Chapter 7

Proprietary Norms in Corporate Law: An Essay on Reading Gambotto in the United States

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It is a truism that national economies are extensively linked in the late twentieth century. Capital markets, in particular, transcend national boundaries; among developed economies, funds for investment move quickly and in vast amounts. One might be tempted as a result to anticipate an inevitable convergence among nations of the legal norms that underly capital investment. Corporate law, in particular, seems a likely candidate for convergence because it defines the corporate enterprise and the relationship between investors and managers. It also specifies the legal protection accorded to investors' expectations. Convergence in the corporate law context is a natural-feeling thesis for proponents of a Hegelian thesis of historical evolution,[2] as well as for the efficiency-oriented proponents of the economic analysis of legal rules and institutions.[3]

The High Court's opinion in *Gambotto v WCP Ltd*[4] is a development that confounds robust visions of impending convergence among corporate law regimes. By treating a shareholder's interest as proprietary, the *Gambotto* court impeded transactions that eliminate the equity investment of minority shareholders. By comparison, corporate law in the United States, and particularly in Delaware, facilitates such transactions, commonly (and not always pejoratively) known as "freezeouts." Additionally, in the United States, a freezeout transaction would utilize substantially different statutory mechanisms, and litigation challenging the transaction would be structured differently from the *Gambotto* litigation.

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2 See eg, Francis Fukuyama, *The End of History and the Last Man* (1992) (convergence thesis of evolution in political structures toward liberal democracy).

3 The standard account is one of competition among states for corporate charters, focusing on statutes. See Roberta Romano, *The Genius of American Corporate Law* (1993). In the United States, Delaware dominates as the situs of incorporation for public companies. Although they differ in some respects, state corporation statutes are relatively uniform. Other states mimic Delaware, and it adopts innovations introduced elsewhere to maintain its lead. See generally Michael Klausner, "Corporations, Corporate Laws and Networks of Contracts" (1995) 81 *Virginia L Rev* 757 n 283.

4 (1995) 182 CLR 432; 127 ALR 417; 16 ACSR 1; 13 ACLC 243.

Reading *Gambotto* is a startling experience for a United States lawyer, not because the case illustrates differences in formal statutory mechanics, but because the normative bases for the majority judgment diverge dramatically from assumptions prevailing in the United States. Additionally, United States lawyers would be startled by the fact that Mr Gambotto represented himself in the lawsuit and by his resilience as a pro se litigant, given the duration of the lawsuit and the relatively small value of his investment. In this chapter I describe initially how a *Gambotto*-like transaction would as a formal matter be structured under United States corporation statutes and how challenges to the transaction would proceed. I then examine the larger comparative interest of the case: it illustrates the profound significance to practical outcomes of underlying assumptions about the nature of corporate law structures and equity investment. In United States corporate law, property-based ideas do not have as dominant a place in defining the nature of shareholding as the High Court accords them in *Gambotto*.

Statutory Mechanisms to Eliminate Minority Shareholders

The dispute in Gambotto

Industrial Equity Limited ("IEL") owned 99.7% of the issued shares of WCP Ltd, all but 50,590 of WCP's shares. IEL determined that eliminating the minority shareholding in WCP would be a tax-efficient move. It anticipated selling WCP's land holdings at a gain, then offsetting the taxes due with otherwise unusable tax losses realized elsewhere in the IEL group of companies. IEL was unable to eliminate WCP's minority shareholders through statutory provisions that explicitly permit compulsory acquisition of minority shares by a majority shareholder, due to the provisions' high approval thresholds;[5] the provisions require the acquisition to be approved by 90% in nominal value and 75% in number of minority shares. The dissentient shareholders in *Gambotto* held 15,898 shares out of the 50,590 not held by IEL. To eliminate the minority thus required either a voluntary sale of the dissentients' shares or an alternate statutory mechanism with less onerous voting requirements to compel the disposition of all minority shares. The alternate mechanism of choice was an amendment to WCP's articles.

The amendment proposed by WCP's directors would have conferred on a shareholder entitled to 90% or more of WCP's shares, the right to acquire compulsorily all of WCP's issued shares at a price of $1.80 per share. Under the Corporations Law, altering or amending articles requires a special resolution adopted at a shareholder meeting.[6] The vote required is a majority vote based on a quorum of at least 75% of shareholders entitled to vote.[7] Prior to the shareholder meeting, WCP shareholders received an expert's report valuing the shares at $1.365, a valuation the dissentient shareholders conceded to be independent and fair. All shareholders present at the

5 Corporations Law ss 414(5)(b) and 701(2)(c)(ii).

6 Ibid s 176(1).

7 Ibid s 253(1)(b).

meeting voted in favor of the amendment (the dissentients did not appear personally or by proxy). The dissentient shareholders challenged the amendment as oppressive and beyond the statutory power to amend articles. A majority of the High Court agreed, reversing the New South Wales Court of Appeal.[8]

The High Court majority held that the power to amend a corporation's articles could be used to eliminate a shareholder only when that shareholder's continuing ownership would be detrimental to the corporation. The opinion gives two specific examples of detriment. A freezeout would be justifiable when a shareholder competes with the corporation or when necessary for the corporation's continuing compliance with a regulatory requirement applicable to its principal business that, for example, concerns shareholders' nationality. In contrast, the majority explicitly disapproved of freezeouts that would enable the corporation to pursue a new commercial advantage. The majority reasoned that the proprietary nature of shareholding is inconsistent with any less onerous standard for expropriation, and allocated the burden of establishing validity to the majority shareholder. Additionally, reasoned the majority opinion, to permit the use of amendments to articles to eliminate minority shareholders would circumvent "the protection which the Corporations Law gives to minorities who resist compromises, amalgamations and reconstructions, schemes of arrangement and takeover offers."[9]

Justice McHugh's separate opinion, like the majority opinion, assigns to the majority shareholder the burden of establishing that the amendment was not oppressive. The relevant standard, however, should be whether the freezeout "will enable the company to pursue some significant goal, or to protect itself from some action that is external to the company."[10] This standard is broader than that adopted by the majority opinion because it would permit a freezeout that enables the corporation to pursue an opportunity otherwise foreclosed to it. Justice McHugh's opinion expressly approves as a legitimate business objective the realization of significant tax savings. But, the opinion concludes, proponents of the WCP transaction failed to prove that it was not oppressive, that is, that the price was fair, the minority shareholders were dealt with fairly and "a full disclosure of all matters in relation to the alteration and expropriation has been made."[11]

Freezeouts in the United States

A transaction like that attempted in *Gambotto* would usually be structured as a merger in the United States. Following a resolution from the subsidiary corporation's directors, the majority shareholder would vote its shares to merge the corporation with another corporation, most likely an existing wholly-owned subsidiary of the majority

8 *WCP Ltd v Gambotto* [1993] 30 NSWLR 385.

9 (1995) 182 CLR 432 at 446.

10 Ibid at 455.

11 Ibid at 459.

shareholder or a new subsidiary created solely for use in the merger.[12] The resolution would specify the consideration to be received by minority shareholders in exchange for their shares. If the majority shareholder holds a very large proportion of the stock - 90% under the Delaware statute and the Revised Model Business Corporation Act - the directors' adoption of a plan of merger suffices and it is not necessary to obtain a shareholder vote on the merger.[13] Shareholders who dissent from the transaction have the right, following a judicial appraisal proceeding, to receive in cash the value of their shares as of the time of the merger.[14]

Corporation statutes in the United States do not contain counterparts to the statutory oppression remedy.[15] A shareholder challenging the propriety of a freezeout would, instead, argue that the transaction breached the majority shareholder's fiduciary duty to the minority.[16] The general proposition that a majority shareholder should be treated as a fiduciary toward the minority is long- and well-established in US caselaw. This principle is not understood to make it improper for the majority to exercise its voting power. Cases applying the principle to the specific context of freezeout mergers fall into two groups. First, since 1983, the Delaware standard has been that the majority must establish the "entire fairness" of the transaction by establishing fair price and fair dealing; Delaware caselaw does not require any showing as to the purpose of the transaction.[17] Second, courts in several other states - like Justice McHugh's opinion in *Gambotto* - additionally require a showing that the transaction had a bona fide business purpose.[18] Delaware

12 See eg, Del Code Ann, tit 8, s 251; Rev Model Business Corp Act ss 11.01 and 11.03. Under these statutes, a simple majority of outstanding shares suffices to approve a merger, in the absence of complications created by division of shareholders into distinct classes or voting groups. A statutory share exchange is an alternate structure under the Revised Model Business Corporation Act. See ibid s 11.02. Merger and share exchange statutes do not require that the transaction be approved by a majority of minority shareholders.

13 See Del Code Ann, tit 8, s 253; Rev Model Business Corporation Act s 11.04.

14 See Del Code Ann, tit 8, s 262, Rev Model Business Corporation Act ss 13.01-13.03; 13.20-13.28; 13.30-13.31.

15 The closest comparison is with statutory provisions that treat oppression as a basis for involuntary dissolution in a petition brought by a shareholder. See eg, RMBCA s 14.30(2)(ii). In about half of the states, a buyout of the complainant's holdings is an alternative remedy. Some states limit the buyout remedy to closely-held corporations. See F Hodge O'Neal and Robert B Thompson, *O'Neal's Oppression of Minority Shareholders*, ss 7.13 and 7.19 (2d ed, 1991).

16 In some states, appraisal is by statute the shareholder's sole and exclusive remedy following a merger. These statutory provisions vary, and some (but not all) courts have recognized exceptions for outright fraud. See Victor Brudney and William W Bratton, *Brudney and Chirelstein's Corporate Finance* 797-98 (4th ed, 1993).

17 *Weinberger v UOP, Inc* 457 A 2d 701 (Del 1983).

18 See *Perl v UI Int'l Corp*, 607 P 2d 1036, 1046 (Hawaii 1980) (merger effected for sole purpose of freezing out minority is breach of majority shareholder's fiduciary duty); *Coggins v New England Patriots Football Club, Inc*, 397 Mass 527, 492 NE 2d 1112 (1986) (controlling shareholder has burden of showing that freeze-out furthered a business purpose); *Berkowitz v Power/Mate Corp*, 135 NJ Super 36, 342 A 2d 566 (1975) (enjoining transaction when majority shareholder did not establish business purpose for transaction or fairness of price to minority); *Alpert v 28 Williams Street Corp*, 63 NY 2d 557, 473 NE 2d 19 (1984) (in freeze-out merger, removal of minority will be justified when related to advancement of a general corporate interest).

cases required a showing of business purpose from 1977[19] through *Weinberger v UOP, Inc,* decided in 1983. The *Weinberger* court jettisoned the business purpose requirement on the basis that it provided no additional meaningful protection to minority shareholders, given the entire fairness test, the operation of the appraisal remedy, and the court's "broad discretion...to fashion such relief as the facts of a given case may dictate..."[20]

Delaware cases apply the entire fairness test to directors' decisions that are not protected by the business judgment rule from judicial scrutiny of the merits of the decision. The business judgment rule would, for example, be inapplicable to a decision made by self-interested directors[21] or to a decision made by directors who were insufficiently informed prior to making the decision.[22] *Weinberger* applied the test to a cashout merger because the directors of the subsidiary corporation were dual (and conflicted) fiduciaries, who owed fiduciary duties to the minority shareholders as well as the majority.[23] The operative content of entire fairness varies somewhat with the type of transaction at issue. If, for example, a parent corporation has benefitted at the expense of the subsidiary in dealings between them, the entire fairness standard requires the parent to disgorge the benefit.[24]

As detailed in *Weinberger*, in the freezeout context the standard encompasses separate but ultimately related aspects of fair dealing and fair price. An inquiry into fair dealing implicates questions about the timing, structuring, negotiation and disclosure of the transaction. Fair price under *Weinberger* includes all "elements that affect the intrinsic or inherent value of a company's stock" and is equivalent to the general appraisal remedy.[25] Although *Weinberger* and its progeny do not dictate any particular definition for "intrinsic or inherent value" that would specify a division of anticipated gains between majority and minority shareholders, *Weinberger* permits introduction of evidence of elements of future value known or susceptible of proof as of the date of the merger.[26]

Although the differences among US jurisdictions are significant, their magnitude seems puny once one reads the majority opinion in *Gambotto*. The *Gambotto* majority explicitly imposed a substantive hurdle for freezeouts that differs from the business purpose test and ranges well beyond the entire fairness standard in *Weinberger*. Additionally, the potential reach of the reasoning in *Gambotto* is open to question in several respects, some of them interrelated. The principle adopted by the majority in *Gambotto* is, on its face, broadly applicable and would reach actions that are not

19 See *Singer v Magnavox Co*, 380 A 2d 969 (Del 1977).

20 457 A 2d 701 at 715.

21 See eg, *Gottlieb v Heyden Chemical Corp*, 91 A 2d 57, 57-58 (Del 1952).

22 See eg, *Smith v Van Gorkom*, 488 A 2d 858, 893 (Del 1985).

23 457 A 2d at 710. *Weinberger* contains a dictum strongly encouraging the use of an independent committee comprised of the subsidiary's outside directors; the use of such a committee is "strong evidence that the transaction meets the test of fairness." Ibid at 709 n 7. See also *Gambotto* at 446 (leaving open whether majority must refrain from voting).

24 See eg, *Sinclair Oil Corp v Levien*, 280 A 2d 717, 720 (Del 1971).

25 457 A 2d at 710.

26 Ibid at 713.

preliminary to expropriations of minority interests. *Gambotto* emphasizes the "proprietary nature" of a share, characterising a share as more than a capitalized stream of dividends. *Gambotto* would thus be implicated by an unconsented-to alteration of any non-economic prerogative conferred by the share that can be characterized as a proprietary right. Alteration to voting rights would be an obvious example. It is an open question, to say the least, whether *Gambotto* applies to alterations that treat all shares equally, or whether the case should be read as applicable only to transactions that are uniquely advantageous to the majority shareholder.

On the freezeout front, a pressing question is *Gambotto's* applicability to freezeout transactions effected other than through an amendment to articles. The Corporations Law contains provisions permitting binding compromises or arrangements between a corporation and its members, subject to approval from 75% of the nominal value of the shares present and voting and to judicial approval.[27] The court may condition its approval on "such alterations or conditions as it thinks just."[28] As it happens, the leading Australian treatise suggests that this statutory mechanism could be used to effect a "conversion of preference shares to debentures,"[29] that is, to compel an exchange of equity securities for debt. The *Gambotto* majority does not fully address the circumstances under which a minority shareholder may be bound by a compromise or arrangement that eliminates the shareholder's equity investment. A passage in the opinion quoted earlier notes the statutory protection afforded minorities who resist schemes of arrangement (and other transactions). One might read this passage to exempt schemes from the operation of the *Gambotto* principle, on the basis that the protective statutory structure supersedes the consequences of the shares' proprietary nature. But the statutory standard for judicial approval of a scheme is whether it is "just", and it would be unsurprising were *Gambotto* to frame or influence operative conceptions of justice.

Relatedly, the *Gambotto* majority disapproves of the use of the alteration of articles mechanism to circumvent the protective features of other mechanisms in the statute. Interdependence of statutory provisions is the unarticulated premise supporting this point. It is not evident how broad a doctrine of interdependence the majority have adopted. Alternatively, a court could accord independent operation or equal dignity to each formally distinct mechanism created by the same statute.[30] As it happens, US courts disagree on this question. Delaware and states following its lead usually apply an equal dignity doctrine, permitting (for example) the elimination of accrued dividends on preferred stock through a merger although the statute prohibits achieving the same

27 Corporations Law s 411(4)(a)(ii).

28 Ibid s 411(6).

29 See H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (1995) para 24.010.

30 As did Meagher, J A, writing for the Court of Appeal in *Gambotto*. See [1993] 30 NSWLR at 389 (various provisions in Corporations Law do not "constitute some sort of code governing the expropriation of shares").

end through an amendment to the corporation's charter.[31] Courts in other states have, at least in specific contexts, rejected the equal dignity doctrine; the best-known case, *Faris v Glen Alden Corp* recharacterizes as a merger a transaction formally structured as a purchase of assets, and thereby confers voting and appraisal rights on the shareholders of the purchaser.[32] While some degree of tension between form and substance in corporate law is inevitable,[33] the majority opinion in *Gambotto* is striking because it resolves the tension through a potentially unbounded, albeit unarticulated, anti-formalist stance.

Australian commentators on the practical effect of *Gambotto* predict an increase in greenmail transactions, that is, in individually-negotiated transactions in minority shares at prices or on terms not available to other minority shareholders.[34] In general, majority shareholders may find it attractive to acquire the minority's shares through voluntary transactions that do not implicate the sundry statutory mechanisms, varying the purchase price when necessary.

Australian corporations could in theory foreclose greenmail threats by adopting articles amendments that prohibit the payment of greenmail, as did many US corporations in the 1980's. Suppose, however that a shareholder dissents from the amendment and argues that, if effective, the amendment would constitute oppression under the reasoning in *Gambotto*. The dissentient shareholder would, as a result of the amendment, lose the ability to obtain an individually-negotiated sale of his shares, an arguably proprietary feature of share ownership. One response would be that an anti-greenmail amendment satisfies the criteria for legitimacy specified in *Gambotto*. Foreclosing an avenue to extract greenmail forecloses a prospective detriment, in this instance not a detriment to the corporation's current commercial operation, but to the nongreenmailers among minority shareholders. The theory of detriment is that each dollar extra paid to the greenmailer is a dollar less available to pay to all other minority shareholders. On the other hand, if the shares in question are viewed solely as the dissentient shareholder's individual property, demanding a higher price for them does not seem inappropriate. Moreover, *Gambotto* may require a more immediate detriment than this example suggests.

Gambotto's reasoning suggests an analogy to real estate development. A real estate developer may offer to buy a group of adjoining parcels for the same price per acre. It is not unusual, nor is it morally or legally objectionable, for any individual owner to hold out for a higher price. If the developer pays the higher price, moreover, it does

31 See *Federal United Corp v Havender*, 11 A 2d 331 (Del Ch 1940); *Bove v Community Hotel Corp*, 105 RI 36, 249 A 2d 89 (1969).

32 143 A 2d 25 (Pa 1958).

33 Indeed, Delaware cases overall are not consistent. Some recharacterize transactions on the basis of economic substance while others decline to do so. See generally Ronald J Gilson and Bernard S Black, *The Law and Finance of Corporate Acquisitions* (2d ed, 1995) at 682.

34 See Saul Fridman, "*Gambotto v WCP*: No Definitive Statement on Issue" *Australian Financial Review*, March 13, 1995.

not necessarily pay a lower price to all other property owners. The developer may simply be spending a larger amount on land acquisition which, other things being equal, would make the project less profitable for the developer. It remains to be seen whether *Gambotto* implies a comparably atomistic view of members' proprietary interests. By characterizing the dissentients' shareholding as a proprietary interest, the *Gambotto* majority pretermitted any reason to consider the legitimacy of any particular shareholder's reasons for refusing to sell at a given price. To the extent the real estate analogy underlies *Gambotto's* reasoning, the principle in the case applies regardless of whether the proposed transaction treats all members equally.

Proprietary Norms

Gambotto demonstrates the power of theory in corporate law disputes: as the case illustrates, how we think about the nature of shareholding has major practical consequences. The preceding comparison with US corporate law might prompt the conclusion that its treatment of shareholders is free of intellectual artifacts derived from property. To be sure, members' rights to remain as such are, as we have seen, readily defeasible in the United States under standards much less exacting than those adopted by the majority in *Gambotto*. All the same, notable features of the US corporate law landscape are explicable only by reference to concepts derived from property norms.

In characterizing the forms of legally-protected entitlements, legal theorists conventionally distinguish between property rules and liability rules.[35] For our immediate purposes, the key difference is that under a property rule the holder of an entitlement has a veto over any proposed transfer of the entitlement, whereas under a liability rule a nonentitled party may purchase the entitlement at a price set by a court. This abstract distinction applies neatly to the treatment of freezeout transactions in Delaware law contrasted with *Gambotto*. Delaware applies a liability rule to freezeouts. Subject to establishing that the transaction was entirely fair to the minority if it is challenged by a shareholder, the majority has the right to compel the minority to sell at a price set by directors elected by the majority, the price in turn always open to judicial scrutiny through the appraisal remedy.[36] *Gambotto*, in contrast, applies a property rule, subject to one modification: each shareholder has an absolute veto over the sale of his shares, unless the majority establishes his continuing ownership itself to be detrimental.

Aspects of corporate law resist complete capture by this simple dichotomy, however. Consider the implications of the court's authority under *Weinberger* to fashion such relief as the facts of a given case dictate, when a controlling shareholder has not acted with entire fairness. *Weinberger* explicitly permits the court to award rescissory damages,

35 See Guido Calabresi and A Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089.

36 Appraisal provisions in US corporation statutes are far from uniform in applicability and operation. For a comprehensive evaluation, see Hideki Kanda and Saul Levmore, "The Appraisal Remedy and the Goals of Corporate Law" (1985) 32 *UCLA L Rev* 429.

noting that the appraisal remedy - which gives the shareholder the fair value of his shares as of the time of the merger - may be inadequate in circumstances including "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching..."[37] Rescissory damages are, in monetary form, a proprietary remedy, a substitute for return of property in kind. In the absence of some proprietary element in shareholding, the robust presence of this remedy in shareholder litigation would be difficult to explain. Even if the remedy is characterized as an unusual form of liability rule, its justification derives from a property-based conception of the initial entitlement. Nor is the presence of rescissory relief adequately explained by the objective of deterring specified forms of conduct. Punitive or exemplary damages more directly serve a deterrent function, yet are distinct from rescissory damages.

The proprietary character of some aspects of corporate law is likewise evident in the Delaware Supreme Court's most controversial recent case, *Cede & Co v Technicolor, Inc.*[38] In *Cede*, the court held that proof of injury was not an element of a shareholder's cause of action for directors' breach of their duty of care.[39] Technicolor's directors approved an arms-length merger of the corporation without conducting an auction or structuring an effective post-agreement market check to legitimate the negotiated price. The directors' decision to approve the merger fell outside the protection of the business judgment rule because it was not adequately informed. As a consequence, the directors had the burden of establishing the entire fairness of the merger. In an appraisal action tried first by the Court of Chancery, the court determined that the merger price was fair. The supreme court reversed the lower court's reliance on a "no harm, no foul principle"; the supreme court also emphasized that under the entire fairness standard applicable to the dispute - the plaintiff having rebutted the presumptions of the business judgment rule - ultimate recovery would not be limited to the difference between the merger price and value as determined by appraisal because it might well include elements of rescissory damages.

The outcome in *Cede* is baffling if the shareholder's entitlement to duly informed service from directors is treated exclusively as a form of liability rule, one that resembles entitlements created by tort law. The directors' breach deprived the shareholders of that entitlement, but through the resulting merger the shareholders received a price at least equal to the appraised value of their stock, as determined by a court. If the shareholders' entitlement is, in contrast, treated as a form of property rule, the merger is the consequence of an unconsented-to transfer or taking, and the shareholders are presumptively entitled to the return of their shares. Translated into monetary relief, shareholders should receive an amount equal to the current value of the shares, an

37 457 A 2d at 714 (1983).

38 634 A 2d 345 (Del 1993). The purchaser in *Cede* sold Technicolor six years after the merger for $750 million, having paid $125 million through the merger. The plaintiff in *Cede* sought to recover $40 million. The suit named as defendants Technicolor's directors at the time of the merger, plus the purchaser and its controlling shareholder. See generally Karen Donovan, "Delaware Court Hears Takeover Case Third Time", *National Law Journal*, June 5, 1995, at B1.

39 Ibid at 371.

entitlement that gives shareholders the benefit of post-merger appreciation in value.

The availability to shareholders of a proprietary remedy is, nonetheless, significantly different from the form of shareholders' entitlement under *Gambotto*. Rescissory damages become available under *Weinberger* only when the majority has acted wrongfully. If the majority deals fairly, although the appraisal remedy may result in dissenting shareholders receiving more than the merger price, the majority shareholder has no general duty to account for benefit it realizes through the freezeout. Indeed, in its latest opinion in the *Cede* litigation, the Delaware Supreme Court affirmed the Court of Chancery's determination on remand that the transaction was entirely fair to Technicolor's shareholders.[40] The Supreme Court emphasized that liability is not automatic under the entire fairness standard; analysis under the standard requires the trial court to examine and balance "the nature of the duty or duties the board breached vis-a-vis the manner in which the board properly discharged its other fiduciary duties."[41] In contrast, under *Gambotto*, each minority shareholder has an absolute veto over the sale of his shares. The presumptive value to any or all minority shareholders of their veto power is the gain the majority shareholder anticipates through the freezeout. On the *Gambotto* facts, the benchmark amount would be the value of the projected tax savings. Generalised, the legal principle in *Gambotto* is distributively more favorable to minority shareholders than the *Weinberger* approach.[42]

Distributional consequences are not the end of the story, however. The history of corporate law in the United States illustrates that legal rules have consequences for business efficiency. Two points in the evolutionary line are salient. Well into the nineteenth century in the United States, any fundamental corporate change required shareholders' unanimous consent; any shareholder could block the corporation's consolidation with another corporation, and could also block a major purchase or sale of assets.[43] As the century progressed, "[i]t became increasingly apparent to observers that great benefits to society, to the corporation, and derivatively to the rest of the shareholders were sometimes blocked to protect interests that seemed quite minor or even venal to the remaining shareholders and perhaps to most outsiders."[44] This era led

40 *Cinerama, Inc v Technicolor, Inc.*, 1995 WL 431434 (Del, July 17, 1995).

41 Ibid. The Supreme Court's opinion does not specify respective weights to be assigned in the balance, nor does it articulate categorical restrictions on the availability of rescissory damages. The Court of Chancery's opinion, in dicta, observes that rescissory damages may be an appropriate remedy against a director when the director has breached the fiduciary duty of loyalty but that such damages should never be awarded when the director has breached only the duty of care. The underlying principle limits the availability of rescission or a substitute for it to one who participates in a transaction as a principal or is a co-conspirator of a principal or "has a material conflict of interest of another sort." See *Cinerama, Inc v Technicolor, Inc*, 1994 WL 568654 (Del Ch, October 6, 1994).

42 Entitlement forms that give the in-kind holder more control over transfer are, in general, more distributively favorable to in-kind holders than are liability rules. See Madeline Morris, "The Structure of Entitlements" (1993) 78 *Cornell L Rev* 822 at 854.

43 See William J Carney, "Fundamental Corporate Changes, Minority Shareholders, and Business Purposes" [1980] *Am Bar Found Res* J 69 at 80.

44 Ibid at 81.

to general corporation legislation that facilitated mergers by majority shareholder vote and created appraisal rights. Merger legislation itself evolved significantly in the twentieth century, with changes that permitted the distribution to shareholders of consideration other than shares of the surviving corporation, and, in particular, the distribution of cash.[45] Courts in turn legitimated the use of these statutes to eliminate minority shareholders.[46] Later cases like *Weinberger* regulate freezeout tactics. This history, from its start to present, encapsulates a shift from a property rule to a liability rule, driven (if one credits the historians) by legislative and judicial concern for business efficiency.

Conclusion

Many factors might help explain the relative primacy that *Gambotto* accords to a proprietary conception of shareholding. For starters, in the Australian context, arguments grounded in efficiency concerns may be less compelling, as applied to freezeouts, than in the United States. The Australian universe of public companies and securities trading is much smaller than its counterpart in the United States. Justice McHugh's opinion in *Gambotto* notes that price volatility in the Australian market is noticeable and not necessarily the product of rationally explicable factors.[47] As a result, observers of the Australian market, and of corporate transactions more generally, may perceive a disjunction between activity dominated by securities markets and underlying business enterprise. Freezeouts, moreover, often follow in the wake of takeovers and other larger transactions in corporate control; freezeouts' social utility may be in question in an environment skeptical about the broader social value of stock markets and takeover activity.

Relatedly, Australians who make direct investments in domestic equities have many fewer choices than do their counterparts in the United States.[48] After a freezeout, opportunities to reinvest, at least in domestic equities, are more limited in Australia. A shareholder's identity as a member of a company, not merely as a provider of equity investment, is likely stronger in a world that appears to afford fewer investment choices. This appearance is a bit illusory, however, if nondomestic equity investments, or pooled

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45 See Gilson and Black, supra n 33 at 1253-54.

46 See eg, *Stauffer v Standard Brands, Inc*, 187 A 2d 78 (Del Ch 1962).

47 (1995) 182 CLR 432 at 458. Debates over the significance of volatility in US securities markets focus on whether volatility increased in the 1980's, when the transactions costs of trading became lower. Volatility statistics for the 1980's look very different depending on one's treatment of the October 1987 crash. After the 1987 crash, volatility returned to pre-1975 levels. See Paul G Mahoney, "Is There a Cure for `Excessive' Trading" (1995) 81 *Virginia L Rev* 713 at 730-31. Average volatility data for the Australian stock market illustrate that it is the least volatile market in the Asia-Pacific region. See Australian Stock Exchange, *Market Report 1994* at 12.

48 The US securities market is enormous. The New York Stock Exchange - listing venue for most large US corporations - in 1994 listed 2,510 companies, including 204 non-US listings. New York Stock Exchange, *Fact Book for the Year 1994*, at 8. Total US equities outstanding had an estimated value of US$6.1351 trillion in the third quarter of 1994. Ibid at 83. As of June 1994, total capitalization on the Australian market was A$287.6 billion. See Australian Stock Exchange, *Market Report* 1994 at 11.

investment vehicles, are readily available choices.

A further explanation may lie in differences between the structure and approach of corporate law in the two countries. The formal qualities of corporate law in Australia are markedly different from corporate legislation in the United States. The Corporations Law does not include provisions that authorize merger transactions and, as *Gambotto* notes, the statutory treatment of compulsory acquisitions requires a high degree of assent from the minority. On several points, the Corporations Law is more complex and contains much more mandatory prescription than counterpart legislation in the United States.[49] In contrast, requirements for extensive periodic disclosure of information have long been a feature of federal securities regulation in the United States but are relatively recent in Australia. An information-rich environment may engender greater confidence in the integrity of corporate decisionmakers because greater visibility legitimates their decisions.[50] In contrast, in a legal universe where so much is specified by statute in great detail, the omitted - like freezeouts - may presumptively be prohibited.

Comparative law scholarship is ill-suited to prescriptive conclusions. We do well to understand the differences between legal norms in different systems and do very well indeed if we can explain their origins. It is no criticism of the majority's approach in *Gambotto* that it differs profoundly in many respects from norms of corporate law that prevail in the United States. The question warranting further inquiry is the fit between *Gambotto* and the objectives and presuppositions of corporate law in Australia.

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49 Examples include the statutory treatment of share repurchases and takeover bids.

50 Freezeouts are subject to specific disclosure requirements under federal securities regulation when they have the effect of eliminating public shareholders in a public company. The relevant SEC rule does not regulate the purpose or pricing of the transaction. It does, however, require the company's directors to state whether they believe the transaction to be fair or unfair to minority shareholders and to discuss the factors on which such belief is based. SEC Rule 13e-3, Schedule 13E-3, item 8. Counterpart regulation in Canada, issued by the Ontario Securities Commission, imposes substantive requirements for minority approval and valuation. See Ontario Securities Commission, Policy Statement 9.1. Further discussion of the regulation of freezeouts in Canada is contained in Chapter 9.