively small groups).

276. See generally *id.* (arguing that such a corporate structure might serve as the best of all possible worlds).

making—are all attributes of peaceful societies.²⁷⁷ Thus, a model of communities within corporations is a potential model for peaceful societies.

ii. Lessons to Counteract Cynicism

In another article in this volume, Professor Dana Muir discusses the history of employee-benefit programs as related to issues surrounding peace.²⁷⁸ Muir notes that employee-benefit programs have been championed as a way to mitigate some of the harshness of capitalism so that employees believed that they were participants in the system rather than exploited by it.²⁷⁹ Muir traces this hope in the United States and in other countries, and suggests that such programs offer some degree of participation that fosters harmony over competition.²⁸⁰ Yet, she also warns that superficial programs—those that promise employee involvement, participation, and voice, but do not deliver—can sow the seeds of cynicism.²⁸¹ This potential problem exists, for instance, in employee programs where putative employee stock owners do not have the right to vote the stock they own.²⁸²

Professor Muir's warnings are apt for any extension of benefits to a group not traditionally having them. The extension of a right to those who otherwise have not had it may engender as much suspicion as gratitude. Thus, if the promise of voice, participation, ownership, transparency, disclosure, or other attributes that appear to be beneficial to harmonious relationships is not fulfilled, there is a risk of increasing cynicism and distrust. At the same time, Muir's analysis shows that there are models that could prove to be beneficial to connecting business and peace.

c. Comparative Assessment

From the foregoing analysis, it does not appear that there is anything inherently problematic about connecting corporate governance and sustainable peace. Although maximizing shareholder value is clearly an important, overriding goal, Anglo-American law allows for consideration of non-shareholder constituents, Japanese law provides room for concern for the social aspect of work, and

277. See *supra* note 256 and accompanying text (noting the work of anthropologist David Fabbro).

278. Muir, *supra* note 16.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

German law is concerned for employee and social welfare in business management.²⁸³ Although questing for sustainable peace may sound idealistic, it is also a goal that benefits corporations themselves by providing them with more stable and peaceful societies in which to operate. Thus, there is a plausible long-term reason for businesses to have an interest in sustainable peace. To be sure, it would be even more conducive to making this goal a widely-endorsed corporate goal if extant governance regimes were to specify their legitimacy. Yet, even without legal change, corporations can adapt current practices to integrate the goal of sustainable peace into their practices.

This quest will require some adaptation of corporate governance. We propose four ways in which corporations might thus be able to contribute to sustainable peace. This proposal is not made in definitive terms, and is not presented as a proven mechanism for achieving sustainable peace. Instead, our ambition is to sketch a plausible way for corporations to contribute to sustainable peace in light of existing evidence.

2. A Proposed Model of Corporate Action

As we have suggested in this Article and developed more fully in previous work, there is a plausible, conceptual relationship among the role of business, business ethics, and sustainable peace.²⁸⁴ The gist of this argument is that through economic progress and mitigation of rivalries in the workplace, multinational corporations can contribute to sustainable peace.²⁸⁵ Businesses can do this by:

- (1) fostering economic development, particularly for the marginalized;
- (2) adopting external evaluation principles, such as transparency, and supporting a legal system that enforces those principles, i.e., a "rule of law";
- (3) nourishing a sense of community both within the company and in the areas in which the company is located; and
- (4) mediating potentially-conflicting parties and redirecting those parties toward a common goal, even if that goal is only that of profitability.

We wish to sketch this model conceptually and illustrate the themes with examples from actions taken by specific companies. In doing so, we are not suggesting that these attributes be uncritically accepted as a model for peaceful corporate governance. There is, however, evidence to show connections between these characteristics and

283. See Fort & Schipani, *supra* note 142.

284. See generally Fort & Schipani, *supra* note 15.

285. *Id.*

sustainable peace, and to suggest that corporate governance regimes, attentive to the comparative concerns already raised, may be able to integrate these characteristics in culturally-appropriate ways.²⁸⁶

a. Fostering Economic Development

The first thing companies can do to help work toward the goal of peace is what they do best: foster economic development. A recent World Bank report showed a highly positive correlation between underdevelopment and violence.²⁸⁷ Intuitively, this correlation makes sense: in an environment of extremely scarce resources, competition for the necessities of life could lead to conflict that could turn violent. Although critics of globalization often downplay the economic advantages corporations bring with them to country, there are a number of ways in which corporations contribute to more stable societies.

The first contribution that corporations make toward stability is in providing jobs to residents of the country. For instance, Frigorifico Canelones, a division of Land O'Frost and recognized by the U.S. Secretary of State as a winner of the Award for Corporate Excellence,²⁸⁸ turned a bankrupt meat processing plant into a

286. *Id.*

287. Post-Conflict Unit of the World Bank, *Security, Poverty Reduction and Sustainable Development: Challenges for the New Millennium* 4-11 (Sept. 1999) (assessing the links between poverty and violence).

288. The criteria for the Secretary of State's Award for Corporate Excellence are:

- Maintaining good corporate citizenship by engaging in ethical business practices, maintaining the integrity of the company, and dealing with consumers in accordance with fair business practices.
- Displaying exemplary employment practices and a fair opportunity for trade unions to represent employees as well as avoiding discrimination based on race, gender or ethnicity.
- Creating a healthy workplace environment for all workers. This includes working for the effective abolition of child labor and forced labor practices as well as maintaining a working environment equal to, if not exceeding, comparable local industry standards of health and safety.
- Conducting business with an astute consciousness of local, national, and global environmental concerns. This includes the collection and ongoing monitoring of useful information regarding the environmental, health, and social impacts of operations. Also, working with local, national, and international officials to adequately communicate to the public regarding potential environmental and health issues without compromising the business's integrity and ability to operate successfully.

profitable Uruguayan operation.²⁸⁹ The resulting 800 jobs, in a town with no other major employer, provided economic development to an impoverished area.²⁹⁰ The same kind of experience holds true in Malaysia where Motorola, also an Award winner, invested \$1.1 billion and employed more than 8,000 people,²⁹¹ as well as in Ethiopia through the work of F.C. Schaffer & Associates, a small Louisiana sugar company employing 7,000 people.²⁹²

The second corporate contribution results from the benefits they can provide to the local population. For example, Frigorifico Canelones supports training and educational programs for homeless and abused youth, as well as recreational programs for children.²⁹³ Ford Motor Company, also a winner of the Award for Corporate Excellence, sponsors AIDS-related programs in Africa, working with local health care authorities.²⁹⁴ Xerox, which won an Award in 1999, not only contributes to programs for children, but also addresses another stakeholder group—employees—by providing counseling programs designed to help lift people out of poverty in Brazil.²⁹⁵ In addition, it offers space in its facilities for local cultural activities.²⁹⁶

-
- Contributing to the overall growth and development both economically and socially of the local society. This includes work-specific skills training, general academic improvement, and opportunities for personal self-improvement, as well as other programs, services and philanthropic endeavors for the local public, all aimed at providing a base for growing and sustaining an increased quality of life.
 - Endeavoring to ensure that business activities are compatible with the science and technology policies of the countries and, as appropriate, contribute to the development of local innovative capacity.
 - Developing and maintaining a healthy respect for the local, national, and international authority. This includes rejecting the practices of bribery, extortion, illegal tax exemption, and favoritism in favor of creating a fair and open marketplace beneficial to all.

U.S. Dep't of State, *Award for Corporate Excellence 2001: Criteria*, available at <http://www.state.gov/e/eb/cba/bs/ace>.

289. U.S. Dep't of State, *2000 Award for Corporate Excellence, Frigorifico Canelones*, available at <http://www.state.gov/e/eb/cba/bs/ace>.

290. *Id.*

291. U.S. Dep't of State, *2000 Award for Corporate Excellence, Motorola Malaysia*, available at <http://www.state.gov/e/eb/cba/bs/ace>.

292. U.S. Dep't of State, *1999 Award for Corporate Excellence, F.C. Schaffer & Associates*, available at <http://www.state.gov/e/eb/cba/bs/ace>.

293. *Frigorifico Canelones*, *supra* note 289.

294. U.S. Dep't of State, *2001 Award for Corporate Excellence, Ford*, available at <http://www.state.gov/e/eb/cba/bs/ace>

295. U.S. Dep't of State, *1999 Award for Corporate Excellence, Xerox*, available at <http://www.state.gov/e/eb/cba/bs/ace>

296. *Id.*

The third contribution relates to resource transfer. This transfer could be in technological development or development of human managerial capabilities, or both. Motorola's work in Malaysia exemplifies both features of this dimension. By building a high-tech manufacturing plant, it provides technological know-how to the Malay people,²⁹⁷ which itself provides a foundation for additional economic development. Moreover, the managers of Motorola's facilities are not expatriates, but citizens of Malaysia,²⁹⁸ thereby managerial skills are transferred to the country as well. F.C. Schaffer & Associates exhibits these characteristics with a bit of a novel twist. After devastating floods racked Ethiopia, the company shared its expertise in running sugar refineries with competitors.²⁹⁹ It continues to provide consulting services for the design of co-generation, environmentally safe power plants.³⁰⁰

A fourth contribution is the simple task of paying taxes. The benefit to society provided by tax revenues, however, is dependent on the quality of the government collecting the taxes and the use made of them. Assuming just governmental regimes, tax revenues may be quite beneficial in helping to provide a much-needed infrastructure.

If a key factor in violence is the desperation produced by marginalization, then the work of companies such as these avoids exploitation. These companies have built local capacities while also being profitable. Ethics scholar Michael Santoro has argued that there is a difference between companies that exploit low-wage economies by creating sweatshops as a cost-minimization strategy and others that adopt a market-building strategy.³⁰¹ The first is more likely to sow the seeds of resentment. The second is a contribution to the welfare of the countries in which companies do their work.

b. Adopting External Evaluation Principles

With modern communications technology, it is difficult for any company to be immune from the potential glare of publicity and investigative reporting. Some companies welcome transparency. To be transparent is to be willing to have your actions evaluated by others. Although not all transparency is universally good—there are, after all balances that need to be struck between transparency and

297. U.S. Dep't of State, *2000 Award for Corporate Excellence, Motorola*, available at <http://www.state.gov/e/eb/cba/bs/ace>.

298. *Id.*

299. *F.C. Schaffer*, *supra* note 292.

300. *Id.*

301. See generally MICHAEL A. SANTORO, PROFITS AND PRINCIPLES: GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA (2000).

privacy—accountability to external standards may contribute to a social environment where violence is less likely to occur. Two aspects of transparency are particularly worth noting: transparency with respect to corruption and support of a rule of law.

In previous research, we conducted an analysis of whether there is a connection between corruption and violence.³⁰² We compared the ranking of countries by Transparency International (TI) in its Corruption Perception Index with the Heidelberg Institute for International Conflict Research's index related to conflict around the world.³⁰³ The Corruption Perception Index is based on interviews with approximately 770 managers and other business people about the extent to which corruption is endemic in a country in which they work.³⁰⁴ The Heidelberg Institute keeps track of conflicts that occur within a country and evaluates them according to whether they are handled in a nonviolent or violent way.³⁰⁵ The assessment tracks 28 different attributes and also provides a four-part characterization of whether disputes are handled mostly violently, somewhat violently, somewhat nonviolently, and mostly nonviolently.³⁰⁶

The results were striking. Countries in the top quartile of the TI index—that is, those countries that were the least corrupt—resolved disputes by violence 14 percent of the time.³⁰⁷ Those in the second quartile resolved disputes by violence 26 percent of the time.³⁰⁸ The third quartile resolved disputes by violence 44 percent of the time and those in the bottom TI quartile, that is the most corrupt, resolved disputes by violence 60 percent of the time.³⁰⁹ These findings are correlative, not causative. Yet, it is possible that poverty may contribute to corruption that leads to violence. If so, then underdevelopment may be more of a root cause to violence than corruption per se. Nevertheless, it is hard to see how more corruption will help a social situation.

John Noonan, an expert in the study of bribery, once noted that bribery is typically hidden unless the leaders are so brazen and secure in their power that they can flaunt their corruption.³¹⁰ That which is hidden, by tautology, is not subject to external evaluation. In fact, the goal of the efforts of TI is to publicize incidents of

302. Fort & Schipani, *supra* note 15, at 398.

303. *Id.*

304. Transparency International, *The 2000 Corruption Perceptions Index*, available at <http://www.transparency.de/documents/cpi/2000/cpi2000.html>.

305. HEIDELBERG INSTITUTE FOR INTERNATIONAL CONFLICT RESEARCH, CONFLICT BAROMETER 2002 (2002), at http://www.liik.de/en/index_e.htm.

306. *Id.*

307. Fort & Schipani, *supra* note 15, at 398.

308. *Id.*

309. *Id.*

310. See JOHN T. NOONAN, BRIBES (1984).

corruption.³¹¹ Keeping corruption hidden denies the opportunity to raise meaningful objections to the practice. As ethicists Thomas Donaldson and Thomas Dunfee have argued, keeping bribery hidden skews efficient distribution of resources because decisions are not made on the basis of a merit that can be publicly evaluated and justified, but on the basis of a kind of power that is immune from evaluation.³¹² Corruption stifles the voice of people evaluating the action.

No one company is going to solve a country's corruption problems. Yet, companies can try to limit the corruption endemic to a country, and also work to try to change the enforcement of laws so that anti-bribery laws are effective. Indeed, this is the recommendation of the OECD to promote efficient markets.³¹³ Moreover, if there is also a correlation between corruption and violence, then the cause of peace could be beneficially supported by corporate efforts to limit or eliminate corruption.

This commitment to support laws that reduce or eliminate bribery leads to the second kind of evaluative commitment: support of the rule of law itself. One of the clear lessons from the emerging economies of Central and Eastern Europe after 1989 is that those countries that quickly established a commitment to a rule of law, particularly in contract and property protection, flourished more than others. Even the free market is not completely free—it requires a legal and moral infrastructure to work. Devout free marketers such as F.A. Hayek³¹⁴ and Milton Friedman have acknowledged this.³¹⁵ Perhaps even more interestingly, economist Jane Jacobs has argued that those countries with strong commercial values, including values of promise-keeping in contracts, respect for property, and nonviolent, negotiated resolution of disputes, tend to be more peaceful.³¹⁶

There are at least three ways in which companies can support a rule of law. First, they can comply with legal requirements.³¹⁷

311. Transparency International, *TI Bribe Payers Index and Corruption Perceptions Index* (2002), available at <http://www.transparency.org/surveys/index.html>.

312. THOMAS DONALDSON & THOMAS DUNFEE, *TIES THAT BIND* 226-30 (2000).

313. See Miguel Scholoss, *Luncheon Address at the Symposium on Fighting International Corruption & Bribery in the 21st Century*, 33 *CORNELL J. INT'L L.* 469, 478 (2000); see also DONALDSON & DUNFEE, *supra* note 312.

314. See F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988) (arguing that the free market depends on legal protection of contracts and property rights).

315. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, *N.Y. TIMES* (Magazine), Sept. 13, 1970, at 33 (arguing that the free market is dependent upon a functioning legal system that restrains some kinds of behavior).

316. See generally JANE JACOBS, *SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS* (1992).

317. See *supra* note 288 and accompanying text (specifying rule of law as a criteria for the Award of Excellence).

Unfortunately, not all laws are just. Nevertheless, compliance with most legal requirements typically yields good results. Second, they can educate people about what laws are and how they can be useful. Johnson & Johnson currently operates a program in rural China in conjunction with the Chinese government and UNICEF that teaches healthcare workers about regulations pertaining to childbirth.³¹⁸ This is done with the hope of increasing the knowledge of midwives and other healthcare providers to improve the quality of medical services.³¹⁹ Thus, by teaching people about law, living conditions can be improved.

A third way is more controversial. Hernando de Soto has made a provocative argument claiming that nearly \$1.3 trillion lay in the hands of the very poor around the world.³²⁰ The problem is that the poor are unable to access those resources because the most valuable assets are their homes, and the legal title requirements in emerging countries often do not allow the marginalized to acquire clear title to their homes.³²¹ Without title, the poor cannot exercise the most basic entrepreneurial strategy of taking out a home loan to start a business. As a result, there is enormous potential that could be unleashed if certain kinds of property systems—akin to the Homestead Act in the United States in the early part of its history³²²—are developed. Clearly, this is a legal reform dependent upon governmental action, but corporations have influence, often significant influence, in law reform. De Soto's point is that such reforms would improve the plight of the marginalized, which itself would be a contribution to stability, and also provide more economic opportunity as the creative potential of the poor is unleashed.³²³ The market is not a zero-sum game, but one that grows with increased economic activity.

c. Nourishing a Sense of Community

The neorealist school of foreign policy argues that people are concerned with filling their needs, including their psychological needs of security and identity.³²⁴ The post-Cold War era has made this point painfully on numerous occasions. According to one study, more

318. See 900 Million Farmers Health Promotional Project, available at <http://www.900mfhp.org>.

319. *Id.*

320. See generally HERNANDO DESOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM WORKS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

321. *Id.*

322. *Id.*

323. *Id.*

324. See CONNIE PECK, *SUSTAINABLE PEACE: THE ROLE OF THE UN AND REGIONAL ORGANIZATIONS IN PREVENTING CONFLICT* (1998).

than 90 percent of post-Cold War conflicts have occurred within the borders of an existing state and the battles have been on the basis of ethnic, cultural, and religious identity.³²⁵ Religious historian Scott Appleby has analyzed fundamentalist religious movements in all faiths and argues that it is when a group feels threatened—i.e., their security in their identity is at risk—extremism can take hold.³²⁶ Extremism is not necessarily violent, but it can be.

In a rare cross-cultural study of attributes of peaceful societies, anthropologist David Fabbro notes that those societies that are relatively small, have a great deal of face-to-face interaction, allow for most, if not all, community members to participate in decisions, are relatively egalitarian (including gender equity), practice nonviolent resolution of conflicts, and are geographically separated from others tend to be more peaceful.³²⁷ There is not much that a company can do to influence geographical separation, but there are things companies can do to mirror the attributes of peaceful societies.

First, businesses can become genuine communities. More specifically, companies can become mediating institutions. As Timothy Fort has argued, there are both moral and neurobiological reasons for why human beings develop their values in relative small groups—mediating institutions—such as family, neighborhood, religious groups, and voluntary associations.³²⁸ Large bureaucratic companies do not necessarily lend themselves to being communities, but creating a sense of connectedness among members of an organization can provide a sense of security and identity to the people who work there.

As part of this process, the second thing companies can do is to encourage the use of voice by those in the company. Having a voice in the promulgation of rules is a critical, identifying characteristic of a democracy.³²⁹ Although subtle, when a company committed to quality processes, such as Motorola, insists that its employees speak up when they recognize a product defect, these employees have learned something about participatory governance, and this knowledge may spill over into the country itself. This could be

325. *Id.* at 9.

326. See R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* 17 (2000).

327. David Fabbro, *Peaceful Societies: An Introduction*, 15 J. PEACE STUD. 67 (1978).

328. TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* (2000).

329. See Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491, 500 (2001) (noting the application of democratic voice concepts to the internal corporate realm).

significant because, as noted above,³³⁰ democratic countries rarely, if ever, go to war with each other.

Finally, a corporation can contribute to the psychological security and identity of a country by investing in the people of that country. Earlier, the Motorola example of having its Malay plant run by Malay managers was noted.³³¹ To the extent companies can develop and empower leaders in the countries where their plants are located, the less likely, it would seem, that those plants would be seen as threatening of local culture. This is an area that merits considerably more research.

d. Mediating Between Potentially Conflicting Parties

States clearly compete for power. We suggest that corporations can play a role in mediating some of the contests for power between people for whom either power or security is at stake through what has become known as "track-two" diplomacy.³³² This can happen in three ways.

In general, governmental leaders are typically limited in the people they can talk with in other countries. By diplomatic protocol, they can only talk to other governmental officials. Not only does this limit the number of available conversation partners, it limits the flexibility of negotiations between leaders of countries in the midst of a dispute. Utilizing track-two diplomacy, an outside party can relay unofficial messages.³³³ For instance, New York Times columnist Thomas Friedman notes that the 2002 nuclear showdown between India and Pakistan was mitigated, at least in part, by the actions of General Electric executives impressing on the Indian government the need to come to a peaceful resolution of the conflict.³³⁴ Businesses, in short, can play a role. Governments interested in expanding power may still bluster at each other, but businesspeople have a perspective of the security and stability that is in play for a variety of participants that needs to be factored into political equations. This is not to suggest that businesspeople become spies for their own governments. Instead, it suggests that they may provide ways for

330. See GEORGE ECKES, *THE SIX SIGMA REVOLUTION: HOW GENERAL ELECTRIC AND OTHERS TURNED PROCESS INTO PROFITS* 1-11 (2000) (emphasizing quality processes involving management at every level of the organization).

331. See Motorola, *supra* note 299.

332. Lisa Daughtry-Weiss, *Exploring Track Two Diplomacy: A Panel Discussion* (2002), available at <http://www.maxwell.syr.edu/parc//NEWSLETTER/TRACKTWO.htm>.

333. *Id.*

334. Thomas L. Friedman, *India, Pakistan, and G.E.*, N.Y. TIMES, Aug. 11, 2002, at 13A.

politicians to settle disputes with a minimum amount of social disruption.

A second kind of track-two diplomacy is that of corporate citizenship.³³⁵ Businesses can be ambassadors for their countries. In doing so, a more-positive vision of the country may emerge. Much has been written on the actions that corporations can take in order to be constructive citizens in their communities. These actions range from environmental responsibility to respect for human rights to promoting educational opportunities for employees and others.³³⁶ Within this vast corporate citizenship literature lies a large number of examples of constructive corporate involvement.³³⁷

A third kind of track-two diplomacy might occur in the workplace. A corporation provides the opportunity for different people, perhaps even ethnically conflicting, to work together for a common goal. Sometimes this is explicit; other times it is not. For instance, Futureways, a company in Ireland, purposely hires both Protestants and Catholics, in an approximate 1:1 ratio, for its workforce.³³⁸ Not only do these often-warring populations work together for the goal of a profitable company, they also talk about their experiences with each other. A non-business example of the same philosophy—Seeds of Peace—brings together Israeli and Palestinian youths to a summer camp in New England each year in order to demonstrate that “the enemy has a face.”³³⁹ People typically walk away from the experience with the “outgroup member” as being a person rather than an enemy.³⁴⁰ A less explicit example of this would be a company that simply brings together people from different groups to work together without necessarily promoting explicit discussion of their differences.³⁴¹

335. See, e.g., Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 291 (2001) (noting the use of corporate citizenship to augment governmental regulation to implement international legal norms).

336. See, e.g., *id.* (environmental responsibility); Bennet Freman et al., 24 HASTINGS INT'L & COMP. L. REV. 423 (2001) (noting general issues in corporate citizenship).

337. See, e.g. JANE NELSON, *THE BUSINESS OF PEACE: THE PRIVATE SECTOR AS A PARTNER IN CONFLICT PREVENTION AND RESOLUTION* 20 (2000) (demonstrating a variety of corporate citizenship examples that are believed to have an impact on reduction of violence).

338. *Id.* at 118-19.

339. JOHN WALLACH, *THE ENEMY HAS A FACE: THE SEEDS OF PEACE EXPERIENCE* (2000).

340. *Id.*

341. See RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (1993) (arguing that it is at work where U.S. citizens of different ethnic origins meet and learn to work together).

Our argument is not that business should take on some kind of messianic purpose. Businesses have a primary role in terms of providing economic growth and opportunity. However, businesses can choose to pursue that growth in different ways. This research suggests that business can pursue its work in ways that might contribute to more stability, more security, and more peace in societies.

IV. CONCLUSION

Issues of globalization have been present for many years. Corporate power has been increasing for decades if not centuries. Communication technologies allow for relative ease in crossing the borders of sovereign nation-states, thereby reducing the power of traditional forms of government. Environmental degradation defies neat compartmentalization within geographic boundaries. States are still critically important organizations, but markets and technologies marking the new millennium present a different set of challenges than has previously existed.

In a changing environment, those who survive are those who adapt. This is a time where adaptation is necessary. More specifically, those organizations that have the capability to cross borders, move markets, connect individuals and cultures, and bring people to work together have the potential to create either great harm and anguish or great gains. Among these organizations are transnational governmental bodies (NGOs) such as the United Nations, the World Trade Organization, and many others as well as NGOs such as the Red Cross or Transparency International. Yet at the center of the changes impacting the world is the multinational corporation.

In this Article, we have not argued that corporations have a duty to adapt their policies to integrate a quest for sustainable peace among their other financial objectives. Instead, we have suggested that given the changing world and the potential negative impact corporations may have on democracy, it is worth pausing to consider what corporations might be able to do to support a goal of peace. By incorporating sustainable peace as a business objective, multinational corporations may be able to blend extant corporate governance principles with a goal that can significantly contribute to the reduction of violence in society.

The arguments are, at best, nascent in form. There is considerable amount of research that needs to be conducted and refinement of the ideas we have articulated. In particular, there is a need for academic scholars as well as members of nongovernmental organizations to more fully explore the extent to which corporate

actions have an impact on violence and stability. The reason for this is a need to sketch out the relationship between corporate action and sustainable peace. We expect that such research will demonstrate an indirect connection. That is, certain kinds of societies are more prone to violence (and stability) and that corporations contribute to the development of such societies in certain ways.

If this connection can be made, businesses may have a model of how they can act. And, in fact, there are models of good corporate citizenship that are already being linked to sustainable peace. These examples are likely to become important touchstones for other businesses to emulate and to provide the freedom for businesses to think more broadly about they might be able to do.

Finally, if there are connections between types of economic productivity and sustainable peace, there may be pressure on governments to create incentives for corporations to contribute to stability by modifying existing governance laws. In the meantime, enough evidence exists to sketch some things that companies can do to contribute to peace. That is, they can foster economic development, remain open to external evaluation of corporate actions, act as good corporate citizens in the community, be a corporate community in their own right, and take advantage of opportunities for track-two diplomacy.