Global Business & Development Law Journal

Volume 16
Issue 1 *Symposium: The Globalization of Corporate and Securities Law in the Twenty-First Century*

Article 4

1-1-2002

Corporate Governance Convergence: Lessons from Australia

Brian R. Cheffins
University of Cambridge

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TABLE OF CONTENTS

I. INTRODUCTION

Corporate governance is currently the subject of much discussion in boardrooms, classrooms, and the media.[1] Cross-border analysis is a noteworthy

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* S.J. Berwin Professor of Corporate Law, Faculty of Law, University of Cambridge and Visiting Professor, Harvard Law School (Fall 2002). The author would like to thank John Farrar, David Merrett, Ian Ramsay, Roberta Romano and Geof Stapledon for helpful comments. This is a revised version of a previously published paper: Brian R. Cheffins, *Comparative Corporate Governance and the Australian Experience*, *in* KEY DEVELOPMENTS IN CORPORATE LAW & EQUITY: ESSAYS IN HONOUR OF PROFESSOR HAROLD FORD 13 (Ian Ramsay ed., 2002).

1. Brian R. Cheffins, *Teaching Corporate Governance*, 19 LEGAL STUD. 515, 515-16 (1999); Klaus J. Hopt & Eddy Wymeersch, *Preface*, *in* COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS v, v (Klaus J. Hopt & Eddy Wymeersch eds., 1997).

feature of the topic's rise to prominence.[2] During the late 1980s and early 1990s, admirers of Germany and Japan's economic performance argued that the United States would benefit by adopting, in a modified form, corporate governance features from these two countries.[3] The pattern may now be working in reverse. Market forces could be serving to destabilize traditional business structures and cause some form of convergence along "Anglo-American" lines.[4] Academics from various disciplines have sought to explain and evaluate this possible reorientation of corporate governance, with contributions being made by individuals based in economics departments,[5] business schools,[6] and law faculties.[7]

The possibility that governance convergence is occurring along Anglo-American lines has prompted much speculation about how far matters are likely to progress. A topic that has captured considerable attention in this context is the set of conditions that need to be in place in order for a country's corporate economy to be organized in accordance with the Anglo-American pattern. In academic circles, debate has centered largely on the extent to which legal, political, and ideological factors have a pivotal influence.

This article contributes to the ongoing discourse in two distinctive and innovative ways. First, it focuses on Australia, a country that has been neglected thus far in the academic literature dealing with corporate governance convergence. Second, the paper offers a multifaceted overview of the variables that might be expected to influence whether a country's economy will evolve in an Anglo-American direction. To this point, the predominant tendency in the literature has been to focus on one potentially important factor and perhaps offer a cursory analysis of some other relevant contingencies.[8]

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2. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1602-03 (2000); Lawrence A. Cunningham, *Comparative Corporate Governance and Pedagogy*, 34 GA. L. REV. 721, 722 n.1 (2000); Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 327 (2001); Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 162 (2001).

3. Mary O'Sullivan, *Corporate Governance and Globalization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 154 (2000).

4. *See, e.g.*, Geoffrey Owen, *The Americanization of European Business*, WALL ST. J. (Eur.), July 28, 1999, at 14; David Chiang, *Asia's Corporate Governance Revolution*, WALL ST. J. (Asia), June 24, 1999, at 8; *Lean, Mean & European: Survey of European Business*, ECONOMIST, Apr. 29, 2000.

5. *See, e.g.*, Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000).

6. *See, e.g.*, O'Sullivan, *supra* note 3.

7. *See, e.g.*, John C. Coffee, *The Future as History: Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. UNIV. L. REV. 641, 644 (1999).

8. *But see* Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 584-99 (2000) [hereinafter Roe, *Political Preconditions*]; Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL ST. 233, 263-65 (2002) [hereinafter Roe, *Corporate Law's Limits*]; Ronald J. Daniels & Edward M. Iacobucci, *Some of the Causes and Consequences of Corporate Ownership Concentration in Canada*, *in* CONCENTRATED CORPORATE OWNERSHIP 81 (Randall K. Morck ed., 2000).

The paper is organized as follows. An overview of international corporate governance arrangements will be provided first. We will then consider why developments in Australia are potentially significant from a corporate governance standpoint and examine how corporate capitalism is currently structured in the country. After this, key variables that might account for present arrangements will be discussed. For instance, did regulation of Australia's banks have a significant influence on Australia's system of ownership and control? Was the country's ideological orientation important? Did the country's corporate and securities laws have an impact? Has bankruptcy law played a role? Was trade policy influential? The paper concludes by acknowledging that the list of variables discussed here is not necessarily exhaustive and by stressing the importance of multifaceted analysis in the area of comparative corporate governance.

II. THE WORLD'S RIVAL CORPORATE GOVERNANCE SYSTEMS

The structure of ownership and control that exists in the United States and the United Kingdom has been characterized as an "outsider/arm's-length" system.[9] The "outsider" typology is used to describe the situation that exists because most big firms do not have "core" shareholders (e.g. family owners, affiliated firms or the state) that own enough equity to exercise "inside" influence. Instead, share ownership is typically dispersed among a large number of institutional and individual shareholders. The term "arm's-length" signifies that investors in the U.S. and the U.K. are rarely poised to intervene and take a hand in running a business. Instead, they tend to maintain their distance and give executives a free hand to manage.[10]

Adolf Berle and Gardiner Means, in a famous book published in 1932, drew attention to the emergence of the outsider/arm's-length governance pattern in the U.S.[11] They said there was "a separation of ownership and control" in America's larger public companies because share ownership was too widely dispersed to permit stockholders to scrutinize managerial decision-making properly. The normative implications of their analysis were widely debated in the decades that

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9. MARC GOERGEN, CORPORATE GOVERNANCE AND FINANCIAL PERFORMANCE: A STUDY OF GERMAN AND U.K. INITIAL PUBLIC OFFERINGS 1-2 (1998); Geoffrey Jones, *Big Business, Management, and Competitiveness in Twentieth-Century Britain*, *in* BIG BUSINESS AND THE WEALTH OF NATIONS 102, 128 (Alfred D. Chandler et al. eds., 1997).

10. *See* Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459 (Peter Newman ed., vol. 1 1998) (discussing the arm's length approach in the United States); Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L LAW 5, 12-13 (1999) (considering the outsider system in the United Kingdom); Jane Martinson, *Shares in the Action*, FIN. TIMES (U.K.), Apr. 27, 1998, at 21 (describing how institutional shareholders in Britain take a "hands-off" approach). *But see* G.P. STAPLEDON, INSTITUTIONAL SHAREHOLDERS AND CORPORATE GOVERNANCE 10-11, 113 n.166 (1996) (arguing that British institutional shareholders do exercise meaningful influence over management).

11. BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

followed. Interested observers implicitly agreed, however, that the "Berle-Means corporation" must inevitably be the dominant paradigm in a market economy.[12]

According to the prevailing orthodoxy, big companies would, by virtue of economies of scale, dominate key industries.[13] Fragmented share ownership was inevitable because a handful of wealthy individuals could not provide such firms with proper financial backing. Also, a separation of ownership and control was beneficial since executives could be hired solely on the basis of their managerial credentials. This could occur because they would not be expected to make any financial contribution to the firm hiring them or have any sort of connection with key shareholders (e.g., as a member of a family owning a substantial block of equity). The upshot was that the Berle-Means corporation, logically, must be the winner of a Darwinian struggle between different forms of corporate structure.

Perhaps because of this seemingly compelling economic reasoning, Berle and Means' work fixed the image of the modern corporation as one run by professional managers who were potentially unaccountable to widely dispersed shareholders.[14] In fact, however, the Berle-Means corporation is far from universal.[15] While an outsider/arm's-length system of ownership and control might prevail in the U.S. and the U.K., corporate governance in continental Europe and in market-oriented economies in East Asia is organized on a much different basis. Publicly quoted companies do not play as nearly as important a role in the economy.[16] Also, with those firms that are publicly traded, "core" shareholders are prevalent and are usually well situated to exercise considerable influence over management. The prevailing approach to corporate governance, therefore, is "insider/control-oriented."[17]

While capitalism is organized on a different basis in continental Europe and East Asia than it is in the U.S. and the U.K., matters may well be in flux. Certainly, prior to the fall in global equity markets in 2001, there was much anecdotal evidence which suggested that some form of convergence was occurring along Anglo-American lines. For instance, frequent initial public offerings (IPOs) meant the number of listed companies was growing rapidly in continental Europe.[18] Similarly,

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12. *Owners Versus Managers*, ECONOMIST (U.K.), Oct. 8, 1994, at 20; Gregory A. Mark, *Realms of Choice: Finance Capitalism and Corporate Governance*, 95 COLUM. L. REV. 969, 973-76 (1995); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE ch. 1 (1994) [hereinafter ROE, STRONG MANAGERS].

13. *See* Alfred D. Chandler, *The Competitive Performance of U.S. Industrial Enterprises Since the Second World War*, 69 BUS. HIST. REV. 1, 2-3 (1994) (providing background on the economy of scale point).

14. Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 471 (1999).

15. *Id.* at 474.

16. Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1137-38 (1997).

17. Erik Berglöf, *A Note on the Typology of Financial Systems*, *in* COMPARATIVE CORPORATE GOVERNANCE 152, 157-64; Hans J. Blommestein, *The New Financial Landscape and Its Impact on Corporate Governance*, *in* CORPORATE GOVERNANCE, FINANCIAL MARKETS AND GLOBAL CONVERGENCE 41, 56-59 (Morten Balling et al. eds., 1998).

18. Chirstoph van der Elst, *The Equity Markets, Ownership Structures and Control: Towards an International Harmonisation* (Financial Law Institute, University of Ghent, Working Paper 2000-04, at 5-6, 9-

Japan's IPO market was booming.[19] Also, firms that had already issued shares to the public were actively seeking out broader markets for their equity, quite often by obtaining listings on U.S. stock exchanges.[20] Furthermore, within insider/control-oriented countries, those owning large blocks of equity in publicly quoted companies appeared to be unwinding their holdings to some degree.[21] At the same time, share ownership was becoming more popular on a societal level as the number of individuals owning equity directly or via collective investment vehicles (e.g., mutual funds) was growing significantly.[22]

These various trends led some to argue that a fundamental shift towards Anglo-American capitalism was taking place on a cross-border basis. For instance, there were headlines in the financial press proclaiming that "A Governance Revolution"[23] was in progress, that Asia was witnessing "The End of Tycoons,"[24] and that "The Americanization of European Business"[25] was underway. Academics who argued that there was a strong convergence trend also used some colourful rhetoric. For example, Henry Hansmann and Reinier Kraakman declared "The End of History for Corporate Law."[26]

Despite the forceful language, it remains unclear whether continental Europe and market-oriented countries in Asia are in fact experiencing any sort of wholesale shift towards Anglo-American capitalism. The recent fall in global equity markets has led to, at the very least, a pause in any convergence trend. Global equity issuance, for instance, has declined significantly.[27] Also, the pace at which concentrated shareholdings are being unwound might be slowing.[28] Moreover, the stock market drop has sorely tested enthusiasm for shares in those countries where an incipient "equity culture" was emerging.[29]

11, 2000); John C. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 16-17 (2001).

19. Paul Abrahams, *A Sudden Increase in Demand Has Caught Everyone by Surprise: Survey on Japanese Investment Banking*, FIN. TIMES (U.K.), May 8, 2000, at 2.

20. Marco Pagano et al., *The Geography of Equity Listing: Why Do European Companies List Abroad?*, (Salerno University Center for Studies in Economics and Finance, Working Paper No. 28, at 16-18, 1999); Gerard Hertig, *Western Europe's Corporate Governance Dilemma*, *in* CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW 265, 271-72 (Theodor Baums et al. eds., 2000); Krishna Guha & Khozem Merchant, *India Makes a Clean Break*, FIN. TIMES (U.K.), June 15, 2000, at 15.

21. Coffee, *supra* note 18, at 15-16; Christopher Rhoads & Vanessa Fuhrmans, *Stakeholders Yield to Shareholders in the New Germany*, WALL ST. J. (Eur.), June 21, 2001, at 1.

22. *See, e.g.*, George Melloan, *Europe's New Shareholder Culture Spurs Big Changes*, WALL ST. J., May 9, 2000, at A27; Simon Targett, *Europe Places Its Bets on the Equity Culture*, FIN. TIMES (U.K.), Jan. 26, 2001, FT Survey: Europe Reinvented (Part 2), at 12; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 452 (2001).

23. WALL ST. J. (Eur.), May 19, 2000, at 10.

24. ECONOMIST (U.K.), Apr. 29, 2000, at 93.

25. Owen, *supra* note 4.

26. *See* sources cited *supra* note 22.

27. *Rise and Fall: Survey of Global Equity Markets*, ECONOMIST, May 5, 2001; *Old Habits Die Hard*, ECONOMIST, Aug. 4, 2001, at 64.

28. *Old Habits Die Hard*, *supra* note 27 (discussing Japan).

29. *Rise and Fall*, *supra* note 27, at 4, 7, 38; Ellen Thalman, *Shareholder Value Loses Favor*, WALL ST. J.

More broadly, it cannot be taken for granted that the Berle-Means corporation will become dominant by virtue of its inherent economic advantages. Germany and Japan, both insider/control-oriented countries, seemed to be enjoying greater economic success than the U.S. during the late 1980s and early 1990s.[30] This implied that their systems of corporate governance were fully capable of yielding results similar or even superior to the American model.[31] Indeed, the inference some drew from Germany and Japan's economic performance was that the U.S. and the U.K. would benefit by adopting, with modifications, corporate governance features from these two countries.[32]

Even if the Berle-Means corporation does constitute the evolutionary pinnacle, a switch to Anglo-American capitalism will not necessarily occur in countries where a different system currently prevails. Convergence may instead occur only within limits set by national contexts.[33] For instance, Mark Roe has argued that a country's system of ownership and control is politically and ideologically contingent, instead of simply being the product of market forces.[34] Also, various empirical studies suggest that dispersed shareholdings and strong securities markets are unlikely to become well-established in countries that do not offer significant legal protections to minority shareholders.[35] Moreover, David Skeel has argued that a country's corporate governance regime is defined in part by its bankruptcy regime.[36]

III. THE SIGNIFICANCE OF THE AUSTRALIAN EXPERIENCE

Since systems of corporate governance can potentially be explained in terms of a country's political, ideological, and legal environment, Australia's experience may provide clues as to what constitutes the "bedrock" for an economy where the

(Eur.), July 31, 2001, at 13; Christopher Rhoads, *Europe's Tender Equity Culture*, WALL ST. J., Sept. 18, 2002, at A17.

30. Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 218-19 (1991); MICHEL ALBERT, CAPITALISM VS. CAPITALISM: HOW AMERICA'S OBSESSION WITH INDIVIDUAL ACHIEVEMENT AND SHORT-TERM PROFIT HAS LED IT TO THE BRINK OF COLLAPSE ch. 7 (Paul Haviland trans., 1993).

31. ALBERT, *supra* note 30, at 128; Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U.L.Q. 327, 331-32 (1996).

32. Lipton & Rosenblum, *supra* note 30, at 224-52; Michael E. Porter, *Capital Disadvantage: America's Failing Capital Investment System*, HARV. BUS. REV., Sept.-Oct. 1992, at 65, 77-80; Allen Sykes, *Proposals for a Reformed System of Corporate Governance to Achieve Internationally Competitive Long-Term Performance*, *in* CAPITAL MARKETS AND CORPORATE GOVERNANCE 111 (Nicholas Dimsdale & Martha Prevezer eds., 1994).

33. Licht, *supra* note 2, at 153-56, 162-65; William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 247-52 (1999).

34. *See, e.g.*, Roe, *Political Preconditions*, *supra* note 8; ROE, STRONG MANAGERS, *supra* note 12; Mark J. Roe, *German "Populism" and the Large Public Corporation*, 14 INT'L REV. L. & ECON. 187 (1994).

35. *See* La Porta et al., *Investor Protection*, *supra* note 5, at 4-6, 14-16.

36. *See* David A. Skeel Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325 (1998).

Berle-Means corporation dominates. Australia's situation is a promising candidate for analysis because those who have sought to categorize the country's version of corporate capitalism say that it follows the Anglo-American or Anglo-Saxon economic model.[37] Again, corporate governance allegedly is converging along the outsider/arm's-length parameters that currently prevail in the U.S. and the U.K. Given Australia's Anglo-American orientation, developments in the country can potentially shed light upon the pre-conditions that need to be satisfied before a switch to this sort of regime can take place.

Despite Australia's potential significance, little has been said about lessons that might be derived from the country's experience. Since academic analysis of corporate governance issues has generally had a strong comparative dimension,[38] this is somewhat surprising. Still, those examining corporate governance from a cross-border angle have largely ignored Australia.[39]

The situation has been a little different within Australia. The country's policymakers and academics do draw upon work done in the U.S. and the U.K. when they analyze key corporate governance issues such as the functioning of the board of directors and the structure of executive pay.[40] Still, perhaps because Australia is currently overhauling the regulatory regime governing its corporate sector, only scant attention has been paid to the convergence trend that has attracted so much attention elsewhere.[41]

To understand properly why Australia can shed light upon contemporary corporate governance debates, it is necessary to consider precisely why its version of corporate capitalism has been characterized as Anglo-American. One reason the country potentially constitutes a good example of the Anglo-Saxon economic model is that the country has a "shareholder economy." In jurisdictions of this type, private enterprise is about maximizing returns, for investors and shareholders

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37. *See, e.g.*, JOHN SCOTT, CORPORATE BUSINESS AND CAPITALIST CLASSES 3, 56 (3d ed. 1997); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 51 (1999); *cf.* William K. Carroll & Malcolm Alexander, *Finance Capital and Capitalist Class Integration in the 1990s: Networks of Interlocking Directorships in Canada and Australia*, 36 CANADIAN REV. SOC. ANTHROPOLOGY 331, 333-34 (1999).

38. *Supra* note 2 and related discussion.

39. *See* Cunningham, *supra* note 2, at 723 (noting that generally comparative corporate governance scholarship does tend to focus on a narrow range of countries); Branson, *supra* note 2, at 334-35.

40. *See, e.g.*, AUSTRALIAN STOCK EXCHANGE, DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES BY LISTED COMPANIES 5-8 (1994); Helen Bird, *The Rise and Fall of the Corporate Director*, 5 AUSTRL. CORP. L. 235, 239-43 (1995); Jennifer Hill, *"What Reward Have Ye": Disclosure of Director and Executive and Remuneration in Australia*, 14 CO. & SEC. L.J. 232, 233-36 (1996); Paul von Nessen, *The Americanization of Australian Corporate Law*, 26 SYRACUSE J. INT'L L. & COM. 239, 261-64 (1999).

41. *But see* Leon Gettler, *Good Corporate Governance Is Not a Sideshow Any More*, AGE (Melbourne), Apr. 2, 1999, at 3; John Farrar, *The New Financial Architecture and Effective Corporate Governance*, 33 INT'L LAW. 927 (1999); John Farrar, In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance (2001) (unpublished working paper). For an overview of the regulatory overhaul, see Sean B. Hughes, *Corporate Governance in the Sun: Reform to Corporate Governance in Australia*, 9 INT'L COMP. CORP. COM. L. REV. 307 (1998).

occupy the central position with respect to companies.[42] Those who own equity dominate because they elect the directors and the law has traditionally equated the interests of the company with those of the shareholders. The U.S. and the U.K. are the most commonly cited examples of countries where corporate law falls within these parameters[43] but Australia also qualifies.[44]

Another reason why Australia has been treated as a member of the Anglo-American club is that the stock market is a well-established feature of the corporate economy. In the U.S. and the U.K. the ratio of market capitalization to gross national product (GNP) is considerably greater than it is in other major industrial nations. Moreover, both countries have considerably more listed companies per one million people than do countries such as Germany, Italy, France and Japan.[45] Australia's market capitalization/GNP ratio is considerably lower than Britain's, but is near the American level.[46] Also, Australia has a substantially greater number of listed companies per one million people than either the U.S. or the U.K.[47]

Though Australia's version of corporate capitalism clearly resembles both America's and Britain's in important ways, there is a pivotal dimension where the position is not clear. This is with respect to the dispersion of share ownership. Whereas in the U.S. and the U.K. companies with widely held shares dominate the economy, it is not clear where matters stand in Australia.

According to the Organization for Economic Co-Operation and Development (OECD), Australia qualifies as a country with an outsider/arm's-length system of

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42. *See* Frits Bolkestein, *The High Road that Leads Out of the Low Countries*, ECONOMIST, May 22, 1999, at 115. Others have made the same point using somewhat different terminology. *See, e.g.*, Bradley et al., *supra* note 37, at 37-38, 48 (using the term "contractarian" to describe a regime where shareholders are the focal point); Lawrence A. Cunningham, Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance, 84 CORNELL L. REV. 1133, 1136-39 (1999) ("shareholder market model"); Erik Berglöf, *Reforming Corporate Governance: Redirecting the European Agenda*, [1997] ECONOMIC POLICY 93, 105-06 ("company based system").

43. *See, e.g.*, Cunningham, *supra* note 42, at 1136-39; J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 75-77, 81 (1993); FRANKLIN ALLEN & DOUGLAS GALE, COMPARING FINANCIAL SYSTEMS 376-81 (2000).

44. *See* H.A.J. FORD ET AL., FORD'S PRINCIPLES OF CORPORATIONS LAW ¶¶ 7.170, 8.095, 8.100, 8.120, 8.130 (10th ed. 2001) (noting, though, that regard must also be had for the interests of creditors in some circumstances); Andrea Corfield, *The Stakeholder Theory and Its Future in Australian Corporate Governance: A Preliminary Analysis*, 10 BOND L. REV. 213, 220-26 (1998); *see also* Bird, *supra* note 40, at 248-49 (summarizing adoption of the "shareholder model" by an influential Australian corporate governance committee).

45. *See* Cheffins, *supra* note 10, at 11-12; *see also* Coffee, *supra* note 18, at 17.

46. *See* La Porta et al., *supra* note 16, at 1137-38; ORG. ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS 1997-1998: AUSTRALIA 96 (1997); Maria Maher & Thomas Andersson, Corporate Governance: Effects on Firm Performance and Economic Growth 19 (2000) (unpublished working paper); Alan Dunk & Alan Kilgore, *Financial Markets, Corporate Governance, and Short-Term Pressures in Australia*, *in* CORPORATE GOVERNANCE, ACCOUNTABILITY, AND PRESSURES TO PERFORM: AN INTERNATIONAL STUDY 141, 144 (Istemi S. Demirag ed., 1998) (noting that the ratio is lower, however, than in other major Asia-Pacific financial markets).

47. *See* La Porta et al., *supra* note 16, at 1137.

ownership and control.[48] It is open to question, though, whether this is an accurate assessment. One important feature that distinguishes Australia from America and Britain is that companies which have distributed their shares for sale to the public play a considerably less important role in the economy. The vast majority of large companies in the U.S. are listed on the stock market, and as of 1994, sixty-three percent of the U.K.'s largest five hundred non-financial companies were publicly quoted.[49] In contrast, again as of 1994, only thirty-five percent of Australia's top five hundred companies had shares traded on a stock exchange.[50] Hence, even though Australia has more publicly traded companies per capita than the U.S. or the U.K.,[51] firms that are privately held (or government-owned) are of comparatively greater economic significance.

Also noteworthy is that, with companies traded on the stock market, the ownership structure in Australia is more concentrated than it is in the U.S. and the U.K. According to a study published in 1999, in Australia eleven out of the twenty largest publicly quoted companies could be classified as "widely-held" in the sense that they did not have a shareholder that owned ten percent or more of the equity. In the U.S. and Britain the figures were, respectively, sixteen out of twenty and eighteen out of twenty.[52]

A similar pattern is evident when smaller companies are taken into account. As of 1996, approximately forty-five percent of the companies that make up Australia's ASX All Ordinaries Index had a shareholder other than an institutional investor that owned twenty percent or more of the shares.[53] In contrast, in the U.K. just over twenty percent of the companies listed on the London Stock Exchange were in the same position.[54] Overall, then, despite what the OECD has said, the empirical evidence suggests that an observation made about Australia's system of ownership and control in 1978 may remain valid:

> "(A)lthough the 'managerial revolution' may have begun in Australia it is certainly nowhere near completion, nor is there any guarantee . . . that it will ever get there."[55]

Uncertainty concerning Australia's status as an outsider/arm's-length country affects the inferences that can be drawn from the country's experience. To

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48. *See* ORG. ECON. CO-OPERATION & DEV., *supra* note 46, at 95.

49. *See* Pieter W. Moerland, *Alternative Disciplinary Mechanisms in Different Corporate Systems*, 26 J. ECON. BEHAVIOR & ORG. 17, 19 (1995); Geof Stapledon, *Australian Sharemarket Ownership*, *in* SECURITIES REGULATION IN AUSTRALIA AND NEW ZEALAND 242, 243 (Gordon Walker et al. eds., 2d ed. 1998).

50. Stapledon, *supra* note 49, at 243; *see also* Carroll & Alexander, *supra* note 37, at 338-39.

51. *Supra* note 47 and related discussion.

52. La Porta et al., *supra* note 14, at 492-93.

53. *See* Stapledon, *supra* note 49, at 250.

54. *See* Mara Faccio & Larry H.P. Lang, The Separation of Ownership and Control: An Analysis of Ultimate Ownership in Western European Corporations tbl. 2 (2000) (unpublished working paper).

55. MICHAEL LAWRIWSKY, OWNERSHIP AND CONTROL OF AUSTRALIAN CORPORATIONS 31 (1978).

illustrate, assume that Australia currently has share ownership dispersion akin to that existing in the U.S. and the U.K., but has a distinctive political, ideological and legal environment. It would follow that national context may not have the sort of decisive influence on a country's system of ownership and control that some have suggested. Instead, the Australian experience would indicate that the Berle-Means corporation is sufficiently robust to become dominant under varying political, ideological, and legal conditions.

Assume conversely that Australia differs from the U.S. and the U.K. because of concentration of ownership. If Australia's political, ideological and legal environment was similar to America's and Britain's, it would seem that other factors must have dictated that a separation of ownership and control would not evolve. On the other hand, if Australia's politics, ideology and law were distinctive in key respects, this would imply that these were potentially crucial variables. Such an inference could have significant ramifications for countries in continental Europe and East Asia. This is because, to the extent that their national context is different from America's and Britain's, the Australian evidence would cast doubt on the prospects for convergence along outsider/arm's-length lines.

Since the experience in Australia can potentially shed light on the pre-conditions for a separation of ownership and control, it would be helpful if there was additional evidence on the country's share ownership pattern. Some valuable empirical work is in fact currently being done,[56] but the results are still too tentative to allow firm conclusions to be drawn. For present purposes then, due allowance must be made for the fact that it is unclear whether an arm's-length/outsider system of ownership and control is in place.

IV. BANK REGULATION

A. *The United States and the United Kingdom*

As mentioned, Mark Roe has cast doubt on whether, in the United States, the Berle-Means corporation was the logical winner of a Darwinian struggle between different forms of corporate structure.[57] A key theme in his writing is that the American system of ownership and control was, at least in part, a product of a deeply ingrained popular mistrust of concentrated financial power.[58] He has

56. *See* Geof Stapledon & Asjeet Lamba, The Determinants of Corporate Ownership Structure: Australian Evidence (Univ. of Melbourne/Faculty of Law Public Law and Legal Theory, Working Paper No. 20, 2001).

57. *Supra* note 34 and related discussion.

58. *See, e.g.*, ROE, STRONG MANAGERS, *supra* note 12; Mark J. Roe, *Political and Legal Restraints on Ownership and Control of Public Companies*, 27 J. FIN. ECON. 7 (1990); *The Political Roots of American Corporate Finance*, 1997 J. APPLIED CORP. FIN. 8 (Winter); *see also* Joseph A. Grundfest, *Subordination of American Capital*, 27 J. FIN. ECON. 89 (1990); Michael C. Jensen, *Corporate Control and the Politics of Finance*, 1991 J. APPLIED CORP. FIN. 13, 20-21) (Summer) (arguing along similar lines to Roe). Roe's work, however, has been the dominant influence in the field. Coffee, *supra* note 7, at 643 n.4.

argued that at several points in the Twentieth Century, major U.S. financial institutions were poised to take substantial block positions in American businesses and adopt an activist approach to corporate governance. On these occasions, however, politicians intervened. Mindful of a deeply ingrained popular mistrust of concentrated financial power, they passed laws that forced corporate ownership to remain fragmented and deterred big financial institutions from taking a close interest in the affairs of large U.S. companies.

Roe has illustrated his point by describing how American banks conducted themselves differently from their German and Japanese counterparts.[59] According to his version of events, banking institutions in Germany and Japan developed and retained over time strong links with major industrial and commercial enterprises.[60] American banks, in contrast, maintained their distance. Roe has argued that U.S. government regulations dictated this outcome, saying that federal laws put a fault line between banking and other sectors of the economy.[61]

Events occurring in the U.K. cast doubt on Roe's interpretation of events.[62] In Britain, like the U.S., interdependence between banks and larger industrial or commercial firms has been the exception rather than the rule.[63] Given what Roe has said, one would expect that in the U.K. there would have been laws in place that discouraged banks from stepping forward. This, however, was not the case. Instead, Britain's commercial deposit-taking or "clearing" banks have never been confronted with explicit restrictions on the activities they can undertake.[64]

If law did not constrain British banks, why did they shy away from taking on responsibility for the operation and development of the country's companies? The primary reason apparently was that top banking personnel were deeply concerned about maintaining public confidence in the ability to pay cash on demand.[65] Influenced by this strong bias in favour of liquidity, banks preferred

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59. *E.g.*, ROE, STRONG MEDICINE, *supra* note 12, at chs. 5, 7, 11-12.

60. *Id.* at 215-16. Roe, when discussing Germany, traces the origins of bank dominance back to the late 19th Century, but this interpretation of events has been challenged. *See, e.g.*, Caroline Fohlin, *Universal Banking in Pre-World War I Germany: Model or Myth?*, 36 EXPLORATIONS ECON. HIST. 305, 323-35 (1999).

61. *See, e.g.*, Act of June 16, 1933, ch. 89, 48 Stat. 162, known as the Glass Stegall Act. This federal law, which was repealed in 1999, prohibited bank affiliates from owning and dealing in corporate securities.

62. *See* Brian R. Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle-Means Corporation in the United Kingdom, Convergence and Diversity*, *in* CORPORATE GOVERNANCE REGIMES AND CAPITAL MARKETS (Joseph A. McCahery & Luc Renneboog eds., forthcoming).

63. *See* FORREST CAPIE & MICHAEL COLLINS, HAVE THE BANKS FAILED BRITISH INDUSTRY?: AN HISTORICAL SURVEY OF BANK/INDUSTRY RELATIONS IN BRITAIN, 1870-1990 37, 42, 50-51, 54-55, 58-59, 67, 76 (1992); JONATHAN CHARKHAM, KEEPING GOOD COMPANY: A STUDY OF CORPORATE GOVERNANCE IN FIVE COUNTRIES 297-300 (1994).

64. *See* HERBERT JACOBS, GRANT ON THE LAW RELATING TO BANKERS AND BANKING COMPANIES 579 (1923) (noting that British banks were permitted to own shares in their borrowers so long as they were authorized by their corporate constitution to proceed); Franklin Allen & Douglas Gale, *Corporate Governance and Competition*, *in* CORPORATE GOVERNANCE: THEORETICAL AND EMPIRICAL PERSPECTIVES 23, 31, 35 (Xavier Vives ed., 2000) (noting, though, that Bank of England clearance is presently required for the acquisition of large blocks of corporate equity).

65. *See* MICHAEL COLLINS, BANKS AND INDUSTRIAL FINANCE IN BRITAIN 1800-1939 36, 41, 49, 69-71 (1991).

not to make long-term financial commitments to corporate borrowers and dismissed the ownership of shares as an option on grounds of poor marketability and high risk.[66] Establishing a substantial degree of interdependence with industry was, therefore, generally not considered a legitimate function of deposit banks.[67]

B. *Australia*

Does Australia's experience cause problems for Roe's theories on bank regulation in the same way as Britain's? Evaluating this question requires that due allowance be made for uncertainties concerning Australia's system of ownership and control. To start, assume that the country does not have a sufficiently dispersed pattern of share ownership to qualify as an outsider/arm's-length governance regime. This would lead one to wonder whether close relations between banks and industry might have contributed to the outcome. A possibility is that when the typical large Australian company sought funds from external sources it refrained from raising capital on the stock market because it had a sufficiently close working relationship with a bank to ensure that funding was readily available on suitable terms.[68]

Still, while in theory close bank/industry links could have been an intrinsic element of Australia's system of ownership and control, the facts suggest that there was not a substantial degree of interdependence. Admittedly, in the early decades of the Twentieth Century, Australian corporate finance revolved around banks. At this point in time, the demand for funds was modest and the bigger banks could provide what was, in effect, long-term working capital to just about any of their customers.[69]

Strong interdependence between banking and industry did not persist, however, throughout the remainder of the century. Instead, Australia's large commercial banks ("trading banks") proved to be cautious commercial lenders.[70] Also, they largely refrained from developing links with companies by

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66. *See* CAPIE & COLLINS, *supra* note 63, at 36, 49, 50-51, 54-55, 67, 80-81 (discussing share ownership and lending practices); Caroline Fohlin, *The Balancing Act of German Universal Banks and English Deposit Banks, 1880-1913*, at 24-25 (California Institute of Technology Social Science, Working Paper No. 1016, 1999) (discussing share ownership).

67. Note, though, that the willingness of banks to "roll over" short term loans may have meant that English commercial banks offered more support for industry than this discussion implies. *See, e.g.*, Forrest Capie, *Finance and Industry in Britain: Some Issues and Evidence*, *in* JAPANESE SUCCESS? BRITISH FAILURE?: COMPARISONS IN BUSINESS PERFORMANCE SINCE 1945 171, 179 (Etsuo Abé & Terry Gourvish eds., 1997); Forrest Capie & Michael Collins, *Banks, Industry and Finance, 1880-1914*, 41 BUS. HIST. 37, 49-61 (1999).

68. It is important to distinguish between external and internal sources of finance. For Australian public companies, internal sources (e.g., retained earnings and depreciation allowances) were the more important. *See* E.L. WHEELWRIGHT, OWNERSHIP AND CONTROL OF AUSTRALIAN COMPANIES 11 (1957); D.T. Merrett, *Capital Markets and Capital Formation in Australia, 1945-1990*, 38 AUSTL. ECON. HIST. REV. 135, 147 (1998) [hereinafter Merrett, *1945-1990*].

69. *See* D.T. Merrett, *Capital Markets and Capital Formation in Australia, 1890-1945*, 37 AUSTL. ECON. HIST. REV. 181, 191 (1997) [hereinafter Merrett, *1890-1945*].

70. *See* Merrett, *1945-1990*, *supra* note 68, at 143-47; *see also* Merrett, *1890-1945*, *supra* note 69, at 196.

investing in shares. Until the 1950s, the trading banks shied away completely from owning corporate equity.[71] Thereafter, they did prove willing, in certain situations, to accept equity stakes in reorganizations of troubled corporate borrowers.[72] Still, for the most part, Australian trading banks did not depart from their "hands off" policy concerning shares.[73]

Assume now that Australia is a country with an outsider/arm's-length system of ownership and control. The fact that the country's trading banks shied away from developing close working relationships with companies could have contributed to this outcome. This is because firms that otherwise might have approached a bank to obtain working capital may have felt compelled to carry out public offerings of shares.[74]

If the "hands off" approach trading banks adopted contributed to the development of an outsider/arm's length governance regime in Australia, were they constrained by restrictive legislation similar to that existing in the U.S.? At first glance, one would expect they would have been. Anti-bank sentiment was traditionally very strong in the Labour Party, a left-wing party that has governed Australia on a number of occasions.[75] When it held power in the years following World War II it took decisive action against trading banks by imposing draconian controls on the their lending activities.[76] These restrictions remained largely in place until deregulation took place in the 1980s.[77]

Still, while Australian anti-bank sentiment was akin to the mistrust of financial power in the U.S., events in Australia in fact fall more closely into line with the British experience.[78] Like their British cousins, Australia's trading banks were not prohibited from owning shares in industrial and commercial companies.[79] Also, British banking principles and precepts were highly influential in Australia,[80] presumably including the bias towards conservatism.[81] It follows that management policy, not financial services regulation, probably caused Australia's trading banks to adopt a "hands-off" approach to industrial finance. Correspondingly, while there was uneasiness with concentrated financial power

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71. *See* H.W. ARNDT & W.J. BLACKERT, THE AUSTRALIAN TRADING BANKS 91 (5th ed. 1977).

72. *See* D. Daugaard & T.J. Valentine, *The Banks*, *in* THE AUSTRALIAN FINANCIAL SYSTEM 39, 71 (M.K. Lewis & R.H. Wallace eds., 1993).

73. *See* ARNDT & BLACKERT, *supra* note 71, at 91; *see also* Daugaard & Valentine, *supra* note 72, at 71.

74. *See* Merrett, *1890-1945*, *supra* note 69, at 196.

75. *See* OWEN E. HUGHES, AUSTRALIAN POLITICS ch. 4 (3d ed. 1998) (discussing the Labour Party).

76. Merrett, *1945-1990*, *supra* note 68, at 137-38.

77. *Id.*; Mervyn K. Lewis & R.H. Wallace, *The Evolution of the Australian Financial System*, at 6-10 (University of Nottyngham, Discussion Paper in Economics No. 95/5, 1995).

78. *See also* Daniels & Iacobucci, *supra* note 8, at 85-87 (detailing a similar pattern in Canada).

79. The introduction of tighter solvency regulations in 1991 did, however, place banks under pressure to sell off any shares they did own. Daugaard & Valentine, *supra* note 72, at 67, 71.

80. *See* Merrett, *1890-1945*, *supra* note 69, at 184, 196, 198.

81. *Supra* note 65 and related discussion.

in Australia, this sentiment seemingly did not influence the evolution of the country's system of ownership and control in a meaningful way.

V. SOCIAL DEMOCRACY

A. *The United States and the United Kingdom*

Mark Roe has not relied solely on popular mistrust of concentrated financial power to make his argument that corporate governance systems are politically and ideologically contingent. Another proposition he has advanced is that a country's attitude towards social democracy is influential.[82] Roe says that left-wing countries favor employees over investors and correspondingly use regulation to increase the leverage workers possess. Under such circumstances, corporate executives will tend to cater to employee preferences and give shareholders short shrift. This bias, according to Roe, will exacerbate underlying conflicts of interest between managers and shareholders, thereby increasing substantially the disadvantages associated with investing in a widely held public company. As a result, the ownership format characteristic of the Berle-Means corporation is less likely to emerge in a social democracy than it is in a country without a strong socialist tradition, such as the United States.

Roe uses empirical evidence to provide support for his argument.[83] According to his data, there is a statistical correlation between a country's position on the ideological spectrum and its corporate ownership structure. Essentially, left-wing social democracies have fewer publicly quoted firms and significantly higher levels of ownership concentration than right-wing countries where there is little or no tradition of social democracy. It therefore seems to follow that key political values influence whether the Berle-Means corporation is going to become dominant in a particular jurisdiction.

As is the case with Roe's analysis of financial services regulation, the experience in the U.K. casts doubt on his social democracy thesis.[84] Roe defines a social democracy as a nation with a government that is deeply concerned about distributional issues, favors employees over investors, and plays a large role in the economy.[85] According to such criteria, the U.K. likely qualified as a social democracy from the end of World War II until Margaret Thatcher's rise to power in 1979. Though the chronology is not entirely free from doubt, the Berle-Means corporation might well have become dominant in the U.K. during this period.[86]

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82. *See* Roe, *Political Preconditions*, *supra* note 8, at 553-60, 577-78.

83. *Id.* at 561-66.

84. *See* Cheffins, *supra* note 62 (giving a more detailed analysis); *see also* Coffee, *supra* note 18, at 83-85 (providing additional criticism of Roe's social democracy thesis).

85. Roe, *Political Preconditions*, *supra* note 8, at 543.

86. *See* Brian R. Cheffins, *Does Law Matter?: The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459, 467-68 (2001).

Historical events in the U.K. thus may contradict directly Roe's social democracy thesis.

B. Australia

When one looks at Roe's data, Australia stands out as another potential exception to the general trend he has identified.[87] Roe focuses on sixteen wealthy nations, and of these, Australia is listed as the third most left wing after Sweden and Austria. At the same time, Australia is identified, after the U.K., Japan, and the U.S., as having the fourth most widely dispersed share ownership structure. Australia, therefore, seems to be a left-wing country with a system of ownership and control akin to what might be expected in a right-wing jurisdiction. While Roe has taken the opportunity to look "behind the numbers" for a set of countries as part of his work,[88] he has not sought to resolve this Australian paradox. This leads one to wonder whether Australia, like the U.K., poses problems for Roe's social democracy thesis.

A preliminary evaluation of the available evidence suggests that Australia's position is in fact not as troublesome for Roe's analysis as his data implies. The reason is that the manner in which he has ranked Australia may not be indicative of its true position. Ironically, correcting for possible flaws in Roe's methodology seems to strengthen rather than weaken the basic point he is trying to make. This is because making suitable adjustments brings Australia more closely into line with the ideology/share ownership pattern he has identified than his rankings imply.

One error Roe may have made with respect to Australia is to underestimate the concentration of share ownership. For the purposes of his study, he focused on the presence of a blockholder in a country's very largest public companies.[89] No allowance was therefore made for the role played by firms not traded on the stock market or for ownership concentration levels in smaller publicly quoted companies. We have seen that when due account is taken of the number of large Australian enterprises that are privately held and of share ownership patterns in the full range of listed companies, the country may be disqualified from being an outsider/arm's-length jurisdiction.[90] Possibly then, Australia's ownership structure resembles more closely the pattern Roe has ascribed to left-wing countries than his own data suggests. The paradox arising from his Australian rankings then largely falls away.

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87. Roe, *Political Preconditions*, *supra* note 8, at 562.

88. *Id.* at 566-78 (discussing France, Germany, Italy, Japan, Sweden, the United Kingdom, and the United States).

89. Roe's ownership diffusion index was based on the presence or absence of a shareholder owning 20% or more of the equity in a country's twenty largest public companies. On the source of this data, see La Porta et al., *supra* note 14, at 492; Roe, *Political Preconditions*, *supra* note 8, at 561.

90. *Supra* notes 50-55 and related discussion.

Assume the foregoing reappraisal of Australia's status is erroneous and that Roe's assessment of ownership concentration is broadly accurate. A possible flaw with Roe's social democracy index may still serve to bring Australia into line with his general thesis concerning ideology and corporate governance. Again, Roe ranked Australia as the third most left wing of the world's major industrial democracies.[91] This looks suspect. As a percentage of Gross Domestic Product, Australia has lower government spending and lower social security transfer payments than almost all major industrialized countries.[92] Moreover, Australia moved from being one of the highest tariff countries in the world in the 1970s to one of the lowest by the 1990s.[93] The country also engaged in ambitious deregulation of its financial system during the 1980s and 1990s.[94] Finally, throughout the 1990s, Australia experienced numerous legislative attempts to decentralize labor markets and enhance workplace flexibility.[95]

Timing could be a major source of the discrepancy between Australia's current political situation and Roe's social democracy index. His share ownership dispersion ranking was based on data from 1995.[96] In contrast, his social democracy index was constructed using averages for the 1980s.[97] The disparity might well be very significant, given recent Australian history.

Throughout much of the Twentieth Century, Australia's economic, political, and social fabric was defined by what has been referred to as the "Australian Settlement."[98] At least three aspects of this construct—Industry Protection, Wage Arbitration, and State Paternalism—were features that could easily be associated with a social democracy.[99] In the 1980s, the Australian Settlement was unraveling but remained influential.[100] Correspondingly, during the period when Roe's social democracy data was compiled, Australia might have still justified its ascribed status as a left-wing country.

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91. *Supra* note 87 and accompanying text.

92. HUGHES, *supra* note 75, at 353-56.

93. *Id.* at 379-83.

94. *See* HUGHES, *supra* note 75 and related discussion; *see also* BOB CATLEY, GLOBALISING AUSTRALIAN CAPITALISM 65, 129-30 (1996).

95. *See* ORG. ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS 1999-2000: AUSTRALIA 86-93 (2000); Richard Mitchell, *Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia*, 14 INT'L J. COMP. LAB. L. INDUS. REL. 113 (1998) (discussing federal and state initiatives but questioning their effectiveness); *see also* Hughes, *supra* note 41, at 84-88.

96. Again, Roe's data came from La Porta et al., *supra* note 14, at 474-76.

97. *See* Roe, *Political Preconditions*, *supra* note 8, at 562 (describing the sources used by Roe); Thomas R. Cusack, *Partisan Politics and Public Finance: Changes in Public Spending in the Industrialised Democracies*, 91 PUB. CHOICE 375, 382-83 (1997).

98. *See generally* PAUL KELLY, THE END OF CERTAINTY: THE STORY OF THE 1980S 1-2 (1992). For further background, see HUGHES, *supra* note 75, at 377-79; Graham Maddox, *The Australian Settlement and Australian Political Thought*, *in* CONTESTING THE AUSTRALIAN WAY: STATES, MARKETS AND CIVIL SOCIETY 57, 63-67 (Paul Smyth & Bettina Cass eds., 1998).

99. *See* KELLY, *supra* note 98, at 4-11 (detailing these pillars of the Australian Settlement as well as White Australia and Imperial Benevolence).

100. *See id.* at 2, 13-15.

The tariff cuts, financial deregulation, and labour reform that Australia has experienced in recent decades imply that the country is much less of a social democracy than it used to be.[101] Hence, if Roe had relied on up-to-date evidence when compiling his political index, the country might well have ended up being considerably more right wing than it does in his study. Assuming that this reinterpretation of Roe's data is correct and that Australia currently has dispersed share ownership, the paradox arising from Australia's alleged left-wing status disappears.

VI. CORPORATE AND SECURITIES LAWS

A. *The "Law Matters" Thesis*

The fact that the Berle-Means corporation is not dominant universally suggests that national context influences systems of ownership and control.[102] The experience in the U.K. and Australia (to a lesser extent) demonstrates that banking regulation and ideology do not have a decisive effect.[103] Is there a variable that is pivotal? A thesis which has quickly found adherents is that the "law matters." Various economists and academic lawyers have hypothesized that the ownership pattern associated with an Anglo-American corporate framework has not become the norm elsewhere because the appropriate corporate law regime was not in place.[104]

The essential insight which underlies the "law matters" thesis is that, in an unregulated environment, there is a real danger that a public company's "insiders" (controlling shareholders and senior executives)[105] will cheat outside investors who own equity. In the U.S., the legal system regulates quite closely opportunistic conduct by insiders. According to the "law matters" story, minority shareholders feel "comfortable" in this sort of "protective" environment.[106] Such confidence means that investors are willing to pay full value for shares made available for sale, which in turn lowers the cost of capital for firms that choose to sell equity in financial markets. Public offerings of shares can easily follow. Moreover, most controlling shareholders will be content to unwind their holdings since the law will largely preclude them from exploiting their position. The

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101. *See* Belinda Probert, *Is Our Country History?*, AGE (Melbourne), Mar. 14, 2001, at 15.

102. *Supra* notes 33-34 and accompanying text.

103. *Supra* notes 62-67, 78-81, 84-87 and related discussion.

104. *See, e.g.*, La Porta et al., *supra* note 5; Coffee, *supra* note 7, at 644; Simon Johnson et al., *Tunnelling*, 90 AM. ECON. REV. 22 (2000); Kenneth E. Scott, *Corporate Governance and East Asia* (John M. Olin Program in Law and Economics, Stanford Law School, Working Paper No. 176, 1999); *cf.* Coffee, *supra* note 18, at 7-10, 23, 60, 65-66, 68, 80-81 (illustrating that Professor Coffee's views are evolving).

105. *See* La Porta et al., *supra* note 5, at 4.

106. The terminology is borrowed from Roe, *Political Preconditions*, *supra* note 8, at 586.

conditions, therefore, are well suited for a widely dispersed pattern of share ownership.[107]

In a country where the law offers little protection against cheating by insiders, the outcome seemingly must be different.[108] Potential investors, fearing exploitation, will shy away from buying shares. Insiders, being aware of such skepticism, will decide not to sell equity to the public. They will opt instead to retain the private benefits of control and rely on different sources of finance, even if they have to forego pursuing potentially profitable opportunities in so doing. The Berle-Means corporation will therefore not become dominant.

A series of empirical studies has given the "law matters" story a powerful boost.[109] The research suggests that the degree of protection a country's legal system provides for outside investors has a significant effect on its corporate governance regime. Stronger legal protection for minority shareholders is associated with a larger number of listed companies, more valuable stock markets, lower private benefits of control, and a lower concentration of ownership and control.[110] These results imply that the Anglo-American version of corporate governance is unlikely to become dominant in countries that do not offer significant legal protection to outside investors.

B. The United States and the United Kingdom

While the "law matters" thesis has a plausible ring to it and has empirical backing, the historical experience in the U.S. and the U.K. casts doubt on its persuasiveness. In both countries, the legal system did not offer substantial protection to minority shareholders as the transition towards an outsider/arm's-length system of ownership and control took place. The U.S. experienced a "corporate revolution" between 1880 and 1930, and by 1932 matters had progressed sufficiently for Berle and Means to declare that there was "a separation of ownership and control."[111] If laws that offer outside investors a protective environment constitute a pre-condition for dispersed share ownership, the U.S. should have favored minority shareholders against corporate insiders during the transition period. It is doubtful whether this was in fact the case.[112] Instead, in various

107. Coffee, *supra* note 7, at 644, 647, 652, 683; La Porta et al., *supra* note 8, at 4-6; Bernard Black, *The Core Institutions that Support Strong Securities Markets*, 55 BUS. LAW. 1565, 1565-66 (2000).

108. *See* Black, *supra* note 107, at 1565-66, 1571-72, 1583-86; *see also* Scott, *supra* note 104, at 16-34 (discussing East Asia); Edward Glaeser et al., *Coase v. the Coasians*, 116 Q.J. ECON. 853, 885-95 (2001) (discussing the Czech Republic).

109. *See* Coffee, *supra* note 18, at 644.

110. *See generally* La Porta et al., *supra* note 5, at 14-16. *But see* Roe, *Corporate Law's Limits*, *supra* note 8, at 251-53; Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741, 765-67 (2000) (criticizing the research methodology of La Porta).

111. *See* BERLE & MEANS, *supra* note 11; *see also* Walter Werner, *Corporation Law in Search of Its Future*, 81 COLUM. L. REV. 1611, 1641-42 (1981); WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 3, 16-18 (1997) (detailing the "corporate revolution").

112. Coffee, *supra* note 18, at 25, 27-29.

respects there was an "uninviting legal environment."[113] Perhaps most important, federal securities regulation was not introduced until after Berle and Means set out their separation of ownership and control thesis.[114]

The Berle-Means corporation became dominant in the U.K. somewhat later than was the case in the U.S.[115] Still, despite this "corporate lag,"[116] the British experience resembled the American in that the law's contribution to the emergence of the Berle-Means corporation was not decisive. For instance, during the opening decades of the Twentieth Century, *laissez faire* was the dominant theme since the legal system offered minority shareholders little explicit protection against opportunism by insiders.[117]

The law governing U.K. companies became considerably more intricate and complex from the late 1940s onwards.[118] Nevertheless, with the possible exception of disclosure regulation, the laws that were in place as the U.K.'s outsider/arm's-length system of ownership and control took shape did not provide significant additional protection for those contemplating buying shares in publicly quoted companies.[119] Admittedly, the regulation of U.K. financial markets was toughened considerably in the mid-1980s.[120] The Berle-Means corporation was, however, likely already dominant by this time.[121] The upshot is that, as in the U.S., the Berle-Means corporation became dominant when lawmakers were not doing a great deal to ensure that those buying shares in publicly quoted companies would feel "comfortable."

While the legal system did not afford much explicit protection to minority shareholders as a separation of ownership and control was becoming entrenched in the U.S. and the U.K., this did not mean that investors were left completely at the mercy of market forces. Instead, in both countries market-oriented factors served to make investors sufficiently "comfortable" to purchase tiny holdings in public companies. One was the work done by financial professionals who organized public offerings of shares. In both the U.S. and the U.K., investors benefited as the firms that acted as intermediaries were motivated by reputational concerns to carry out quality control.[122]

113. *Id.* at 29.

114. *See* Securities Act of 1933, 15 U.S.C.A. § 77; *see also* The Securities Exchange Act of 1934, 15 U.S.C.A. § 78. On this timing point, see Roe, *Political Preconditions*, *supra* note 8, at 590.

115. *See* Cheffins, *supra* note 86, at 466-68 (setting forth the chronology).

116. *See* Brian R. Cheffins, *History and Global Governance Revolution: The U.K. Perspective*, 43 BUS. HIST. 87, 90 (2001) (giving the terminology).

117. Cheffins, *supra* note 86, at 468-72.

118. L.S. SEALY, COMPANY LAW AND COMMERCIAL REALITY 5-6, 10-14 (1984).

119. Cheffins, *supra* note 86, at 476-79.

120. The most important change was the enactment of the Financial Services Act 1986, c. 60.

121. Cheffins, *supra* note 86, at 482.

122. *See* Coffee, *supra* note 18, at 30-33; Cheffins, *supra* note 86, at 482-83; Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1468 (1997).

Another significant factor was intervention by privately run stock exchanges. During the early decades of the Twentieth Century, the New York Stock Exchange saw itself as a guardian of the financial quality of companies which listed securities on it. Correspondingly, it sought to improve standards of corporate disclosure and would reject applications to list from companies that lacked an adequate earnings track record or operated in "high-risk" industries.[123] From the 1930s onwards, the London Stock Exchange similarly played a screening role by scrutinizing offerings of shares before trading commenced.[124] The London Stock Exchange also sought to address various matters of potential concern to outside investors by strengthening its listing rules. Topics dealt with included disclosure, insider trading, and other forms of self-dealing by directors and controlling shareholders.[125]

C. Australia

Do historical events in Australia cast doubt on the "law matters" thesis in the same way as the experience in the U.S. and the U.K.? It appears that, while parallels can be drawn, the answer is "no." Prior to the 1920s, the Australian domestic capital market was immature, with most businesses that were more than small family affairs being able to obtain financing by borrowing from banks.[126] Matters then changed somewhat. Beginning in the 1930s, growing numbers of companies sought to raise capital by carrying out public offerings of shares. For instance, more than seven hundred new issues were carried out between 1930 and 1939.[127]

As Australian capital markets began to evolve, consistent with the experience in the U.S. and the U.K., market-oriented factors apparently did more than the law to instill investors with sufficient confidence to buy equity. Until at least the 1960s, Australia's companies legislation was infused with a *laissez-faire* ethos borrowed from Britain.[128] Presumably then, law did not do much to make minority shareholders in public companies feel "comfortable." As in the U.S. and the U.K., however, market-oriented factors helped to boost investor confidence.

Leading Australian stockbrokers were one constituency that offered reassurance to outside investors. These firms fostered the marketability of securities by providing

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123. Coffee, *supra* note 18, at 34-37; Mahoney, *supra* note 122, at 1466, 1469-70; Lance E. Davis & Robert J. Cull, *International Capital Movements, Domestic Markets, and American Economic Growth, 1820-1914*, *in* THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, VOL. II: THE LONG NINETEENTH CENTURY 733, 776, 779-81 (Stanley L. Engerman & Robert E. Gallman eds., 2000).

124. Cheffins, *supra* note 86, at 474; THE COMMITTEE ON COMPANY LAW AMENDMENT, REPORT, Cmnd. Paper 6659, 14 (1945).

125. Cheffins, *supra* note 86, at 474-75, 480-81.

126. Merrett, *1890-1945*, *supra* note 69, at 190-91.

127. *Id.* at 198.

128. Rob McQueen, *An Examination of Australian Corporate Law and Regulation 1901-1961*, 15 U.N.S.W.L.J. 1, 21-23 (1992).

a regular flow of high quality information on publicly quoted companies to growing lists of clients.[129] Moreover, the country's stock exchanges, which were self-governing bodies based in various major cities, operated in a fashion that served to boost investor confidence.[130] To illustrate, their listing requirements were more onerous than existing companies legislation. Notably, the listing rules imposed more stringent disclosure obligations than did the relevant statutory measures.[131]

While market-oriented factors helped to make investors feel "comfortable" in Australia in the same way as in the U.S. and the U.K., the conditions apparently were not sufficiently hospitable to foster the emergence of an outsider/arm's-length system of ownership and control. As we have seen, it is unclear whether Australia currently has this type of corporate governance regime.[132] If the country does, however, it seems likely that diffuse ownership has only emerged as the norm since the 1970s. A study based on 1953 data revealed that even among Australia's larger stock market companies, almost two out of three had a shareholder that owned more than ten percent of the voting shares.[133] Moreover, as mentioned, according to a study published in 1978, the "managerial revolution" associated with the Berle-Means corporation was "nowhere near completion" in Australia.[134] Instead, "the ownership of strategic blocks of shares in most listed Australian corporations [was] highly concentrated."[135]

Let us assume for the sake of argument that there has been a transition towards an outsider/arm's-length system of ownership and control in Australia since the 1970s. Contrary to the experience in the U.S. and the U.K., law may deserve at least some of the credit. This is because, during the relevant period, legal protections offered to investors grew as statutorily oriented regulation overwhelmed self-regulation.

The move towards legislative intervention began as a result of a speculative boom in mining stocks in the late 1960s. Australia's six states and the federal government responded to the excesses of the period by revamping the regulation of

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129. Merrett, *1890-1945*, *supra* note 69, at 198.

130. *See id.*; *see also* Merrett, *1945-1990*, *supra* note 68, at 141 (describing the status of the country's stock exchanges); R. BAXT ET AL., AN INTRODUCTION TO THE SECURITIES INDUSTRY CODES 93-94 (1982).

131. Merrett, *1890-1945*, *supra* note 69, at 198; BAXT, *supra* note 130, at 105; *see also* Merrett, *1945-1990*, *supra* note 68, at 141.

132. *Supra* notes 48-55 and related discussion.

133. *See* WHEELWRIGHT, *supra* note 68, at 103-08 (setting out results from a study of the 102 largest public companies incorporated in Australia). For the purposes of the figures offered here, it is being assumed that companies Wheelwright characterized as having "majority ownership", "minority control", "joint control by a minority and the management" or being controlled by an overseas company had a shareholder owning more than 10% of the shares. Wheelwright himself acknowledged that all of the companies he categorized as "joint control by a minority and the management" had a shareholder that met this threshold. *Id.* at 104. With companies controlled by an overseas firm, they clearly had a 10% shareholder and did not have the sort of dispersed ownership pattern associated with the Berle-Means corporation. Still, Wheelwright categorized these as "management controlled", reasoning that the controlling company must have had widely distributed share ownership. *Id.* at 105 n.10.

134. LAWRINSKY, *supra* note 55.

135. *Id.* at 30.

public companies under a cooperative regulatory scheme the National Companies and Securities Commission (NCSC) coordinated.[136] Under this regime, which was largely put in place during the 1970s, the stock exchanges retained a significant role in regulating stock markets, but the NCSC had the power to intervene to protect investors.[137]

New corporate scandals in the 1980s led to further reform.[138] One significant change was that a unified system of corporate and securities law was established under the control of the federal government.[139] As part of this process, insider dealing, prospectuses, and conflict-of interest transactions involving directors were subjected to much tighter control.[140] Indeed, the revised insider trading rules were, by international standards, strikingly broad in scope.[141]

Another important innovation was that the Australian Securities Commission (ASC), which replaced the NCSC, was bestowed with full responsibility for the regulation of public companies.[142] The previously influential stock exchanges faded out of the picture as they amalgamated to form the Australian Stock Exchange (ASX), which was in turn placed under the regulatory jurisdiction of the ASC (now the Australian Securities and Investment Commission).[143] The ASX did not, however, forego completely the task of supervising listed companies. Instead, it promulgated a new set of strict listing requirements that were intended to help prevent the reoccurrence of the abuses that occurred during the 1980s.[144]

If Australia in fact moved towards an outsider/arm's-length system of ownership and control in the concluding decades of the Twentieth Century, it would be intriguing to discover if the legal system deserves part of the credit for the transition. Recall the empirical evidence indicating a correlation between dispersed share ownership and strong minority protection.[145] An inference one can draw from this is that a country can foster changes to its system of ownership

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136. *See* Merrett, *1945-1990*, *supra* note 68, at 141; BAXT, *supra* note 130, at 14-18, 27-37; Alan Shaw & Paul von Nessen, *The Legal Role of the Australian Securities Commission and the Australian Stock Exchange*, *in* SECURITIES REGULATION 160, 161-62.

137. *See* BAXT, *supra* note 130, at 49-51, 100-01 (discussing legal enforceability of stock exchange listing rules).

138. *See generally* P.J. Drake & D.W. Stammer, *The Stock Exchange*, *in* AUSTRALIAN FINANCIAL, *supra* note 72, at 282, 314-15.

139. *See* FORD ET AL., *supra* note 44, at ¶¶ 2.280, 2.290.

140. *See id.* at ¶¶ 2.291, 22.060; Drake & Stammer, *supra* note 138, at 315.

141. *See* Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions*, 15 TRANSNAT'L LAW 63, 73, 77, 86-87 (2002).

142. *See* FORD ET AL., *supra* note 44, at ¶¶ 3.120, 3.130, 3.140; Shaw & von Nessen, *supra* note 136, at 162-64; Drake & Stammer, *supra* note 72, at 313.

143. *See* Shaw & von Nessen, *supra* note 136, at 174-82 (noting, though, that the ASX's role is not defined clearly by statute); Drake & Stammer, *supra* note 138, at 283-84.

144. *See* Drake & Stammer, *supra* note 138, at 316-17.

145. *See supra* note 110 and accompanying text.

and control by introducing laws that protect outside investors.[146] The experience in the U.S. and the U.K. does not provide a suitable opportunity to test this "jump-start" hypothesis.[147] This is because, in both countries, the Berle-Means corporation emerged as a dominant player without a substantial contribution from corporate and securities law.

If Australia is indeed now an outsider/arm's-length country, then unlike the U.S. and the U.K., it constitutes a possible "test case" for the "jump start" thesis. The reason is that the chronology was different: the transition in ownership structure may well have occurred at the same time thorough regulation was being introduced. Correspondingly, examining events taking place in Australia provide a potentially unique opportunity to assess whether a country can induce changes to its system of ownership and control through legal reform. Countries such as Germany, Italy, Japan, and Brazil are currently seeking to promote their capital markets and, to this end, are taking tentative steps to improve the legal protection available to outside investors.[148] Ascertaining law reform's contribution to the possible dispersion of share ownership in Australia could shed light on whether such initiatives will help to foster convergence towards the Anglo-American governance model.

VII. BANKRUPTCY LAW

A. *The United States and the United Kingdom*

David Skeel has contended that corporate bankruptcy is the "crucial missing piece in understanding corporate governance."[149] He suggests that the manner in which corporate bankruptcy is regulated in a country is integrally related to its corporate governance framework and its corporate law regime.[150] According to Skeel, a country's system of bankruptcy law is either "manager-driven" or "manager-displacing."[151] With the former, exemplified by Chapter 11 of the U.S. Bankruptcy Code, the executives of a financially troubled company have "first

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146. *See* La Porta et al., *supra* note 5, at 20.

147. *See* Brian R. Cheffins, *Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies*, 23 OXF. J. LEGAL ST. (forthcoming Spring 2003) (providing background on the "jump start" strategy and its implications).

148. *See, e.g.*, Uwe Seibert, *Control and Transparency in Business (KonTraG): Corporate Governance Reform in Germany*, 10 EUR. BUS. L. REV. 70 (1999) (Germany); Gian B. Bruni, *The New Consolidated Act on Companies Listed on the Italian Stock Exchange*, 13 BUTTERWORTHS J. INT'L BANKING FIN. L. 416 (1998) (Italy); Alexandra Harney, *Cracks Widen in Japan's Commercial Code*, FIN. TIMES (U.K.), Aug. 17, 2000, at 25 (Japan); John H. Welch, *Making Investment in Brazil Fair for the Little Guy*, WALL ST. J., Sept. 22, 2000, at A23 (Brazil).

149. Skeel, *supra* note 36, at 1350.

150. *Id.* at 1329. He shies away from making claims about causality but speculates "that changes in corporate governance will more frequently prompt changes in bankruptcy, rather than the reverse. . . ." *Id.* at 1349.

151. *Id.* at 1342.

crack" at proposing a reorganization plan under which they will continue to run the firm.[152] In contrast, in a "manager displacement" jurisdiction there is a strong bias in favor of liquidation, and those in charge of a failing company are stripped of their managerial authority immediately once bankruptcy proceedings formally commence. Skeel cites Germany and Japan as examples of countries where the law is organized along such lines.[153]

According to Skeel, a manager-driven bankruptcy regime is complementary to an outsider/arm's-length system of ownership and control.[154] Executives, he argues, are prepared to take the risks required to please profit-oriented shareholders since they know reorganization offers a second chance if things do not work out.[155] In contrast, a manager-displacing bankruptcy regime aligns with an insider/control-oriented governance system. In an insider/control-oriented jurisdiction, banks can be a pivotal source of corporate finance since companies tend to shy away from using capital markets to raise funds.[156] Manager-displacing bankruptcy rules, Skeel says, constitute a potentially important adjunct to this model of capitalism since the law will reinforce the credibility of banks seeking to discipline wayward executives.[157]

The British experience casts doubt on Skeel's analysis. He has suggested that an outsider/arm's-length system of ownership and control and a manager-displacing bankruptcy regime constitute an inherently unstable combination.[158] Nevertheless, while share ownership is widely dispersed in the U.K., the country's bankruptcy laws strongly protect lenders and few public companies that end up in formal bankruptcy proceedings escape liquidation.[159] The fact that the law has never offered scope for large-scale reorganizations with the "debtor in possession" (*i.e.*, with current management remaining in charge)[160] illustrates the bias in favor of creditors. Underlying this approach is a presumption among British observers that it is absurd for the same managers who led a firm into

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152. 11 U.S.C. §§ 1101, 1107, 1121 (2000).

153. Skeel, *supra* note 36, at 1343.

154. *Id.* at 1328. Still, Skeel's terminology is somewhat different. *See id.* at 1328 n.10 (characterizing arrangements in the United States as an "ex ante" system). Others have made points similar to Skeel's. *See, e.g.*, Vaughan S. Armstrong & Leigh A. Riddick, Evidence that Differences in Bankruptcy Law Among Countries Affect Equity Returns, at 3 (2000) (unpublished working paper).

155. Skeel, *supra* note 36, at 1341-43.

156. *See supra* note 60 and accompanying text (describing Germany and Japan). Indeed, a market-oriented/bank-oriented dichotomy is a potential rival to the outsider/insider typology adopted for the purposes of this article. *See* Berglöf, *supra* note 17, at 152, 157-58.

157. Skeel, *supra* note 36, at 1344-45.

158. *Id.* at 1348-49.

159. *See* Armstrong & Riddick, *supra* note 154, at 6-7 (comparing the U.K. with five other major industrialized countries).

160. *See* BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES 246, 282-87 (1998); *see also* John Armour & Sandra Frisby, *Rethinking Receivership*, 21 OXFORD J. LEGAL STUD. 73, 98-99 (2001) (noting that a partial exception has recently been created for small companies).

insolvency to stay to oversee the corporate rescue.[161] Correspondingly, when the British Parliament revised the country's insolvency law in the mid-1980s to provide more scope for the reorganization of a financially distressed company, it vested responsibility for orchestrating a turn-around in the hands of an independent insolvency practitioner rather than the incumbent management team.[162]

B. Australia

Turning now to Australia, its bankruptcy law has traditionally been organized along the same lines as the U.K.'s.[163] As is the case in Britain, Australia has introduced a reorganization process led by an insolvency practitioner.[164] Still, there is no scope under Australian bankruptcy law for debtor in possession corporate rescues. Hence, its bankruptcy regime continues to be fundamentally creditor-oriented, with the differences between its system and its U.S. counterpart far outweighing the similarities.[165] Or, to phrase matters in Skeel's terms, Australia is a "manger-displacing" regime.

Assuming that Australia in fact is a management displacement jurisdiction, according to Skeel it should have an insider/control-oriented system of corporate governance.[166] The country's shareholder ownership pattern may be too widely dispersed for the country to fall into the insider category.[167] Still, even if Australia qualifies for the insider/control-oriented "club," it poses problems for Skeel's characterisation of bankruptcy and corporate governance. Skeel, when he explains

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161. *See* CARRUTHERS & HALLIDAY, *supra* note 160, at 246, 284. Chapter 11 does have, however, its admirers in the United Kingdom. *See, e.g.*, Nick Segal, *An Overview of Recent Developments and Future Prospects in the United Kingdom*, *in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 5, 11 (Jacob S. Ziegel ed., 1994).

162. *See* CARRUTHERS & HALLIDAY, *supra* note 160, at 288-93, 296-97. Skeel did seek to bring the United Kingdom into line with his analytical scheme by referring to its insolvency regime as an "intermediate approach"; Skeel, *supra* note 36, at 1397-98. Still, the ideological hostility to the debtor in possession concept in Britain suggests that this is not an accurate characterization. *See also* Ron Harmer, *An Overview of Recent Developments and Future Prospects in Australia (with Some Reference to New Zealand and Asia)*, *in* CURRENT DEVELOPMENTS, *supra* note 161, at 39, 49 (explaining that the U.K. regime remained strongly biased towards creditors after the insolvency reforms of the 1980s). Skeel has recognized in subsequent work that Britain creates a paradox for his theoretical framework and has sought to address the point. *See* John Armour et al., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the U.K.*, 56 VAND. L. REV. (forthcoming 2003).

163. *See* V. MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH CENTURY ENGLAND 295 (1995); ROMAN TOMASIC & KETURAH WHITFORD, AUSTRALIAN INSOLVENCY AND BANKRUPTCY LAW 2-3 (2d ed. 1997).

164. *See generally* Harmer, *supra* note 162, at 42-50; TOMASIC & WHITFORD, *supra* note 163, at ch. 6; PHILIP CRUTCHFIELD, CORPORATE VOLUNTARY ADMINISTRATION LAW (2d ed. 1997).

165. *See* Harmer, *supra* note 162, at 49; CRUTCHFIELD, *supra* note 164, at 48-49; Lynden Griggs, *Voluntary Administration and Chapter 11 of the Bankruptcy Code*, 2 INSOLVENCY L.J. 93, 97-98 (1994).

166. Even though Skeel focuses only on the United States, Germany, and Japan when setting out his arguments, he does intend his analysis to be of general application. *See* Skeel, *supra* note 36, at 1328 n.8.

167. *Supra* note 48 and related discussion.

why manager-displacing bankruptcy laws complement an insider/control-oriented system of ownership and control, stresses that banks play a pivotal role in financing corporate activity and rely on the legal regime to give them leverage in dealing with executives of poorly run companies.[168] Australia's trading banks have typically taken, however, a hands-off approach with respect to corporate finance.[169] Correspondingly, even if the country's manager-displacing bankruptcy laws align with its system of ownership and control, a pivotal element of Skeel's bankruptcy/corporate governance equilibrium has been absent.

Again, for Skeel, the U.K. is a problematic case because it has an outsider/arm's-length system of ownership and control, but does not have "manager-driven" bankruptcy laws.[170] If Australia has joined the U.K. as a member of the "outsider club," then it poses similar difficulties for his analytical framework. In fact, Australia may well be a more challenging case. In the U.K. since the 1980s a significant number of financially troubled large companies have carried out workouts without reference to formal insolvency mechanisms. The process, which is conducted pursuant to informal Bank of England guidelines known as the "London Approach," permits the incumbent management team to remain in office while offering key lenders scope to investigate and renegotiate outside the full glare of publicity.[171] The fact that the "London Approach" is invoked in the U.K. arguably means that, consistent with Skeel's analysis, its bankruptcy regime is more "manager-driven" than its insolvency laws imply. No such fallback position is available with Australia, however, since there is no analogous informal workout process in place.[172]

VIII. THE OPENNESS OF THE ECONOMY

A. *The Importance of Tariff Regulation*

We have already seen that, if Australia did in fact experience a transition towards an outsider/arm's length system of ownership and control in recent decades, corporate law reform may have had a contributory effect.[173] Other factors, however, may have also played a role. A significant liberalization of Australia's policy on trade protection is a strong candidate for consideration.

Why might trade liberalization be expected to affect corporate governance arrangements? The reason is that high tariffs, by fostering a bias in favor of small

168. Skeel, *supra* note 36, at 1344.

169. *Supra* notes 71-73 and accompanying text.

170. *Supra* notes 159-62 and related discussion.

171. *See generally* John Armour & Simon Deakin, *Norms in Private Insolvency: The "London Approach" to the Resolution of Financial Distress*, 1 J. CORP. L. STUD. 21, 31-37 (2001).

172. *See* Tim Boreham, *The Art of Twisting Creditors' Arms*, BUS. REV. WKLY. (Australia), Mar. 26, 1993, at 87.

173. *Supra* note 136-44 and related discussion.

firms, could perpetuate concentrated ownership. Let us consider why. To start, a country which offers generous tariff protection for its domestic producers will tend to have smaller companies than would otherwise be the case.[174] The reason is that the tariff barriers will permit under-sized firms to survive when, under open market conditions, they would lack the resources and infrastructure required to remain competitive.[175]

The fact that a country has a disproportionate number of under-sized business enterprises will, in turn, likely affect its system of ownership and control. This is because a small company is more likely to have concentrated ownership than a bigger counterpart. Resource constraints constitute one reason why size will affect share ownership dispersion. All else being equal, accumulating or purchasing a control block will be more expensive in a large firm than in a small firm. It follows that a big company is less likely to have concentrated ownership than its smaller counterpart.[176]

Poor diversification on the part of controlling shareholders is another reason why the likelihood of concentrated ownership diminishes as size increases.[177] Typically, a company's dominant shareholder will have a lot of wealth tied up in that one firm. Generally, for those in control, the difficulties associated with having "too many eggs in one basket" will become more acute as the value of the controlling stake grows. Therefore, all else being equal, dominant shareholders in large companies should unwind their investment more readily than their counterparts in smaller firms. The upshot is that under-sized enterprises are less likely to have diffuse shareholdings than large concerns.[178] Since there will be a bias in favour of small enterprises in a country which offers generous trade protection to domestic industries, this sort of trade policy should yield a higher degree of concentrated share ownership than would otherwise be the case.[179]

The experience in Canada lends support to the proposition that there is a link between tariff barriers and ownership structure. Publicly owned companies are common in Canada, and the country has well-developed securities markets.[180] Nevertheless, since companies traded on the stock market have traditionally had

174. *See* Daniels & Iacobucci, *supra* note 8, at 90.

175. *See* J.H. DALES, THE PROTECTIVE TARIFF IN CANADA'S DEVELOPMENT 162, 162 (1966); John Roth, *A New World's Coming*, GLOBE & MAIL (Canada), Dec. 19, 2000 (National ed.), at A15.

176. *See* Daniels & Iacobucci, *supra* note 8, at 90; Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155, 1158 (1985).

177. *See* Demsetz & Lehn, *supra* note 176, at 1158.

178. *See* Stapledon & Lamba, *supra* note 56, at 23 (illustrating a correlation between size and ownership dispersion appears to exist in Australia).

179. *See* Daniels & Iacobucci, *supra* note 8, at 90.

180. *See* Cheffins, *supra* note 10, at 36; David J. Sharp & Boguslaw Ciepielewski, *Capital Market Pressures, Management Reward Systems, and R & D in Canada*, *in* CORPORATE GOVERNANCE, ACCOUNTABILITY, *supra* note 46, at 121, 121-22; *see also* La Porta et al., *supra* note 16, at 1138 (setting out figures indicating that Canada has more publicly quoted companies per capita than the United States or the United Kingdom and a higher market capitalisation/GNP ratio).

a dominant shareholder, the country has not shared with the U.S. and the U.K. an outsider/arm's-length system of ownership and control.[181]

In a reversal of historical trends, empirical studies indicate that Canada's pattern of concentrated ownership is now unraveling significantly. For instance, according to evidence two Canadian law professors have compiled, less than one out of three of Canada's publicly quoted companies were widely held in 1988 whereas by 1998 almost two out of three were.[182] Trade liberalization occurring as a result of the 1989 Canada-U.S. Free Trade Agreement has been identified as a potential cause of the shift. The thinking is that the lowering of tariff barriers penalized family owners of Canadian public companies who were maintaining inherited control. An unwinding of large share blocks correspondingly followed.[183]

B. Australia

Australia's experience may well fall into line with Canada's and lend further support to the proposition that there is a link between trade policy and ownership concentration. Throughout much of the Twentieth Century, domestic producers received all manners of protection from foreign competitors. This apparently served to subsidize inefficient small and medium-sized firms in various industries.[184] Still, government intervention was seen as promoting the national interest by fostering employment, and by the early 1970s, Australia's tariff levels were higher than those in any modern industrialized country except New Zealand.[185]

A dramatic reversal of policy subsequently took place, and Australia is now one of the world's lowest tariff countries.[186] As we have seen, the country may have undergone a transition towards an outsider/arm's-length system of ownership and control during the same time period.[187] Given the theoretical link between trade protection and ownership concentration and the experience in Canada, further investigation of possible causation seems merited.

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181. *See* Cheffins, *supra* note 10, at 36-37; Istemi S. Demirag & A. Tylecote, *Emerging Trends and Clusters: An Exploration of the Influencing Factors*, *in* CORPORATE GOVERNANCE, ACCOUNTABILITY, *supra* note 46, at 363, 376-77.

182. Daniels & Iacobucci, *supra* note 8, at 93 n.26. (focusing on the Toronto Stock Exchange 300 and defining a company as "widely held" if it had a "float percentage" above 90%). *See also generally* Randall K. Morck et al., *Inherited Wealth, Corporate Control, and Economic Growth*, *in* CONCENTRATED CORPORATE, *supra* note 8, at 319, 360-61 (presenting further evidence indicating that widely held companies are becoming more prevalent in Canada); Yun M. Park et al., *Controlling Shareholder and Executive Incentive Structure: Canadian Evidence*, 17 CAN. J. ADMIN. SCI. 245, 248 tbl. 2 (2000).

183. *See* Morck et al., *supra* note 182, at 361-62; Daniels & Iacobucci, *supra* note 8, at 93 n.26 (citing also the enactment of new antitrust legislation in 1986).

184. *See* Simon Ville & D.T. Merrett, *The Development of Large Scale Enterprise in Australia, 1910-64*, 42 BUS. HIST. 13, 26 (2000); David Merrett, "Australian Firms Abroad: Why So Few, Why Those and Why There?," at 3 (2001) (unpublished working paper).

185. Ville & Merrett, *supra* note 184, at 26; HUGHES, *supra* note 75, at 80.

186. *See* HUGHES, *supra* note 75, at 80-83; Steve Lewis & Michelle Singer, *Industry Anger as General Tariff and Import Duty Stay*, AUSTL. FIN. REV., Dec. 20, 2000, at 8 (noting further tariff liberalization appears unlikely in the near future).

187. *See supra* notes 132-35 and related discussion.

It is worthwhile stressing that the results of an examination of a possible link between Australia's trade policy and its system of ownership and control would not be of merely local interest. There is much speculation that economic globalization, represented by the dismantling of protected markets and heightened cross-border competition, is fostering the much-discussed shift towards the Anglo-American corporate governance model.[188] Examining the experience in Australia should offer guidance on the accuracy of this prognosis.

IX. CONCLUSION

The topic of corporate governance convergence has attracted much attention recently, and this article has sought to advance the discussion on two fronts. First, it has addressed in detail the experience in Australia, a country that has been largely neglected from a comparative perspective. The fact that Australia's status as an outsider/arm's-length jurisdiction is uncertain complicates somewhat the process of drawing inferences. Nevertheless, we have seen that while developments in Australia seem to contradict Mark Roe's account of banking regulation, they can be brought into line with his work on social democracy. Moreover, while David Skeel may sensibly highlight a possible link between bankruptcy law and corporate governance, the Australian situation is inconsistent with his characterization of the relationship between the two. Finally, we have seen that further research on corporate law reform and trade liberalization in Australia could yield valuable lessons concerning corporate governance convergence.

Second, this article has offered a multifaceted analysis of factors likely to influence the configuration of a country's system of ownership and control. Beginning with Mark Roe's work from the early 1990s, various attempts have been made to explain cross-border differences in corporate governance by reference to political, ideological, and legal conditions.[189] As this literature has begun to accumulate, a sensible inference to draw is that various factors may play a role.[190] Nevertheless, those who have contributed to the debate have shied away from offering a pluralist account in favour of focusing on individual variables.[191] The analysis provided here is different because account has been taken of various political, ideological, and legal factors that could influence governance arrangements within particular national contexts.

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188. *See Lean, Mean & European*, *supra* note 4, at 3-4, 18, 26; George Melloan, *Corporate Ties to the State Begin to Unravel in Europe*, WALL ST. J., Jan. 25, 2000, at A19; Paul Betts & James Blitz, *Italy's Capitalist Renaissance?*, FIN. TIMES (U.K.), Feb. 23, 1999, at 21.

189. *See, e.g.*, *supra* notes 34-36 and related discussion.

190. Roe, *Political Preconditions*, *supra* note 8, at 594 (explaining that "monocausal explanations . . . are incomplete").

191. On exceptions, see sources cited *supra* note 8.

The foregoing discussion of variables that can potentially have an impact on national corporate governance arrangements is not intended to be exhaustive. Instead, additional factors could influence the configuration of ownership and control in a particular country. One example, illustrated by the situation in Australia, makes the point.[192] As we have seen, a small company is more likely to have concentrated ownership than a large company.[193] It seems reasonable to assume that a country with a large economy is more likely to have big firms than a country with a small economy. It follows that there should be a correlation between an economy's size and its share ownership structure.[194] This proposition has received scant attention in the academic literature dealing with the world's dominant systems of corporate governance.[195] Still, since Australia has a small domestic market of nineteen million people, the size of its economy might well have placed limits on the extent to which share ownership dispersion could take place.[196]

The size of a country's economy clearly does not have a decisive influence on the configuration of a country's system of ownership and control. For instance, while the French and British economies are roughly the same size and Germany's is larger, share ownership is far more widely dispersed in the U.K. than it is in the two other countries.[197] This bears out, however, the point being made here: various contingencies need to be taken into account to fully appreciate why corporate governance arrangements differ between countries.

It may well be that the balance between the factors that influence the structuring of corporate governance is changing. More specifically, economic dynamics might be moving to the forefront. There is, as we have seen, currently much discussion of a fundamental shift towards Anglo-American capitalism.[198] This is occurring at the same time that market forces are growing in influence around the world and commerce is being conducted increasingly on a cross-border basis.[199] An inference one can draw from this is that as globalization

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192. *See* Roe, *Political Preconditions*, *supra* note 8, at 584-85, 598-99 (identifying some other possibilities—accounting rules, cultural attitudes towards investing, the status of private pension funds, and "trust"—but then ultimately dismissing these as being unimportant).

193. *Supra* note 176 and accompanying text.

194. The author is grateful to Ed Iacobucci for clarifying the source of the possible correlation.

195. *See* Mark J. Roe, *Rents and Their Corporate Law*, 53 STAN. L. REV. 1463, 1481-82 (2001) (providing an exception).

196. For observations on the impact which the size of Australia's economy may have had on the organization and activities of its companies, see Ville & Merrett, *supra* note 184, at 27-28, 33; David T. Merrett, Australia's Outward FDI in a Comparative Context: A Case of Constrained Internationalisation?, at 79, 20 (2001) (unpublished working paper).

197. *See* THE WORLD ALMANAC AND BOOK OF FACTS 2002 795, 798, 859 (William A. McGeveran ed., 2001) (noting that according to 1999 estimates, the gross domestic product of Germany was $1.864 trillion, France's was $1.373 trillion, and the U.K.'s was $1.29 trillion); *see also* Faccio & Lang, *supra* note 54, at tbl. 2 (describing ownership dispersion in Germany, France, and the United Kingdom).

198. *See supra* notes 23-26 and related discussion.

199. *See, e.g.*, *Lean, Mean & European*, *supra* note 4, at 4; Bradley et al., *supra* note 37, at 19-22; Martin Wolf, *The Heart of the New World Economy*, FIN. TIMES, Oct. 1, 1997, at 16.

prompts more direct encounters between different types of business organization, the best model—the Berle-Means Corporation—is prevailing.[200] Still, for the time being, proper analysis of comparative corporate governance continues to require a multifaceted approach that makes due allowance for national context.

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200. Cheffins, *supra* note 116, at 93.

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