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

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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.

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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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. Nonetheless, News Corp.’s migration to the United States from Australia, which paved the way for this victory—a victory that appears increasingly Pyrrhic in the light of the global financial crisis—was neither smooth

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 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.


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.

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).

As Chancellor Chandler recognized in *UniSuper Ltd. v. News Corp.*, 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.

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. The momentum in this regard appears to be intensifying, with a range of proposals to increase shareholder power now on the table. 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. 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, 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. There are, however,
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. This crisis has demonstrated “that there are . . . costs to under-regulation,” and reform and intensified regulation appear politically inevitable. 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. 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.


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).


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 (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).

reform proposals concerning shareholder rights would, if implemented, augment this power shift.  

Finally, the assumption that Delaware’s traditional dominance is attributable to the superiority of its legal rules is also under pressure.  

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, enthusiasm for the program now appears to have waned. However, several recent U.S. reforms and reform proposals replicate particular legal provisions of other common law jurisdictions.


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).  


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. 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, and the recently proposed legislation for a Shareholder Bill of Rights contains an analogous provision.

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

Rupert Murdoch is a great Australian, in the sense that Attila was a great Hun.
- Geoffrey Robertson QC

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. reincorporation.
reincorporation. The convergence debate reached its zenith at the turn of the last decade.\textsuperscript{27} Its central issue was whether international corporate laws would converge,\textsuperscript{28} or whether differences between common law and civil law jurisdictions would persist.\textsuperscript{29} While convergence theory and the closely allied “law matters” hypothesis\textsuperscript{30} highlighted stark legal differences between common law and civil law jurisdictions,\textsuperscript{31} they obscured or ignored important differences within the common law world itself.\textsuperscript{32} Indeed, both sides of the convergence-divergence debate often seem to assume that a unified and stable
Anglo-American, or common law, model of corporate governance exists.\footnote{\textsuperscript{33}}

The controversial shareholder empowerment debate is of more recent origin.\footnote{\textsuperscript{34}} 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.\footnote{\textsuperscript{35}} Instigating the debate, Professor Bebchuk advocated stronger participatory rights for U.S. shareholders in a range of governance scenarios.\footnote{\textsuperscript{36}} The Committee on Capital Markets Regulation (“Paulson Committee”) also recommended increasing U.S. shareholder rights.\footnote{\textsuperscript{37}}

\footnote{\textsuperscript{33}} Toms & Wright, supra note 32, at 267; see, e.g., \textit{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?”).


\footnote{\textsuperscript{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.


\footnote{\textsuperscript{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 \textit{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 (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. \textit{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\(^3\) and a proposed SEC Rule 14a-11,\(^4\) which would grant shareholders access to the company’s proxy materials to nominate directors.\(^5\) The reaction to these proposals has been both polarized and intense: some have strongly supported the Shareholder Bill of Rights,\(^6\) while others have condemned the proposal on the basis that it will exacerbate short-termism and the problem of predatory investors.\(^7\) 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 (“Provid[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, Schmer, 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.


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).


Few academic commentators in the United States seem to doubt that there is “ample room for increasing shareholder power” under U.S. corporate law.\footnote{\cit{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”).}} 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.\footnote{\cit{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).}} 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.\footnote{\cit{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).}} Under this critique, traditional discourse about protection of investors has given way to discourse about protection of the corporation from investors.\footnote{\cit{Robert C. Clark, Opening Comments, Corporate Separateness, Sixth Annual Law and Business Conference at Vanderbilt University (Mar. 31, 2006).}}

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.\footnote{\cit{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. 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, 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, 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.

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”). The reincorporation proposal, which involved

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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.

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

According to News Corp., the move to the United States, where most of its operations were based, was prompted by legitimate commercial goals, including the desire to gain greater access to U.S. capital markets and to enhance shareholder value. 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.

In contrast to the Paulson Committee’s concern that minimal shareholder rights might deter corporations from entering U.S. public markets, these critics claimed that this feature of Delaware law constituted its main allure for News Corp.

An independent expert’s report, prepared by Grant Samuel & Associates on behalf of News Corp., found that the reincorporation


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).


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.


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, AUSTL. FIN. REV., Sept. 28, 2004, at 1.


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, 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.” 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.”

In late July 2004, two institutional investor organizations, the Australian Council of Super Investors, Inc. (“ACSI”) and Corporate Governance International Pty. Ltd. (“CGI”) met with News Corp. to discuss a range of corporate governance concerns relating to the effect of the reincorporation proposal on shareholder rights. ACSI and CGI, which had the support of several major international institutional investors, 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”—which they provided to News Corp. with a request that its

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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).


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 (last visited Nov. 13, 2009).


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.

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.

Initially, News Corp. made no concessions to the institutional investors' demands. Echoing the arguments of Montesquieu, 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.

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.” By late September 2004, Institutional Shareholder Services, Inc. (“ISS”), the largest U.S. proxy adviser, entered the fray, adding its voice to calls for News Corp. to adopt certain Australian corporate governance standards. It appears that U.S. institutions held around 21 percent of ordinary shares and 35 percent of preference shares in News Corp.,

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.
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.
and that approximately 20 to 30 percent of U.S. institutional investors received advice from ISS.\textsuperscript{77} Rupert Murdoch’s family interests controlled approximately 30 percent of News Corp.’s voting stock.\textsuperscript{78} 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.\textsuperscript{79}

III. THE NEWS CORP. CONCESSIONS

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

- George E. Reedy\textsuperscript{80}

In October 2004, News Corp. resiled from its earlier rejection of the institutional investors’ demands\textsuperscript{81} and agreed to incorporate some shareholder protection provisions into its Delaware charter.\textsuperscript{82} 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.\textsuperscript{83}


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


\textsuperscript{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, which institutional investors sought to incorporate into News Corp.'s Delaware charter. News Corp. did not accede to this specific demand. 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. Although its primary listing was on the New York Stock Exchange after the reincorporation, News Corp.'s concession that it would retain full foreign listing on the ASX ensured that all the ASX Listing Rules and corporate governance guidelines would continue to apply to the company.

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

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.


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)(v)(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. 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. In particular, the rules impede the use of entrenchment mechanisms that are permitted in many other jurisdictions, such as dual class stock and poison pills. 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. 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.

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. This aspect of the concession would become relevant immediately following News Corp.’s reincorporation.

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. 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.


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.\footnote{99. See ASX Listing Rules, \textit{supra} note 89, at R. 6.9 (mandating a “one share, one vote” rule in relation to voting on a poll).}

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.\footnote{100. Sue Lecky, \textit{Murdoch Seeks ‘Super’ Shares}, \textit{Sydney Morning Herald}, Oct. 13, 1993, at 27.} News Corp. subsequently asked the ASX to waive the strict “one share, one vote” principle\footnote{101. For discussion of the history and economic theory underlying the “one share, one vote” rule, see Guido Ferrarini, \textit{One Share – One Vote: A European Rule?} (ECGI, Working Paper No. 58, 2006), \textit{available at http://ssrn.com/abstract=875620}.} under its rules so the company could issue shares with differential voting rights.\footnote{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, \textit{The News Corporation Super Shares Proposal: Crime of the Century or Tempest in a Teapot}, \textit{4 Austral J. Corp. L.} 184, 184–85 (1994), \textit{available at 1994 AJCL LEXIS 9}.} The proposal was widely condemned in Australia as an entrenchment and anti-takeover device which would erode general shareholder rights.\footnote{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.” Emilia Mychasuk, \textit{Industry Says No to News Share Plan}, \textit{Sydney Morning Herald}, Nov. 30, 1993, at 33; cf. Fridman, \textit{supra} note 102, at 184–85.}

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.\footnote{104. \textit{See ASX, Discussion Paper on Differential Voting Rights} 4–6 (Nov. 1993) (on file with author); \textit{see also} Ivor Ries, \textit{ASX Opens Up One-vote Debate}, \textit{Austral 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").} Institutional investor opposition,\footnote{105. \textit{See Ivor Ries, Big Guns Open Fire on Murdoch’s Super Shares}, \textit{Austral 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. \textit{See Brian Hale, US Support for Murdoch Share Plan}, \textit{Austral Fin. Rev.}, Nov. 11, 1993, at 23.} governmental intervention,\footnote{106. Tim Dodd & Neil Chenoweth, \textit{Gout Steps into Super Share Row}, \textit{Austral Fin. Rev.}, Nov. 24, 1993, at 1.} and public backlash ultimately led News Corp. to abandon the plan to issue super-voting shares,\footnote{107. \textit{News Corp. Plan for New Shares Bows to Pressure}, \textit{Wall St. J.}, Nov. 22, 1993, at A11.} leading some prescient commentators at the time to speculate that News Corp. might seek to avoid future
difficulties of this kind by delisting in Australia or reincorporating in a jurisdiction such as Delaware. 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.

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. Accordingly, they included an extensive list of shareholder protection provisions from the Australian Corporations Act in their Governance Article. These provisions related to matters such as the convening of shareholder meetings, conduct of those meetings, and removal of directors from office.

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.
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.115 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.116 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),117 it contained significant qualifications118 and included various other shareholder protection provisions, such as §§ 207–230 (general requirement of shareholder consent for related party transactions).


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.\textsuperscript{119}

\textbf{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.\textsuperscript{120} U.S. federal law regulates “tender offers”\textsuperscript{121} rather than the concept of “changes of control,” which forms the regulatory fulcrum in jurisdictions such as the United Kingdom and Australia.\textsuperscript{122} Under U.S. law, assessment of directors’ defensive conduct in takeovers is the province of state law and courts.\textsuperscript{123} Delaware law, in spite of the potential for intense scrutiny of directors’ defensive tactics following the \textit{Unocal} decision,\textsuperscript{124} continues to accord great deference to board decisions under a paradigm in which the board occupies a “gatekeeper” role.\textsuperscript{125} Although views differ on whether this gatekeeper
paradigm in fact promotes shareholder interests,\textsuperscript{126} 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.\textsuperscript{127}

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"),\textsuperscript{128} 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.\textsuperscript{129} The U.K. approach has thus far been characterized by an extremely low incidence of tactical litigation compared to the United States.\textsuperscript{130} 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.\textsuperscript{131}

\textsuperscript{126} See, e.g., Paul Davies & Klaus Hopt, \textit{Control Transactions}, in \textsc{Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus J. Hopt, Hideki Kanda & Edward Rock, \textit{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).

\textsuperscript{127} See, e.g., Leo E. Strine, \textit{Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance}, 33 \textit{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").

\textsuperscript{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).


\textsuperscript{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 \textsc{Dept of Trade & Ind.}, \textit{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, an approach which also underpins recent European Community developments in takeover law. 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. 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.

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.” They are explicitly based on policies of equality of opportunity and protection of minority shareholders, which are embodied in the so-called “Eggleston principles.” The basic rule under Australian takeover law, which has a historical focus on fairness rather than

132. See Davies & Hopt, supra note 126, at 164.
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”).
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,\textsuperscript{138} 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”).\textsuperscript{139} 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\textsuperscript{140} provided that a general offer or “mandatory bid” is subsequently made to all shareholders.\textsuperscript{141}

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.\textsuperscript{142} 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.\textsuperscript{143} This policy focused on the effect, rather than the purpose, of directors’ conduct in response to a takeover,\textsuperscript{144} and limited permissible action by the board in the absence of shareholder

\textsuperscript{138} Mannolini, supra note 136, at 338.


\textsuperscript{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).

\textsuperscript{141} Mannolini, supra note 136, at 357–58.

\textsuperscript{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 Ogwewo, 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.).


consent.\textsuperscript{145} It constituted a major shift in the balance of power between the board and shareholders during a bid under Australian law.\textsuperscript{146}

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.\textsuperscript{147} U.S. courts have acknowledged this diversity in international takeover regulation.\textsuperscript{148} 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.\textsuperscript{149}

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.\textsuperscript{150} Furthermore, the Governance Article tackled the issue of defensive conduct by the board of directors.\textsuperscript{151} Clause 8.1 of the Governance Article contained a general limitation on the board’s power in relation to corporate control transactions.\textsuperscript{152} It also included

\begin{footnotesize}
\begin{enumerate}
\item[(145)] See id. at 126; Jennifer G. Hill & Jeremy Kriewaldt, \textit{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.

\item[(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.

\item[(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”).

\item[(148)] See, for example, the recent case of \textit{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. \textit{Id.}

\item[(149)] COMM. ON CAPITAL MKTS. REGULATION, supra note 37, at 93–105.

\item[(150)] Governance Article, supra note 68, cl. 6, at 3.

\item[(151)] \textit{Id.} cl. 8, at 4.

\item[(152)] Clause 8.1 of the Governance Article stated that

\begin{itemize}
\item[(a)] the 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
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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.’”

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. 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. News Corp. also accepted a restriction on the board’s power to issue poison pills. However, this restriction was contained not in the charter, as the institutional investors had requested, but rather in a board policy. The ostensible reason for this was logistical constraints. 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.”

E. Best Practice Principles

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

\[\text{Id.}\]
\[\text{153. Id.}\]
\[\text{154. See Letter from News Corp. to Shareholders and Optionholders, supra note 82, at app. \(\dag\) (b); see also id. \(\dag\) 4 (summarizing the “Restrictions on the rights of the Murdoch interests to acquire further shares, and to transfer existing shares, in News Corp US”).}\]
\[\text{155. Id. app. \(\dag\) (a).}\]
\[\text{157. Id.}\]
\[\text{158. During negotiations, News Corp.’s General Counsel, Ian Phillip, told the President of ACSI, Michael O’Sullivan, that it would not be possible, in the limited time available before the shareholder vote on the corporate reconstruction, to draft and finalize an appropriate charter restriction on poison pills. Id. at *2.}\]
and international corporate governance. 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. News Corp. did not agree to include these provisions in its Delaware charter. 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.

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

Although News Corp.’s concessions were far more limited than the institutional investors’ original demands in the Governance Article, the compromise was generally portrayed in the Australian financial press as a significant victory for the institutional investors. One commentator, for example, described the News Corp. concessions as heralding “a major step forward” for shareholder democracy; 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.
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.
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

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

- John Malone

[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

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

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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).


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.\(^{179}\)

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:

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

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


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 New 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.


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. 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. 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. 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. 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 for Class B voting stock. In contrast, Mr. Murdoch was...
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.  

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). Further acquisitions of more than 1 percent by any party could, however, trigger the pill. The pill therefore ensured that Liberty Media could not raise its voting stake in News Corp. beyond 18 percent without experiencing massive dilution.

Although Chancellor Chandler has suggested that Liberty Media “suddenly appeared” as a hostile acquirer, 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. 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.

The AAT decision concerned a Freedom of Information request which had been made by a Deutsche Bank analyst, Michael
Mangan, 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. 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.” 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. 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.

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. 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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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.

permitted under Australian law. Unlike Delaware (and some other jurisdictions such as Canada, France, and Japan), 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. Directors are subject to a fundamental duty to act in good faith for the benefit of the company and for proper purposes. Defeating a takeover or ensuring that the current target board retains control are prima facie improper purposes under Australian law.


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 (Theordor 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.


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


right to be protected against dilution of their voting rights by improper board conduct. Any such share issuance by the directors would be voidable, unless ratified by the shareholders in a general meeting. Since poison pills, if triggered, produce substantial dilution of the bidder’s stake and often discriminate between shareholders, 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. A statutory remedy is also available for conduct that is oppressive, unfairly prejudicial, or discriminatory to a shareholder under Australian law.

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, and the Panel has made some specific remarks about poison pills that are consistent with this interpretation. 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. This decision, in the
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.” The Panel stressed the “principle of ‘non-entrenchment’ ” as a basis for its finding of unacceptable circumstances. 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.*

The third, and most significant, factor that has prevented the use of poison pills in Australia is the ASX Listing Rules. Some commentators have argued that former ASX Listing Rule 3G(7), which specifically prohibited certain defensive measures, would have invalidated the use of poison pills. 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.

Moreover, even if poison pills are not expressly prohibited under the ASX Listing Rules, the rules require shareholder approval.
for a range of transactions related to changes of control or alterations to the capital structure of a listed company. 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. The rule originated out of concern about defensive share placements that might frustrate takeover bids and dilute the interests of existing shareholders. 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. Specific reform proposals included raising the 15 percent threshold for shareholder consent to 20 percent and allowing shareholders to confer a general mandate on management to issue securities. 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

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.


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.236

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.237 Indeed, many of these waivers were granted on November 4, 2004,238 only one day after Justice Hely had issued orders in the Federal Court of Australia approving the News Corp. schemes of arrangement.239 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.240

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 7.53 (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. 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, 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. 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. 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. Under Delaware law,
directors may be elected for a staggered term of up to three years and, unless the certificate of incorporation provides otherwise, these directors can only be removed “for cause.” 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. 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. Instead, the charter provided for a staggered board, the directors of which would, according to the Delaware norm, be removable only for cause.


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.”


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

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

- Chancellor Chandler

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. 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.”

In a response to this criticism, John Hartigan, CEO and chairman of News Corp.’s wholly-owned Australian subsidiary, News Ltd., 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. 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.”


255. Kohler, supra note 206.


258. Id.
Rupert Murdoch claimed simply that News Corp. had never actually promised to make the board policy unalterable.\textsuperscript{259} 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,\textsuperscript{260} which had approved the corporate restructuring and reincorporation.\textsuperscript{261} In August 2005, the Australian corporate regulator, ASIC, announced that it intended to investigate News Corp.’s statements to the market,\textsuperscript{262} but this inquiry was later discontinued on the basis that News Corp. was now a U.S. company.\textsuperscript{263}

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 \textit{UniSuper Ltd. v. News Corp.}\textsuperscript{264} The plaintiffs sought to invalidate News Corp.’s extension of the poison pill and any subsequent extensions unless authorized by shareholder vote.\textsuperscript{265} Their claim was based on a variety of grounds, including breach of contract, promissory estoppel, fraud, negligent misrepresentation, and breach of fiduciary duty.\textsuperscript{266} The defendants, on the other hand, argued that reversal of its earlier board policy did not breach a binding contractual undertaking.

\begin{footnotes}
\item[259] Murray, \textit{supra} note 252.
\item[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. \textit{Re News Corp.} (2004) 51 A.C.S.R. 394, ¶ 5 (Austl.).
\item[262] See Askew & Murray, \textit{supra} note 260.
\item[263] In announcing the decision to discontinue the inquiry, ASIC’s head of compliance stated \textit{[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, \textit{supra} note 252.
\item[265] \textit{UniSuper Ltd.}, 2005 WL 3529317, at *1.
\item[266] \textit{Id.} at *3.
\end{footnotes}
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.

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 could proceed. 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. 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.

Chancellor Chandler raised some problematic aspects of the plaintiffs’ claim. He observed, in reasoning reminiscent of Metropolitan Life Insurance Co. v. RJR Nabisco, Inc., 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. He also noted that interpretational difficulties could arise in the future about ambiguities in the alleged agreement.

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. 

Adopting a principal/agent theory of the

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.
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.
275. Id. at *5.
276. Id. at *6.
relationship between shareholders and the board, he viewed shareholders as “the ultimate holders of power,” or “owners” of the company, and saw no impediment to directors entering into such a contract with the shareholders. Although Chancellor Chandler’s theory of the shareholder does not accord with modern U.K. and Australian law, the outcome in the case is consistent with legal principles concerning allocation of power in these jurisdictions. However, it should be remembered that the UniSuper case is a decision of the Delaware Chancery Court, and it is open to doubt whether the Delaware Supreme Court would agree with it.

Policy issues were clearly influential in the UniSuper case. 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. Yet the judge accepted that without these concessions, News Corp.’s reincorporation would not have occurred. Echoing certain policy concerns of the Paulson Committee, Chancellor Chandler suggested that shareholders of foreign companies would in the future be unlikely to vote for reincorporation in Delaware if

277. Id. at *6, *8.
278. Id. at *6.
279. Id.
281. See, e.g., Hill, supra note 280, at 43–44.
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, quoted in Guhan Subramanian, The Emerging Problem of Embedded Defenses: Lessons from Air Line Pilots Ass’n v. UAL Corp., 120 HARV. L. REV. 1239, 1243 n.35 (2007).
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.\textsuperscript{288}

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.\textsuperscript{289} On October 20, 2006, News Corp. shareholders voted to approve the continuance of the poison pill defense.\textsuperscript{290} The approval margin was relatively slim—57 percent to 43 percent.\textsuperscript{291} Shareholder backlash was also evident in voting on the reelection of four directors.\textsuperscript{292} 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.\textsuperscript{293}

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 \textit{v.} CA, \textit{Inc.}\textsuperscript{294} 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

\begin{footnotes}
\footnotetext[288]{\textit{UniSuper Ltd.}, 2006 WL 207505, at *1.}
\footnotetext[291]{Liberty Media voted against renewal of the poison pill. \textit{Id.}}
\footnotetext[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, \textit{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; \textit{News Corp. Shareholders Accept Liberty Deal}, N.Y. TIMES, Apr. 4, 2007, at 6.}
\footnotetext[294]{902 A.2d 737 (Del. Ch. 2006).}
\end{footnotes}
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. 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. Vice Chancellor Lamb dismissed the request for declaratory relief as “unripe” 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. Nonetheless, in obiter dictum the court stated that the proposed bylaw was not “obviously invalid.” 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.” 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.

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

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 1547885, 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” 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.

However, a more recent decision of the Delaware Supreme Court, CA, Inc. v. AFSCME Employees Pension Plan, 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, the decision nonetheless strongly reaffirms as a “cardinal precept” the board’s freedom to control the management and affairs of the corporation. The court declared that “a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions.” The court further rejected the argument that shareholders and the board possess coextensive powers to adopt and amend the bylaws. 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. This prediction accords with some early studies, which found that

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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. These studies provided support for a “race to the top” perspective on the jurisdictional competition debate of the 1980s. 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.

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. The adoption and extension of News Corp.’s poison pill also appeared to negatively affect its share price 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. News Corp.’s Tobin’s Q, which is a proxy for the value of

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 Leisurly 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).


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\textsuperscript{320} to the fiscal year-end immediately following reincorporation\textsuperscript{321}

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.

\textit{\small - John Malone\textsuperscript{322}}

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,\textsuperscript{323} the alacrity with which the company adopted a poison pill upon arrival in Delaware\textsuperscript{324} strongly suggests

\textit{See} Stephen Bartholomeusz, \textit{Murdoch’s Happy to Miss Australia’s King Tide}, \textit{SYDNEY MORNING HERALD}, June 9, 2005, at 26.\textsuperscript{319}

\textsuperscript{319} Measured by the ratio of its market value of equity to its book value of equity.

\textsuperscript{320} \textit{I.e.} June 30, 2004.

\textsuperscript{321} \textit{I.e.} June 30, 2005. \textit{See generally} FinAnalysis daily price data and annual financial reports for News Corporation.

\textsuperscript{322} Chenoweth, \textit{supra} note 171 (quoting John Malone).

\textsuperscript{323} NEWS CORP., \textit{ANNUAL REPORT}, \textit{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., \textit{supra} note 57, at 2.

\textsuperscript{324} Press Release, News Corp., \textit{supra} note 175.
that gaining access to Delaware’s pro-managerial governance regime was an important aspect of the reincorporation decision.\footnote{325 \textit{See}, \textit{e.g.}, Power & Chenoweth, \textit{supra} note 58. Some commentators took the view, however, that the real reason for News Corp.’s move to Delaware might never be known. \textit{See} Knight, \textit{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.”).}

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 \textit{UniSuper} litigation that shareholder constraints on board power to issue poison pills contravened Delaware law.\footnote{326 \textit{See}, \textit{e.g.}, \textit{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).} 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”\footnote{327 \textit{Id. at} *1–2.}—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 \textit{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.\footnote{328 \textit{Id. at} *1.}

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
jurisdictions, there are nonetheless sufficient differences to make comparative analysis not only fruitful and interesting,\textsuperscript{329} but also highly relevant to future law reform.

\textsuperscript{329} L.C.B. Gower, \textit{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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