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# Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware

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University of Sydney, Vanderbilt University and ECGI

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## Abstract

This Article critically analyzes News Corp.'s reincorporation in Delaware against the backdrop of two major contemporary corporate governance debates relating to shareholder empowerment and convergence theory. Legal scholars opposing greater shareholder power often argue that the lack of shareholder participatory rights under U.S. law provides evidence that such rights are neither desired nor valued by investors. Also, an underlying assumption of convergence theory is that a unified "Anglo-American" model of shareholder protection exists, suggesting that shareholder rights are similarly restricted throughout the common law world.

This Article challenges both these assumptions by means of a detailed case study of News Corp.'s migration from Australia to Delaware. News Corp.'s original reincorporation proposal prompted a revolt by a number of institutional investors, who argued that a move to Delaware would strengthen managerial power and reduce shareholder rights. The institutional investors were particularly concerned about the effect of the move on the ability of the board of directors to adopt anti-takeover mechanisms, such as poison pills, which are not generally permissible under Australian law.

This Article places News Corp.'s reincorporation in Delaware within the framework of contemporary corporate governance theory and debate. It also uses the reincorporation to highlight a number of significant, but underappreciated, differences between U.S. corporate law and the law of other common law jurisdictions. Specifically, this Article shows how News Corp.'s migration from Australia to Delaware effectively subverted shareholder rights. The News Corp. reincorporation, in sum, has significant implications for Delaware law generally, and for current shareholder empowerment developments in the United States.

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Keywords: Corporate governance, comparative corporate governance, News Corporation, Rupert Murdoch, institutional investors, shareholder activism, shareholder empowerment, poison pills, entrenchment mechanisms

JEL Classifications: D70, G30, G32, G34, G38, K22, K33, K40, K42, M14

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## I. INTRODUCTION

[I]f there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful.

- L.C.B. Gower<sup>1</sup>

Convergence theory and shareholder empowerment represent two major debates in contemporary corporate governance. A pervasive underlying assumption in these debates is that a high level of corporate governance homogeneity exists within the common law world in relation to shareholder rights. This Article challenges that assumption through a detailed case study of the decision by News Corporation (“News Corp.”) to move from Australia to Delaware. As events surrounding News Corp.’s reincorporation illustrate, although there are undoubtedly basic similarities between corporate law in the United States and in other common law jurisdictions, there are also fascinating, but underappreciated, differences.

In late 2007, News Corp. became the subject of intense media attention when it successfully acquired Dow Jones & Company (“Dow Jones”), publisher of the *Wall Street Journal*, and brought it under the aegis of News Corp.’s \$70 billion global media empire.<sup>2</sup> Nonetheless, News Corp.’s migration to the United States from Australia, which paved the way for this victory—a victory that appears increasingly Pyrrhic<sup>3</sup> in the light of the global financial crisis<sup>4</sup>—was neither smooth

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1. L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370 (1956).

2. The success of the bid was assured after News Corp. finally secured support from the majority of the Bancroft family, which had controlled Dow Jones & Company since 1902 and held 64 percent of its voting shares. Richard Perez-Pena & Andrew Ross Sorkin, *Dow Jones Deal Gives Murdoch a Coveted Prize*, N.Y. TIMES, Aug. 1, 2007, at A1. See generally *Mogul’s Dream: Murdoch Wins His Bid for Dow Jones – News Corp.’s Success Follows Delicate Dance Between Suitor, Target*, WALL ST. J., Aug. 1, 2007, at A1 (detailing Murdoch’s interactions with the Bancroft family). Formal approval for the acquisition was given on December 13, 2007, when 60.2 percent of Dow Jones shareholders voted in favor of the deal. Joshua Chaffin, *Dow Jones Now With Murdoch*, FIN. TIMES (London), Dec. 14, 2007, at 21; Richard Perez-Pena, *News Corp. Completes Takeover of Dow Jones*, N.Y. TIMES, Dec. 14, 2007, at 4.

3. See Tim Arango, *News Corp. Loss Shows Trouble at Dow Jones*, N.Y. TIMES, Feb. 6, 2009, at B1 (stating that many media analysts considered that News Corp. had paid too much for Dow Jones, when News Corp. purchased it for approximately \$5 billion). In spite of promises by News Corp., at the time of the acquisition, of increased investment in Dow Jones, in February

nor a *fait accompli*. Rather, the original 2004 reincorporation proposal prompted a revolt by a number of institutional investors concerned that the move to Delaware would significantly diminish shareholder rights. The institutional investors attempted to respond to this threat by demanding that News Corp. make certain concessions preserving existing shareholder rights under Australian corporate law. As this Article demonstrates, however, the protection embodied in these concessions was later effectively subverted by a variety of means.

The News Corp. reincorporation saga highlights some important differences between current U.S. and Australian corporate law regimes. Specifically, the reincorporation shows how shareholder rights were reduced as a result of these differences. It offers a valuable counterpoint to the persistent assumption in much contemporary legal theory that a cohesive Anglo-American model of shareholder protection exists, and it identifies some crucial corporate governance fault lines within the common law world.

The News Corp. story also has significant implications for Delaware law. It demonstrates, for example, that Delaware's preference for managerial fiat over strong shareholder rights<sup>5</sup> may provide Delaware with a competitive advantage in encouraging reincorporation by foreign companies. Nonetheless, the concessions granted by News Corp. to its institutional investors directly conflicted with Delaware's cardinal principle of centralized managerial power.<sup>6</sup>

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2009, the Wall Street Journal announced newsroom layoffs. Kenneth Li & Andrew Edgecliffe-Johnson, *Murdoch Remains Bullish in the Face of News Corp Challenges*, FIN. TIMES (London), Feb. 7, 2009, at 9; Shira Ovide, *Corporate News: News Corp. Posts \$6.4 Billion Loss After Charges*, WALL ST. J., Feb. 6, 2009, at B3.

4. On February 5, 2009, News Corp. announced a \$6.4 billion loss in its second quarter and a 50 percent reduction in the value of Dow Jones. Mr. Murdoch forecast that earnings from the News Corp. empire would fall by around 30 percent in 2009, in what he described as the worst economic crisis in News Corp.'s fifty-year history. Arango, *supra* note 3, at B1; Li & Edgecliffe-Johnson, *supra* note 3, at 9. Indeed, the global financial crisis appears to have impelled something of a retreat by News Corp. from its prior image as one of the world's most acquisitive media companies. Gerald Magpily, *Murdoch and News Corp. Holding onto Wallet*, DEALSCAPE, July 9, 2009, [http://www.thedeal.com/dealscape/2009/07/murdoch\\_and\\_news\\_corp\\_holding.php](http://www.thedeal.com/dealscape/2009/07/murdoch_and_news_corp_holding.php).

5. The preference for managerial interests in the United States, compared to a preference for shareholder interests in other common law jurisdictions such as the United Kingdom, has been noted on a number of occasions. It has been said, for example, that "[w]hile the focus in the UK has been on attracting capital, the focus in the U.S. has been on attracting managers." Jonathan Rickford, *Do Good Governance Recommendations Change the Rules for the Board of Directors?*, in CAPITAL MARKETS AND COMPANY LAW 461, 474 (Klaus J. Hopt & Eddy Wymeersch eds., 2003); see also John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? — The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727 (2007) (identifying these competing preferences in the takeover context).

6. *UniSuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317, at \*1–2 (Del. Ch. Dec. 20, 2005).

As Chancellor Chandler recognized in *UniSuper Ltd. v. News Corp.*,<sup>7</sup> this conflict had ramifications for the appeal of Delaware as a potential reincorporation site for foreign companies. Chancellor Chandler was concerned that if Delaware law were found to trump the pro-shareholder concessions granted by News Corp., it might deter shareholders of foreign corporations from approving reincorporations in Delaware in the future.<sup>8</sup>

News Corp.'s reincorporation also has implications for U.S. corporate law reform generally. In recent times, there have been growing calls in the United States for reforms granting shareholders stronger rights.<sup>9</sup> The momentum in this regard appears to be intensifying, with a range of proposals to increase shareholder power now on the table.<sup>10</sup> Some critics of shareholder empowerment, however, have defended the regulatory status quo from an evolutionary/efficiency perspective, suggesting that, if shareholder empowerment were efficient, we would already see it in the marketplace.<sup>11</sup> The News Corp. reincorporation story challenges claims to the inevitability of the U.S. system of corporate governance by showing major differences between the U.S. approach and that of other common law jurisdictions. Indeed, the current proposals to enhance shareholder rights, despite being the subject of great controversy in the United States,<sup>12</sup> fall far short of rights already held by shareholders in other common law countries, such as the United Kingdom and Australia.

Historically, the United States has paid only sporadic attention to international corporate governance regimes.<sup>13</sup> There are, however,

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7. *Id.*

8. *UniSuper Ltd. v. News Corp.*, No. Civ.A. 1699-N, 2006 WL 207505, at \*1 (Del. Ch. Jan. 19, 2006).

9. *See, e.g.*, Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 847–50 (2005) (comparing U.S. and U.K. corporate law to argue that U.S. law should no longer “view the modern corporation as a ‘purely representative democracy’”).

10. *See infra* notes 38–43. For a summary of recent reform developments, see *The Battle for Shareholder Access: The Current State of Play*, Posting of Charles M. Nathan to The Harvard Law School Forum on Corporate Governance and Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2009/05/30/the-battle-for-shareholder-access-the-current-state-of-play/> (May 30, 2009, 7:09 EST).

11. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1736–37 (2006).

12. *See infra* notes 38–43.

13. There are a number of possible reasons for the relative lack of attention historically paid in the United States to international corporate regimes. These include the fact that the United States has traditionally been a regulatory leader, rather than follower, and that the richness of the U.S. federalist system obviated the need to look abroad for regulatory innovation.

several recent developments that suggest U.S. lawmakers are increasingly interested in and receptive to the regulatory experiences of other jurisdictions. First, heightened interest in international corporate governance has traditionally occurred during periods of weak U.S. economic performance, such as the current financial crisis.<sup>14</sup> This crisis has demonstrated “that there are . . . costs to under-regulation,”<sup>15</sup> and reform and intensified regulation appear politically inevitable.<sup>16</sup> Second, the regulatory field within the United States has opened up, with Delaware’s central position in corporate law now subject to challenge. The Sarbanes-Oxley Act of 2002 represented a federal encroachment into the traditional state-based corporate arena.<sup>17</sup> Indeed, some have suggested that the enduring legacy of this Act is to render federal law an equal partner with state law in the regulation of corporate governance.<sup>18</sup> The recent U.S.

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*See generally* Jennifer G. Hill, *Regulatory Show and Tell: Lessons from International Statutory Regimes*, 33 DEL. J. CORP. LAW 819, 819–21 (2008).

14. For discussion of the circuitous evolutionary path of comparative corporate governance debate, see Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT’L L.J. 477, 480–85 (2005). In the early 1990s, for example, when the United States was in recession, there was much U.S. interest in the governance models of Germany and Japan, which had more successful economies at that time. *Cf.* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2036 (1993).

15. John C. Coffee Jr., *Financial Crises 101: What Can We Learn from Scandals and Meltdowns - from Enron to Subprime?*, in THE CREDIT CRUNCH AND THE LAW 37 (RP Austin ed., 2008). *But see* *The Proper Limits of Shareholder Proxy Access*, Posting of Troy A. Paredes to The Harvard Law School Forum on Corporate Governance and Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2009/06/30/the-proper-limits-of-shareholder-proxy-access/> (June 30, 2009, 10:53 EST) (stating, in criticizing proposed Rule 14a-11, “we cannot overlook the risk of overregulating”).

16. Early in his term of office, President Obama has, for example, criticized the Bush Administration’s adherence to a deregulatory agenda, and condemned U.S. regulators for having been “asleep at the switch.” He indicated that major financial regulatory reform would be a priority for his government, and this has indeed proven to be the case. *See* Joanna Chung & Andrew Ward, *Obama Signals Change with Choice of Schapiro*, FIN. TIMES (London), Dec. 19, 2008, at 3. Regulatory roll-back is also constrained in the current political environment. *See generally* Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?* 108 (Nat’l Bureau of Econ. Research, Working Paper No. 385, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1404967](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404967) (explaining how, from a political standpoint, reducing regulation of small firms is much more feasible than “broad-based reform benefiting large firms and stock exchanges”).

17. Professor Bainbridge, for example, has described the reforms in the *Sarbanes-Oxley Act* of 2002 as “the most dramatic expansion of federal regulatory power over corporate governance since the New Deal,” arguing that the reforms were “deeply flawed” and would undermine traditional board autonomy. Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REG. 26 (2003).

18. Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 100 (2003).

reform proposals concerning shareholder rights would, if implemented, augment this power shift.<sup>19</sup> Finally, the assumption that Delaware's traditional dominance is attributable to the superiority of its legal rules is also under pressure.<sup>20</sup>

Within this fluid and evolving regulatory picture, the corporate governance lessons from other regimes, such as those exemplified by the News Corp. story, may become important. In the wake of the global financial crisis, the SEC has sent mixed messages about its willingness to engage with other common law regulators. Although in 2008 the SEC announced its entry into a pilot mutual recognition program with Australia in relation to securities market regulation and investor protection,<sup>21</sup> enthusiasm for the program now appears to have waned.<sup>22</sup> However, several recent U.S. reforms and reform proposals replicate particular legal provisions of other common law jurisdictions.

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19. See generally Paredes, *supra* note 15 (arguing that an SEC proposal "dictating a direct right of access to the company's proxy materials" intrudes "far too much on . . . the traditional domain of state corporate law"). For a general discussion of federalism tensions in contemporary corporate governance, see E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 42–51 (2009).

20. See, e.g., William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 1 (arguing that the increasing complexity and uncertainty in Delaware corporate law has "led to a litigation explosion" and high litigation costs for firms).

21. Press Release, U.S. Sec. & Exch. Comm'n, SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Australia Mutual Recognition Talks (Mar. 29, 2008), available at [www.sec.gov/news/press/2008/2008-52.htm](http://www.sec.gov/news/press/2008/2008-52.htm). As part of this program, the SEC and the Australian corporate regulator, ASIC, "agreed to undertake a formal assessment of each other's regulatory systems to determine the extent to which each jurisdiction produces a comparable level of investor protection." *Id.*

22. Although no formal announcements have been made by the SEC on the matter, the progress of the mutual recognition program appears to have stalled in light of the financial crisis and following the appointment of Mary Schapiro as Chairman of the SEC in January 2009 (replacing former Chairman Christopher Cox, who was a key supporter of mutual recognition). See Romano, *supra* note 16, at 110–11. When asked about the pace of the mutual recognition process with Australia at her nomination hearing, Chairman Schapiro stated that she held "some concerns with the speed with which mutual recognition . . . [has] proceeded" and warned of the need to "take a big step back and look at whether we are headed in the right direction." *Nominations of: Mary Schapiro, Christina D. Romer, Austan D. Goolsbee, Cecilia E. Rouse, and Daniel K. Tarullo: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 22 (2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_senate\\_hearings&docid=f:50221.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:50221.pdf). Despite this apparent cooling of SEC enthusiasm, other countries have continued to show interest in the schemes. In June 2009, the Committee of European Securities Regulators called for submissions into establishing a mutual recognition process between the United States and European Union. Brooke Masters, *Europe Seeks 'Mutual Recognition' Pact Allowing Direct Sales to US*, FIN. TIMES (London), June 12, 2009, at 4. *But cf.* James Doran, *US Rejects Global Finance Controls*, OBSERVER (England), Mar. 8, 2009, at 1 (suggesting that plans for E.U.-U.S. mutual recognition are likely to be hampered by the SEC's recent change of heart). Industry groups in the United States are said to be generally supportive of the idea. Masters, *supra*, at 4.

For example, the American Recovery and Reinvestment Act of 2009 includes a provision requiring a nonbinding shareholder vote on executive pay, a provision based on U.K. and Australian law,<sup>23</sup> and the recently proposed legislation for a Shareholder Bill of Rights contains an analogous provision.<sup>24</sup>

The structure of this Article is as follows. Part II discusses News Corp.'s reincorporation decision and the corresponding reaction of institutional investors against the background of the contemporary corporate governance debate over the balance of power between shareholders and the board. Part III examines various concessions granted by News Corp. to appease its institutional investors. Parts IV and V consider, from a comparative law perspective, News Corp.'s adoption (and subsequent extension) of a poison pill. Finally, Part VI concludes by analyzing some of the implications of the News Corp. reincorporation saga for corporate law.

## II. BACKGROUND ISSUES IN CONTEMPORARY CORPORATE GOVERNANCE AND THE EXODUS OF NEWS CORP.

[W]e are tending toward a managerial, rather than a capitalist society . . . .

- William L. Cary<sup>25</sup>

Rupert Murdoch is a great Australian, in the sense that Attila was a great Hun.

- Geoffrey Robertson QC<sup>26</sup>

Two contemporary corporate governance debates, relating to convergence theory and shareholder empowerment, form the theoretical backdrop to this Article's analysis of the News Corp.

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23. Pub. L. No. 111-5, 123 Stat. 115. This provision required that executive compensation paid by institutions receiving Troubled Asset Relief Program ("TARP") government funding would be subject to a nonbinding "say on pay" shareholder vote. See U.S. Sec. & Exch. Comm'n, Compliance and Disclosure Interpretations: American Recovery and Reinvestment Act of 2009 (Feb. 26, 2009), available at <http://sec.gov/divisions/corpfin/guidance/arrainterp.htm>; Letter from Christopher J. Dodd, Chairman, S. Comm. On Banking, Hous., and Urban Affairs, to Mary Schapiro, Chairman, U.S. Sec. and Exch. Comm'n (Feb. 20, 2009), available at <http://www.complianceweek.com/s/documents/DoddSchapiro.pdf>. The United Kingdom and Australia introduced a nonbinding shareholder resolution on remuneration in 2002 and 2004 respectively. For a discussion of the operation of the nonbinding vote, see Hill, *supra* note 13, at 829-36.

24. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. (2009), available at <http://law.du.edu/documents/corporate-governance/legislation/bill-text-shareholders-bill-of-rights-act-of-2009.pdf>; see *Shareholder Bill of Rights Would Provide Say on Pay*, NAT'L J.'S CONGRESS DAILY, May 19, 2009.

25. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 670 (1974).

26. Richard Ackland, *We Must Not Over-egg Free Speech Argument*, SYDNEY MORNING HERALD, Aug. 31, 2007, at 17.

reincorporation. The convergence debate reached its zenith at the turn of the last decade.<sup>27</sup> Its central issue was whether international corporate laws would converge,<sup>28</sup> or whether differences between common law and civil law jurisdictions would persist.<sup>29</sup> While convergence theory and the closely allied “law matters” hypothesis<sup>30</sup> highlighted stark legal differences between common law and civil law jurisdictions,<sup>31</sup> they obscured or ignored important differences within the common law world itself.<sup>32</sup> Indeed, both sides of the convergence-divergence debate often seem to assume that a unified and stable

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27. For an overview of the convergence-divergence debate, see CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 SYDNEY L. REV. 743 (2005).

28. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) (concluding at the time that “[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured”).

29. “Path dependence” theory represented the opposite side of the theoretical divide to convergence theory and the “law matters” hypothesis. Path dependence scholars traced differences in corporate governance structures throughout the world to divergent historical, political, and social factors, which operate in conjunction with law. Given the complexity of the factors at play, they predicted that convergence, or successful transplantation of elements of one legal system to another, was highly unlikely. See, e.g., Mark J. Roe, *Path Dependence, Political Options, and Governance Systems*, in COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS 165 (Klaus J. Hopt & Eddy Wymeersch eds., 1997); Helmut Kohl, *Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sideline*, 5 COLUM. J. EUR. L. 189 (1999).

30. The “law matters” hypothesis emanated from the research of corporate finance scholars, La Porta, Lopez-de-Silanes, Shleifer and Vishny and was highly influential in defining the contours of the convergence-divergence debate. These scholars postulated that “law matters”, in the sense that the structure of capital markets is directly linked to a country’s corporate governance regime. Specifically, they predicted that jurisdictions with a high level of minority shareholder protection would develop dispersed ownership structures, such as those existing in the United States and United Kingdom. See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

31. A number of commentators have criticized this aspect of convergence theory and the “law matters” hypothesis, arguing that perceived differences between the common law and civil law are often overly generalized and inaccurate. See, e.g., Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT’L ECON. L. 791, 799 n.27 (2002) (explaining that the distinction between codified law and case law is “less obvious” for corporate law than in the general case); David A. Skeel Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1546 (2004).

32. See, e.g., Ruth V. Aguilera, Cynthia A. Williams, John M. Conley & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and US*, 14 CORP. GOV.: INT’L REV. 147, 147–48 (2006); Paul Davies & Klaus Hopt, *Control Transactions*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 157, 172–73 (Reinier R. Kraakman et al. eds., 2004); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK 1950–2000*, 47 BUS. HIS. 267, 267–68 (2005).

Anglo-American, or common law, model of corporate governance exists.<sup>33</sup>

The controversial shareholder empowerment debate is of more recent origin.<sup>34</sup> In contrast to the broad comparative law sweep of convergence theory, the shareholder empowerment debate has been primarily U.S.-focused, with limited acknowledgement of international corporate law differences.<sup>35</sup> Instigating the debate, Professor Bebchuk advocated stronger participatory rights for U.S. shareholders in a range of governance scenarios.<sup>36</sup> The Committee on Capital Markets Regulation (“Paulson Committee”) also recommended increasing U.S. shareholder rights.<sup>37</sup>

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33. Toms & Wright, *supra* note 32, at 267; *see, e.g.*, CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE, *supra* note 27, at 27–29 (Jeffrey Gordon & Mark Roe eds., 2004) (posing the question, “Is the Anglo-American model of shareholder capitalism destined to become standard or will sharp differences persist?”).

34. The debate is played out in a 2006 and 2007 Special Issue of the *Harvard Law Review* and *Virginia Law Review*, respectively. *See* 119 HARV. L. REV. 1641, 1641–81, 1735–84 (2006) (debating the benefits of shareholder control); 93 VA. L. REV. 515, 653–811 (2007) (same). The debate can arguably be traced to the refusal of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.), to grant shareholders stronger participatory rights in, for example, the director election process, which was described at the time as potentially “the forgotten element” of the U.S. post-scandal reforms. William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 999 (2003).

35. Although proponents of stronger shareholder rights have made the point that U.S. shareholders have more limited rights than shareholders in other jurisdictions, there is little discussion of this fact in critiques opposing shareholder empowerment, which are predominantly U.S.-focused. For pro-shareholder rights commentary recognizing regulatory diversity in this regard, see the comments of the Paulson Committee, *infra* note 37; Bebchuk, *supra* note 9, at 847–50.

36. Bebchuk called for increased shareholder participation in relation to both the corporate election process, *see* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 696–97 (2007); Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 44 (2003) and amendment of the corporate constitution, *see* Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784–85 (2006); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 835 (2005).

37. The Paulson Committee viewed increased shareholder rights as a desirable alternative to more stringent rule-based regulation, such as under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.). *See* COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION xi, xiii, 93–114 (revised ed. 2006), *available at* [http://www.capmktreg.org/pdfs/11.30Committee\\_Interim\\_ReportREV2.pdf](http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf) (explaining that shareholders’ rights “are particularly important” for protecting investors). Whereas convergence theory and the “law matters” hypothesis assumed that common law jurisdictions provide superior protection for shareholders, the Paulson Committee challenged this proposition in the U.S. context. The Committee stated that “[o]verall, shareholders of U.S. companies have fewer rights . . . than do their foreign competitors,” and expressed concern that inadequate shareholder protection might deter corporations from entering U.S. public markets. *Id.* at 16.

These initial proponents of shareholder empowerment may see some of their hopes realized through regulatory responses to the global financial crisis. Prospective reforms under consideration include legislation for a Shareholder Bill of Rights<sup>38</sup> and a proposed SEC Rule 14a-11,<sup>39</sup> which would grant shareholders access to the company's proxy materials to nominate directors.<sup>40</sup> The reaction to these proposals has been both polarized and intense: some have strongly supported the Shareholder Bill of Rights,<sup>41</sup> while others have condemned the proposal on the basis that it will exacerbate short-termism and the problem of predatory investors.<sup>42</sup> Both the Shareholder Bill of Rights and proposed SEC Rule 14a-11 have also

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38. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. (2009) *available at* <http://law.du.edu/documents/corporate-governance/legislation/bill-text-shareholders-bill-of-rights-act-of-2009.pdf> (“[P]rovid[ing] shareholders with enhanced authority over the nomination, election and compensation of public company executives”). The proposed legislation was introduced by U.S. Democrat Senators, Charles Schumer and Maria Cantwell on May 19, 2009. Press Release, Sen. Charles E. Schumer, Schumer, Cantwell Announce ‘S’holder Bill of Rights’ to Impose Greater Accountability on Corp. Am. (May 19, 2009). The legislation is aimed at increasing shareholder powers as an antidote to excessive risk-taking and executive compensation. *Id.* Key provisions include the following: (i) a mandatory annual nonbinding shareholder vote on executive compensation in public companies; (ii) instruction to the SEC to issue rules permitting shareholders wishing to nominate a director to have access to the company's proxy in certain circumstances; (iii) the introduction of a majority, rather than plurality, voting rule for uncontested director elections; (iv) the elimination of staggered boards; (v) a requirement for separation of the position of CEO and Chairman of the Board in public companies; and (vi) a requirement that public company boards have a risk committee. *Id.*

39. SEC commissioners voted, in a 3–2 split along party lines, to propose SEC Rule 14a-11 on May 20, 2009. *See* Elizabeth Bennett, *SEC Votes to Propose Shareholder Proxy Access Rule*, 12 DEL. L. WKLY., June 3, 2009, at 1; Press Release, U.S. Sec. & Exch. Comm’n, SEC Votes to Propose Rule Amendments to Facilitate Rights of S’holders to Nominate Directors (May 20, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-116.htm>.

40. *See* Sarah N. Lynch, *Watchdog Backs Greater Power for Shareholders*, WALL ST. J. ASIA (Hong Kong), May 22, 2009, at M4 (specifying the conditions under which shareholders would be eligible for access to proxy materials under the proposed reform); Nathan, *supra* note 10 (explaining the effect of the proposed reforms on shareholder proxy access).

41. *See* Anne Simpson, *America’s Governance Revolution Must Not Be Ducked*, FIN. TIMES (London), May 26, 2009, at 9 (observing “political momentum behind the proposals”); Press Release, Schumer, *supra* note 38 (explaining that the proposed Shareholder Bill of Rights is “supported by nearly 20 major pension funds, labor unions, and consumer groups,” including AFL-CIO, AFSCME, and CalPERS).

42. *See, e.g.*, Martin Lipton, Jay W. Lorsch & Theodore N. Mirvis, *Schumer’s Shareholder Bill Misses the Mark*, WALL ST. J., May 12, 2009, at A15; Lawrence Mitchell, *Protect Industry from Predatory Speculators*, FIN. TIMES (London), July 9, 2009, at 9 (stating that “[s]hareholder rights are simply wrong”); *see also* Press Release, U.S. Chamber of Commerce, U.S. Chamber Issues Study Showing Politically Driven Union Activism Hurts S’holders: Raises Questions about Schumer S’holder Activism Legislation (May 19, 2009), *available at* [http://www.uschamber.com/press/releases/2009/may/090519\\_activism.htm](http://www.uschamber.com/press/releases/2009/may/090519_activism.htm).

been criticized for contributing to the further federalization of corporate law.<sup>43</sup>

Few academic commentators in the United States seem to doubt that there is “ample room for increasing shareholder power” under U.S. corporate law.<sup>44</sup> Nonetheless, they have presented a range of arguments as to why shareholder empowerment would constitute a dangerous deviation from established, and near-sacrosanct, corporate law principles.<sup>45</sup> These include arguments that shareholder disempowerment is not a cause for concern, but rather a positive attribute of U.S. corporate law, and that granting stronger powers to shareholders would encourage them to engage in predatory and self-interested behavior.<sup>46</sup> Under this critique, traditional discourse about protection *of* investors has given way to discourse about protection of the corporation *from* investors.<sup>47</sup>

Some commentators have criticized shareholder empowerment from an evolutionary/efficiency perspective, asking why, if shareholder empowerment is a valuable corporate governance attribute, we do not already see it in the marketplace.<sup>48</sup> While this is an intriguing

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43. See Press Release, Business Roundtable, Business Roundtable Statement on Senator Schumer’s Proposed S’holder Bill of Rights Act (May 20, 2009), *available at* <http://www.businessroundtable.org/sites/default/files/2009.05.19.Schumer%20Statement.pdf>; Paredes, *supra* note 15; see also Press Release, U.S. Chamber of Commerce, U.S. Chamber Comments on SEC S’holder Access Proposal: Cites Growing Evidence that Union Activism Schemes Would Harm Investors (May 20, 2009), *available at* [http://www.uschamber.com/press/releases/2009/may/090520\\_sec.htm](http://www.uschamber.com/press/releases/2009/may/090520_sec.htm). It now appears that the SEC has deferred its decision on proposed SEC Rule 14a-11 until early 2010. See Sarah N. Lynch, *Activists, Take Note: SEC Delays a Proxy Vote*, WALL ST. J., Oct. 3, 2009, at B3.

44. Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 569 (2006); see also Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 789–90 (2007) (agreeing with Bebchuk that “shareholder control is largely a myth in public companies today”); cf. Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 734 (2007) (proposing that “the myth of the shareholder franchise’ is no myth at all”).

45. For criticism of the shareholder empowerment proposals, see Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735–36 (2006); Lipton & Savitt, *supra* note 44, at 734; Stout, *supra* note 44, at 789–92; Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1759–60 (2006).

46. For a detailed analysis of the central arguments against shareholder empowerment found in the academic literature, see Jennifer G. Hill, *The Rising Tension Between Shareholder and Director Power in the Common Law World*, CORP. GOVERNANCE: INT’L REV. (forthcoming 2010) (analyzing a variety of types of criticism against shareholder empowerment proposals).

47. Robert C. Clark, Opening Comments, Corporate Separateness, Sixth Annual Law and Business Conference at Vanderbilt University (Mar. 31, 2006).

48. See Bainbridge, *supra* note 45, at 1736–37 (“[W]hen firms do not offer specific governance terms, we may infer that such items are not attractive to investors.”); Lipton & Savitt, *supra* note 44, at 743–44 (criticizing Bebchuk’s argument that the costs of shareholder empowerment would be “worth paying”); Strine, *supra* note 45, at 1774 (“If such measures really

question with respect to U.S. corporate law, it is a less persuasive argument from a comparative corporate governance perspective, as the facts of News Corp.'s reincorporation show.

The events surrounding the reincorporation of News Corp.<sup>49</sup> have significant implications for both convergence theory and the shareholder empowerment debate. Contrary to the argument of several critics of shareholder empowerment that the dearth of shareholder participatory rights under U.S. corporate law provides evidence that they are neither desired nor valued by investors,<sup>50</sup> background events to News Corp.'s exodus from Australia to Delaware present another picture. They demonstrate that shareholder rights, and the extent to which they are valued, differ considerably within the common law world. The News Corp. story also challenges claims to the inevitability of the U.S. system of corporate governance,<sup>51</sup> which are implicit in evolutionary/efficiency arguments favoring the regulatory status quo. The circumstances surrounding the reincorporation show that other common law countries have in fact chosen to allocate power between shareholders and management in quite a different way than Delaware law. The News Corp. reincorporation story brings into sharp focus the attitudinal conflict over the rights of shareholders, which has so far tended to play out in a more abstract sense in the media and academic circles.<sup>52</sup>

The issue of the balance of power between shareholders and the board of directors came to the fore in Australia following News Corp.'s 2004 announcement signaling its intention to shift domicile from Australia to Delaware, to obtain primary listing on the New York Stock Exchange, and to seek inclusion in the Standard & Poor's 500 Index ("S&P 500").<sup>53</sup> The reincorporation proposal, which involved

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destroy value over the long term, then one would expect investors to demand different charters." A more recent variant of this argument is that since we are starting to see provisions empowering shareholders in the U.S. marketplace, there is no need for mandatory rules in this regard. See, e.g., Paredes, *supra* note 15. Paredes notes that in April 2009, the Delaware legislature introduced a new section 112, which authorizes bylaws to grant shareholders access to the corporation's proxy materials for nomination of directors. *Id.*

49. Prior to the reincorporation, the Australian entity was known as The News Corporation Limited. See Press Release, News Corp., News Corp. Plans to Reincorporate in the U.S. (Apr. 6, 2004), available at [http://www.newscorp.com/news/news\\_207.html](http://www.newscorp.com/news/news_207.html).

50. See, e.g., Bainbridge, *supra* note 45, at 1737; Stout, *supra* note 44, at 801-03.

51. See also Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 378 (1996) (discussing comparative corporate governance developments in the early 1990s, which had a similar effect).

52. See, e.g., *Battling for Corporate America - Shareholder Democracy*, ECONOMIST, Mar. 11, 2006, at 75. See generally Hill, *supra* note 46.

53. See NEWS CORP., ANNUAL REPORT 4-5 (2004), available at [http://www.newscorp.com/Report2004/2004\\_annual\\_report.pdf](http://www.newscorp.com/Report2004/2004_annual_report.pdf); Grant Samuel & Assocs., *Re-incorporation of The News*

incorporating a new parent company in the United States, was to be implemented by schemes of arrangement,<sup>54</sup> which rely on both shareholder consent and court approval under Australian law.<sup>55</sup>

According to News Corp., the move to the United States, where most of its operations were based,<sup>56</sup> was prompted by legitimate commercial goals, including the desire to gain greater access to U.S. capital markets and to enhance shareholder value.<sup>57</sup> Critics of the proposal argued, however, that the purpose of the reincorporation was to strengthen managerial power vis-à-vis shareholder power within News Corp. They claimed that Delaware law provided less protection for minority shareholders than Australian corporate law, enabling the Murdoch family to entrench its interests more easily in the United States.<sup>58</sup> In contrast to the Paulson Committee's concern that minimal shareholder rights might deter corporations from entering U.S. public markets,<sup>59</sup> these critics claimed that this feature of Delaware law constituted its main allure for News Corp.

An independent expert's report,<sup>60</sup> prepared by Grant Samuel & Associates on behalf of News Corp., found that the reincorporation

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*Corporation Ltd in the United States and Acquisition of Queensland Press Pty Ltd*, in INFORMATION MEMORANDUM IN RELATION TO A PROPOSAL TO "RE-INCORPORATE" IN THE UNITED STATES AND TO ACQUIRE FROM MURDOCH FAMILY INTERESTS THEIR SHAREHOLDING IN QUEENSLAND PRESS PTY. LIMITED E1, E1-E4 (Sept. 14, 2004) (outlining the details of the reincorporation and explaining that it "is in the best interests of News Corporation shareholders as a whole"); *News Corp. Prepares for U.S. Transfer, Listing on S&P 500*, WALL ST. J., Oct. 27, 2004, at 1.

54. See News Corp., Current Report (Form 8-K), at Item 2.01 (Nov. 12, 2004) (setting out the structure of the reorganization of the Australian corporation, The News Corporation Limited).

55. Schemes of arrangement are regulated under Chapter 5 of the Corporations Act, 2001 (Austl.). For an overview of the scheme of arrangement procedure in Australia, see TONY DAMIAN & ANDREW RICH, SCHEMES, TAKEOVERS AND HIMALAYAN PEAKS: THE USE OF SCHEMES OF ARRANGEMENT TO EFFECT CHANGE OF CONTROL TRANSACTIONS 8-19 (2004).

56. Approximately 70 percent of the group's revenues and 80 percent of profits were derived from the United States at the time of the reincorporation proposal. Grant Samuel & Assocs., *supra* note 53, at E-3.

57. NEWS CORP., ANNUAL REPORT, *supra* note 53, at 4. For other perceived benefits, see Press Release, News Corp., Australian Federal Court Approves S'holder Meetings to Vote on Proposed Reincorporation 2 (Sept. 15, 2004), available at [http://www.newscorp.com/news/news\\_216.html](http://www.newscorp.com/news/news_216.html).

58. See, e.g., Elizabeth Knight, *Murdoch Gymnastics Good for Investors*, SYDNEY MORNING HERALD, Oct. 8, 2004, at 25 (stating "[w]hat we will never know is the extent to which this move offshore was motivated by the potential re-rating or the deterioration of minorities' rights and the enhancement of Murdoch family control. Was the latter the prime aim or just a collateral gain?"); see also Ben Power & Neil Chenoweth, *Funds Lash News Corp's US Move*, AUSTRALIAN FIN. REV., Sept. 28, 2004, at 1.

59. COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT, *supra* note 37, at 16.

60. Although an independent expert's report is only required where a party to a corporate reconstruction is entitled to at least 30 percent of the voting shares, see Corporations

proposal was in the best interests of the company's shareholders as a whole,<sup>61</sup> but it nonetheless acknowledged the possibility of a reduction of minority shareholder rights. The report stated that "the costs, disadvantages and risks are not inconsequential but do not outweigh the advantages."<sup>62</sup> The Federal Court of Australia, in its subsequent approval of the schemes of arrangement implementing the proposal, noted that these advantages related mainly to the market for News Corp. shares and involved "judgments rather than propositions that can be empirically verified."<sup>63</sup>

In late July 2004, two institutional investor organizations, the Australian Council of Super Investors, Inc. ("ACSI")<sup>64</sup> and Corporate Governance International Pty. Ltd. ("CGI")<sup>65</sup> met with News Corp. to discuss a range of corporate governance concerns relating to the effect of the reincorporation proposal on shareholder rights.<sup>66</sup> ACSI and CGI, which had the support of several major international institutional investors,<sup>67</sup> subsequently launched a corporate governance campaign urging News Corp. to transplant certain Australian shareholder protection provisions into its prospective Delaware charter.

As part of this campaign, ACSI and CGI drafted a document dealing with corporate governance—the so-called "Governance Article"<sup>68</sup>—which they provided to News Corp. with a request that its

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Regulations, 2001, R. 8303 & 8306, pt. 3, sched. 8 (Austl.), the provision of such a report to members in a scheme of arrangement is standard commercial practice in Australia. *See generally* DAMIAN & RICH, *supra* note 55, at 11.

61. Where required, an independent expert's report must state whether, in the expert's opinion, the proposed scheme is in the best interests of the members and must set out reasons for that opinion. Corporations Regulations, 2001, R. 8303, pt. 3, sched. 8 (Austl.).

62. *See* Grant Samuel & Assocs., *supra* note 53, at E-126; *see also id.* at E-10 to E-13 (outlining further possible disadvantages for shareholders, particularly minority shareholders).

63. *Re* News Corp. (2004) 51 A.C.S.R. 394, ¶ 3 (Austl.) (per Hely, J.).

64. ACSI is a not-for-profit organization formed in 2001 to provide independent research and education services to superannuation funds. *See* Welcome – ACSI, [http://www.acsi.org.au/dsp\\_about.cfm](http://www.acsi.org.au/dsp_about.cfm) (last visited Nov. 13, 2009).

65. CGI was formed in 1993, and provided proxy analysis and voting recommendations to institutional investors. CGI combined with Glass, Lewis & Co., LLC, in 2006 and is now known as CGI Glass Lewis. *See* Press Release, CGI Glass Lewis (Sept. 14, 2006), *available at* <http://www.glasslewis.com/downloads/535-52.pdf>.

66. *See* UniSuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317 (Del. Ch. Dec. 20, 2005).

67. For example, the Global Institutional Governance Network, comprising institutional investors such as British Hermes in the United Kingdom and CalPERS in the United States, supported ACSI and CGI. *See* Stephen Bartholomeusz, *Activists Confront News on World Stage*, SYDNEY MORNING HERALD, Sept. 28, 2004, at 22; Power & Chenoweth, *supra* note 58, at 1.

68. News Corp. Group, Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions (2004) (on file with author).

contents be included in News Corp.'s Delaware charter.<sup>69</sup> The Governance Article included a large number of Australian statutory provisions and "best practice" procedures. Its purpose was expressed to be:

(i) To preserve, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, key Australian investor protection and empowerment provisions. . . .

(ii) To render inapplicable, for the benefit of those public investors, certain presumptions of Delaware/US law and practice which are contrary to key Australian investor protection and empowerment provisions, and

(iii) To include, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, other key elements of Australian and international best practice in corporate governance.<sup>70</sup>

Initially, News Corp. made no concessions to the institutional investors' demands.<sup>71</sup> Echoing the arguments of Montesquieu,<sup>72</sup> the acknowledged father of comparative law, News Corp. claimed that the selective transplantation of Australian governance principles into the constitution of a Delaware-incorporated company would limit access to U.S. institutional investor capital, confuse investors, and put the corporation at a competitive disadvantage with regard to its U.S. competitors, such as Viacom and Disney.<sup>73</sup>

Following News Corp.'s refusal to adopt the Governance Article, ACSI issued a critical press release entitled "News Corporation settles for second best on governance."<sup>74</sup> By late September 2004, Institutional Shareholder Services, Inc. ("ISS"),<sup>75</sup> the largest U.S. proxy adviser, entered the fray, adding its voice to calls for News Corp. to adopt certain Australian corporate governance standards.<sup>76</sup> It appears that U.S. institutions held around 21 percent of ordinary shares and 35 percent of preference shares in News Corp.,

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69. The Governance Article was sent to News Corp. on August 20, 2004. *See UniSuper Ltd.*, 2005 WL 3529317, at \*1 n.8.

70. Governance Article, *supra* note 68, at cl. 2.

71. *See* Press Release, ACSI, News Corporation Settles for Second Best on Governance 1 (Sept. 27, 2004).

72. BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 7 (J.V. Prichard ed., Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1748). Montesquieu warned against the unpredictability and dangers inherent in transplanting elements of one legal system to another.

73. *See* Ben Power, *News Won't Compromise, Says Murdoch*, AUSTL. FIN. REV., Sept. 29, 2004, at 16.

74. *See* Press Release, ACSI, *supra* note 71.

75. ISS was acquired by RiskMetrics Group in 2007. *See RiskMetrics Group Completes Acquisition of Institutional Shareholder Services*, BUS. WIRE, Jan. 11, 2007.

76. *See* Tim Burt, *News Corp in Talks to Avert Revolt*, FIN. TIMES (London), Sept. 24, 2004, at 29; Ben Power, *News Faces Crucial Test on US Move*, AUSTL. FIN. REV., Sept. 27, 2004, at 17.

and that approximately 20 to 30 percent of U.S. institutional investors received advice from ISS.<sup>77</sup> Rupert Murdoch's family interests controlled approximately 30 percent of News Corp.'s voting stock.<sup>78</sup> News Corp.'s public shareholders were in a position to prevent the reorganization by virtue of the fact that Australian law required the schemes of arrangement to be approved by separate class resolutions, with the Murdoch family voting as a separate class.<sup>79</sup>

### III. THE NEWS CORP. CONCESSIONS

No victory is final and no coalition of support ever solid.

- George E. Reedy<sup>80</sup>

In October 2004, News Corp. resiled from its earlier rejection of the institutional investors' demands<sup>81</sup> and agreed to incorporate some shareholder protection provisions into its Delaware charter.<sup>82</sup> The agreed charter amendments related to five main areas of corporate governance over which the institutional investors had expressed concern: the securities exchange listing rules, super-voting shares, shareholder meetings and voting, takeovers, and best practice principles.<sup>83</sup>

77. See Malcolm Maiden, *Dominant US Interests the Key to Rupert's Backflip*, AGE (Melbourne), Oct. 7, 2004, at 1.

78. Martin Peers, *News Corp. Strengthens its Takeover Defenses*, WALL. ST. J., Nov. 8, 2004, at A2. For a discussion of some of the distinctive corporate governance problems and challenges associated with family controlled public companies, including News Corp., see Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819 (2008).

79. See *UniSuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317, at \*1 (Del. Ch. Dec. 20, 2005). The reincorporation proposal required approval of schemes of arrangement by News Corp.'s ordinary and preference shareholders and option holders, and approval by shareholders of a capital reduction under Australian law. See generally Corporations Act, 2001, § 411(4) (Austl.). Federal Court approval of the transactions, which was also required under Australian law, was given on November 3, 2004 in *Re News Corp.* (2004) 51 A.C.S.R. 394, when Justice Hely made orders approving the schemes under § 411(4)(b). Under this procedure, shareholders and option holders effectively exchanged their shares and options in News Corp. for shares and options in News Corp. US. See generally Press Release, News Corp., Australian Federal Court Approves News Corp. Reincorporation to U.S. (Nov. 3, 2004); Trevor Sykes, *Murdoch Bows out . . . But He'll Still Visit*, AUSTL. FIN. REV., Oct. 27, 2004, at 1.

80. George E. Reedy, *The Vocabulary of Presidents*, N.Y. TIMES, Jan. 19, 1973, at 33.

81. On October 1, 2004, News Corp. commenced further negotiations with ACSI. See *UniSuper Ltd.*, 2005 WL 3529317, at \*2.

82. See Letter from News Corp. to Shareholders and Optionholders (Oct. 7, 2004), available at <http://www.newscorp.com/investor/download/SupplementIMCorpGov.pdf>; Press Release, ACSI, News Corporation Yields to Investor Concerns (Oct. 7, 2004).

83. See generally *UniSuper Ltd.*, 2005 WL 3529317, at \*2.

*A. Securities Exchange Listing Rules*

First, the Governance Article had included a number of specific investor protection provisions of the Australian Securities Exchange (“ASX”) Listing Rules,<sup>84</sup> which institutional investors sought to incorporate into News Corp.’s Delaware charter.<sup>85</sup> News Corp. did not accede to this specific demand.<sup>86</sup> Rather, it agreed to include a provision in the charter stating that News Corp. would not request removal of full foreign listing from the ASX without majority shareholder approval.<sup>87</sup> Although its primary listing was on the New York Stock Exchange after the reincorporation,<sup>88</sup> News Corp.’s concession that it would retain full foreign listing on the ASX<sup>89</sup> ensured that all the ASX Listing Rules and corporate governance guidelines would continue to apply to the company.<sup>90</sup>

At first blush, this appeared to be a major concession. The ASX Listing Rules are relatively stringent by international standards and employ shareholder consent as a legitimating device in a wide range of

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84. At the time of the reincorporation, these rules were called the Australian Stock Exchange Listing Rules.

85. The institutional investors’ Governance Article deemed certain specified “public investor protection and empowerment provisions” under the ASX Listing Rules to be included within it. The ASX Listing Rules specified were Rules 7.1–7.9 (requiring shareholder approval for new share issues exceeding 15 percent of capital); Rules 10.1–10.18 (requiring shareholder consent for transactions between the corporation and persons in a position of influence); Rules 14.2 (requirements for proxy form); 14.2A (rights of CHESS Depositary Interest holders); 14.3 (requirements regarding nomination of directors); 14.4–14.5 (requirements regarding election and rotation of directors); and 14.11 (voting exclusion statements). *See* Governance Article, *supra* note 68, at cl. 7.

86. *UniSuper Ltd.*, 2005 WL 3529317, at \*1–2.

87. Under the charter provision, News Corp. cannot request removal of full foreign listing from the ASX without the affirmative vote of a majority of all listed shares in the corporation, rather than simply a majority of shares voted on the resolution. *See* News Corp., Current Report (Form 8-K), Amended and Restated Certificate of Incorporation of News Corporation, Inc., at art. IV, § 4(a)(iv)(1) (Nov. 12, 2004).

88. News Corp. obtained secondary listing on both the ASX and the London Stock Exchange. News Corp., Current Report (Form 8-K), at Item 2.01 (Nov. 12, 2004).

89. The full foreign listing adopted by News Corp. is distinguishable from “foreign exempt listing” under the ASX Listing Rules. Foreign exempt listing requirements are far less onerous than full ASX listing. Companies admitted to ASX foreign exempt listing are required merely to satisfy the ASX that they comply with the listing rules of their home overseas exchange, not with ASX Listing Rules themselves. *See* ASX Listing Rules, at R. 1.11, Condition 3, and R. 1.11–1.15, *available at* [http://www.asx.com.au/supervision/rules\\_guidance/listing\\_rules1.htm](http://www.asx.com.au/supervision/rules_guidance/listing_rules1.htm). By way of contrast, the full foreign listing adopted by News Corp. *prima facie* carried an obligation to comply with all ASX Listing Rules.

90. *See* Press Release, ACSI, News Corp Yields to Investor Concerns (Oct. 7, 2004) (on file with author); Letter from News Corp. to Shareholders and Optionholders, *supra* note 82 (stating “No removal of full foreign listing on the ASX without shareholder approval”).

circumstances.<sup>91</sup> In particular, the rules impede the use of entrenchment mechanisms that are permitted in many other jurisdictions, such as dual class stock<sup>92</sup> and poison pills.<sup>93</sup> The ASX Listing Rules are given statutory backing under the Australian Corporations Act of 2001 (“Corporations Act”). Following a failure to comply, these rules are enforceable in court on the application of the Australian Securities and Investments Commission (“ASIC”), the ASX, or “a person aggrieved” by the breach.<sup>94</sup> Where the purpose of a listing rule is to protect shareholders, an individual shareholder may have standing to enforce the rule as a person aggrieved.<sup>95</sup>

Nonetheless, there was a crucial difference between the institutional investors’ original demand that News Corp. include the substance of specified ASX Listing Rules in its charter and the concession as finally accepted: the potential for modification of the rules. Although News Corp.’s agreement to retain full foreign listing on the ASX meant that the company was required *prima facie* to comply fully with the ASX Listing Rules, shareholder protections could be undermined if the ASX exercised its power to waive particular rules on behalf of News Corp.<sup>96</sup> This aspect of the concession would become relevant immediately following News Corp.’s reincorporation.<sup>97</sup>

### *B. Super-Voting Shares*

Second, the institutional investors tried to ensure that News Corp. would not issue super-voting shares without shareholder approval after reincorporation.<sup>98</sup> The ASX Listing Rules prohibit

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91. Under the ASX Listing Rules, matters which require shareholder approval include: the issue of more than 15 percent of equity securities (Rule 7.1); the issue of securities during a takeover bid (Rule 7.9); the disposal of substantial corporate assets to certain associated persons (Rule 10.1); any increase in fees payable to non-executive directors (Rule 10.17); the conferral of termination benefits, if the total value of benefits payable to all officers will exceed 5 percent of equity in the company (Rule 10.19); and the disposal of the main undertaking of the company (Rule 11.2). ASX Listing Rules, *supra* note 89.

92. ASX Listing Rules, *supra* note 89, at R. 6.9.

93. *Id.* at R. 7.1.

94. *See* Corporations Act, 2001, §§ 793C(1),(3), 1101B, 1324 (Austl.).

95. ROBERT P. AUSTIN & IAN M. RAMSAY, *FORD’S PRINCIPLES OF CORPORATIONS LAW* ¶11.233 (13th ed. 2007).

96. *See* ASX Listing Rules, *supra* note 89, at Introduction (“ASX may also waive compliance with a listing rule, or part of a rule, unless the rule in question says otherwise.”).

97. As discussed later in the Article, in the week during which News Corp.’s reincorporation became fully effective, the ASX waived a number of its listing rules on News Corp.’s behalf.

98. *See* Press Release, ACSI, News Corporation Settles for Second Best on Governance 2 (Sept. 27, 2004) (on file with author) (stating “[t]he fact that the Board can create a further class

Australian publicly listed corporations from issuing shares with enhanced voting power unless the ASX waives the rules.<sup>99</sup>

There was a history to the institutional investors' concern in this regard. More than a decade earlier, at News Corp.'s 1993 annual shareholder meeting, Rupert Murdoch had announced a plan to issue super-voting shares.<sup>100</sup> News Corp. subsequently asked the ASX to waive the strict "one share, one vote" principle<sup>101</sup> under its rules so the company could issue shares with differential voting rights.<sup>102</sup> The proposal was widely condemned in Australia as an entrenchment and anti-takeover device which would erode general shareholder rights.<sup>103</sup> Thus, what began as a discrete waiver request by News Corp. broadened into a general policy debate about the future of the "one share, one vote" rule for Australian-listed companies.<sup>104</sup> Institutional investor opposition,<sup>105</sup> governmental intervention,<sup>106</sup> and public backlash ultimately led News Corp. to abandon the plan to issue super-voting shares,<sup>107</sup> leading some prescient commentators at the time to speculate that News Corp. might seek to avoid future

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of shares in the United States without shareholder approval is of considerable concern"); Power, *supra* note 76, at 17.

99. See ASX Listing Rules, *supra* note 89, at R. 6.9 (mandating a "one share, one vote" rule in relation to voting on a poll).

100. Sue Lecky, *Murdoch Seeks 'Super' Shares*, SYDNEY MORNING HERALD, Oct. 13, 1993, at 27.

101. For discussion of the history and economic theory underlying the "one share, one vote" rule, see Guido Ferrarini, *One Share – One Vote: A European Rule?* (ECGI, Working Paper No. 58, 2006), available at <http://ssrn.com/abstract=875620>.

102. News Corp. wrote to the ASX seeking approval to make a bonus issue of super-voting shares on a one-for-ten basis, with each new share carrying twenty-five votes. See Saul Fridman, *The News Corporation Super Shares Proposal: Crime of the Century or Tempest in a Teapot*, 4 AUSTL. J. CORP. L. 184, 184–85 (1994), available at 1994 AJCL LEXIS 9.

103. The deputy managing director of AMP Society, one of Australia's largest institutional investors, stated at the time, "We believe that the only reason for differential voting rights is to allow control to be entrenched in the hands of the minority, perhaps in perpetuity." Emiliya Mychasuk, *Industry Says No to News Share Plan*, SYDNEY MORNING HERALD, Nov. 30, 1993, at 33; cf. Fridman, *supra* note 102, at 184–85.

104. See ASX, *Discussion Paper on Differential Voting Rights* 4–6 (Nov. 1993) (on file with author); see also Ivor Ries, *ASX Opens Up One-vote Debate*, AUSTL. FIN. REV., Nov. 11, 1993, at 64 (arguing that such a change to Australian law would constitute "perhaps the most dramatic shift in the balance of power in favour of the company management and dominant shareholders and away from minority shareholders since the first company was set up in this country").

105. See Ivor Ries, *Big Guns Open Fire on Murdoch's Super Shares*, AUSTL. FIN. REV., Nov. 30, 1993, at 52. In spite of the opposition of Australian institutional investors to News Corp.'s super-voting shares proposal, it appeared that U.S. institutional investors were generally supportive of it. See Brian Hale, *US Support for Murdoch Share Plan*, AUSTL. FIN. REV., Nov. 11, 1993, at 23.

106. Tim Dodd & Neil Chenoweth, *Govt Steps into Super Share Row*, AUSTL. FIN. REV., Nov. 24, 1993, at 1.

107. *News Corp. Plan for New Shares Bows to Pressure*, WALL ST. J., Nov. 22, 1993, at A11.

difficulties of this kind by delisting in Australia or reincorporating in a jurisdiction such as Delaware.<sup>108</sup>

In its concessions to the 2004 reincorporation campaign by institutional investors, News Corp. agreed to include a provision in its Delaware charter prohibiting the issuance of any super-voting shares absent the approval of a majority of all voting shareholders.<sup>109</sup>

### *C. Shareholder Meetings and Voting*

Third, the institutional investors raised the issue of the disparity between shareholder rights under Australian law and Delaware law, particularly in the context of shareholder meetings and voting.<sup>110</sup> Accordingly, they included an extensive list of shareholder protection provisions from the Australian Corporations Act in their Governance Article.<sup>111</sup> These provisions related to matters such as the convening of shareholder meetings,<sup>112</sup> conduct of those meetings,<sup>113</sup> and removal of directors from office.<sup>114</sup>

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108. See, e.g., Ivor Ries, *Super-voter Isn't Dead Yet*, AUSTL. FIN. REV., Dec. 9, 1993, at 48.

109. See News Corp., Current Report (Form 8-K), Amended and Restated Certificate of Incorporation of News Corporation, Inc., at art. IV, § 4(a)(iv)(2) (Nov. 12, 2004).

110. *UniSuper*, 2005 WL 3529317, at \*2.

111. See Governance Article, *supra* note 68, cl. 5.

112. Relevant provisions of the Corporations Act relating to the convening of meetings, which appeared in the Governance Article, included: § 249CA (mandatory rule empowering a single director of a listed company to convene a shareholder meeting); § 249D (provision requiring directors to convene a shareholder meeting on the request of shareholders with at least 5 percent of votes that may be cast in a general meeting or one hundred members); § 249E (liability consequences for directors of failing to comply with a valid shareholder request to convene a shareholder meeting under § 249D); § 249F (power of shareholders with at least 5 percent of votes that may be cast in a general meeting to convene a shareholder meeting to call and hold a shareholder meeting themselves); and § 249HA (mandatory minimum notice period of twenty-eight days for shareholder meetings of listed public companies). See *id.*

113. Relevant provisions of the Corporations Act relating to the conduct of meetings, which appeared in the Governance Article, included: § 249N (power of shareholders with at least 5 percent of votes that may be cast in a general meeting, or one hundred members, to propose resolutions at a shareholder meeting); § 249O (company obligation to give notice of shareholder resolutions); § 249P (power of shareholders with at least 5 percent of votes, or one hundred members by number, to require the company to distribute a statement about shareholders' resolutions to shareholders in certain circumstances); § 250R (requiring a nonbinding shareholder vote at the annual general meeting on the directors' remuneration report); § 250RA (requiring the auditor of a listed corporation to attend the company's annual general meeting); § 250SA (requiring reasonable opportunity for shareholder discussion of the remuneration report at the annual shareholder meeting); § 250T (requiring reasonable opportunity for shareholders to ask relevant questions of the auditor, if present, at the annual shareholder meeting); and § 251AA (requiring listed companies to disclose proxy votes). See *id.*

114. Corporations Act, 2001, § 203D (Austl.) (mandatory power of public company shareholders to remove a director from office by ordinary resolution). The Governance Article

Several of the Australian provisions included in the Governance Article merit comment. It included, for example, two provisions of the Australian Corporations Act granting shareholders (or “members,” as they are otherwise known) the right to convene company meetings in certain circumstances. The first of these provisions was § 249D of the Corporations Act, commonly known as the “one-hundred member rule.” This rule requires directors to convene a meeting upon the request of either members holding at least 5 percent of a company’s voting stock or one hundred members by number. The second provision was § 249F, which permits shareholders holding at least 5 percent of a company’s voting stock to convene a meeting directly. The Governance Article also contained the recently enacted § 250R of the Corporations Act, which requires shareholders of an Australian-listed company to pass a nonbinding resolution at their annual meeting approving the directors’ remuneration report.<sup>115</sup> Regarding the removal of directors from office, the Governance Article advocated inclusion of § 203D of the Corporations Act, granting shareholders of public companies an absolute right to remove directors from office, with or without cause, by majority vote.

News Corp. made only one concession in this regard. The company agreed to include a provision in its Delaware charter permitting shareholders holding 20 percent or more of Class B common stock to request a special stockholder meeting.<sup>116</sup> While this charter provision was more generous to shareholders than Delaware law (under which they have no prima facie right to convene a special shareholder meeting),<sup>117</sup> it contained significant qualifications<sup>118</sup> and

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included various other shareholder protection provisions, such as §§ 207–230 (general requirement of shareholder consent for related party transactions).

115. See generally Larelle Chapple & Blake Christensen, *The Non-Binding Vote on Executive Pay: A Review of the CLERP 9 Reform*, 18 AUSTL. J. CORP. L. 263 (2005); Jennifer G. Hill, *Regulating Executive Remuneration: International Developments in the Post-Scandal Era*, 3 EUR. COMP. L. 64, 69–72 (2006) (discussing disclosure requirements for executive pay); Kym Sheehan, *Is the Outrage Constraint an Effective Constraint on Executive Remuneration? Evidence from the UK and Preliminary Results from Australia* (Mar. 18, 2007) (unpublished manuscript, available at <http://ssrn.com/abstract=974965>).

116. See News Corp., Current Report (Form 8-K), Amended and Restated Certificate of Incorporation of News Corporation, Inc., at art. VI (Nov. 12, 2004). Perhaps surprisingly, the charter did not include a supermajority provision defending the shareholder rights contained in this provision.

117. Under DEL. CODE ANN. tit. 8, § 211(2)(d) (2008), a special meeting of the stockholders may only be convened by the board or by a person so authorized in the certificate of incorporation or by the bylaws. Cf. Model Bus. Corp. Act. § 7.02(a)(2) (2008), which prima facie permits members holding at least 10 percent of votes to convene a special meeting of stockholders. The

was far less generous than the Australian approach embodied in the one-hundred member rule and associated provisions described above.<sup>119</sup>

#### *D. Takeovers*

Fourth, the institutional investors' Governance Article addressed takeovers. Significant differences exist between the United States and other common law countries, including Australia, with respect to the balance of power between shareholders and directors in takeovers.<sup>120</sup> U.S. federal law regulates "tender offers"<sup>121</sup> rather than the concept of "changes of control," which forms the regulatory fulcrum in jurisdictions such as the United Kingdom and Australia.<sup>122</sup> Under U.S. law, assessment of directors' defensive conduct in takeovers is the province of state law and courts.<sup>123</sup> Delaware law, in spite of the potential for intense scrutiny of directors' defensive tactics following the *Unocal* decision,<sup>124</sup> continues to accord great deference to board decisions under a paradigm in which the board occupies a "gatekeeper" role.<sup>125</sup> Although views differ on whether this gatekeeper

articles of incorporation may fix a lower or higher percentage, though not exceeding 25 percent. *Id.*

118. News Corp.'s Delaware charter states, for example, that no special meeting of stockholders can be called if written notice by the stockholders is received less than 135 days prior to the first anniversary of the date of the preceding annual meeting of stockholders. News Corp., Current Report (Form 8-K), Amended and Restated Certificate of Incorporation of News Corporation, Inc., at art. VI (Nov. 12, 2004). The clause also provides that the directors must convene a special shareholders' meeting not later than one hundred days after receipt of the stockholders' written request, compared to a twenty-one day deadline for directors under Australian law. *See* Corporations Act, 2001, § 249D(5) (Austl.). If the directors fail to convene a meeting within twenty-one days, a specified proportion of the requisitioning shareholders may convene the meeting themselves and the company may recover meeting expenses from the directors personally. *Id.* §§ 249E(1), 249E(5).

119. *Id.* §§ 249D, 249F.

120. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 18–22 (2001) (noting the existence of different regulatory approaches to takeovers within common law jurisdictions).

121. *See, e.g.*, Williams Act, § 14(d)–(e) Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. § 78m(d)–(e), 78n(d)–(f) (1976 & Supp. III 1982)). *See generally* JESSE H. CHOPER, JOHN C. COFFEE, JR., & RONALD J. GILSON, *CASES AND MATERIALS ON CORPORATIONS* 1114 (6th ed., 2004).

122. Richard Hall, *The Endesa Takeover Battle and its Implications for U.S. Regulation of Cross-Border M&A Transactions*, Ross Parsons Centre of Commercial, Corporate and Takeover Law Seminar, University of Sydney Law School (Oct. 3, 2007).

123. *See, e.g.*, *Unocal Corp v. Mesa Petroleum Corp.*, 493 A.2d 946 (Del. 1985).

124. *Id.*

125. It has been stated that the board acts, not just as a gatekeeper, but rather as "the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders." Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 772 (2006) (quoting *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361,

paradigm in fact promotes shareholder interests,<sup>126</sup> the assumption that board access to defensive tactics is a vital antidote to coercive bids continues to have strong traction in U.S. corporate law scholarship.<sup>127</sup>

In the United Kingdom, takeover disputes are resolved not by the courts but by a specialized non-judicial body, the Panel on Takeovers and Mergers (“the U.K. Panel”),<sup>128</sup> which is responsible for administering the City Code on Takeovers and Mergers (“the City Code”). The operation of the U.K. Panel reflects a self-regulatory approach to takeovers and has served as the blueprint for reform in numerous jurisdictions, including Australia, Hong Kong, Ireland, and South Africa.<sup>129</sup> The U.K. approach has thus far been characterized by an extremely low incidence of tactical litigation compared to the United States.<sup>130</sup> Some of the contours of U.K. takeover regulation were altered recently to implement the Directive on Takeover Bids (“the Directive”) under European Community law.<sup>131</sup>

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1387–88 (Del. 1995)); Robert B. Thompson, *Takeover Regulation after the ‘Convergence’ of Corporate Law*, 24 SYD. L. REV. 323, 325–26 (2002).

126. See, e.g., Paul Davies & Klaus Hopt, *Control Transactions*, in REINIER KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS J. HOPT, HIDEKI KANDA & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 157, 172 (2004) (arguing that it is difficult to justify the Delaware takeover law model as an efficient regulatory regime for agency problems in the takeover context); cf. Bainbridge, *supra* note 125, at 787 n.82 (arguing that insulation of board authority is a critical factor in promoting efficient corporate decision-making for the benefit of shareholders).

127. See, e.g., Leo E. Strine, *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 12 (2007) (stating that it would be “crazy from an investor’s perspective for a target board not to have a traditional pill in place to stimulate a value-enhancing auction and to deter structurally coercive bids”).

128. The U.K. Panel was established in 1968, the same year that the Williams Act was passed in the U.S. Membership of the U.K. Panel is drawn from major financial and business institutions. See The Takeover Panel, Membership of the Panel, <http://www.thetakeoverpanel.org.uk/structure/panel-membership> (last visited Nov. 13, 2009).

129. See Emma Armson, *Models for Takeover Dispute Resolution: Australia and the UK*, 5 J. CORP. L. STUD. 401, 402 (2005).

130. Tunde I. Ogowewo, *Tactical Litigation in Takeover Contests*, J. BUS. L. 589, 607–09 (2007).

131. Council Directive 2004/25, 2004 O.J. (L 142) 12. Thus, for example, the U.K. Panel has been designated as the supervisory authority for the purposes of the Directive. Whereas previously takeover regulation in the United Kingdom had no direct statutory force, the introduction of Part 28 of the U.K. Companies Act 2006, which implements the Directive on Takeover Bids, now provides a statutory basis for takeover regulation in the United Kingdom for the first time. See generally Ogowewo, *supra* note 130, at 590–92. The U.K. Government expressed concern that the new legal framework created by the Takeovers Directive might potentially increase the level of tactical litigation in the United Kingdom. See DEP’T OF TRADE & IND., COMPANY LAW IMPLEMENTATION OF THE EUROPEAN DIRECTIVE ON TAKEOVER BIDS: A

In contrast to Delaware's deference to board discretion, the City Code seriously restricts the ability of the board to engage in defensive tactics and implement entrenching mechanisms. It elevates shareholder decisionmaking power during a takeover,<sup>132</sup> an approach which also underpins recent European Community developments in takeover law.<sup>133</sup> A central feature of the City Code is the "frustrating action" principle, which prohibits directors, in the absence of shareholder approval, from taking any action that may result in frustration of a bona fide offer or in the shareholders being denied the opportunity to decide an offer on its merits.<sup>134</sup> Some scholars argue that differences in the prevailing paradigms in the U.K. and U.S. context are attributable to the stronger influence of institutional investors under the U.K. self-regulatory regime than in the United States, where the balance of power is firmly tilted towards management.<sup>135</sup>

Australia's takeover laws also diverge from the Delaware approach and have been described as "unique" and "widely regarded as some of the most restrictive among capitalist economies."<sup>136</sup> They are explicitly based on policies of equality of opportunity and protection of minority shareholders, which are embodied in the so-called "Eggleston principles."<sup>137</sup> The basic rule under Australian takeover law, which has a historical focus on fairness rather than

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CONSULTATIVE DOCUMENT 9 (Jan. 2005) (U.K.), available at <http://www.berr.gov.uk/files/file10384.pdf>.

132. See Davies & Hopt, *supra* note 126, at 164.

133. DEPT OF TRADE & IND., IMPLEMENTATION OF THE EU DIRECTIVE ON TAKEOVER BIDS: GUIDANCE ON CHANGES TO THE RULES ON COMPANY TAKEOVERS 4 (revised ed. Feb. 2007) (U.K.), available at <http://www.berr.gov.uk/files/file37429.pdf>; Davies & Hopt, *supra* note 126, at 164; Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOBAL. STUD. L. REV. 867, 869–70 (2004).

134. City Code on Takeovers and Mergers, R. 21 (U.K.). Examples of frustrating actions are set out in Rule 21 and include matters such as: issuing new shares; granting options over unissued shares; creating securities that carry rights of conversion into shares; selling or acquiring assets of a material amount, and entering into contracts otherwise than in the ordinary course of business. *Id.* at R. 21.1(a)–(b).

135. See Armour & Skeel, *supra* note 5, at 1727 (noting that, "[i]nstitutional shareholders played a far greater role in the development of U.K. takeover regulation than in the United States," and "[i]n the United States, federalism has amplified the voice of corporate managers").

136. Justin Mannolini, *Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment?*, 24 SYD. L. REV. 336, 336 (2002).

137. The Eggleston Principles are embedded in Corporations Act, 2001, § 602 (Austl.), which outlines the purposes of the Chapter in the Act that governs takeovers. The provision includes a purpose that "as far as practicable" the holders of voting shares "all have a reasonable and equal opportunity to participate in any benefits" accruing from the acquisition of a substantial interest. *Id.* § 602(c); see also Mannolini, *supra* note 136, at 337–38.

economic efficiency,<sup>138</sup> is that a bidder cannot acquire control of a parcel of 20 percent or more of a company's voting shares, except pursuant to a general offer to all shareholders (the "20 percent threshold rule").<sup>139</sup> Private control transactions are thus precluded. By requiring a bidder to make an offer to all shareholders before it is permitted to pass the control threshold, Australian takeover law ensures that majority and minority shareholders share equally any control premium. This rule is particularly strict in comparison to some international regimes, such as U.K. law, which permit private control transactions<sup>140</sup> provided that a general offer or "mandatory bid" is subsequently made to all shareholders.<sup>141</sup>

Australian law moved closer to U.K. law in 2000, when responsibility for the resolution of takeover disputes shifted from the courts to the Australian Takeovers Panel.<sup>142</sup> Although Australian courts traditionally adopted a fiduciary duty analysis to assess directors' defensive conduct, the Australian Takeovers Panel diverged sharply from this approach by implementing its own "frustrating action" policy.<sup>143</sup> This policy focused on the effect, rather than the purpose, of directors' conduct in response to a takeover,<sup>144</sup> and limited permissible action by the board in the absence of shareholder

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138. Mannolini, *supra* note 136, at 338.

139. See Corporations Act, 2001, §§ 606(1), 611(10) (Austl.).

140. Under Rule 9.1(a) of the City Code on Takeovers and Mergers (U.K.), the relevant control threshold is 30 percent of voting shares. City Code on Takeover and Mergers, *supra* note 134, at R. 9.1(a).

141. Mannolini, *supra* note 136, at 357–58.

142. Corporations Act, 2001, pt. 6.10, div. 2 (Austl.). The policy basis for this change was the perception that there was widespread use of tactical litigation in the Australian context. See Ogowewo, *supra* note 130, at 602–03. Note that the Australian Takeovers Panel has recently been the subject of a High Court constitutional challenge. See generally Emma Armson, *Before the High Court: Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?*, 29 SYD. L. REV. 495, 496 (2007) (observing that the primary issue is whether the Panel has been given judicial powers of the Commonwealth in violation of the Constitution). The High Court upheld the constitutional validity of the Takeovers Panel's powers in a judgment delivered on 13 December 2007. *Attorney-General (Cth) v. Alinta Ltd.* (2008) 233 C.L.R. 542 (Austl.).

143. The frustrating action policy arises from the reasonable and equal opportunity principle under Corporations Act, 2001, § 602(c) (Austl.). Emma Armson, *The Frustrating Action Policy: Shifting Power in the Takeover Context*, 21 COMP. & SEC. L.J. 487, 487 (2003); Takeovers Panel, Guidance Note 12: Frustrating Action 2–3 (2003), [http://www.takeovers.gov.au/content/Guidance\\_Notes/Current/downloads/GN12\\_2003.pdf](http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN12_2003.pdf) (last visited Nov. 13, 2009).

144. See Jennifer G. Hill, *Back to the Future? Bigshop 2 and Defensive Tactics in Takeovers*, 20 COMP. & SEC. L.J. 126, 129–30 (2002).

consent.<sup>145</sup> It constituted a major shift in the balance of power between the board and shareholders during a bid under Australian law.<sup>146</sup>

There has been increasing recognition of the extent of variation in international takeover regulation. Academic commentators have explored possible reasons for the “peculiar divergence” between U.S. and U.K. takeover rules.<sup>147</sup> U.S. courts have acknowledged this diversity in international takeover regulation.<sup>148</sup> Takeovers also constituted an important theme in the Paulson Committee report. The committee compared the “pro-shareholder” approach of the U.K. regulatory regime with the “pro-management” approach of the Delaware courts, and recommended certain reforms to the U.S. system to shift more power to shareholders.<sup>149</sup>

The institutional investors’ Governance Article addressed the takeover issue by advocating that News Corp.’s Delaware charter include the 20 percent threshold rule found in Australian takeover law to ensure that any control premium would be shared between all stockholders.<sup>150</sup> Furthermore, the Governance Article tackled the issue of defensive conduct by the board of directors.<sup>151</sup> Clause 8.1 of the Governance Article contained a general limitation on the board’s power in relation to corporate control transactions.<sup>152</sup> It also included

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145. See *id.* at 126; Jennifer G. Hill & Jeremy Kriewaldt, *Theory and Practice in Takeover Law – Further Reflections on Pinnacle No. 8*, 19 COMP. & SEC. L.J. 391, 391 (2001) (suggesting that the shareholder consent limitations “in effect bypassed the need to determine issues of breach of duty.”); Thompson, *supra* note 125, at 326.

146. According to the Australian Takeovers Panel, “[a]lthough it is generally the responsibility of a company’s directors to make company decisions, decisions about control and ownership of the company are properly made by its shareholders.” Takeovers Panel, *supra* note 143, at 1.

147. See generally Armour & Skeel, *supra* note 5, at 1765–84 (concluding that “starkly different approaches to takeover regulation in the United States and United Kingdom have been influenced by their characteristic modes of rule-production: courts have been the principal regulators in the United States, whereas self-regulation shaped by institutional shareholders prevails in the United Kingdom”).

148. See, for example, the recent case of *E.On AG v. Acciona, S.A.*, No. 06 Civ. 8720(DLC), 2007 WL316874 316874, at \*12 (S.D.N.Y. Feb. 5, 2007). In this case, which concerned a €47 billion hostile takeover in Madrid, the court warned of the need for caution in applying U.S. takeover principles in cross-border acquisitions, where the acquirer may be acting in compliance with the laws of its home jurisdiction. *Id.*

149. COMM. ON CAPITAL MKTS. REGULATION, *supra* note 37, at 93–105.

150. Governance Article, *supra* note 68, cl. 6, at 3.

151. *Id.* cl. 8, at 4.

152. Clause 8.1 of the Governance Article stated that

[t]he Board shall not have power to, and shall not, restrict, limit or hinder in any way the opportunity and capacity of shareholders to decide whether or not control of the Company should pass under any takeover bid which may be made in compliance with Delaware law and New York Stock Exchange listing requirements. For the avoidance of doubt, this provision applies throughout

a provision expressly stating that “the Board shall not have power to, and shall not, create or implement any device, matter or thing the purpose, nature or effect of which is commonly described as a ‘poison pill.’”<sup>153</sup>

In the takeover context, as in other areas, News Corp. made some concessions but did not agree to all of the institutional investors’ requests. It was agreed, for example, that the Murdoch interests would be subject to restrictions analogous to the Australian 20 percent threshold rule under a series of voting agreements.<sup>154</sup> Subject to specified “permitted transfers,” the Murdoch interests were prohibited from acquiring more than an additional 3 percent of News Corp.’s outstanding shares every six months.<sup>155</sup> News Corp. also accepted a restriction on the board’s power to issue poison pills.<sup>156</sup> However, this restriction was contained not in the charter, as the institutional investors had requested, but rather in a board policy.<sup>157</sup> The ostensible reason for this was logistical constraints.<sup>158</sup> News Corp. issued a press release and letter to shareholders announcing that the board of the new Delaware corporation had “established a policy that if any stockholder rights plan (known as a ‘poison pill’) is adopted without stockholder approval, it will expire after one year unless it is ratified by stockholders.”<sup>159</sup>

### *E. Best Practice Principles*

Finally, the institutional investors’ Governance Article included a number of best practice principles derived from Australian

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the life of the Company and whether or not any takeover bid is anticipated or current.

*Id.*

153. *Id.*

154. See Letter from News Corp. to Shareholders and Optionholders, *supra* note 82, at app. ¶ (b); see also *id.* § 4 (summarizing the “Restrictions on the rights of the Murdoch interests to acquire further shares, and to transfer existing shares, in News Corp US”).

155. *Id.* app. ¶ (a).

156. UniSuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at \*2–3 (Del. Ch. Dec. 20, 2005).

157. *Id.*

158. During negotiations, News Corp.’s General Counsel, Ian Phillip, told the President of ACSI, Michael O’Sullivan, that it would not be possible, in the limited time available before the shareholder vote on the corporate reconstruction, to draft and finalize an appropriate charter restriction on poison pills. *Id.* at \*2.

159. Letter from News Corp. to Shareholders and Optionholders, *supra* note 82, § 5, at 2 (describing “Board policy on stockholder rights plans”); see also Press Release, News Corp., News Corp. Adopts Additional Corp. Governance Provisions 2 (Oct. 6, 2004), available at <http://www.hoovers.com/free/co/secdoc.xhtml?ID=41816&ipage=3215955>.

and international corporate governance.<sup>160</sup> These issues included standards of independence for board members, disclosure of the company's process for determining leadership succession, procedures for assessing reasonable shareholder proposals, and elimination of the company's staggered board structure.<sup>161</sup> News Corp. did not agree to include these provisions in its Delaware charter.<sup>162</sup> It did, however, agree to establish board committees "to consider" certain corporate governance issues prior to the company's first annual meeting under Delaware law.<sup>163</sup>

The adoption of the various concessions previously discussed quelled the corporate governance revolt by institutional investors.<sup>164</sup> At News Corp.'s general meeting in October 2004,<sup>165</sup> shareholders overwhelmingly approved the reincorporation proposal, with over 90 percent of votes cast in its favor.<sup>166</sup>

Although News Corp.'s concessions were far more limited than the institutional investors' original demands in the Governance Article,<sup>167</sup> the compromise was generally portrayed in the Australian financial press as a significant victory for the institutional investors.<sup>168</sup> One commentator, for example, described the News Corp. concessions as heralding "a major step forward" for shareholder democracy;<sup>169</sup> others, however, viewed them as inconsequential and a

160. Governance Article, *supra* note 68, cl. 9, at 4–6.

161. *Id.*; *see also* Letter from News Corp. to Shareholders and Optionholders, *supra* note 82, § 6, at 3.

162. *Cf.* Letter from News Corporation to Shareholders and Optionholders, *supra* note 82, at 1.

163. *Id.* § 6, at 3.

164. *See* John Durie, *Murdoch Peace Deal to Gain Support for US Move*, AUSTL. FIN. REV., Oct. 6, 2004, at 1.

165. *See* Press Release, News Corp., *supra* note 57.

166. Votes cast in favor of the schemes of arrangement at the various class meetings of News Corp. were as follows:

- Ordinary shareholders: 91.28 percent in favor; 8.72 percent against;
- Preferred shareholders: 96.23 percent in favor; 3.77 percent against;
- Option holders: 99.95 percent in favor; 0.05 percent against.

The schemes of arrangement were unanimously approved at the separate class meetings of the Murdoch interests. *Re News Corp.* (2004) 51 A.C.S.R. 394, ¶ 3 (Austl.).

167. Governance Article, *supra* note 68, cl. 2, at 1; *see also* Maiden, *supra* note 77, at 1 (stating that the agreed changes were "at the top of a much more extensive list" sought by ACSI and CGI).

168. *See, e.g.*, Stephen Bartholomeusz, *News Corp Capitulation a Victory for Shareholders*, AGE (Melbourne), Oct. 7, 2004, at 1 ("It is unlikely that News will completely satisfy the initial demands of ACSI and CGI, but its backdown does represent a major victory for the shareholder activists and a potentially significant milestone in the embryonic development of global institutional co-operation on specific governance issues.").

169. Knight, *supra* note 58, at 25.

mirage.<sup>170</sup> At least with respect to the poison pill, the latter view appears to have been correct.

#### IV. NEWS CORP.'S POISON PILL—COMPARATIVE LAW PERSPECTIVES

I think he's the most brilliant financial mind I know . . . . I should think we are all responding to John Malone, dancing to his tune. I still do sometimes.

- Rupert Murdoch<sup>171</sup>

Rupert is a great guy but I never found him of compelling generosity.

- John Malone<sup>172</sup>

[Murdoch is] a shark, always dangerous, always on the move. By contrast, Malone is a swamp alligator, content to lie secreted in the mud, to let the prey come to him.

- David Elstein<sup>173</sup>

On November 8, 2004, in the same week that the reincorporation became fully effective, one problematic aspect of the domicile change<sup>174</sup> emerged as a reality: News Corp. issued a press release announcing that its board of directors had adopted a poison pill.<sup>175</sup> The poison pill was in the form of a stockholder rights plan,<sup>176</sup> granting each shareholder a dividend distribution of one right for each voting and non-voting common stock held.<sup>177</sup> These inchoate rights would crystallize and become exercisable if an acquirer obtained 15 percent or more of News Corp.'s voting common stock.<sup>178</sup> When triggered, the rights would entitle their holder (with the exception of

170. See Wendy Frew, *News Charter has Self-destruct Clause*, SYDNEY MORNING HERALD, Oct. 19, 2004, at 22; Ben Power, *News Rejects Murdoch Loophole Claim*, AUSTL. FIN. REV., Oct. 19, 2004, at 15; see also Christian Catalano, *News Finally Goes, and with a Big Tick*, AGE (Melbourne), Oct. 27, 2004, at 3 (claiming that even after revisions to the corporate governance charter, investors were still concerned about takeover protection retained by Murdoch interests).

171. Neil Chenoweth, *Malone's Ambitious Plan to Sneak up on Murdoch*, AUSTL. FIN. REV., Oct. 18, 2005, at 1 (quoting Rupert Murdoch).

172. Christian Catalano, *Murdoch Looks Set to Do a Deal with Malone*, SYDNEY MORNING HERALD, Apr. 20, 2005, at 22 (quoting John Malone).

173. David Osborne, *The Saturday Profile JOHN MALONE: The Man Who Shook up Murdoch*, INDEPENDENT (London), Nov. 13, 2004, at 44 (quoting David Elstein).

174. See Grant Samuel & Assocs., *supra* note 53, at E-11.

175. Press Release, News Corp., News Corporation Announces Stockholder Rights Plan 1 (Nov. 8, 2004), available at <http://www.asx.com.au/asxpdf/20041108/pdf/3nlcbk2lxx2rz.pdf>. The decision was originally made by the board of directors as constituted prior to News Corp.'s reincorporation. See Peers, *supra* note 78, at A2. On November 23, 2004, the reconstituted board approved the earlier decision to implement a poison pill. News Corp., Current Report (Form 8-K), at 2 (Nov. 24, 2004), available at <http://www.secinfo.com/d14D5a.166n6.htm0>.

176. News Corp.'s stockholder rights plan is set out in News Corp., Report of a Foreign Issuer (Form 6-K), at ex. B (Nov. 8, 2004), available at <http://www.secinfo.com/dsVsj.12Gu.htm>.

177. *Id.* at 18.

178. *Id.* at ex. A.

the acquirer) to purchase News Corp.'s voting and non-voting common stock at half price, and, in the event of a merger or acquisition of News Corp., buy shares in the acquiring company at half price.<sup>179</sup>

The press release expressly referred to News Corp.'s recently adopted board policy that any poison pill would expire after one year unless approved by shareholders. However, references to this policy were nebulous and suggested a certain malleability. According to the press release:

[T]he Rights Plan currently provides that the rights will expire in one year. At or prior to such one year anniversary, the Board of Directors will take such action as it deems appropriate in the light of facts and circumstances existing at such time, including, if appropriate, implementing such policy (whether by seeking stockholder ratification or by allowing the rights to expire).<sup>180</sup>

The press release also revealed that the poison pill was a direct response to the actions of Liberty Media Corp. ("Liberty Media"),<sup>181</sup> the investment vehicle of cable TV magnate John Malone, with whom Murdoch had a longstanding involvement.<sup>182</sup> Five days before the pill's adoption, Liberty Media disclosed that it had entered into a \$1.48 billion equity swap<sup>183</sup> for News Corp. shares with Merrill Lynch & Company.<sup>184</sup> There were several prior controversial transactions in Australia in which cash-settled equity swaps had been used strategically in a takeover context,<sup>185</sup> and there was growing

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179. Press Release, News Corp., News Corp. Announces Stockholder Rights Plan, *supra* note 175, at 1; see also Armour & Skeel, *supra* note 5, at 1734 (describing the technical operation of poison pills).

180. Press Release, News Corp., News Corp. Announces Stockholder Rights Plan, *supra* note 175, at 2.

181. *Id.* at 1. News Corp.'s press release noted that this action was taken by Liberty Media "without any discussion with, or prior notice to, News Corporation." *Id.*

182. This involvement included Malone's participation in a News Corp. capital raising in the early 1990s, which rescued News Corp. from near bankruptcy at the time. Martin Peers, *Mogul vs. Mogul: Stock Gambit Strains Relations Between Two Media Titans*, WALL ST. J., Mar. 3, 2005, at A1. At one stage, Murdoch and Malone had also apparently contemplated appointing Malone to the board of News Corp. *Id.*; Chenoweth, *supra* note 171, at 1.

183. For a description of a cash-settled equity swap, see *Glencore Int'l AG v. Takeovers Panel* (2005) 220 A.L.R. 495, 498 (Austl.).

184. The equity swap for 84.7 million Class B News Corp. shares was scheduled for completion by April 2005. Tim Burt, *News Corp Channels Energies into Pay-TV*, FIN. TIMES (London), Nov. 4, 2004, at 20; *Liberty Media Buys Another Chunk of News Corp*, DENVER BUS. J., Nov. 4, 2004, at 3, cited in Louise McCoach, *The Glencore Decision: A Case for Reform?* (2005) (unpublished manuscript, on file with author).

185. Cash-settled equity swaps were used to obtain a pre-bid acquisition stake or a blocking position in control transactions, such as the 2005 takeover by BHP Billiton of WMC Resources Ltd. Bryan Frith, *BHP King Hit Knocks Rivals out of the Ring*, AUSTRALIAN, Mar. 9, 2005, at 36. However, the most prominent example was the use of equity swaps by Glencore International AG ("Glencore") to obtain a blocking position during a 2005 takeover bid by Centennial Coal Co. Ltd. for Austral Coal Ltd. See generally *Glencore Int'l AG*, 220 A.L.R. at ¶¶ 15–19; Emma

international concern about the regulatory implications of equity swaps.<sup>186</sup> In this instance, the equity swap transaction permitted Liberty Media to raise its voting stake in News Corp. from approximately 9 percent to 17 percent, only 13 percentage points below the Murdoch family's voting interests.<sup>187</sup> Thus, whatever rule-based constraints regarding takeovers Australian law may impose on management via shareholder rights, it is clear that the market for corporate control in the United States was a far more potent force than in Australia, given the fact that News Corp. was a potential takeover target virtually upon its arrival in Delaware.

Liberty Media's equity swap transaction was an opportunistic one, taking advantage of instability in News Corp. shares during the domicile change.<sup>188</sup> This instability was due to the fact that many index funds in Australia and Asia were required to sell News Corp. shares in anticipation of its removal from Australian stock indices.<sup>189</sup> Analysts considered that, but for the presence of a poison pill, Liberty Media could have raised its voting stake to 49 percent of News Corp. shares by swapping its 421.6 million non-voting Class A ordinary shares<sup>190</sup> for Class B voting stock.<sup>191</sup> In contrast, Mr. Murdoch was

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Armson, *The Australian Takeovers Panel and Judicial Review of its Decisions*, 26 ADEL. L. REV. 327, 340–41 (2005). Glencore's equity swap provides a good illustration of the contemporary phenomenon of hidden or "morphable" ownership, and the associated regulatory challenges of such ownership. Henry T. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 839–40 (2006) (discussing the attempted use of hidden ownership through equity swaps in the Glencore matter to avoid disclosure under Australia's takeover rules).

186. See Andrew Ross Sorkin, *A Loophole Lets a Foot in the Door*, N.Y. TIMES, Jan. 15, 2008, at C1 (discussing a regulatory loophole in relation to equity swaps). For a summary of some recent international regulatory proposals and developments in relation to equity derivatives, including equity swaps, see COMMONWEALTH OF AUSTRALIA, IMPROVING AUSTRALIA'S FRAMEWORK FOR DISCLOSURE OF EQUITY DERIVATIVE PRODUCTS: ISSUES PAPER ¶ 43 (2009).

187. Tim Burt, *Liberty Share Deal Unsettles News Corp: Murdoch Issues Poison Pill as John Malone's Media Group Lifts Stake*, FIN. TIMES (London), Nov. 9, 2004, at 30; Martin Peers, *News Corp.'s Net Increases by 27% on TV Strength – Liberty Media Gains Right to Boost its Voting Stake in Murdoch-led Concern*, WALL ST. J., Nov. 4, 2004, at B3.

188. Catalano, *supra* note 172. Speculation existed on Wall Street that the equity swap constituted a negotiating strategy to put pressure on News Corp. to purchase certain Liberty Media assets. Martin Peers, *Malone Gets a Step on Murdoch*, WALL ST. J., Nov. 9, 2004, at C1.

189. Peers, *supra* note 182; The Lex Column, *News Corp*, FIN. TIMES (London), Nov. 9, 2004, at 20; Jane Schulze, *News Up as it Awaits Move on Index Shift*, AUSTRALIAN, Oct. 28, 2004, at 34.

190. Liberty Media owned approximately 17 percent of News Corp.'s non-voting shares. Sam Matthews, *Liberty Looks to Double Voting Stake in News Corporation*, BRAND REPUBLIC, Nov. 5, 2004, <http://www.brandrepublic.com/News/226985/Liberty-looks-double-voting-stake-News-Corporation/?DCMP=ILC-SEARCH>. This non-voting stake had been accumulated through deals with News Corp. itself and was worth approximately \$6 billion. Peers, *supra* note 182. By late 2003, Liberty Media was the largest shareholder in News Corp. on a global basis, including voting and non-voting stock. *Id.*

constrained in his ability to purchase any News Corp. shares that came onto the market during this period because the concessions extracted by the institutional investors prevented the Murdoch family from acquiring more than an additional 3 percent of News Corp.'s outstanding shares every six months.<sup>192</sup>

News Corp.'s poison pill specifically exempted existing shareholdings above the 15 percent threshold (such as the Murdoch interests) and previously disclosed contracts to purchase stock (such as Liberty Media's equity swap arrangement).<sup>193</sup> Further acquisitions of more than 1 percent by any party could, however, trigger the pill.<sup>194</sup> The pill therefore ensured that Liberty Media could not raise its voting stake in News Corp. beyond 18 percent without experiencing massive dilution.<sup>195</sup>

Although Chancellor Chandler has suggested that Liberty Media "suddenly appeared" as a hostile acquirer,<sup>196</sup> in fact it seems that Liberty's acquisition strategy may have commenced some years earlier. A 2005 Australian Administrative Appeals Tribunal ("AAT") decision, *Re Mangan v. The Treasury*, revealed that Liberty Media had lodged an application with the Australian Foreign Investment Review Board ("FIRB") in 2002.<sup>197</sup> The Foreign Acquisitions and Takeovers Act of 1975 requires a foreign person seeking to acquire certain interests in Australia, including via a takeover bid, to obtain prior approval from FIRB.<sup>198</sup>

The AAT decision concerned a Freedom of Information request<sup>199</sup> which had been made by a Deutsche Bank analyst, Michael

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191. Tim Burt, *News Corp. Unveils Poison Pill Defence Strategy: Murdoch's Board Acts to Ward off Any Liberty Media Bid after Malone Raises Voting Interest*, FIN. TIMES (London), Nov. 9, 2004, at 21; Lex Column, *supra* note 189.

192. Peers, *supra* note 182; Letter from News Corp. to Shareholders and Optionholders, *supra* note 82, app. ¶ (a).

193. Press Release, News Corp., News Corp. Announces Stockholder Rights Plan, *supra* note 175, at 1.

194. *Id.*

195. Peers, *supra* note 188.

196. *UniSuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317, at \*3 (Del. Ch. Dec. 20, 2005).

197. No. N2005/150, [2005] A.A.T.A. 898, ¶¶ 1–10 (15 Sept., 2005) (Austl.).

198. The Federal Treasurer is the ultimate arbiter of foreign investment decisions, and is advised by FIRB. For discussion of Australia's foreign investment regulatory regime, including proposed 2009 amendments to extend its reach, see Greg Golding & Rachael Bassill, *Australian Regulation of Foreign Direct Investment by Sovereign Wealth Funds and State Owned Enterprises: Are Our Rules Right?*, paper presented at the Law Council Corporations Law Committee, 2009 Corporate Law Workshop 10–12 (Sept. 12, 2009).

199. The application was made under the Freedom of Information Act, 1982, § 15(1) (Austl.).

Mangan,<sup>200</sup> to the Australian Treasury for release of information about whether Liberty Media had lodged a FIRB application to seek clarification of any ownership restrictions on News Corp.<sup>201</sup> Treasury denied Mr. Mangan access to certain documents falling within the scope of his Freedom of Information request on the basis that their release would adversely affect Liberty Media's "lawful business, commercial and financial affairs."<sup>202</sup> Mr. Mangan subsequently commenced proceedings before the AAT for review of this decision. In the AAT proceedings, it became publicly known that Liberty Media had indeed lodged a FIRB application in 2002. However, the AAT upheld Treasury's decision and refused disclosure of specific documents providing details of the FIRB application on a variety of grounds, including that disclosure would reveal Liberty Media's "strategy for maintaining and increasing its interest" in News Corp. and would disadvantage Liberty Media vis-à-vis its competitors in any acquisition of News Corp. shares.<sup>203</sup> The AAT also rejected the applicant's argument that disclosure of the relevant documents was now justified because News Corp.'s adoption of a poison pill had effectively destroyed the documents' commercial value.<sup>204</sup>

Liberty Media's 2002 FIRB application is significant because it suggests the possibility that Liberty may have contemplated a full takeover bid for News Corp. under Australian law at least two years before its controversial equity swap transaction.<sup>205</sup> Moreover, it provides some support for the theory that the main motivation behind News Corp.'s move to Delaware was to adopt a poison pill, which is not

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200. Michael Mangan reappeared in the News Corp. tableau in 2005. See Michael Mangan, *Hardball, Murdoch Style*, EUREKA REPORT, Oct. 14, 2005. A respected Australian media analyst, who had covered News Corp. for fifteen years, Mangan claimed that he was retrenched by Deutsche Bank after he downgraded News Corp. stock to a "sell" recommendation in early 2005. Lisa Murray, *Analyst Says News Threatened Brokers*, SYDNEY MORNING HERALD, Oct. 15, 2005, at 47. Mangan was openly skeptical about the effect of the Delaware reincorporation on News Corp. shareholder value. Mangan, *supra*. Rupert Murdoch later publicly denied any attempt by News Corp. to put pressure on Deutsche Bank because of Mangan's sell recommendation. See Mark Coultan, *Don't Blame Us, Says Murdoch – Share Price Will Rise, Eventually*, SYDNEY MORNING HERALD, Oct. 24, 2005, at 19.

201. *Re Mangan v. Treasury*, [2005] A.A.T.A. 898, ¶¶ 1, 3–4 (Austl.).

202. *Id.* ¶¶ 2, 7, 9. The relevant provisions on exemptions from disclosure are §§ 43 and 45, Freedom of Information Act, 1982 (Austl.).

203. *Re Mangan*, [2005] A.A.T.A., at ¶ 29. From a policy perspective, the AAT also considered that an order requiring disclosure would seriously limit the information that Liberty Media would be willing to provide voluntarily to FIRB in any future applications. *Id.* ¶¶ 30, 44–47.

204. *Id.* ¶¶ 32–33, 38–39.

205. Chenoweth, *supra* note 171, at 1.

permitted under Australian law.<sup>206</sup> Unlike Delaware<sup>207</sup> (and some other jurisdictions such as Canada,<sup>208</sup> France, and Japan<sup>209</sup>), Australia and the United Kingdom have not proven to be hospitable terrain for poison pills. Poison pills are, for all intents and purposes, nonexistent in Australia, though there appears little consensus as to why this is so. There is no general prohibition upon specific defensive measures of this kind; however, at least three areas of Australian corporate law and governance have tended to impede the development of poison pills.

First, a possible explanation for the absence of poison pills in Australia is that the general law on fiduciary duties prohibits directors from implementing such measures.<sup>210</sup> Directors are subject to a fundamental duty to act in good faith for the benefit of the company and for proper purposes.<sup>211</sup> Defeating a takeover or ensuring that the current target board retains control are prima facie improper purposes under Australian law.<sup>212</sup> U.K. and Australian case law contain strong dicta to the effect that it is unconstitutional for directors to allot shares to manipulate control<sup>213</sup> and that shareholders have a personal

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206. See Alan Kohler, *Shock! News Screws Punters*, SYDNEY MORNING HERALD, Aug. 13, 2005, at 45.

207. In the post-Enron era, however, shareholder pressure has led to the elimination of poison pills in an increasing number of U.S. companies. In 2005, less than 50 percent of companies in the S&P 500 had poison pills and this figure fell to 37 percent in 2006. INST. S'HOLDER SERVS., POISON PILLS IN FRANCE, JAPAN, THE U.S. AND CANADA: TAKEOVER BARRIERS RISE IN EUROPE AND JAPAN, BUT FALL IN NORTH AMERICA 10–11 (2007), available at <http://www.complianceweek.com/s/documents/PoisonPillPrimer.pdf>.

208. Note, however, that in Canada the poison pill has evolved in an idiosyncratic way, providing shareholders “with protections that were never intended by the original designers of poison pills.” Philip Anisman, *Poison Pills: The Canadian Experience*, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM 12 (Theodor Baums et al. eds., 2000).

209. Poison pills have only been introduced in Japan and France very recently. INST. S'HOLDER SERVS, *supra* note 207, at 6–9.

210. See, e.g., Deborah A. DeMott, *Shareholders as Principals* 32–33 (Duke Law School Public Law and Legal Theory Working Paper Series, Working Paper No. 15, 2001), available at <http://ssrn.com/abstract=275049>; Lynden Griggs, *Golden Parachutes, Crown Jewels and the Arrival of the White Knight—Strategies to Defeat a Takeover. What Use in an Era of Rigorous Enforcement of Directors' Duties*, 5 CANBERRA L. REV. 203, 214–16 (1998) (noting that directors would have difficulty in proving such measures served a legitimate corporate purpose).

211. An analogous statutory duty is found in Corporations Act, 2001, § 181 (Austl.).

212. *Hogg v. Cramphorn, Ltd.*, [1967] Ch. 254, 268 (U.K.); *Howard Smith, Ltd. v. Ampol Petroleum, Ltd.*, [1974] A.C. 821, 837 (P.C.) (appeal taken from New South Wales) (U.K.). Directors' conduct may, however, in limited circumstances be characterized as within the proper sphere of managerial discretion, even though the conduct incidentally thwarts a takeover bid. See, e.g., *Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. NL* (1968) 121 C.L.R. 483, 493–94 (Austl.); cf. *Teck Corp. Ltd. v. Millar* (1972) 33 D.L.R. (3d) 288, ¶¶ 157–65 (Can.).

213. *Hogg*, [1967] Ch. 254 at 268; *Howard Smith, Ltd.*, [1974] A.C. 821 at 837.

right to be protected against dilution of their voting rights by improper board conduct.<sup>214</sup> Any such share issuance by the directors would be voidable, unless ratified by the shareholders in a general meeting.<sup>215</sup> Since poison pills, if triggered, produce substantial dilution of the bidder's stake<sup>216</sup> and often discriminate between shareholders,<sup>217</sup> in most cases it would be difficult for directors to argue that they have fulfilled their duty to act for a proper purpose in the best interests of the company.<sup>218</sup> A statutory remedy is also available for conduct that is oppressive, unfairly prejudicial, or discriminatory to a shareholder under Australian law.<sup>219</sup>

The second inhibiting factor is the approach of the Australian Takeovers Panel toward defensive conduct by target boards. The "frustrating action" policy would seem to preclude the adoption of a poison pill without shareholder consent,<sup>220</sup> and the Panel has made some specific remarks about poison pills that are consistent with this interpretation.<sup>221</sup> Further support for this position can be derived from the important decision of the Panel concerning a 2003 takeover bid by Centro for the AMP Shopping Centre Trust.<sup>222</sup> This decision, in the

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214. See, e.g., *Residues Treatment & Trading Co. v. S. Res. Ltd.* (1988) 51 S.A.S.R. 177, 202 (Austl.) (King, C.J.).

215. *Hogg*, [1967] Ch. 254 at 268–69.

216. Depending on whether the poison pill has a "flip-in" or a "flip-over" feature, the dilution may relate to the equity of either the target company or the hostile bidder. Ogowewo, *supra* note 130, at 589 n.2.

217. Such discrimination will occur where the bidder is excluded from the invitation to target shareholders to buy two shares for the price of one under the shareholder rights plan. Armour & Skeel, *supra* note 5, at 1734.

218. Griggs, *supra* note 210, at 215–216; see also *Criterion Props. Plc v. Stratford UK Properties L.L.C.*, [2003] 1 W.L.R. 2108, ¶ 26 (U.K.) (positing that only when structured to drive off one particular predator could a poison pill ever possibly be justified as a proper purpose). *But see* John Plender, *An Acceptable Poison Pill? It's Not an Oxymoron*, FIN. TIMES (London), Apr. 10, 2006, at 20 (discussing one form of poison pill, as adopted by the Japanese company, Nippon Steel Corporation, which might be beneficial for long-term shareholders).

219. Corporations Act, 2001, § 232(e) (Austl.).

220. This policy was developed in *Re Pinnacle VRB Ltd. (No. 5)* (2001) 39 A.C.S.R. 43, ¶¶ 21–31 (Austl.); *Re Pinnacle VRB Ltd. (No. 8)* (2001) 39 A.C.S.R. 55, app. 3 (Austl.); *Re Bigshop.com.au Ltd. (No. 2)* (Oct. 17, 2001) [2001] A.T.P. 24, ¶¶ 32–36 (Austl.). See generally Emma Armson, *The Frustrating Action Policy: Shifting Power in the Takeover Context*, 21 COMP. & SEC. L.J. 487 (2003).

221. The Australian Takeovers Panel has stated, for example, that "[a]greements which the Panel considers are 'poison pills' and have not been approved by relevant shareholders may be found to create unacceptable circumstances." Takeovers Panel, Guidance, *supra* note 143, ¶ 12.28, n.11. Although Guidance Note 12 stated that the Panel may issue a further guidance note specifically on poison pills in the future if it appeared necessary, *id.* ¶ 12.35, this has not occurred to date.

222. See *Re AMP Shopping Centre Trust (No. 1)* (2003) 45 A.C.S.R. 496, [2003] A.T.P. 21, ¶¶ 59–69 (Austl.), and *Re AMP Shopping Centre Trust (No. 2)* (2003) 45 A.C.S.R. 524, [2003] ATP 24, ¶¶ 14–21 (Austl.), which concerned a managed investment scheme. The Australian

context of managed schemes, demonstrated that the Panel is “willing to scrutinize measures that tend to act as poison pills . . . to ensure that unitholders are not unfairly deprived of the opportunity for a takeover premium.”<sup>223</sup> The Panel stressed the “principle of ‘non-entrenchment’ ” as a basis for its finding of unacceptable circumstances.<sup>224</sup> This reasoning also appears to underpin the English Court of Appeal decision in the leading U.K. case on poison pills, *Criterion Properties Plc v. Stratford UK Properties LLC*.<sup>225</sup>

The third, and most significant, factor that has prevented the use of poison pills in Australia is the ASX Listing Rules.<sup>226</sup> Some commentators have argued that former ASX Listing Rule 3G(7),<sup>227</sup> which specifically prohibited certain defensive measures, would have invalidated the use of poison pills.<sup>228</sup> Although this particular rule is no longer operative, the more general wording of Listing Rule 6.1, which affords the ASX discretion to ensure that the terms governing each class of equity securities are “appropriate and equitable,” could still be applied to invalidate poison pills.<sup>229</sup>

Moreover, even if poison pills are not expressly prohibited under the ASX Listing Rules, the rules require shareholder approval

Takeovers Panel held, at first instance, that the granting of certain pre-emptive rights to acquire interests in AMP Shopping Centre Trust (ART), exercisable on a change of responsible entity in ART, constituted “unacceptable circumstances.” Unacceptable circumstances existed because: (a) the pre-emptive rights would potentially deter a takeover bid for the target and entrench ART’s existing responsible entity, which was contrary to the principles of an efficient, competitive, and informed market; (b) there had had not been adequate disclosure to unitholders about the effect of the pre-emptive rights; and (c) the pre-emptive rights had not been approved by unitholders. The Review Panel upheld the first instance decision. *See generally* Allens Arthur Robinson, *In the Deal* (Aug. 7, 2003), <http://www.aar.com.au/pubs/itd/aug03/index.htm> (outlining the details of the case and its implications).

223. Braddon Jolley et al., *Takeovers Panel Doesn’t Swallow Poison Pill* (July 2003), <http://www.findlaw.com.au/article/9240.htm>.

224. *Re AMP Shopping Centre Trust (No. 1)* (2003) 45 A.C.S.R. at ¶¶ 66–68.

225. [2003] 1 W.L.R. 2108, ¶¶ 23–27 (U.K.). An appeal to the House of Lords was decided on different grounds. [2004] U.K.H.L. 28, [2004] 1 W.L.R. 1846, ¶¶ 29–33. It has been noted that, although Lord Justice Carnwath referred to the defensive arrangement in this case as a “poison pill”, it in fact more closely resembled a lock-up agreement. *See* Armour & Skeel, *supra* note 5, at 1784 n.269.

226. *See* RODD LEVY, TAKEOVERS: LAW AND STRATEGY 151–52 (2d ed. 2002).

227. ASX Listing Rule 3G(7) prohibited a company from issuing an option which, in the opinion of the stock exchange, was designed to frustrate a takeover bid or frustrate a person from becoming entitled to more than 20 per cent of equity securities in the company, or a person already entitled to more than 20 per cent of equity securities acquiring further equity securities in the company.

*Id.*

228. LEVY, *supra* note 226, at 151–52.

229. *Id.*

for a range of transactions related to changes of control or alterations to the capital structure of a listed company.<sup>230</sup> Some of these rules would affect the adoption of a poison pill. Listing Rule 7.1 has particular resonance in this regard.

Listing Rule 7.1 requires shareholder approval for any issuance, other than on a pro-rata basis, of more than 15 percent of the company's share capital.<sup>231</sup> The rule originated out of concern about defensive share placements that might frustrate takeover bids and dilute the interests of existing shareholders.<sup>232</sup> In 2003, only six months before News Corp. announced its Delaware reincorporation plan, the ASX considered reform proposals to Listing Rule 7.1 aimed at providing more discretion to directors in issuing securities. The ASX acknowledged that Listing Rule 7.1 was more restrictive and interventionist than the rules and practices of comparable exchanges, and the reform proposals sought to align it better with international markets.<sup>233</sup> Specific reform proposals included raising the 15 percent threshold for shareholder consent to 20 percent<sup>234</sup> and allowing shareholders to confer a general mandate on management to issue securities.<sup>235</sup> Ultimately, however, no changes were made to Listing Rule 7.1, and the 15 percent threshold for shareholder consent to a securities issue remains. The triggering of a poison pill arguably falls within the ambit of Listing Rule 7.1 and would therefore require shareholder approval.

The ASX Listing Rules, therefore, undermine management's ability to establish entrenching mechanisms, such as poison pills, without shareholder consent. Recent empirical research suggesting that the presence of entrenching mechanisms may reduce firm value

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230. These ASX Listing Rules include: Rule 10.1 (acquisition or disposal of a substantial asset to a person in a position of influence); Rule 11.2 (change in the main undertaking of the company); Rule 7.1 (issue of more than 15 percent of capital currently on issue); Rule 7.6 (issue of shares if 50 percent of shareholders call a meeting to appoint or remove directors); and Rule 7.9 (issue of shares within three months of written notice of a takeover proposal). See ASX Listing Rules, *supra* note 89. See generally Takeovers Panel, Guidance, *supra* note 143, ¶¶ 12.8–12.9.

231. For a discussion of the history of Listing Rule 7.1 and a comparison of its operation with capital raising barriers in other jurisdictions, see Austl. Stock Exch. Ltd., Exposure Draft, *Capital Raising Mechanisms in a Disclosure-Based Market – ASX Proposals for Informed Choice: A Review of Listing Rule 7.1 – Proposed ASX Listing Rule Amendments* ¶¶ 6.1–6.4, 8.1–8.3 (Oct. 2003).

232. *Id.* ¶¶ 7.1–7.3.

233. *Id.* ¶¶ 4.1–4.3, 8.3.

234. *Id.* ¶ 9.1.

235. It was proposed that such a general mandate would permit management to issue securities without the need for specific shareholder consent for a thirteen month period from the date of the mandate. *Id.* ¶ 9.2.

and stockholder returns supports the approach taken by the listing rules from a policy perspective.<sup>236</sup>

The anti-entrenchment effect of the ASX Listing Rules seems to present a profound dilemma in relation to the News Corp. reincorporation story. In its concessions to the institutional investors, News Corp. agreed to retain full foreign listing on the ASX, thereby binding itself to compliance with these listing rules. As such, the ASX Listing Rules should still have prohibited News Corp. from issuing a poison pill even after its reincorporation in Delaware.

The answer to this puzzle appears to lie in the ability of the ASX to waive compliance with its listing rules. In the week that the Delaware reincorporation became fully effective, the ASX granted an array of waivers to News Corp. exempting the company from compliance with particular listing rules.<sup>237</sup> Indeed, many of these waivers were granted on November 4, 2004,<sup>238</sup> only one day after Justice Hely had issued orders in the Federal Court of Australia approving the News Corp. schemes of arrangement.<sup>239</sup> While some of these waivers involved technical aspects of the reincorporation, others related to fundamental corporate governance matters. A number of the waivers, in fact, related to specific listing rules that the institutional investors had included in their Governance Article and had sought to incorporate into News Corp.'s Delaware charter.<sup>240</sup> The

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236. Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 786–88 (2009).

237. On November 2, 2004, the ASX issued a waiver exempting News Corp. from compliance with ASX Listing Rule 6.23. News Corp., ASX Waiver: Listing Rule 6.23, WLC040530-001 (Nov. 2, 2004). On November 4, 2004, further waivers were issued in favor of News Corp. in relation to the following ASX Listing Rules: LR 1.1 (condition 3) (WLC040532-001); LR 1.1 (condition 8) (WLC040532-002); LR 6.8 (WLC040532-003); LR 6.9 (WLC040532-004); LR 6.22 (WLC040532-005); LR 6.23 (WLC040532-006); LR 7.1 (WLC040532-007); LR 8.10 (WLC040532-008); LR 10.11 (WLC040532-009); LR 14.3 (WLC040532-010); LR 14.4 (WLC040532-011); and LR 15.15 (WLC040532-012). In 2005, further waivers were granted to News Corp. regarding LR 3.8A (WLC050287-001) and LR 7.33 (WLC050287-002), and in 2007, a waiver was granted of LR 2.4 (WLC070221-001).

238. ASX Listing Rules LR 1.1 (condition 3); LR 1.1 (condition 8); LR 6.8; LR 6.9; LR 6.22; LR 6.23; LR 7.1; LR 8.10; LR 10.11; LR 14.3; LR 14.4 and LR 15.15.

239. *Re News Corp.* (2004) 51 A.S.C.R. 394, ¶ 9 (Austl.). In making these orders, Justice Hely specifically noted the corporate governance concessions adopted by News Corp. at the request of the institutional investors. Justice Hely conceded that, although the concessions did not alter the actual terms of the schemes of arrangement he was asked to approve, they were relevant to “the overall commercial context” of the corporate reconstruction. *Id.* ¶ 5.

240. ASX waivers were granted to News Corp. with respect to the following listing rules, which had been included in the institutional investors' Governance Article: Listing Rule 7.1 (requiring shareholder approval for new share issues exceeding 15 percent of capital); Listing Rule 10.11 (requiring shareholder approval for issue of securities to a related party); Listing Rule 14.3 (requirements regarding nomination of directors); and Listing Rule 14.4 (requirements

underlying policy of these listing rules is shareholder protection.<sup>241</sup> It is particularly significant that one of the waivers related to ASX Listing Rule 7.1, the rule that primarily stands in the path of Australian companies issuing a poison pill.

In granting waivers to News Corp. at the time of the reincorporation, the ASX faced an inevitable position of conflict. Since its demutualization and listing as a public company,<sup>242</sup> the ASX had been subject to criticism on the basis that a conflict of interest existed between its twin goals of regulation and profit maximization.<sup>243</sup> This conflict lay particularly close to the surface in its relations with News Corp. Earlier in 2004, there had been consternation in the Australian marketplace that News Corp. might delist from the ASX.<sup>244</sup> News Corp.'s decision to retain full secondary listing ensured that the ASX continued to receive revenue from trading of News Corp. shares in Australia.

A further entrenchment mechanism, which is closely allied to poison pills and also makes an appearance in the News Corp. reincorporation story, is the staggered board. In the United States, the combination of a poison pill and a staggered board will constitute a virtually impregnable takeover defense.<sup>245</sup> Under Delaware law,

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regarding election and rotation of directors). See Governance Article, *supra* note 68, cl. 7 (“ASX Listing Rules provisions to apply”); ASX Listing Rules, *supra* note 89.

241. The waivers granted by the ASX specify the “underlying policy” for each listing rule waived. According to ASX Listing Waiver for LR 7.1 (WLC040532-007), the underlying policy of LR 7.1 is to “provide greater protection to smaller holders against dilution . . .” ASX Listing Waiver for LR 10.11 (WLC040532-009) states that, by requiring shareholder approval for an issue of securities to a related party, LR 10.11 is “directed at preventing related party obtaining securities on advantageous terms and increasing their holding proportionate to other holdings . . .” ASX Listing Waiver for LR 14.3 (WLC040532-010) states that LR 14.3, which provides that an entity must accept nominations for the election of directors up to 35 business days before the date of meeting, “gives reasonable opportunity for candidates to be nominated” and “supports shareholder democracy.” According to ASX Listing Waiver for LR 14.4 (WLC040532-011), LR 14.4, regarding election and rotation of directors, “prevents entrenchment of directors” and “supports shareholder democracy” (waivers on file with the author).

242. The ASX was one of the first stock exchanges in the world to demutualize and to list as a public company on its own market. Fleur Leyden, *Best Result for ASX is Humphry's Last*, AGE (Melbourne), July 29, 2004, at 1; Gwen Robinson, *Australia – Another Milestone Nears*, FIN. TIMES (London), Mar. 24, 1998, at 7.

243. See, e.g., Editorial, *The Best Way to Restore Faith*, AUSTL. FIN. REV., July 23, 2002, at 62.

244. See, e.g., Stephen Bartholomeusz, *News Move to NY Not Good for ASX*, SYDNEY MORNING HERALD, Apr. 27, 2004, at 18.

245. Lucian A. Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 919 (2002).

directors may be elected for a staggered term of up to three years<sup>246</sup> and, unless the certificate of incorporation provides otherwise, these directors can only be removed “for cause.”<sup>247</sup> This insulates directors from removal and effectively prevents an acquirer from obtaining control of the board in a single election. While it is common for Australian and U.K. public companies to have staggered election terms for directors, staggered boards cannot operate as an entrenchment and anti-takeover device in these jurisdictions. This is because shareholders possess an absolute right to remove directors with *or* without cause under Australian and U.K. law.<sup>248</sup> At the time of News Corp.’s reincorporation, the institutional investors were unsuccessful in their attempt to include an analogous right in the Delaware charter.<sup>249</sup> Instead, the charter provided for a staggered board,<sup>250</sup> the directors of which would, according to the Delaware norm, be removable only for cause.<sup>251</sup>

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246. DEL. CODE ANN. tit. 8, § 141(d) (2008). Note, however, that the proposed Shareholder Bill of Rights currently under consideration (discussed *supra* notes 24, 38) would introduce a requirement that directors be subject to annual election by the shareholders. See Shareholder Bill of Rights of 2009, S. 1074, 111th Cong. § 5(e)(3), available at <http://law.du.edu/documents/corporate-governance/legislation/bill-text-shareholders-bill-of-rights-act-of-2009.pdf> (“Corporate Governance Standards . . . Annual Elections Required”).

247. DEL. CODE ANN. tit. 8, § 141(k)(1) (2008). This contrasts with the modern default rule, applying to non-classified boards, that directors may be removed with or without cause. Removal of directors “for cause” is no easy matter, and has been described as a “weapon of last resort.” CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 163 (5th ed., 2006). See also *Campbell v. Loew’s, Inc.*, 134 A.2d 852 (Del. Ch. 1957), the leading case on removal for cause.

248. This right cannot be altered in the constitution or by agreement. See Corporations Act, 2001 § 203D (Austl.); Companies Act, 2006 c. 46 § 168(1) (U.K.).

249. Governance Article, *supra* note 68, at 2.

250. See News Corp., Current Report (Form 8-K), Amended and Restated Certificate of Incorporation of News Corporation, Inc., at ex. 3.1, art. V (Nov. 12, 2004). This was in spite of the fact that there has been a trend recently towards declassification of U.S. boards. For example, “in 2006, for the first time ever, a majority of S&P 500 companies had annually elected boards.” INST. S’HOLDER SERVS., *supra* note 207, at 11.

251. DEL. CODE ANN. tit. 8, § 141(k)(1) (2008). Note, however, that News Corp.’s charter discards this norm in limited circumstances, stating that “[a]t any time that there shall be three or fewer stockholders of record, directors may be removed with or without cause.” News Corp., Current Report (Form 8-K), ex. 3.1, art. V, at 14.

## V. EXTENSION OF THE PILL AND ITS AFTERMATH

It was never a bylaw. It was never a promise. It was never a pledge.

- Rupert Murdoch<sup>252</sup>

News Corp. thus finds itself in a stew of its own making.

- Chancellor Chandler<sup>253</sup>

If News Corp.'s adoption of a poison pill in 2004 aroused institutional investor concern, its actions the following year produced a furor. In August 2005, News Corp. announced that its board had decided to extend the poison pill for two years beyond its original one-year expiration date in November 2005 without shareholder approval.<sup>254</sup> The announcement made no reference either to the board policy on poison pills or to the reasons for deviating from that policy. The general reaction of the Australian financial press was severe, with one critic describing the announcement as "quite breathtaking" and evidence that News Corp. was "mostly run by untrustworthy people."<sup>255</sup>

In a response to this criticism, John Hartigan, CEO and chairman of News Corp.'s wholly-owned Australian subsidiary, News Ltd.,<sup>256</sup> justified the board's decision as necessary on the basis that changes of control are less stringently regulated under U.S. law than under Australian law. According to Hartigan, the board's gatekeeper role under U.S. law operates as the functional equivalent of Australian law's 20 percent threshold rule in ensuring that all shareholders are treated fairly and equitably.<sup>257</sup> Without the reversal of the board's policy on poison pills, Hartigan said, all News Corp. shareholders "would now be potentially at risk of a predator who could assume control without paying a premium for it."<sup>258</sup>

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252. Lisa Murray, *Poison Pill – There Was No Promise, Says Murdoch*, SYDNEY MORNING HERALD, Oct. 13, 2005, at 21 (quoting Rupert Murdoch).

253. *UniSuper Ltd. v. News Corp.*, No. Civ.A. 1699-N, 2006 WL 207505 at \*2 (Del. Ch. Jan. 20, 2006).

254. News Corporation, Current Report (Form 8-K), ex. 99.1, at 7 (Aug. 10, 2005); Keith L. Johnson & Andrew Clearfield, *Improving Governance by Joint Shareholder Action; Investors Await Trial to Assert Rights on News Corp. Poison Pill*, PENSIONS & INVESTMENTS, Mar. 6, 2006, at 12.

255. Kohler, *supra* note 206.

256. Press Release, News Corp., John Hartigan Appointed Chairman of News Ltd. (Aug. 19, 2005).

257. John Hartigan, *News Ltd. Boss Fires Back over Poison Pill*, SYDNEY MORNING HERALD, Aug. 20, 2005, at 46.

258. *Id.*

Rupert Murdoch claimed simply that News Corp. had never actually promised to make the board policy unalterable.<sup>259</sup> News Corp.'s undertaking concerning the extension of poison pills had appeared, however, not only in its board policy, but also as an attachment to the Australian Federal Court proceedings,<sup>260</sup> which had approved the corporate restructuring and reincorporation.<sup>261</sup> In August 2005, the Australian corporate regulator, ASIC, announced that it intended to investigate News Corp.'s statements to the market,<sup>262</sup> but this inquiry was later discontinued on the basis that News Corp. was now a U.S. company.<sup>263</sup>

In October 2005, a group of twelve predominantly Australian and European institutional investors filed legal proceedings against News Corp. and its directors in the Delaware Chancery Court in *UniSuper Ltd. v. News Corp.*<sup>264</sup> The plaintiffs sought to invalidate News Corp.'s extension of the poison pill and any subsequent extensions unless authorized by shareholder vote.<sup>265</sup> Their claim was based on a variety of grounds, including breach of contract, promissory estoppel, fraud, negligent misrepresentation, and breach of fiduciary duty.<sup>266</sup> The defendants, on the other hand, argued that reversal of its earlier board policy did not breach a binding contractual undertaking

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259. Murray, *supra* note 252.

260. Kate Askew & Lisa Murray, *A Hard Act to Swallow*, SYDNEY MORNING HERALD, Aug. 20, 2005, at 43.

261. In the Federal Court proceedings confirming the schemes of arrangement, Justice Hely made specific reference to the fact that News Corp. had agreed to additional corporate governance provisions. *Re News Corp.* (2004) 51 A.C.S.R. 394, ¶ 5 (Austl.).

262. *See* Askew & Murray, *supra* note 260.

263. In announcing the decision to discontinue the inquiry, ASIC's head of compliance stated [o]bviously, it's a concern when a company makes a statement to shareholders, only to go back on it, so we had a good look at it . . . . But the statement was made by a US company under US law and it would require a very resource-intensive exercise for us to pursue the matter. We have decided we should stay out of it.

Murray, *supra* note 252.

264. The majority of institutional shareholders were from Australia (six of the plaintiffs being members of ACSI), the Netherlands, and the United Kingdom. Only two of the plaintiffs were U.S. institutional investors. *See* *UniSuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317, at \*3 (Del Ch. Dec. 20, 2005) (The plaintiffs to the action were UniSuper Ltd, Public Sector Superannuation Scheme Board, Commonwealth Superannuation Scheme Board, United Super Pty Ltd, Motor Trades Association of Australia Superannuation Fund Pty Ltd, HEST Australia Ltd, CARE Super Pty Ltd, Universities Superannuation Scheme Ltd, Britel Fund Nominees Limited, Stichting Pensioenfonds ABP, Connecticut Retirement Plans and Trust Funds, and the Clinton Township Police and Fire Retirement System.); Stephen Bartholomeusz, *Murdoch and the Global Fund Alliance that Bites*, SYDNEY MORNING HERALD, Oct. 11, 2005, at 19; Johnson & Clearfield, *supra* note 254.

265. *UniSuper Ltd.*, 2005 WL 3529317, at \*1.

266. *Id.* at \*3.

by News Corp.<sup>267</sup> Moreover, they argued that any such contract between shareholders and the board would, contrary to Delaware law, constitute an impermissible constraint on centralized managerial authority under § 141(a) of the Delaware General Corporation Law.<sup>268</sup>

In response to a motion filed by the defendants to dismiss the case, Chancellor Chandler ruled in late 2005 that the plaintiffs' action for breach of contract and estoppel<sup>269</sup> could proceed.<sup>270</sup> The plaintiffs claimed that an agreement existed, either in the form of an oral contract or a written contract, in which News Corp. had consented to subject any extension of the poison pill to a shareholder vote.<sup>271</sup> Although Chancellor Chandler considered that the complaint asserted few facts to support either form of contract, the plaintiffs' entitlement to the benefit of all reasonable inferences was sufficient to overcome the motion to dismiss.<sup>272</sup>

Chancellor Chandler raised some problematic aspects of the plaintiffs' claim. He observed, in reasoning reminiscent of *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*,<sup>273</sup> that the plaintiffs were sophisticated institutional investors who could have protected their interests by negotiating an enforceable agreement or changes to the corporate charter, as had indeed occurred in the case of some other concessions.<sup>274</sup> He also noted that interpretational difficulties could arise in the future about ambiguities in the alleged agreement.<sup>275</sup>

In spite of these difficulties, the plaintiffs' claim withstood the defendants' motion to dismiss. Chancellor Chandler rejected the defendants' argument that any agreement between the board and shareholders would be contrary to the general grant of managerial power under Delaware law.<sup>276</sup> Adopting a principal/agent theory of the

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267. News Corp. claimed that it had promised to establish a board policy, but had not promised that the policy would be immutable. *Id.* at \*3 n.34.

268. DEL. CODE ANN. tit. 8, § 141(a) (2008); *UniSuper Ltd.*, 2005 WL 3529317, at \*6; *see also* Peg Brickley, *News Corp. Wins Right to Appeal Holder Suit in Delaware*, DOW JONES NEWSWIRES, Jan. 20, 2006.

269. The defendants' motion to dismiss was successful in relation to the counts of fraud, negligent misrepresentation and equitable fraud, and breach of fiduciary duty. *See UniSuper Ltd.*, 2005 WL 3529317 at \*10.

270. *Id.*

271. It was argued that the parties entered into a written contract evidenced by News Corp.'s Press Release and Letter to Shareholders at the time of its reincorporation. *Id.* at \*4.

272. *Id.*

273. 716 F. Supp. 1504, 1508 (S.D.N.Y. 1989).

274. *UniSuper Ltd.*, 2005 WL 3529317 at \*4 n.39.

275. *Id.* at \*5.

276. *Id.* at \*6.

relationship between shareholders and the board,<sup>277</sup> he viewed shareholders as “the ultimate holders of power,” or “owners” of the company,<sup>278</sup> and saw no impediment to directors entering into such a contract with the shareholders.<sup>279</sup> Although Chancellor Chandler’s theory of the shareholder does not accord with modern U.K. and Australian law,<sup>280</sup> the outcome in the case is consistent with legal principles concerning allocation of power in these jurisdictions.<sup>281</sup> However, it should be remembered that the *UniSuper* case is a decision of the Delaware Chancery Court,<sup>282</sup> and it is open to doubt whether the Delaware Supreme Court would agree with it.<sup>283</sup>

Policy issues were clearly influential in the *UniSuper* case.<sup>284</sup> Chancellor Chandler noted that a “troubling” aspect of the defendants’ view of Delaware law was that, if correct, it would potentially invalidate all of the governance concessions made by News Corp. in favor of the institutional investors, not merely the board policy on poison pills.<sup>285</sup> Yet the judge accepted that without these concessions, News Corp.’s reincorporation would not have occurred.<sup>286</sup> Echoing certain policy concerns of the Paulson Committee,<sup>287</sup> Chancellor Chandler suggested that shareholders of foreign companies would in the future be unlikely to vote for reincorporation in Delaware if

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277. *Id.* at \*6, \*8.

278. *Id.* at \*6.

279. *Id.*

280. Although nineteenth-century U.K. corporate law adopted an agency analysis, *see, e.g.*, *Isle of Wight Ry. Co v. Tahourdin*, (1884) 25 Ch.D. 320, 320–21 (C.A.), this analysis was definitively rejected in *Automatic Self Cleansing Filter Syndicate Co. v. Cuninghame*, (1906) 2 Ch. 34, 45–46 (C.A.). *See generally* Jennifer G. Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 42–44, 48 (2000).

281. *See, e.g.*, Hill, *supra* note 280, at 43–44.

282. News Corp. asked the Court of Chancery to certify the case for immediate appeal, and, although the Court of Chancery did so, *see UniSuper Ltd. v. News Corp.*, No. Civ.A 1699-N, 2006 WL 207505, at \*1 (Del. Ch. Jan. 19, 2006), the Delaware Supreme Court declined to accept an appeal in the case, *News Corp. v. UniSuper Ltd.*, 906 A.2d 138, 139 (Del. 2006) (depublished).

283. Indeed, this point was made by a Delaware Supreme Court judge in a hearing. Vice Chancellor Lamb said, “UniSuper is a decision by the Court of Chancery. It’s not a Supreme Court decision, and it isn’t necessarily true that the Supreme Court would agree, is it?”: Transcript of Final Hearing at 36, *Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006) (C.A. No. 2145-N), available at [http://www.law.harvard.edu/faculty/bebchuk/Policy/CA\\_Hearing\\_Transcript.pdf](http://www.law.harvard.edu/faculty/bebchuk/Policy/CA_Hearing_Transcript.pdf), quoted in Guhan Subramanian, *The Emerging Problem of Embedded Defenses: Lessons from Air Line Pilots Ass’n, Int’l v. UAL Corp.*, 120 HARV. L. REV. 1239, 1243 n.35 (2007).

284. *UniSuper Ltd.*, 2006 WL 207505, at \*1.

285. *Id.*

286. *Id.*

287. *See* COMM. ON CAPITAL MKTS. REGULATION, *supra* note 37, at 16.

inducements to procure their vote were held to be unenforceable there.<sup>288</sup>

On April 6, 2006, less than three weeks before the case was due to go to trial, the parties settled the proceedings, and News Corp. agreed to allow shareholders to vote on the extension of the poison pill at its October 2006 annual meeting.<sup>289</sup> On October 20, 2006, News Corp. shareholders voted to approve the continuance of the poison pill defense.<sup>290</sup> The approval margin was relatively slim—57 percent to 43 percent.<sup>291</sup> Shareholder backlash was also evident in voting on the reelection of four directors.<sup>292</sup> The conflict was finally resolved when Rupert Murdoch and John Malone settled their differences via an \$11 billion asset swap, with News Corp. agreeing to lift its contentious pill.<sup>293</sup>

Although the *UniSuper* case was ultimately settled, its implications for the balance of managerial and shareholder power in the United States continue to be tested. In June 2006, *Bebchuk v. CA, Inc.*<sup>294</sup> came before the Delaware Court of Chancery. *Bebchuk*, like *UniSuper*, concerned poison pills. It involved the validity of a proposed stockholder bylaw which sought to restrict the authority of the board of directors to enact any stockholder rights plan in the absence of

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288. *UniSuper Ltd.*, 2006 WL 207505, at \*1.

289. The trial had been scheduled for April 24, 2006. Julia Angwin, *News Corp. to Put Poison Pill to Shareholder Vote*, WALL ST. J., Apr. 7, 2006, at A3; Joshua Chaffin, *News Corp Settles Poison Pill Lawsuit*, FIN. TIMES (London), Apr. 7, 2006, at 25; John Plender, *supra* note 218.

290. Julia Angwin, *News Corp. Fends off Liberty Media*, WALL ST. J., Oct. 21, 2006, at A3.

291. Liberty Media voted against renewal of the poison pill. *Id.*

292. CGI and ISS recommended that shareholders withhold their votes from the four directors seeking reelection. Sundeep Tucker, *News Corp Tries to Halt Poison Pill Revolt*, FIN. TIMES (London), Oct. 11, 2005, at 23. When the reelection vote took place, 15 percent of shares voted withheld support from three directors seeking reelection and 13 percent of shares voted withheld support for News Corp.'s President, Peter Chernin. Julia Angwin, *News Corp.'s Murdoch Claims Victory in Poison-Pill Decision*, WALL ST. J., Oct. 22, 2005, at A3; *see also* Andrew Edgecliffe-Johnson & Aline Van Duyn, *Murdoch Weathers Investor Protests*, FIN. TIMES (London), Oct. 22, 2005, at 1.

293. Under the deal with News Corp., Liberty Media agreed to swap its \$11.2 billion stake in News Corp. for News Corp.'s 38.5 percent stake in DirecTV, \$588 million in cash (raised from \$550 million under an initial agreement in December 2006) and three local Fox sports channels, valued at approximately \$550 million. The deal was generally considered to favor Liberty Media. The elimination of Liberty Media's News Corp. stake increased the voting stake of other News Corp. shareholders, including Murdoch family interests, which rose from approximately 31.2 percent to 38 percent after the deal. The asset swap was later overwhelmingly approved by News Corp. Class B shareholders. *See* Julia Angwin & Matthew Karnitschnig, *Liberty is Expected to Seek Partner for DirecTV – With News Corp. Deal Set, Investors Look for Tie-Up; Murdoch to Drop Poison Pill*, WALL ST. J., Dec. 23, 2006, at A3; *News Corp. Shareholders Accept Liberty Deal*, N.Y. TIMES, Apr. 4, 2007, at 6.

294. 902 A.2d 737 (Del. Ch. 2006).

shareholder consent.<sup>295</sup> The corporation argued that the proposed bylaw could be omitted from its proxy materials on the basis that its adoption would violate Delaware law by seeking to limit the authority of the board of directors and interfere with managerial power.<sup>296</sup>

Vice Chancellor Lamb dismissed the request for declaratory relief as “unripe”<sup>297</sup> and noted that the court should be particularly cautious in giving advisory or hypothetical opinions in matters that raise novel and significant issues under Delaware law.<sup>298</sup> Nonetheless, in obiter dictum the court stated that the proposed bylaw was not “obviously invalid.”<sup>299</sup> The court, while acknowledging that the power to adopt a rights plan is clearly vested in the board of directors, observed that it was “less clear that the exercise of that power can never be the subject of a bylaw, whether enacted by the board of directors or by the stockholders.”<sup>300</sup> The court relied on the *UniSuper* decision in support of the proposition that a contractual restraint on the board’s power to issue a poison pill is valid under Delaware law.<sup>301</sup>

Therefore, although the conflict between News Corp. and its institutional shareholders was settled, the ruling in *UniSuper Ltd. v. News Corp.*<sup>302</sup>—that, under Delaware law, shareholders may enter into enforceable agreements with the board concerning the allocation of power under corporate governance structures<sup>303</sup>—continues to exert influence. Given the Delaware courts’ traditional legitimization of poison pills without the need for shareholder consent,<sup>304</sup> the *UniSuper*

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295. Under the proposed amendment to the company’s bylaws, in the absence of shareholder consent, any adoption or extension of a stockholder rights plan by the board of directors would require unanimous consent of directors and would automatically expire one year after its adoption or amendment. *Id.* at 738–39.

296. *Id.* The SEC refused to give a “no-action letter” in connection with CA’s proposed omission of the shareholder proposal, since litigation was pending. CA, Inc., SEC No-Action Letter, 2006 WL 1547985, at \*1 (June 5, 2006).

297. According to the court, the action would only become ripe and within its jurisdiction if the bylaw were put to a stockholder vote and adopted. *Bebchuk*, 902 A.2d at 741.

298. *Id.* at 740 (citing *Stroud v Milliken Enter.*, 552 A.2d 476, 480–81 (Del. 1989)).

299. *Id.* at 742.

300. *Id.* at 743 (citing *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401 (Del. 1985); *UniSuper Ltd. v. News Corp.*, 2005 WL 3529317 (Del. Ch. 2005)).

301. *Id.* at 743 n.34. The court also considered that future factual matters, such as the possibility that the CA board might voluntarily restrict its powers in relation to poison pills as in the *UniSuper* case, could also affect the justiciable issues in the case. *Id.* at 743.

302. 2005 WL 3529317.

303. *See id.* at \*5–6; *Johnson & Clearfield*, *supra* note 254.

304. *See, e.g.*, *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1348 (Del. 1984) (approving the use of “Preferred Share Purchase Rights Plans”). While basic poison pills, such as that found in the *Moran* case, have been upheld by the Delaware courts, the courts have invalidated some variations, such as “dead hand” and “no hand” poison pills. *See, e.g.*, *Carmody v. Toll Bros.*, 723

case has been described as marking “a symbolic shift”<sup>305</sup> in this regard. It was suggested that the possible weakening of poison pills through the *UniSuper* and *Bebchuk* decisions might lead to the development of alternative forms of takeover defenses in the United States.<sup>306</sup>

However, a more recent decision of the Delaware Supreme Court, *CA, Inc. v. AFSCME Employees Pension Plan*,<sup>307</sup> has significantly curtailed the potential use of stockholder-proposed bylaws to restrict the board’s power to adopt poison pills. While providing some scope for shareholder bylaws restricting the power of the board,<sup>308</sup> the decision nonetheless strongly reaffirms as a “cardinal precept” the board’s freedom to control the management and affairs of the corporation.<sup>309</sup> The court declared that “a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions.”<sup>310</sup> The court further rejected the argument that shareholders and the board possess coextensive powers to adopt and amend the bylaws.<sup>311</sup> This aspect of the decision stands in clear contrast to the Australian and U.K. default rules on constitutional allocation of power.

One final intriguing aspect of the News Corp. reincorporation involves its effect on the corporation’s equity value. In promoting its move to Delaware, News Corp. asserted that the reincorporation would enhance its share price through increased trading by indexed investors, such as mutual funds, that invest in the S&P 500.<sup>312</sup> This prediction accords with some early studies, which found that

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A.2d 1180, 1182 (Del. Ch. 1998) (“dead hand” poison pills); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1283 (Del. 1998) (“no hand” poison pills).

305. Plender, *supra* note 218; *see also* Stuart M. Grant & Megan D. McIntyre, *UniSuper v News Corporation: Affirmation that Shareholders, Not Directors, are the Ultimate Holders of Corporate Power*, 1557 PLI/CORP. 17, 19 (2006) (viewing the decision as a significant “victory for shareholder rights”).

306. *See, e.g.*, Subramanian, *supra* note 283, at 1243–44.

307. 953 A.2d 227 (Del. 2008). The case concerned a proposed bylaw, which would have directed CA’s board of directors to cause the corporation in certain circumstances to reimburse stockholders for reasonable proxy expenses, relating to nomination of directors in a contested election. *Id.* at 230.

308. The Delaware Supreme Court stated that the proper scope for bylaws was limited to defining the process and procedures by which managerial decisions are made and considered that bylaws of this ilk would not constitute an illegitimate intrusion into the board’s management powers under DEL. CODE ANN. tit. 8, § 141(a) (2008). *Id.* at 234–35. While holding that the proposed bylaw was indeed procedural in nature, the court nonetheless also found that such a bylaw, if adopted, could cause CA to violate Delaware law, by potentially requiring the directors to reimburse proxy expenses in breach of their fiduciary duties. *Id.* at 240.

309. *Id.* at 232 & n.6 (quoting *Aronson v. Lewis*, 437 A.2d 805, 811 (Del. 1984)).

310. *Id.* at 234–35.

311. *See id.* at 232.

312. *See Peers, supra* note 188.

reincorporation in Delaware benefited a firm's shareholders and positively affected its stock prices.<sup>313</sup> These studies provided support for a "race to the top" perspective on the jurisdictional competition debate of the 1980s.<sup>314</sup> However, more recent studies have cast doubt on the continued existence of a significant valuation premium associated with reincorporation in Delaware, and have even raised the specter of a negative Delaware effect.<sup>315</sup>

Ultimately, the promised share price rise for News Corp. stock has been elusive. In spite of record profits, News Corp.'s share price fell by over 10 percent in the twelve months following its reincorporation.<sup>316</sup> The adoption and extension of News Corp.'s poison pill also appeared to negatively affect its share price:<sup>317</sup> in the three months following the company's announcement of the unilateral extension of its poison pill, News Corp. shares fell by around 15 percent.<sup>318</sup> News Corp.'s Tobin's Q,<sup>319</sup> which is a proxy for the value of

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313. See, e.g., Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 272 (1985) (rebutting prior assertions to the contrary). Further support was later given to this position by Daines, who found a 5 percent positive effect on firm value from re-incorporating in Delaware, using Tobin's Q analysis. Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 554 tbl.11 (2001).

314. See, e.g., Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254-58 (1977) (critiquing the dominant "race to the bottom" conception). See generally ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 16-24 (1993) (comparing both "race to the bottom" and "race to the top" approaches empirically and ultimately supporting Winter's view). The "race to the top" approach assumed that Delaware's preeminence derived from the fact that its corporate law rules were superior to those of other places of incorporation. However, both the assumption of vigorous jurisdictional competition for charters and the assumption of Delaware's superiority have been challenged in recent times. On the issue of whether active competition for state charters exists, see, for example, Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 555 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002). On the issue of the assumed superiority of Delaware's laws, see generally William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 1-62 (2009).

315. See, e.g., Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 33 (2004). For general discussion of the trajectory of this debate, see Carney & Shepherd, *supra* note 314, at 9-11; Tobias H. Tröger, *Corporate Governance in a Viable Market for Secondary Listings*, 10 U. PA. J. BUS. & EMP. L. 89, 178-80 (2007).

316. According to Mr. Murdoch, contributing factors to News Corp.'s depressed share price were the forced sale of News Corp. stock by many Australian index funds and a general bear market in media stock. See Coultan, *supra* note 200; see also FinAnalysis daily price data for News Corporation's common stock on the ASX.

317. See FinAnalysis daily price data for News Corp.'s common stock on the ASX for the announcement dates of the poison pill (Nov. 8, 2004) and its extensions (Aug. 10, 2005). This potentially accords with studies which show that introduction of entrenchment features in corporate governance decreases firm value. See, e.g., Bebchuk, Cohen & Ferrell, *supra* note 236, at 785.

318. Coultan, *supra* note 200. It has been suggested that in the period before settling its differences with John Malone, News Corp. may actually have benefited from a lower stock price.

its growth options, dropped 25 percent from the fiscal year-end immediately prior to reincorporation<sup>320</sup> to the fiscal year-end immediately following reincorporation.<sup>321</sup>

## VI. CONCLUSION

We used to joke that the problem with News Corp stock was half of the shareholders are afraid Rupert will die and the other half are afraid that he won't.

- John Malone<sup>322</sup>

The aim of this Article has been to reconsider, through a detailed case study of News Corp.'s migration from Australia to Delaware, an embedded assumption in much contemporary corporate governance scholarship that a unified common law corporate governance model exists. The News Corp. reincorporation saga highlights a number of important differences between U.S. and Australian corporate law rules relating to shareholder rights and provides a valuable counterpoint to convergence theory, which often assumes that a homogeneous shareholder protection regime exists within the common law world. The News Corp. reincorporation case study is also relevant to the ongoing shareholder empowerment debate. It tests claims about the evolutionary nature of the current U.S. system of corporate governance that are often inherent in anti-shareholder empowerment arguments. It also demonstrates the importance of focusing on specific legal rules, rather than broad generalizations, in comparative corporate governance scholarship.

The net result of News Corp.'s move from Australia to Delaware was an appreciable reduction in shareholder rights and an enhancement of managerial powers, including the power to implement poison pills—a power unavailable in Australia. Although News Corp. asserted that legitimate commercial goals prompted its original reincorporation proposal,<sup>323</sup> the alacrity with which the company adopted a poison pill upon arrival in Delaware<sup>324</sup> strongly suggests

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See Stephen Bartholomeusz, *Murdoch's Happy to Miss Australia's King Tide*, SYDNEY MORNING HERALD, June 9, 2005, at 26.

319. Measured by the ratio of its market value of equity to its book value of equity.

320. *I.e.* June 30, 2004.

321. *I.e.* June 30, 2005. See generally FinAnalysis daily price data and annual financial reports for News Corporation.

322. Chenoweth, *supra* note 171 (quoting John Malone).

323. NEWS CORP., ANNUAL REPORT, *supra* note 53, at 4 (“We undertook this move for one reason: to create greater value for our shareholders.”). For other perceived benefits, see Press Release, News Corp., *supra* note 57, at 2.

324. Press Release, News Corp., *supra* note 175.

that gaining access to Delaware's pro-managerial governance regime was an important aspect of the reincorporation decision.<sup>325</sup>

The concessions demanded by News Corp.'s institutional investors were designed to respond to the reduction of their rights under Delaware law. As this Article shows, however, News Corp. sought to subvert key concessions via an array of methods, both in Australia and Delaware. These methods included use of ASX waivers, reversal of the board policy on poison pills, and arguments in the *UniSuper* litigation that shareholder constraints on board power to issue poison pills contravened Delaware law.<sup>326</sup> Indeed, the degree of News Corp.'s resistance to the enforceability of the concessions—resistance that, according to Chancellor Chandler, would ultimately land News Corp. in a “stew of its own making”<sup>327</sup>—further suggests that access to Delaware law provided a major inducement for the reincorporation.

News Corp.'s reincorporation has important implications for Delaware law. The pro-management focus of Delaware law may provide a competitive advantage in encouraging reincorporation by foreign companies. Nonetheless, as Chancellor Chandler recognized in *UniSuper*, if Delaware law fails to recognize concessions provided to shareholders in exchange for their support of reincorporation proposals, shareholders of foreign companies may be deterred from approving reincorporation in Delaware in the future.<sup>328</sup>

In the wake of the current global financial crisis, the regulatory environment is a dynamic and unpredictable one. Regulatory reform, including in the area of shareholder rights, is now squarely on the agenda in the United States, and there is also increased interest in international corporate regulatory regimes. An assessment of News Corp.'s reincorporation challenges the inevitability of the U.S. corporate governance status quo in relation to the balance of power between shareholders and the board of directors. It emphasizes the fact that, although there are many basic similarities between corporate governance in the United States and in other common law

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325. See, e.g., Power & Chenoweth, *supra* note 58. Some commentators took the view, however, that the real reason for News Corp.'s move to Delaware might never be known. See Knight, *supra* note 58 (“What we will never know is the extent to which this move offshore was motivated by the potential re-rating or the deterioration of minorities' rights and the enhancement of Murdoch family control.”).

326. See, e.g., *UniSuper Ltd. v. News Corp.*, No. Civ.A. 1699-N, 2006 WL 207505 at \*1 (Del. Ch. Jan. 20, 2006) (expressing concern that News Corp.'s view of Delaware law, would, if correct, potentially invalidate all of News Corp.'s governance concessions, not merely the board policy on poison pills).

327. *Id.* at \*1–2.

328. *Id.* at \*1.

jurisdictions, there are nonetheless sufficient differences to make comparative analysis not only fruitful and interesting,<sup>329</sup> but also highly relevant to future law reform.

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329. L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1370 (1956) (“[I]f there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful.”).

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