

SHAREHOLDER PROTECTION IN AUSTRALIA: INSTITUTIONAL CONFIGURATIONS AND REGULATORY EVOLUTION

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Various explanations have been advanced for why shareholder protection looks the way that it does. These explanations include varieties of capitalism, legal origins and various configurations of social interests. When compared with the United States and the United Kingdom, Australian corporate law appears on its face to be strongly protective of shareholders. However, when trying to explain the relative strength of Australian corporate law, we find that none of the theories advanced appear to be satisfactory. Our analysis of the development of shareholder protection laws in Australia indicates that the Australian experience is not easily located within the broad theories that seek to classify countries according to matters such as types of capitalism, legal origins or political orientation.

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I INTRODUCTION

In recent decades the Australian corporate law system has undergone extensive reform, strengthening the rights within corporate governance structures of shareholders against managers and of minority shareholders against other shareholders. Our starting point in this paper, outlined more fully in the following section, is that Australia now has a decidedly shareholder-centric model of corporate law when measured against the systems of some other similar economies. Given that studies of comparative corporate governance tell us that countries vary greatly in the extent to which they privilege shareholders within the governance structure of corporations, the questions for this paper are as follows: first, how can we explain this variation between systems; and second, how do we explain the particular form that Australian corporate law has taken?

One way of examining the evolution of corporate law and understanding its sociopolitical role is to move away from a study of the field in isolation, to approach it as one sociopolitical institution among several, and to examine its interrelationships with those other social institutions. Recent analyses of the political economy of capitalism have made this point central to their inquiry. In particular, they stress the idea that institutions in one sphere — for example, corporate regulation — may complement those in another — for example, labour law — and that certain patterns of regulation can in turn be linked to patterns of corporate ownership and control. In effect, such approaches explore a three-way relationship between corporate law, labour law (or broader social policy), and corporate ownership and control. Although theories differ as to the causal relationship between these three variables, they all tend to propose a certain coherence or ‘fit’ between the three that explains cross-national diversity in institutional forms and the existence of distinct national regimes of economic and business organisation. In short, we should be able to explain the form that corporate law takes in a nation-state by reference to what goes on around it in other areas of regulation.

In much of this research, countries such as the United States and the United Kingdom are commonly grouped as members of a particular type or family.¹ This so-called 'Anglo-American' or 'liberal' model is usually identified with widely dispersed share ownership, strong securities markets and shareholder-oriented governance and regulation,² accompanied by relatively weak labour laws and social protection; that is to say, 'stakeholder' — relevant non-shareholder — interests are largely eschewed in this model.³ In contrast, continental European regimes, Germany being the paradigm case, exhibit a much greater degree of concentrated share ownership, less prominent shareholder rights and protections, and more protective labour laws.⁴ Perhaps not surprisingly, Australia is usually grouped with the United Kingdom and the United States as part of the Anglo-American family of liberal market, shareholder-oriented (rather than stakeholder-oriented), capitalist economy systems; its system of corporate regulation looks like the United Kingdom and United States systems, and it is usually grouped with the United States and the United Kingdom as a country of shared 'legal origin', suggesting a shared 'regulatory style'.⁵ However, some scholars have questioned the assumed congruity of the Australian, United Kingdom and United States systems, suggesting that, while the evolution of Australian corporate law has closely tracked that of the United Kingdom, it diverges in important respects from the United States system of corporate regulation as regards the level of protection it offers to shareholders.⁶ We explore this divergence within liberal market systems in more detail in the following section.

¹ See, eg, Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

² Christopher M Bruner, 'Power and Purpose in the "Anglo-American" Corporation' (2010) 50 *Virginia Journal of International Law* 579, 581; Martin Gelter, 'The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance' (2009) 50 *Harvard International Law Journal* 129, 130–1.

³ Gelter, above n 2, 131.

⁴ See, eg, *ibid* 168–72.

⁵ Rafael La Porta et al, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3, 8; Rafael La Porta et al, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113, 1119.

⁶ Jennifer G Hill, 'The Shifting Balance of Power between Shareholders and the Board: News Corp's Exodus to Delaware and Other Antipodean Tales' (Legal Studies Research Paper No 08/20, Sydney Law School, 2008); Richard Mitchell et al, *Law, Corporate Governance and Partnerships at Work: A Study of Australian Regulatory Style and Business Practice* (Ashgate, 2011) ch 2; Bruner, 'Power and Purpose', above n 2, 644 n 333, citing Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002) 16 *Transnational Lawyer* 13; Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Founda-*

As noted above, in this paper we are essentially concerned to test the hypothesis that the evolution of Australian corporate law can be explained by reference to an established type of national institutional regime that takes in both the form of Australian labour law and social protection, and Australia's broader patterns of corporate ownership and control. We begin, in Part II, by surveying the evidence regarding the strength of shareholder protection in Australian corporate law. In Part III, we examine the main theories that posit correlations between the form of corporate law, labour law and patterns of corporate ownership and control. In Part IV, we consider how best to characterise Australian labour law or forms of social protection more broadly, and examine the nature of Australian corporate ownership and control. We then conclude, in Part V, by discussing how useful existing theories that align corporate law with labour law and corporate control are for understanding the Australian regulatory position.

II SHAREHOLDER PROTECTION AND AUSTRALIAN CORPORATE LAW

In accordance with the outline of our argument set out above, the purpose of this Part of the paper is to determine the position of shareholders of listed corporations in Australia in the context of the level of protection or empowerment they are afforded. It has been argued elsewhere that Australian corporate law has tended to track developments in the United Kingdom.⁷ Australia's foundational legislative interventions in this area were closely modelled on British company law.⁸ It has been suggested that the more recent flurry of regulatory activity since the mid-1990s represents an 'Americanisation' of corporate law.⁹ While perhaps in general terms there may be such a convergence, there are still key areas where Australia tracks far more closely a distinctly British model. The institutional role of the Takeovers Panel and its predecessor, the Corporations and Securities Panel, for example, represents a transplant of key elements of the United Kingdom's *City Code on Takeovers*

dations of Shareholder Power (Cambridge University Press, 2013). *Contra* Paul von Nessen, 'The Americanization of Australian Corporate Law' (1999) 26 *Syracuse Journal of International Law and Commerce* 239.

⁷ Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, ch 2.

⁸ McQueen goes so far as to refer to company law as 'imperialism', whereby a British model of company law was exported to the colonies despite there being little or no demand amongst business operators for the corporate form: Rob McQueen, 'Company Law as Imperialism' (1995) 5 *Australian Journal of Corporate Law* 187.

⁹ Von Nessen, above n 6.

and Mergers,¹⁰ which, among other things, prohibits directors, in the absence of shareholder approval, from taking action that may frustrate a takeover offer or deny shareholders the opportunity to decide whether to evaluate an offer on its merits.¹¹ On the other hand, in many United States jurisdictions, directors of a target company still have the capacity to thwart hostile takeover bids. Similarly, whereas the United States response to corporate scandals early in the 21st century was to shift towards a 'legislative rules-based approach to corporate governance, with a higher level of mandatory governance standards',¹² Australia has adopted a more non-prescriptive approach, again mirroring that of the United Kingdom, whereby listed companies must comply with, or explain their divergence from, the principles set out in the Australian Securities Exchange's ('ASX') corporate governance guidelines.¹³ A final example is the divergence between recognition of shareholder interests through market mechanisms (for example, disclosure requirements) and enhanced decision-making or participatory rights for shareholders. In more recent post-scandal regulatory reforms Australia and the United Kingdom have favoured the latter path, while the United States has tended toward the former.¹⁴

A recent quantitative study indicates that levels of shareholder protection in Australia and the United Kingdom are stronger than levels of protection in the United States.¹⁵ This research builds upon, in terms of methodology, work undertaken by Lele and Siems¹⁶ in which the authors adopted a 'leximetric'

¹⁰ Panel on Takeovers and Mergers, *City Code on Takeovers and Mergers* (at 20 May 2013) ('*City Code*'). See Alan Dignam, 'Transplanting UK Takeover Culture: The EU Takeovers Directive and the Australian Experience' (2007) 4 *International Journal of Disclosure and Governance* 148; Emma Armson, 'Models for Takeover Dispute Resolution: Australia and the UK' (2005) 5 *Journal of Corporate Law Studies* 401. See generally Ian Ramsay (ed), *The Takeovers Panel and Takeovers Regulation in Australia* (Melbourne University Press, 2010).

¹¹ *City Code* r 21.1(a); Emma Armson, 'The Frustrating Action Policy: Shifting Power in the Takeover Context' (2003) 21 *Company and Securities Law Journal* 487.

¹² Jennifer G Hill, 'Regulatory Responses to Corporate Governance Scandals' (2005) 23 *Wisconsin International Law Journal* 367, 382.

¹³ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (at 27 March 2014). These principles address board role and structure, integrity of financial reporting and disclosure of company information.

¹⁴ Hill, 'The Shifting Balance of Power', above n 6, 6–10.

¹⁵ Helen Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison' (2012) 61 *International and Comparative Law Quarterly* 171.

¹⁶ See Priya P Lele and Mathias M Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7 *Journal of Corporate Law Studies* 17.

methodology¹⁷ to code numerically 60 variables designed to measure the strength of shareholder protection. The authors applied the variables longitudinally to five countries, including the United Kingdom and the United States, over the period 1970–2005.¹⁸ Lele and Siems discovered that shareholder protection was higher in the United States than in the United Kingdom for much of the period from 1970–1980. However, the position was reversed from about 1980 onwards when the level of shareholder protection in the United Kingdom rose and exceeded the level in the United States for the remainder of the period of the study.¹⁹

The later study by Anderson et al of shareholder protection in Australia used the 60 variables adopted by Lele and Siems, and the Australian results were compared with Lele and Siems' results for the United States, United Kingdom, France, Germany and India.²⁰ The Anderson et al study found that, compared with the United Kingdom and the United States (as well as the three other countries examined), the level of protection afforded to shareholders under Australian law was relatively high. While having more in common with the United Kingdom than the United States since 1980, the level of shareholder protection in Australia was higher than both the United Kingdom and the United States for the entire period of the study from 1970–2005.²¹

Christopher Bruner has also made the point that it is an oversimplification to conflate the United States and United Kingdom corporate governance systems — typically put forward as exemplars of liberal market economies — as uniformly privileging shareholders and discounting other stakeholders.²² Bruner, applying measures of shareholder protection that differed from the variables utilised in the Lele and Siems study,²³ found that, on all measures, shareholders in the United Kingdom have greater levels of protection than their counterparts in the United States and that corporate governance is more

¹⁷ The leximetric methodology was adapted from the pioneering work of La Porta et al: see above n 5. See also Rafael La Porta et al, 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131; Rafael La Porta, Florencio Lopez-de-Silanes and Andre Shleifer, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471.

¹⁸ Lele and Siems, above n 16.

¹⁹ Ibid 31.

²⁰ Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia', above n 15. See also Helen Anderson et al, 'Shareholder and Creditor Protection in Australia: A Leximetric Analysis' (2012) 30 *Company and Securities Law Journal* 366.

²¹ Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia', above n 15, 184–5.

²² Bruner, 'Power and Purpose', above n 2, 593.

²³ Ibid 586–93; Bruner, *Corporate Governance in the Common-Law World*, above n 6, ch 2.

shareholder-centric in the United Kingdom than it is in the United States.²⁴ Like the Anderson et al study, Bruner found that shareholder protection in Australia is more closely aligned with that in the United Kingdom than it is with the United States.²⁵

The studies by Lele and Siems, Anderson et al and Bruner enable us to reach two conclusions. First, Australia shows a considerable strengthening in shareholder protection law over the past 20 years, and ranks, according to the work of the Australian researchers utilising the Lele and Siems variables, as the most protective of the six countries examined. Second, there is a divergence between the corporate governance systems in the United States, on the one hand, and the United Kingdom and Australia, on the other. There is greater shareholder power and a greater orientation towards shareholders' interests in the United Kingdom and Australia when compared with the United States.²⁶ The research indicates that, since 1980, corporate governance and the level of shareholder protection in Australia has more in common with the United Kingdom than it does with the United States. We turn now to an examination of the various broad theoretical arguments which seek to explain these differing approaches to shareholder protection law and their association with other sociopolitical arrangements.

III EXPLAINING INSTITUTIONAL VARIATIONS IN MARKET ECONOMIES

A *Varieties of Capitalism*

The stylised division of advanced capitalist economies into two social models or varieties was first advanced by Albert, who distinguished between 'neo-American' and 'Rhine' economies, the latter based in continental Western Europe.²⁷ A more thorough empirical investigation of this division was undertaken by Hall and Soskice, who identified two separate and distinct sets of institutional arrangements, complemented by legal systems and styles of

²⁴ Bruner, 'Power and Purpose', above n 2, 593–611.

²⁵ Bruner, *Corporate Governance in the Common-Law World*, above n 6, 68.

²⁶ This has been the case in Australia from 1970 at least, and in the United Kingdom from around 1980: Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia', above n 15, 185.

²⁷ Michel Albert, *Capitalism against Capitalism* (Paul Haviland trans, Whurr, 1993) [trans of: *Capitalisme contre Capitalisme* (first published 1991)].

regulation, which are labelled by the authors either as 'liberal market' economies or 'coordinated market' economies.²⁸

This 'varieties of capitalism' schema is based on national contexts of corporate governance and finance, and labour management systems. These derive from how employers coordinate their activities: that is, whether they do so either through market mechanisms or through more cooperative means. The United States and the United Kingdom, for example, are usually characterised as liberal market economies. That is, they exhibit a dispersed shareholder base grounded in extensive and deep equity markets, strong protective rights for investors, an active market for corporate control by shareholders (particularly through takeovers and mergers) and a business strategy focussed upon shareholder value.²⁹ This liberal market economy style of corporate governance is then allied to a complementary style of labour management which supports the interests of capital over workers. For example, under a liberal market model, one would expect to see fewer protective labour institutions and rights, less employment security, fewer minimum labour standards for workers, and where such standards exist, the application of such standards to a smaller cohort of workers than in the coordinated style of economy.³⁰

By contrast, Germany and some other continental European states are characterised as coordinated market economies. These feature, it is argued, very different corporate ownership and governance arrangements: shareholding is much less widely dispersed, share markets are less developed, and financing is facilitated more through banks and other large lenders. In effect there arises an 'insider' form of corporate governance whereby financiers develop longer-term relations with corporate managers and there is much less emphasis on short-term market discipline.³¹ With a longer-term view of the business able to be exercised by management, there is also a longer-term view able to be taken of relations with workers. Thus the coordinated market style of economic organisation is marked by superior protections for workers when compared with the labour law systems in the liberal market states. This includes, among other things, greater employment security, more investment

²⁸ Peter A Hall and David Soskice, 'An Introduction to Varieties of Capitalism' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 1.

²⁹ *Ibid* 27–9.

³⁰ *Ibid* 29–30.

³¹ *Ibid* 22–4.

in skills and training, and a higher degree of employee involvement in workplace decision-making.³²

Other comparative studies identify more than two groupings or families of nations. For example, Boyer identifies four regime types;³³ Amable identifies five;³⁴ and Whitley proposes a typology of six ‘business systems’.³⁵ To a large extent, these extended groupings open up the catch-all category of coordinated market economies and differentiate those economies with greater precision.³⁶ Less considered in the literature, but potentially important for our inquiry, is the possibility that there are varieties of liberal markets or, at least, significant differences amongst liberal regimes.³⁷

At this point it is necessary to introduce two concepts that play a key role in the varieties of capitalism literature and which also recur in some of the other causal explanations we go on to explore regarding the links between corporate governance, corporate ownership and social protection: the notions of path dependency and complementarity. As noted by Deeg, notions of path dependency and some sort of institutional coherence underpin most theories of national differences.³⁸ Path dependency — that nations become locked in to a certain form of economic organisation — accounts for the persistent diversity of national systems despite global pressures for systems to converge around a single economically efficient model.³⁹ Yet while the persistence of cross-national diversity in forms of capitalism is explained by path dependen-

³² Ibid 24–6.

³³ Robert Boyer, ‘How and Why Capitalisms Differ’ (2005) 34 *Economy and Society* 509.

³⁴ Bruno Amable, *The Diversity of Modern Capitalism* (Oxford University Press, 2003) 171–81.

³⁵ Richard Whitley, *Divergent Capitalisms: The Social Structuring and Change of Business Systems* (Oxford University Press, 1999).

³⁶ Martin Schröder, ‘Integrating Welfare and Production Typologies: How Refinements of the Varieties of Capitalism Approach Call for a Combination of Welfare Typologies’ (2009) 38 *Journal of Social Policy* 19, 25.

³⁷ Rianne Mahon, ‘Varieties of Liberalism: Canadian Social Policy from the “Golden Age” to the Present’ (2008) 42 *Social Policy & Administration* 342.

³⁸ Richard Deeg, ‘Path Dependency, Institutional Complementarity, and Change in National Business Systems’ in Glenn Morgan, Richard Whitley and Eli Moen (eds), *Changing Capitalisms? Internationalization, Institutional Change and Systems of Economic Organization* (Oxford University Press, 2005) 21, 27–8.

³⁹ Hansmann and Kraakman argue that continuing convergence toward a uniform model of corporate law is likely: Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown Law Journal* 439. See also Lucien Arye Bebchuk and Mark J Roe, ‘A Theory of Path Dependence in Corporate Ownership and Governance’ (1999) 52 *Stanford Law Review* 127.

cy, path dependency itself can be explained by the complementarity or coherence of national systems.

Path dependency is often explained by reference to the cost of switching from an established (albeit less than optimal) arrangement to a more efficient arrangement, which might be outweighed by the welfare gain brought about by changing.⁴⁰ While the existence of adjustment costs for an individual are often a matter of technical fact, as regards economic processes they also arise from the social aspects of institutional development because of the sunk costs and entrenched interests of groups or coalitions of actors.⁴¹ As Jackson and Deeg explain further, the fact that there are 'institutional linkages and complementarities' within national systems makes it difficult to introduce changes which can have the effect of transforming 'the overall institutional configuration from one type of capitalism to another'.⁴² That is, from an economic perspective, the marginal cost of continuing with an established regulatory style is lower than radically recasting the system, principally because the fundamental rules are embedded across regulatory institutions and populations: any change to one aspect of the system may undo or unsettle the overall coherence of the system. 'Alternatively, deeply ingrained cultural and social mores, which are also expressed in legal culture, may lock in a certain regulatory style'.⁴³ Thus, for example, we might expect to see that institutions within one particular context (for example, the capital market) evolve in a complementary way with those in another context (for example, the labour market).⁴⁴

⁴⁰ Reinhard H Schmidt and Gerald Spindler, 'Path Dependence, Corporate Governance and Complementarity' (2002) 5 *International Finance* 311, 314–15; Mark J Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641, 643–4.

⁴¹ Schmidt and Spindler, above n 40, 315.

⁴² Gregory Jackson and Richard Deeg, 'How Many Varieties of Capitalism? Comparing the Comparative Institutional Analyses of Capitalist Diversity' (Discussion Paper 06/2, Max-Planck-Institut für Gesellschaftsforschung, April 2006) 35–6. However, Jackson and Deeg question the validity of this proposition: at 36–7. See also Howard Gospel and Andrew Pendleton, 'Corporate Governance and Labour Management: An International Comparison' in Howard Gospel and Andrew Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (Oxford University Press, 2005) 1, 8–9.

⁴³ Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, 10, citing Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 2nd revised ed, 1987) [trans of: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (2nd revised ed, 1984)].

⁴⁴ See Masahiko Aoki, *Towards a Comparative Institutional Analysis* (MIT Press, 2001) 17–20.

Deeg explains three possible forms of institutional fit.⁴⁵ Institutions might simply cohere through a 'logic of similarity' whereby 'actors adopt similar approaches and solutions across different spheres of activity'.⁴⁶ For example, in liberal market systems, companies might pursue arms-length contractual arrangements in competitive markets as a way of organising their relationships with suppliers, creditors and employees. In contrast, companies in coordinated market systems might pursue more relational dealings with creditors, suppliers and employees.⁴⁷ However, the varieties of capitalism literature tends to use the notion of complementarity in a second, more nuanced way. Rather than mere similarity between institutions, it refers to mutually reinforcing approaches or incentive structures in different economic subsystems such that the presence of one institution increases the returns of the other.⁴⁸ Deeg terms this the 'logic of synergy'.⁴⁹ For example, regarding corporate governance and employee participation, a complementary institutional fit may arise where 'short-term finance requires quick entry and exit from business activities' and thereby provokes an 'industrial relations system that allows the inexpensive hiring and firing of labour' which in turn attracts short term finance and so on.⁵⁰ Finally, institutional fit might also be said to exhibit a certain logic of complementarity where one institution makes up for the deficiencies of another. An example from the social sciences would be the complementarity of Denmark's welfare and labour law systems: minimal

⁴⁵ Deeg, above n 38, 24–5.

⁴⁶ *Ibid* 24.

⁴⁷ As Amable suggests, otherwise contradictory signals might be given to actors: see Amable, above n 34, 6, 57. Goodin et al refer to 'intellectually and pragmatically unified packages of programs and policies, values and institutions': Robert E Goodin et al, *The Real Worlds of Welfare Capitalism* (Cambridge University Press, 1999) 6.

⁴⁸ See Hall and Soskice, above n 28, 17–21, citing Aoki, above n 44.

⁴⁹ Deeg, above n 38, 24. Crouch insists that, given its etymology, 'complementarity' must imply institutions fitting together so as to complete each other by providing useful balancing characteristics. For him, similarity of institutions will often reveal a lack of true complementarity, whereas reciprocal reinforcement, while useful in explaining how forms of path dependence may arise, does not in itself necessarily imply true complementarity: see Colin Crouch et al, 'Dialogue on "Institutional Complementarity and Political Economy"' (2005) 3 *Socio-Economic Review* 359, 359–63. Likewise, Höpner prefers the term 'coherence' to describe situations where institutions are designed according to similar principles. He adds that an institutional configuration may be stable because of complementarity, coherence, or merely because its elements are 'compatible': Martin Höpner, 'What Connects Industrial Relations and Corporate Governance? Explaining Institutional Complementarity' (2005) 3 *Socio-Economic Review* 331, 333.

⁵⁰ Ruth V Aguilera and Gregory Jackson, 'Comparative and International Corporate Governance' (2010) 4 *Academy of Management Annals* 485, 500.

protection of employees against dismissal and redundancy is offset by generous unemployment benefit provision and active labour market programs. Thus society gets the benefit of the former, while the latter offsets the unpalatable effects.⁵¹ This could be called the 'logic of contrast'. Path dependency here flows from the fact that change in one of the institutions would need to be met by some sort of adaptation or change in the other to maintain the socially desired effect of the whole. Similarly, because the parts fit together in a particular way, Jacoby observes that it becomes difficult, if not impossible, to take an institution from one setting, transplant it to another, and have it achieve the same result.⁵²

Ahlering and Deakin note that the development of a system of regulation based in complementary institutions is not necessarily the result of planned or functionally devised arrangements.⁵³ Undoubtedly a degree of functionality must be present or the particular legal system would not persist; but path dependency, as we have noted, rules out a purely functional process of legal and institutional development. Workable complementarities are thus just as likely to arise through 'unexpected contingencies or conjunctions', even accidents, as they are through design.⁵⁴

In understanding how these sets of institutional configurations⁵⁵ interrelate to produce national styles of market regulation, it is necessary to have regard to both regulatory and empirical dimensions of a national political economy. These include the main source of finance of major companies within a particular national system; whether it is mainly equity or debt finance; whether markets for finance are deep or shallow; whether shareholdings are generally consolidated or diffusely held; whether the legal protections extended to minority shareholders are strong or weak; how secure companies are against takeover and merger activity in a particular national market; how shareholder-oriented decision-making is within particular companies; whether labour is strongly integrated into decision-making within the nation's

⁵¹ See John L Campbell and Ove K Pedersen, 'The Varieties of Capitalism and Hybrid Success: Denmark in the Global Economy' (2007) 40 *Comparative Political Studies* 307.

⁵² Sanford M Jacoby, 'Economic Ideas and the Labor Market: Origins of the Anglo-American Model and Prospects for Global Diffusion' (2003) 25 *Comparative Labor Law & Policy Journal* 43.

⁵³ Beth Ahlering and Simon Deakin, 'Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?' (2007) 41 *Law & Society Review* 865, 870-2.

⁵⁴ *Ibid* 870.

⁵⁵ See Richard Deeg and Gregory Jackson, 'Towards a More Dynamic Theory of Capitalist Variety' (2007) 5 *Socio-Economic Review* 149.

corporations; whether there is coordinated collective bargaining; whether employees are strongly protected against dismissal; and so on.

Among these various factors, law, particularly corporate and labour regulation, is a crucial component (though by no means the only one) in both setting the regulatory style of a particular national system and facilitating change in that regulatory style. Legal dimensions set a boundary between the liberal market/outsider-governed, and the coordinated market/insider-governed systems. However, the major works in the varieties of capitalism and comparative business systems literature do not deal with law and legal systems in specific detail, nor do they deal with questions of change through legal reform.⁵⁶ More specific legal factors are explored and absorbed into the analysis by the 'legal origins' literature, which argues that law is at least a key determinant in the division of production regimes into two different types or styles.

B *Legal Origins*

The 'legal origins' theory owes itself to the work of Rafael La Porta and his colleagues. Through a series of major publications dealing with cross-national legal indicators on matters to do with corporate governance and finance,⁵⁷ but subsequently spreading out to the regulation of labour markets,⁵⁸ the authors have argued that different national economic styles can be explained by reference to the legal origin of the country concerned.

The argument about the importance of legal origin is based on the division of legal systems into two families: those originating in the common law tradition, and those which are based in the civil legal system. This division maps fairly easily onto the divide already identified between the liberal market style of capitalism and the coordinated market type, whereby common law

⁵⁶ See, eg, Gospel and Pendleton, above n 42. For two contributions that do examine the role of legal regulation in some detail, see Sigurt Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 337; Steven Casper, 'The Legal Framework for Corporate Governance: The Influence of Contract Law on Company Strategies in Germany and the United States' in Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 387. However, as Stryker has noted, law occupies a peripheral status in most institutionalist scholarship: 'Law is there but not there — mentioned in passing, yet not a sustained object of inquiry in its own right': Robin Stryker, 'Mind the Gap: Law, Institutional Analysis and Socioeconomics' (2003) 1 *Socio-Economic Review* 335, 340.

⁵⁷ See above nn 5, 17.

⁵⁸ Juan Botero et al, 'The Regulation of Labor' (2004) 119 *Quarterly Journal of Economics* 1339.

origin countries are most associated with the liberal market/outsider model of capitalism (the Anglo-American model), while the civil law origin countries are associated with the coordinated market/insider model of capitalism.⁵⁹ Consequently, a country's legal origin may be seen to explain the endurance of these two broad varieties of economic organisation and regulation. La Porta and his colleagues explain that the liberal market type of economy derives from its foundation in common law regulatory forms and concepts, whereas the more centrally controlled European and Japanese style production systems owe more to civil law ideas and concepts.⁶⁰ In short, 'the historical origin of a country's laws shapes its regulation of labor and other markets'.⁶¹

The primacy of law with respect to diversity in national systems of corporate ownership in this discourse relates particularly to the degree of legal protection given to minority shareholders. La Porta et al showed that deep or liquid share markets correlated with an index of basic minority shareholder protections.⁶² Absent these protections, block holdings would persist. A potential purchaser would not buy into a share market if he or she felt the value of a company might be disproportionately siphoned off by a majority shareowner, or such potential buyer would offer such a substantially reduced price for shares that the block-holder would decline to sell. In either case, the block would remain intact.⁶³ Key minority shareholder protections — or what La Porta et al refer to as 'quality' corporate law — range from an efficient judiciary, through mandatory disclosure rules, the fiduciary duties of directors, proxy voting and one-share-one-vote rules.⁶⁴ The jurisdictions that scored highly in terms of minority shareholder protections in the empirical studies tended to be common law origin countries.⁶⁵

Scholars have adopted this 'legal families' categorisation to explain a broad range of economic differences between countries. Notably for our inquiry, a group of scholars, including La Porta, have made a study of comparative

⁵⁹ Katharina Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in Klaus J Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan and the US* (Oxford University Press, 2005) 249.

⁶⁰ Botero et al, above n 58.

⁶¹ Ibid 1340. For an account challenging some of the underlying arguments in the legal origin typology, see Daniel Klerman and Paul G Mahoney, 'Legal Origin?' (2007) 35 *Journal of Comparative Economics* 278.

⁶² La Porta et al, 'Investor Protection and Corporate Governance', above n 5.

⁶³ Ibid 13–15.

⁶⁴ Ibid 8–12.

⁶⁵ Ibid 10–11.

labour market laws and social security systems and again concluded that legal traditions — that is, whether a country's legal system fell into the common law or civil law tradition — were 'a strikingly important determinant of various aspects of statutory worker protection'.⁶⁶ Thus patterns of regulation of labour markets follow the general styles of social control utilised by each legal system more generally, with civil law countries regulating labour markets more extensively than do common law countries, while the latter preserve the freedom of contract to a greater extent and have less generous social security systems (because they are more likely to rely on markets to provide insurance).⁶⁷

Part of the force of this argument lies in the fact that it is not just positing the view that law is *an* important variable to be considered. Note that legal origin is being identified as *the* decisive or critical factor in determining the regulatory style of a particular system, and that legal influence is seen as having *persistent effects*. Thus while law in national systems can, and does, change, sometimes in quite radical ways, legal origins theory generally seems to suggest that legal origin — even where based in colonisation and the transplant of legal systems — sets in place a form of 'social control of business' which will persist over time; in other words, the systems become path-dependent.⁶⁸

There have been a number of critiques levelled at the legal origins literature. Some of these question the method used by legal origins scholars in the

⁶⁶ Botero et al, above n 58, 1365. The study also found that a common law style of regulation led to superior economic efficiency outcomes when compared with that of the civil law style, a conclusion that has important policy implications and was taken up by the World Bank in its 'Doing Business' project to promote business-friendly regulation: see, eg, World Bank, *Doing Business 2010: Reforming through Difficult Times* (World Bank, IFC and Palgrave MacMillan, 2009). We do not address this point in our study. For subsequent studies in this same area, see David E Pozen, "'The Regulation of Labor" and the Relevance of Legal Origin' (2007) 28 *Comparative Labor Law & Policy Journal* 43; Simeon Djankov and Rita Ramalho, 'Employment Laws in Developing Countries' (2009) 37 *Journal of Comparative Economics* 3; Simon Deakin and Prabirjit Sarkar, 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data' (2008) 39 *Industrial Relations Journal* 453.

⁶⁷ The legal origin theorists do not explicitly use a notion of complementarity, but it is clear that they see institutional groupings cohering through a 'logic of similarity': see Deeg, above n 38, 24.

⁶⁸ See Botero et al, above n 58, 1345. See generally Paul A David, 'Why Are Institutions the "Carriers of History"?: Path Dependence and the Evolution of Conventions, Organizations and Institutions' (1994) 5 *Structural Change and Economic Dynamics* 205; Schmidt and Spindler, above n 40. Again, the issue is highly debatable: see Jacoby, above n 52, 68–9.

major empirical studies.⁶⁹ The studies tend to take a set of laws or rules within a given area of regulation and assign each rule a numerical value according to, for example, the level of protection provided to minority shareholders. But this may often mean that the studies overlook important forms of regulation,⁷⁰ or fail to deal with the distinction between ‘law on the books’ and ‘law in action’, the latter focussing on actual implementation and enforcement of rules.⁷¹ Other critiques point to the ahistoricity of the early legal origins approach, which relies on cross-sectional data. In the area of corporate governance, the purported stability of legal systems in fact contrasts with changes in ownership structure in some advanced capitalist countries across the 20th century.⁷² As Herrigel notes, the legal origins argument ‘does a good job of establishing a correlation between legal traditions and corporate governance regimes in the late twentieth century’, but the character of corporate governance — and the density of stockholdings — has varied considerably in individual countries over time, even while legal traditions have remained constant.⁷³ Related to this are critiques that stress the role of politics over and above legal origins, suggesting that current differences between national systems owe more to relatively recent political decisions than to legal variables going back perhaps centuries.⁷⁴ One final problem with the legal origins approach is that it relies on a fairly stylised distinction between common law and civil law traditions that is open to question. Many national legal systems are hybrids, deriving elements from both the civil and

⁶⁹ See, eg, Simon Deakin, Priya Lele and Mathias Siems, ‘The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes’ (2007) 146 *International Labour Review* 133.

⁷⁰ For example, in many countries, labour markets are not merely regulated by statute but also by collective agreements; if the latter are excluded a country may be coded highly inaccurately.

⁷¹ Sean Cooney, Peter Gahan and Richard Mitchell, ‘Legal Origins, Labour Law and the Regulation of Employment Relations’ in Michael Barry and Adrian Wilkinson (eds), *Research Handbook of Comparative Employment Relations* (Edward Elgar, 2011) 75, 82.

⁷² Michel Goyer, ‘Corporate Governance’ in Glenn Morgan et al (eds), *The Oxford Handbook of Comparative Institutional Analysis* (Oxford University Press, 2010) 425, 427–8. See also Brian R Cheffins, ‘Does Law Matter? The Separation of Ownership and Control in the United Kingdom’ (2001) 30 *Journal of Legal Studies* 459; Gary Herrigel, ‘Corporate Governance’ in Geoffrey Jones and Jonathan Zeitlin (eds), *The Oxford Handbook of Business History* (Oxford University Press, 2007) 470, 481–2; Raghuram G Rajan and Luigi Zingales, ‘The Great Reversals: The Politics of Financial Development in the Twentieth Century’ (2003) 69 *Journal of Financial Economics* 5; John Armour, ‘Law and Financial Development: What We Are Learning from Time Series Evidence’ [2009] *Brigham Young University Law Review* 1435.

⁷³ Herrigel, above n 72, 483.

⁷⁴ Goyer, above n 72, 430. See also Mark J Roe, ‘Legal Origins, Politics and Stock Markets’ (2006) 120 *Harvard Law Review* 460.

common law systems.⁷⁵ The distinction between systems based on judge-made law and those based on statutory codes is becoming blurred, particularly in the area of corporate law and regulation.⁷⁶

C Political Orientation

Political explanations stress political differences amongst nations as the key source of national diversity. It is not that legal traditions and institutions are unimportant, but that they are themselves derived from political choices. In effect, what the legal origin theorists identify as quality corporate law is really only a proxy for politics.⁷⁷

Mark Roe gives precedence to the left-wing/right-wing cleavage at the level of national politics.⁷⁸ A left-wing or social democratic regime is one that favours labour over shareholders, and Roe shows for several countries a statistical correlation between a country's embrace of social democracy and its corporate ownership structure: in short, social democracies will have a more concentrated pattern of corporate ownership than will right-wing countries.⁷⁹ In favouring employee interests — which will often align with strategies such as company expansion, risk avoidance, limits on restructuring, and so on — and by putting in place few shareholder rights or protections, social democracies in effect make it more difficult for managers to pursue shareholder value.⁸⁰ As a result, small investors are loath to take up minority shares and owners seek to maintain large, controlling stakes in companies so as to control managers; thus a diversified pattern of ownership fails to emerge.⁸¹ In this reading, corporate law and legal systems are important, but what a country does with its legal tradition is a political question.⁸²

⁷⁵ Mathias M Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' (2007) 52 *McGill Law Journal* 55.

⁷⁶ Deakin, Lele and Seims, above n 69, 136–7.

⁷⁷ John W Cioffi, *Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism* (Cornell University Press, 2010) 35.

⁷⁸ See Mark J Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (Oxford University Press, 2003).

⁷⁹ *Ibid* 3, 24. Roe also provides individual country data: at ch 6.

⁸⁰ *Ibid* 2–5, 203.

⁸¹ *Ibid* 162–6, 177.

⁸² Peter A Gourevitch, 'The Politics of Corporate Governance Regulation' (2003) 112 *Yale Law Journal* 1829, 1830–1.

There have been a number of empirical criticisms levelled at Roe's analysis. Brian Cheffins has suggested that the United Kingdom does not fit with the theory: arguably, a pattern of dispersed corporate ownership arose in the United Kingdom between the end of World War II and the late 1970s, a period when the United Kingdom was best characterised as a social democratic regime.⁸³ John Coffee Jr has also taken issue with Roe's account, pointing out that both Roe and the legal origin theorists appear to suggest that high agency costs for investors (that is, the difficulty in controlling managers) will lead to low dispersal of ownership: it's just that they disagree on the causes of high agency costs. The legal origin theorists suggest high agency costs arise from the absence of strong minority shareholder protection through regulation; Roe suggests that the high agency costs for investors spring from political decisions to make companies 'subordinate the interests of shareholders' to other stakeholders.⁸⁴ Coffee offers a different explanation of the role of politics in determining national styles of corporate governance. He suggests that under the right conditions of private ordering, diffusion of share ownership may occur. This creates a constituency of minority shareholders which then demands that governments institute laws offering minority shareholder protection.⁸⁵ In short, '[i]t is not the law that causes [the style of] corporate governance, but the reverse'.⁸⁶ Again, it is the political decision that is crucial in bringing about a certain style of corporate law, but the politics — and, following it, the law — becomes relevant after the diffusion of share ownership has occurred.⁸⁷

While Roe's argument regarding the political origins of dispersed and concentrated shareholder systems is one of the most prominent, and being based on the primacy of politics it is clearly at odds with the legal origins argument, it is not the only political explanation of corporate governance patterns. Roe stresses a dichotomous right/left or labour/capital divide. However, other theorists who agree on the important role of politics in determining both corporate law and corporate ownership patterns offer different explanations of the importance of political orientation.

⁸³ Brian R Cheffins, 'Putting Britain on the Roe Map: The Emergence of the Berle-Means Corporation in the United Kingdom' in Joseph A McCahery et al (eds), *Corporate Governance Regimes: Convergence and Diversity* (Oxford University Press, 2002) 147.

⁸⁴ John C Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 *Yale Law Journal* 1, 6.

⁸⁵ *Ibid* 76–7.

⁸⁶ Gourevitch, above n 82, 1833.

⁸⁷ *Ibid* 1833–4.

For example, rather than focus on a simple labour/capital divide, Gourevitch and Shinn stress the importance of cross-class coalitions.⁸⁸ Instead of treating the interests of employees and shareholders as inevitably opposed in a zero-sum game, the Gourevitch and Shinn model sketches out three possible sets of coalitions: owners and managers versus workers (the ‘investor coalition’); managers and workers versus owners (the ‘corporatist coalition’); and owners and workers versus managers (the ‘transparency coalition’).⁸⁹ Actual outcomes in terms of styles of regulation, then, depend not only on which coalition is formed, but on who wins. Importantly, coalitions and compromises may dissolve and new ones may form over time.⁹⁰

Cioffi also recognises the importance of a transparency coalition between labour (represented by social democratic governments) and owners against managers, pointing out that it was centre-left governments in the United States and Germany that pushed for securities law reform to strengthen the right of shareholders to disclosure.⁹¹ However, he qualifies this with the observation that no single coalition dominates reform across the three fields of corporate law, securities law and labour relations law. Consequently, he argues, ‘stakeholder groups may have common ground to form an alliance with respect to one legal policy area but may form alternative — and potentially opposing — coalitions regarding others’.⁹² Second, while recognising the importance of politics and political coalitions in driving the shape of corporate and securities law, Cioffi also argues that there is a feedback loop whereby the ‘juridical nexus’ of corporate law, securities law and labour law itself influences political and economic action by shaping the identities,

⁸⁸ See Peter Alexis Gourevitch and James J Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press, 2005).

⁸⁹ *Ibid* 22–5.

⁹⁰ As an added element, Gourevitch and Shinn also incorporate the insights of Pagano and Volpin on the importance of political institutions that aggregate actors’ interests (that is, whether an electoral system is proportional or majoritarian): *ibid* 72–6, citing Marco Pagano and Paolo F Volpin, ‘The Political Economy of Corporate Governance’ (2005) 95 *American Economic Review* 1005.

⁹¹ Cioffi, above n 77, 9–12. On the apparent compatibility of strong labour and moves to increase managerial accountability to shareholders in Germany, see Gregory Jackson, Martin Höpner and Antje Kurdelbusch, ‘Corporate Governance and Employees in Germany: Changing Linkages, Complementarities, and Tensions’ in Howard Gospel and Andrew Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (Oxford University Press, 2005) 84; Larry Fauver and Michael E Fuerst, ‘Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards’ (2006) 82 *Journal of Financial Economics* 673.

⁹² Cioffi, above n 77, 32.

political preferences, relative power and interests of constituencies such as managers, workers and investors.⁹³ This is implicit in the varieties of capitalism literature explored above, whereby capital and labour are not always in opposition in coordinated market economies but may at times, and in respect of particular policy fields such as welfare guarantees, employee training systems and so on, share common interests (and thus form cross-class coalitions).

In a recent contribution, Christopher Bruner has also argued that, in order to understand properly the role of corporate governance systems and regulation, it is necessary to look broadly at the sociopolitical contexts of a nation-state.⁹⁴ Bruner's main argument concerns the shape of corporate governance in countries of dispersed ownership patterns. The starting point for this argument lies in the proposition that whereas in concentrated ownership societies the pattern of corporate governance regulation has only one outcome — strong stakeholder laws⁹⁵ — in dispersed ownership societies more than one outcome might eventuate. Such differing outcomes are exemplified in the cases of the United States and the United Kingdom. Bruner's starting point is that although, as we have seen, there is a tendency to group these countries together for comparative purposes, following ownership dispersal in these countries, their corporate governance systems diverged, one in the direction of strong shareholder orientation (the United Kingdom), and the other in the direction of a relatively weak shareholder orientation (the United States).⁹⁶ The evidence for these characterisations is presented in Bruner's comparative analysis of United Kingdom and United States shareholder protection law. This analysis shows the lumping together of the United States and United Kingdom systems as uniformly privileging shareholders and discounting stakeholders to be a gross oversimplification.⁹⁷ The evidence shows that there are, in fact, major differences in the regulatory structures of corporate governance, at least between the United States and the United Kingdom, seen principally in the limits imposed on the scope of United States shareholders to take unilateral action in relation to corporate governance when compared

⁹³ Ibid 14.

⁹⁴ See Bruner, 'Power and Purpose', above n 2; Bruner, *Corporate Governance in the Common-Law World*, above n 6.

⁹⁵ However, it remains an open question as to whether the pre-existence of worker power might have inhibited ownership dispersal, rather than the pre-existence of shareholder power having stimulated the development of stakeholder protections: see Gelter, above n 2, 181.

⁹⁶ Bruner, 'Power and Purpose', above n 2, 644–5.

⁹⁷ Ibid 593.

with their counterparts in the United Kingdom.⁹⁸ United States shareholders are limited in their powers to remove directors, and to initiate fundamental transactions and amendments to the company's constitution, rendering shareholders largely subject to board power. And in the context of takeover situations 'target boards are afforded substantial latitude to interfere with the shareholders' freedom to sell their stock to a hostile bidder'.⁹⁹ All of this, in Bruner's view, amounts to a regulatory 'ambivalence ... regarding shareholders' governance capacity, as well as the consistency of their interests and incentives with those of the broader public'.¹⁰⁰

A different conclusion is reached on a survey of the evidence for the degree of shareholder protection in the United Kingdom. Here there is no ambivalence — the United Kingdom system is 'decidedly shareholder-centric'.¹⁰¹ This is seen in the powers of United Kingdom shareholders unilaterally to amend a company's constitution by special resolution, their greater capacity to remove directors, and their wide powers in takeover situations, which effectively sidelines the board of directors in takeover situations: 'shareholders decide on the bid, end-stop'.¹⁰² Most of this shareholder-oriented regulation in the United Kingdom was introduced progressively from the late 1960s onwards.

How, then, does this divergence in United Kingdom and United States shareholder protection law tie in with the 'related though distinct subject'¹⁰³ of ownership dispersal? We have already seen that the influential legal origins literature supposes that strong protection for minority shareholder interests is in fact a precondition for ownership dispersal, such protection encouraging investment by non-controlling groups.¹⁰⁴ In Bruner's account, dispersal of ownership in the United States had largely taken place by the 1930s.¹⁰⁵ In the United Kingdom it is accepted that dispersal took place during the 1960s and the 1970s.¹⁰⁶ In neither instance does it seem to be the case that strong legal

⁹⁸ Ibid 593–611.

⁹⁹ Ibid 596.

¹⁰⁰ Ibid 598.

¹⁰¹ Ibid 603.

¹⁰² Ibid 607.

¹⁰³ Ibid 611.

¹⁰⁴ See Part III(B) above.

¹⁰⁵ He relies on Berle and Means, and other authorities: Bruner, 'Power and Purpose' above n 2, 615, citing Adolf A Berle Jr and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan, 1933).

¹⁰⁶ Bruner, 'Power and Purpose', above n 2, 616.

protections for shareholders paved the way for ownership dispersal.¹⁰⁷ It may be the case that some private ordering (regulation by stock exchanges and financial companies) provided some investor security, but, that aside, 'strong shareholder protections did not achieve recognition in law until after dispersal has substantially occurred'.¹⁰⁸

It follows as a matter of course that some alternative, or at least additional, reason must be found to explain the differing regulatory structures of corporate governance. It is at this point that Bruner's broader argument linking stakeholder (labour) protection and shareholder protection takes hold. Whatever the reasons for the dispersal of ownership might be, strong shareholder protection might yet follow, indeed might be necessary, according to the sociopolitical contexts operating in the particular country. Within these deeply ingrained social structures, arrangements are struck which to some degree, and in some form, accommodate varying interests. The content of Bruner's argument suggests that the development of a highly shareholder-oriented system in the United Kingdom is the consequence of two corresponding factors. First, there is the demand by investors for stronger shareholder protection in what is, or is becoming, a widely dispersed system of share ownership. Second, there is a pre-existing (or contemporaneously developing) high level of stakeholder protection in the form of social democratic policies and labour standards, guaranteed through state law. Such labour protections have made (and continue to make) it possible to secure shareholder interests through company law without fear of political repercussions.¹⁰⁹ Correspondingly, the relatively weak state of shareholder security in the United States, when compared with the United Kingdom, is explainable in the same way. The sociopolitical contexts in the United States are very different from those of the United Kingdom. Employment standards guaranteed by law and legislated safety net provisions in the form of social security in the United States are relatively poor by United Kingdom standards.¹¹⁰ As a consequence of this very different United States sociopolitical structure, it is

¹⁰⁷ *Ibid* 613.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* 621–35.

¹¹⁰ In terms of evidence, Bruner's argument is more specific in explaining the shaping of the United Kingdom's pattern of stakeholder and shareholder regulation than it is in explaining that of the United States. In the United States, the 'trade-off' seems more impressionistic: two figures supplied in Bruner's argument are that in 1983 nearly 60 per cent of all Americans received their health coverage through their employers and in 2009 three major automobile manufacturers provided health cover for more than 1 million persons: *ibid* 639, 643.

argued that it is not possible, politically, for a highly shareholder-oriented form of corporate governance to emerge.¹¹¹

Bruner's analysis to a large extent endorses the views of other scholars to the effect that sociopolitical context plays an important role in shaping corporate regulation.¹¹² In fact, his observations regarding the interplay of corporate law and stakeholder protection in concentrated ownership systems largely correspond to the analysis put forward in the varieties of capitalism literature, by the legal origins theorists, and by scholars such as Mark Roe who have emphasised the role of politics. Although in Bruner's account there is no detailed discussion of countries displaying a concentrated ownership pattern,¹¹³ the tenor of his argument is clear. Drawing on the work of Gelter, Bruner explains that where shareholder influence is comparatively strong through concentrated ownership, one also finds comparatively strong state-based stakeholder protections in the form of social democratic laws providing employment security, dismissal protection, unemployment protections, health insurance and so on.¹¹⁴ This is because the core regulatory question in this typical state of concentrated ownership, is 'how to counteract that innate shareholder power through various types of stakeholder-oriented protections'.¹¹⁵

Bruner also endorses the idea of institutional complementarity employed in the varieties of capitalism literature,¹¹⁶ although it is clear that he is using the notion of complementarity in a quite different way to the varieties of capitalism scholars. That is, his theory posits a complementarity whereby aspects of one area of regulation — protection for employees — have the capacity to make up for possible deficiencies or shortcomings produced in another area — such as a corporate law that strongly privileges shareholders.¹¹⁷ This contrasts with the varieties of capitalism theorists' idea of complementarity which stresses the logic of similarity or synergy between regulatory approaches in different domains (for example, arms-length, market-mediated relations between companies and shareholders are matched

¹¹¹ Ibid 635–43.

¹¹² Ibid 620–1.

¹¹³ The same is true of the expanded argument offered in Bruner's book: Bruner, *Corporate Governance in the Common-Law World*, above n 6.

¹¹⁴ Bruner, 'Power and Purpose', above n 2, 622–3, citing Gelter, above n 2.

¹¹⁵ Bruner, 'Power and Purpose', above n 2, 644; see also at 645 (Figure 3: Ownership Structure and Regulatory Posture regarding Shareholders).

¹¹⁶ Ibid 621.

¹¹⁷ Ibid.

by arms-length, market-mediated relations between employers and workers).¹¹⁸

This points us toward a key difference between Bruner's analysis and the explanations offered by theorists considered earlier. When it comes to liberal market or dispersed corporate governance systems, most of the theorists we examined match such regimes both with strong shareholder empowerment and strong minority shareholder protection, and with relatively weak employee protection. Bruner's innovation is to suggest that such a correlation is not inevitable and that in certain circumstances it is possible for strong stakeholder protection (especially as regards workers as a class of stakeholder) to coexist with both dispersed corporate ownership and a strongly shareholder-oriented model of corporate law, with the United Kingdom being his paradigm example.¹¹⁹

Although Bruner's paper is confined specifically to the United Kingdom and the United States, it clearly has implications for other countries supposedly shaped in the Anglo-American mould of corporate governance law, as his later work has explored.¹²⁰ On the face of it, we find Bruner's approach offers a particularly useful corrective or supplement to existing approaches for a number of reasons. One reason, which is significant for our inquiry, is that it focuses on distinctions between regimes which are generally grouped together as liberal market economies, or which share apparently similar systems of corporate regulation or labour law. Accordingly, the evidence dealing with the Australian position assembled in this paper might confirm or disconfirm the utility of such groupings.¹²¹

¹¹⁸ See above nn 38–56 and accompanying text.

¹¹⁹ Conversely, the United States example shows the possibility of a correlation between dispersed share ownership, relatively weak shareholder protection and weak labour laws. As we have noted above, Cioffi and others have suggested that some of the enhanced shareholder protections that have emerged in the past decade in some countries have been championed by social democratic or left-leaning administrations, but the explanation given by these scholars differs fundamentally from the argument developed by Bruner: see above nn 77–93 and accompanying text.

¹²⁰ See, eg, Bruner, *Corporate Governance in the Common-Law World*, above n 6, 66–97, 176–214, 237–42, for his discussion of Australia and Canada.

¹²¹ It is important for us to acknowledge the conditional nature of Bruner's argument in the case of certain countries. In his argument he notes that some intermediate cases such as Australia and Canada (referring here to situations where ownership concentration is part way between the concentrated ownership systems of many European states, for example, and the highly dispersed systems of the United States and the United Kingdom)

tend to be market-oriented in outlook ... [T]he role that politics plays in corporate governance in such societies may differ from the role that politics plays in corporate govern-

Bruner's approach also parts company with the other theories we have examined in two further respects. First, his argument explains what happens in those systems where dispersed ownership has already become established, rather than explaining how such ownership structures are propagated in the first place.¹²² Thus, in contrast to the path dependency that characterises some other theories — in particular, the legal origins approach — it is central to Bruner's approach that regulatory arrangements can undergo significant change over time. His language suggests a fundamental dynamism to regulatory arrangements, referring to 'a constant recalibration of emergent shareholder and stakeholder protections'.¹²³

Second, Bruner extends the inquiry to a wider concept of stakeholder protection than many previous analyses. While he recognises the importance of key employment rights such as redundancy and dismissal protections, he also stresses the foundational role of wider welfare state guarantees, such as universal health coverage, unemployment benefits, old age pensions, and family allowances,¹²⁴ in the settlement of the broad conflicting social interests of shareholders and workers.¹²⁵

IV COMPLETING THE INSTITUTIONAL EQUATION? THE AUSTRALIAN EVIDENCE ON SHARE OWNERSHIP AND STAKEHOLDER PROTECTION

As we noted in Part II, the evidence drawn from empirical studies of Australian shareholder protection law indicates that the degree of shareholder protection in Australia is very high when measured against the United Kingdom, the United States, India, Germany and France. The questions we have set for ourselves in this paper are to ask how one might explain the

ance in other concentrated systems. This is due, among other things, to the cultural proximity of countries like Canada and Australia to the United States and the United Kingdom.

Bruner, 'Power and Purpose', above n 2, 644 n 333. Presumably this means that strong political protection for the interests of shareholders can arise even in the absence of a dispersed system of shareholding, not because of the political pressure coming from investors, but because the society is strongly market-oriented in a sociocultural sense. Potentially this is an important point, but for the purposes of weighing up the position of Australia against Bruner's argument generally, we have adopted his stylised position as set out in the text above.

¹²² Ibid 644–5.

¹²³ Ibid 645; see also at 621.

¹²⁴ Ibid 623–5.

¹²⁵ Ibid 630–1. In this, Bruner is following Martin Gelter's work: see Gelter, above n 2, 190–2.

variation between Australian shareholder protection regulation and the corresponding regulatory systems of other countries, and why Australia's regulatory style in corporate governance should have evolved to be so shareholder-centric when compared internationally. In Part III, we canvassed a number of possible explanations for these Australian developments, including those which focussed on legal heritage, economic style and political tendency. Each of these explanations supposed, in some degree, the relevance of a particular sociopolitical, or socioeconomic, arrangement of institutional factors, which include, in addition to shareholder protection regulation, patterns of share ownership in the economy (that is, whether shareholdings are comparatively concentrated or dispersed) and the degree of stakeholder protection in the regulatory scheme. This Part of the paper deals with the Australian evidence in respect of the second and third components of this institutional puzzle before we turn to our analysis and conclusion in Part V.

A Australia: A Dispersed or Concentrated Ownership System?

The Australian system of corporate governance and control has not featured prominently in international debates. As noted earlier, most international comparative studies rely on a stylised opposition between United States and United Kingdom structures of ownership (dispersed) on the one hand and continental European patterns (concentrated) on the other.¹²⁶ Some commentators have used the United States and United Kingdom experience to assert the existence of an Anglo-American model of ownership and control, into which Australia, along with Canada and New Zealand, is simply presumed to fall.¹²⁷ Others cluster Australia with the United States and United Kingdom on the basis of its presumed pattern of corporate ownership.¹²⁸ A number of analyses point to Australia's market capitalisation to Gross National Product ratio, which is close to that of the United States.¹²⁹ The Organisation for Economic Co-operation and Development ('OECD') observed in 1998:

¹²⁶ See above nn 27–32 and accompanying text.

¹²⁷ See, eg, Michael Bradley et al, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62(3) *Law and Contemporary Problems* 9, 51.

¹²⁸ Gourevitch and Shinn, above n 88, 17; Jonas Pontusson, *Inequality and Prosperity: Social Europe vs Liberal America* (Cornell University Press, 2005) 22. See also Mark J Roe, 'Political Preconditions to Separating Ownership from Corporate Control' (2000) 53 *Stanford Law Review* 539, 605 (Table XI: Inequality, Stock Market Capitalization, and Diffuse Ownership).

¹²⁹ See, eg, Cheffins, 'Corporate Governance Convergence', above n 6, 20.

As in other countries with an ‘outsider’ model, Australia has a relatively large market in publicly traded equities ... Market capitalisation was almost 70 per cent of GDP in 1994, near the United States level but far above the levels in most other countries, especially continental European countries. Australia has also experienced one of the largest increases in market capitalisation relative to GDP amongst OECD countries in the early 1990s.¹³⁰

Weimer and Pape use similar data to group the United States, United Kingdom and Australia as ‘Anglo-Saxon’ economies which in turn are said to be characterised by a low ownership concentration (although they do not provide empirical data as to ownership concentration).¹³¹ Hall and Soskice, writing in the varieties of capitalism tradition, have also clustered Australia with the United States, United Kingdom and Canada as a liberal market economy (and hence characterised by dispersed/outsider systems of corporate ownership and control) partly on the basis of its stock market capitalisation.¹³² Finally, the categorisation of the Australian system as an outsider type is also implicit in the legal origins literature. As we saw, this literature asserts that countries with a common law as opposed to civil law legal system — as is the case in Australia — will tend to exhibit both strong minority shareholder protections in their corporate law and, correlating with this, a dispersed pattern of share ownership.¹³³

On the other hand, some international commentators have expressed reservations about the categorisation of Australia as a dispersed or outsider system. For example, Nestor and Thompson have pointed to a group of countries, including Australia, which inhabit a halfway house between the dispersed patterns evident in the United States and United Kingdom and the concentrated patterns of ownership in continental European countries,¹³⁴

¹³⁰ OECD, *OECD Economic Surveys 1997–1998: Australia* (1998) 96.

¹³¹ Jeroen Weimer and Joost C Pape, ‘A Taxonomy of Systems of Corporate Governance’ (1999) 7 *Corporate Governance: An International Review* 152, 154 (Table 1: A Taxonomy of Systems of Corporate Governance); see also at 153–7.

¹³² Hall and Soskice, above n 28, 19 (Figure 1.1: Institutions across Sub-Spheres of the Political Economy), although the data presented by these authors actually show that, in terms of stock market capitalisation, Australia sits closer to the Netherlands and Japan than to the United States, and closer to Denmark than to the United Kingdom.

¹³³ See, eg, Ahlring and Deakin, above n 53.

¹³⁴ Stilpon Nestor and John K Thompson, ‘Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?’ in OECD, *Corporate Governance in Asia: A Comparative Perspective* (2001) 19, 26. The authors argue that the United Kingdom and United States represent the classic outsider systems while pointing to several continental European systems as insider, but go on to observe:

while Cheffins has been similarly reserved about the Australian position.¹³⁵ Bruner also acknowledges that countries such as Australia and Canada represent '[i]ntermediate cases', with market-oriented corporate governance arrangements similar to the United States and United Kingdom but with ownership of corporations dominated by block-holders.¹³⁶

More recently, however, new empirical studies, and a reappraisal of existing empirical data, have led many to question more directly Australia's status as a dispersed/outsider system. Due to differing ways of measuring concentration and control, there are problems with the comparability of the data, both as between Australian studies undertaken at different points in time, and as between Australian and overseas studies. So at best, such studies provide a series of snapshots taken at different times of different samples of Australian companies. Nevertheless, we would suggest that such studies generally provide support for two insights. The first is that the ownership of Australian companies has been characterised by a notable degree of concentration, persisting across time, which calls into question any categorisation of the Australian system of corporate ownership and control as unequivocally a dispersed or outsider system. However — and this is our second observation — such studies also suggest a significant concentration of ownership in the hands of institutional investors, again persistent or even increasing across time, which further complicates the categorisation of the Australian system of corporate ownership and control, a point we will discuss further below.

One of the most telling points in favour of not treating Australia as an instance of a dispersed/outsider model relates to the proportion of companies that are listed on the stock exchange and which publicly trade shares. This is an important threshold question: it is not sufficient to draw broad or generalised conclusions about the implications of the dispersed or concentrated nature of holdings in publicly listed companies if such companies themselves represent a small proportion of corporate activity in an economy. Unlisted or

there have always been a number of systems which stand somewhere between insider and outsider models. In particular, in the smaller English-speaking countries, such as Australia, Canada and New Zealand, the pattern of ownership is more concentrated than in the US or the UK with family-owned companies often predominating. However, the strong recognition of shareholder rights, institutional ownership of wealth, the tradition of strong legal regulation of securities markets and heavy insistence on transparency in accounting give these systems many points in common with the US and UK.

¹³⁵ Brian Cheffins, 'Comparative Corporate Governance and the Australian Experience' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 13.

¹³⁶ Bruner, 'Power and Purpose', above n 2, 644 n 333; see also at 581 n 4.

private companies are generally going to exhibit a system of insider-oriented governance: a locked-in, semi-closed class of shareholders, and a degree of insulation from the forms of marketised pressure for shareholder value, leading investors to find other, more direct forms of monitoring management. It was Australia that pioneered the statutory recognition of private companies, that is companies which made no public offerings, and restricted transfer of their shares, in return for being exempted from various compulsory disclosure and auditing requirements.¹³⁷ As Ville and Merrett have observed, in the first decades of the 20th century

only a minority of Australian companies sought a stock exchange listing. The capital markets [sic] prime activity before the 1890s was trading in speculative mining stock. ... New issues for industrial stocks remained extremely modest until the 1920s and 1930s.¹³⁸

After World War II, a greater number of Australian companies obtained a stock exchange listing, but still as late as the mid-1990s, the stock exchange-listed corporate sector remained a relatively small part of the economy: 'Only about a third of [Australia's] largest companies [were] listed on its stock exchange, compared with two-thirds of the UK's largest companies and nearly all the largest US companies'.¹³⁹

Putting aside the important question of the proportion of corporate activity that takes place in the listed sector, one measure that has been utilised to determine where a country is placed on the shareholder concentration/diversification continuum is the percentage of large companies that are controlled by block-holders. This was the approach used by Berle and Means in their classic study of United States patterns of corporate control in the 1930s.¹⁴⁰ In the absence of a controlling block-holder, and where shareholders in a company are widely dispersed with each shareholder having only

¹³⁷ See *Companies Act 1896* (Vic) s 2 (definition of 'proprietary company').

¹³⁸ Simon Ville and D T Merrett, 'The Development of Large Scale Enterprise in Australia, 1910-64' (2000) 42(3) *Business History* 13, 26.

¹³⁹ Alan Dignam, 'The Globalisation of General Principle 7: Transforming the Market for Corporate Control in Australia and Europe?' (2008) 28 *Legal Studies* 96, 105, citing Geof Stapledon, 'Australian Sharemarket Ownership' in Gordon Walker, Brent Fisse and Ian Ramsay (eds), *Securities Regulation in Australia and New Zealand* (LBC Information Services, 1998) 242, 243 (Table 1: Structure of Australian and UK Corporate Sectors: Top 500 Non-Financial Companies, 1994). As at June 2011, public companies comprised only 1.2 per cent of total companies: R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 163.

¹⁴⁰ Berle and Means, above n 105, ch 1.

very small holdings, such shareholders will both find it practically difficult, and have little incentive, to expend resources in formulating a coalition of shareholders able to effect change at a general meeting. In such companies, management would have a relatively free hand in furthering their own interests or the interests of stakeholders other than shareholders: these companies are effectively 'management controlled', in Berle and Means' terms.¹⁴¹ The critical question is identifying the point at which we can say that dispersal has proceeded so far that the company is management controlled rather than controlled by any single block-holder. Some studies define controlling block-holders as shareholders that own 20 per cent or more of a company's shares, while other studies are based on a figure of 10 per cent and others on 5 per cent.¹⁴² The appropriate cut-off no doubt depends on the dispersal of remaining shares,¹⁴³ but also on the propensity of shareholders generally to exercise their participation rights. In a corporate governance system where shareholder exercise of voting rights is relatively low — as is the case in Australia — a block-holding as small as 5 per cent may confer effective control.¹⁴⁴

The earliest study that measured shareholder dispersal in Australia in this way was conducted by Wheelwright in 1957.¹⁴⁵ That study defined companies as management controlled where ownership of shares was so dispersed that no single shareholder accounted for more than 5 per cent of voting shares.¹⁴⁶ Wheelwright found that only one third of the domestic companies in his study (the largest registered corporations) were management controlled.¹⁴⁷ Founding families were in the position to control the majority of those

¹⁴¹ See *ibid* 5.

¹⁴² See John Scott, *Corporate Business and Capitalist Classes* (Oxford University Press, 1997) 43–4. The position is further complicated by the fact that some studies include institutional investors in the definition of 'block-holders' and others exclude them: see below nn 175–84 and accompanying text.

¹⁴³ Scott, above n 142, 43. Scott favours a 10 per cent threshold as 'appropriate for the Anglo-American economies in the post-war period': at 44.

¹⁴⁴ Alan Dignam and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 *Melbourne University Law Review* 623, 629, citing Tom O'Lincoln, 'Wealth, Ownership and Power: The Ruling Class' in Rick Kuhn and Tom O'Lincoln (eds), *Class & Class Conflict in Australia* (Longman, 1996) 5, 6.

¹⁴⁵ See E L Wheelwright, *Ownership and Control of Australian Companies* (Law Book, 1957).

¹⁴⁶ *Ibid* 104–5. Note that if there existed a shareholding exceeding 5 per cent of the equity, but that shareholding was held by one or more of the directors, then that company was also classified in the study as management controlled: at 104.

¹⁴⁷ *Ibid* 3.

companies through their board positions and their shareholdings.¹⁴⁸ A follow-up study of Australia's 299 largest listed and unlisted manufacturing companies found that management control was limited to 11.7 per cent of companies in the sample.¹⁴⁹ This contrasted markedly with Berle and Means' finding that, by the 1930s, 44 per cent of the 200 largest United States companies were without a dominant controlling interest and effectively management controlled.¹⁵⁰

Wheelwright's findings for Australia were updated in Stapledon's study of share ownership in 1996.¹⁵¹ Stapledon also defined a 'block-holder' (or 'substantial shareholder') as one who had not less than 5 per cent of the company's voting shares, and included institutional investors as block-holders.¹⁵² The study found that nearly 97 per cent of companies on the ASX's All Ordinaries Index had a substantial shareholder, and 45 per cent of all companies had a shareholder, other than an institutional investor, that owned 20 per cent or more of the shares.¹⁵³

By way of comparison, Cheffins cites the work of Florence and Hannah to suggest that by the 1950s the United Kingdom reached a pattern of ownership similar to that measured by Berle and Means in the United States in the 1930s.¹⁵⁴ Cheffins also cites a British study published in 2000 which indicates that fewer than one in three of companies listed in the United Kingdom had a

¹⁴⁸ Ibid 2.

¹⁴⁹ E L Wheelwright and Judith Miskelly, *Anatomy of Australian Manufacturing Industry: The Ownership and Control of 300 of the Largest Manufacturing Companies in Australia* (Law Book, 1967) 5–6. In terms of the total assets of the companies within the sample, however, managerial control accounted for around a quarter, suggesting management control was more prevalent amongst the larger companies: at 6.

¹⁵⁰ Berle and Means, above n 105, 94.

¹⁵¹ See G P Stapledon, 'Share Ownership and Control in Listed Australian Companies' (1999) 3 *Corporate Governance International* 17.

¹⁵² Ibid 25.

¹⁵³ Ibid 25 (Table 5: Substantial Shareholdings in All Ordinaries Index Companies, 1996).

¹⁵⁴ Cheffins, 'Does Law Matter?', above n 72, 467, citing P Sargant Florence, *Ownership, Control and Success of Large Companies: An Analysis of English Industrial Structure and Policy, 1936–1951* (Sweet & Maxwell, 1961) 186–7, Leslie Hannah, *The Rise of the Corporate Economy* (Methuen, 1976) 130–1, 149–50 and Les Hannah, 'Takeover Bids in Britain before 1950: An Exercise in Business "Pre-History"' (1974) 16 *Business History* 65, 67–8. But Cheffins also notes a study by Scott that found that nearly one out of every two United Kingdom companies in 1976 had a shareholder owning more than 10 per cent of the equity: Cheffins, 'Does Law Matter?', above n 72, 468, citing John Scott and Catherine Griff, *Directors of Industry: The British Corporate Network 1904–76* (Polity Press, 1984) 107–10.

shareholder that owned 20 per cent or more of the shares.¹⁵⁵ The situation in the United States across the 20th century is less clear. As noted, early studies, such as that by Berle and Means, established the United States as having a particularly dispersed ownership structure, but more recent reappraisals have called this into question. Holderness has suggested that Berle and Means' understanding of American corporate ownership prevailed for several decades because no empirical surveys of United States share ownership in the 1950s, '60s and '70s were undertaken to upset the dominant view.¹⁵⁶ In fact, Cheffins and Bank identify seven surveys that confirmed Berle and Means' conclusions across this period, and an equal number of empirical surveys that refuted it.¹⁵⁷ Those studies that concluded, *contra* Berle and Means, that block-holdings persisted in United States companies into the 1970s tended to use a control benchmark of 5 per cent, lower than the benchmark used by Berle and Means and lower than the benchmark used by subsequent studies that confirmed the Berle and Means thesis regarding dispersed ownership.¹⁵⁸ If a higher benchmark had been used, arguably managerial control would have been found to be more prevalent than not.¹⁵⁹ However, given that the 5 per cent benchmark was favoured by Australian analysts, it is perhaps those United States studies utilising a similar benchmark which offer the most appropriate comparison.¹⁶⁰ Most recently Holderness used a data set contain-

¹⁵⁵ Cheffins, 'Does Law Matter?', above n 72, 465 n 21, citing Mara Faccio and Larry H P Lang, 'The Separation of Ownership and Control: An Analysis of Ultimate Ownership in Western European Corporations' (Working Paper, February 2000) 39 (Table 2: Control of Publicly Traded Companies in Europe (Percentage of the Total Number of Companies in the Sample)). Note also that Stapledon and Holderness both include institutional investors in their definition of block-holders: Stapledon, 'Share Ownership and Control in Listed Australian Companies', above n 151, 24–5; Clifford G Holderness, 'The Myth of Diffuse Ownership in the United States' (2009) 22 *Review of Financial Studies* 1377, 1402.

¹⁵⁶ See Holderness, above n 155, 1402.

¹⁵⁷ Brian Cheffins and Steven Bank, 'Is Berle and Means Really a Myth?' (2009) 83 *Business History Review* 443, 468–71.

¹⁵⁸ *Ibid* 458.

¹⁵⁹ *Ibid*.

¹⁶⁰ So, for example, in contrast to Larner's mid-1960s study which used a 10 per cent cut-off and which identified 85 per cent of United States companies to be management controlled, Chevalier's 1969 study of manufacturing companies using a 5 per cent benchmark found only 40 per cent were management controlled, while Pedersen and Tabb's 1976 study, again using the 5 per cent benchmark, found only 15 per cent of companies were management controlled, whereas a block-holder could be found in 64 per cent: see Robert J Larner, 'Ownership and Control in the 200 Largest Nonfinancial Corporations, 1929 and 1963' (1966) 56 *American Economic Review* 777; Jean-Marie Chevalier, 'The Problem of Control in Large American

ing a representative sample of 375 Compustat- and Center for Research in Security Prices-listed United States companies. Defining block-holders as shareholders owning 5 per cent or more of a company's common stock, he found that 95 per cent of the companies in his sample had such block-holders, a figure comparable to Stapledon's findings for Australia.¹⁶¹

One further indication of the comparative extent of block-holding in Australian companies is provided by the 1999 study published by La Porta et al.¹⁶² Defining block-holders as shareholders that owned 10 per cent or more of a company's equity, the study found only 11 out of the 20 largest listed companies in Australia in 1999 could be defined as widely held by that measure. In the United States and the United Kingdom the figures were 16 out of 20 and 18 out of 20 respectively.¹⁶³

Another measure of the degree of share ownership concentration utilised by Australian and overseas empirical studies is that of the percentage of shares held by the top 20 shareholders.¹⁶⁴ Unlike studies that try to identify a block-

Corporations' (1969) 14 *Antitrust Bulletin* 163; Laurence Pedersen and William K Tabb, 'Ownership and Control of Large Corporations Revisited' (1976) 21 *Antitrust Bulletin* 53.

¹⁶¹ See Holderness, above n 155, 1382 (Table 1: Summary Statistics on the Common Stock Ownership of Blockholders, Directors, and Officers at 375 Randomly Selected, CRSP- and Compustat-Listed Firms Measured as a Percentage of the Total Value Outstanding).

¹⁶² La Porta et al, 'Corporate Ownership around the World', above n 17.

¹⁶³ *Ibid* 492–3 (Table II: Control of Large Publicly Traded Firms around the World). Note, however, that compared with the studies by Wheelwright and Stapledon, the sample for the La Porta et al study was small, comprising only 20 of the largest corporations in the countries studied: at 472. This is problematic because ownership concentration decreases with company size, so if only the largest companies are studied, then the results will not be representative of what is happening more widely: see Holderness, above n 155, 1378. If one were to use La Porta et al's data to draw up a 'league table' of countries with dispersed ownership, Australia would rank number three, after the United Kingdom and the United States. However, the gap between the United States and Australia is significant, and placed on a continuum, the incidence of block-holding in Australia is closer to that of Switzerland, Japan, South Korea and the Netherlands than to the United Kingdom.

¹⁶⁴ See P H Davies, 'Equity Finance and the Ownership of Shares' in Committee of Inquiry into the Australian Financial System, *Commissioned Studies and Selected Papers Part 3: Business Taxation and the Financing of Industry* (Australian Government Publishing Service, 1983) 259, 297 [3.2.6]. Some early United States studies in this vein measured the proportion of shares held by the top 5 per cent, but it was Florence in the late 1940s who suggested the top 20 as the appropriate focus: see P Sargent Florence, 'The Statistical Analysis of Joint Stock Company Control' (1947) 110 *Journal of the Royal Statistical Society* 1, 4–5. Some Australian studies using the top 20 approach — such as those by Wheelwright and by Lawriwsky — aggregate what may appear as separate registered holdings but which are controlled by a single interest group into a single holding: see Wheelwright, above n 145, 124; Michael Lawriwsky, 'Ownership and Control of Australian Corporations' (Occasional Paper No 1, Transnational Corporations Research Project, The University of Sydney, April 1978) 8–9. Thus

holder who can exercise minority *control*, the top 20 measure tells us only about *concentration* of shareholdings. Yet a sufficient degree of concentration amongst a small group of shareholders may produce a situation where the concept of management control — associated with more or less complete dispersal of share ownership — cannot be applied.¹⁶⁵ That is, as Scott explains, in some cases there will be a ‘constellation of interests’¹⁶⁶ whereby

the largest shareholders may collectively hold a block of shares that would be large enough to give minority, or even majority, control to a united group, yet they lack the basis for collective organization that would enable them to act as such a cohesive controlling group ... The co-operation of these competing institutions is limited to their very broad and shared interests in the activities of the companies in which they invest.¹⁶⁷

Wheelwright’s 1957 study of Australian companies found that the holders of large shareholdings in a company held, on average, 37 per cent of the issued shares.¹⁶⁸ A study of Australian manufacturing companies in the period 1962–64 indicated that the top 20 shareholders held around 43 per cent of shares in the sample.¹⁶⁹ In a further study undertaken in the first half of the 1970s, this figure had risen from 37 per cent to nearly 52 per cent.¹⁷⁰ A study based on data from the late 1970s, albeit using a smaller sample, found this last figure more or less unchanged.¹⁷¹ In short, data across nearly two decades show ‘a tendency towards concentration of large holdings in the larger listed companies as shown in the rising proportion of shares held by the top twenty shareholders’.¹⁷² There is nothing in more recent studies to indicate this

Lawriwsky’s top 20 in some cases contain 30–50 holdings: at Appendix. In contrast, the top 20 lists provided by Australian companies to the Stock Exchange are lists of the top 20 holdings without aggregation: Davies, above n 164, 295–6 [3.2.2].

¹⁶⁵ Scott, above n 142, 50–1, citing Florence, above n 164.

¹⁶⁶ Scott, above n 142, 48.

¹⁶⁷ Ibid 48–9 (citations omitted).

¹⁶⁸ Wheelwright, above n 145, 38–42 (Table III: Distribution of Voting Shareholdings). Wheelwright defined ‘large’ shareholdings as those of £10 000 or over: at 34. On average, there were 21 such shareholders per company in the sample.

¹⁶⁹ Wheelwright and Miskelly, above n 149, 2.

¹⁷⁰ See Lawriwsky, above n 164, 11 (Table 1: Summary: Ownership (Twenty Largest Cohesive Groups) of All Corporations).

¹⁷¹ G J Crough, ‘Financial Institutions and the Ownership of Australian Corporations’ (Research Monograph No 12, Transnational Corporations Research Project, The University of Sydney, 1981) 3–4.

¹⁷² Davies, above n 164, 328 [5.4].

overall tendency has been reversed. For example, using a similar focus on shareholder concentration for the period 1990–91, Ramsay and Blair found that ‘the five largest shareholders of the 100 companies in [their] sample held, on average, 54% of the issued shares’.¹⁷³ The 10 largest shareholders held 64 per cent and the 20 largest shareholders held 72 per cent.¹⁷⁴

However, block-holders can be of various types, and in Australia — and this is the second main insight supported by the data — the tendency towards concentration of share ownership has gone hand-in-hand with an increase in the proportion of the Australian equity market held beneficially by institutions and a decrease in direct ownership. The concentration of shareholdings which Davies identified in his review of the data from the mid-1950s through to 1980 appears largely to have been driven by the institutionalisation of the share market. Ownership was becoming increasingly concentrated in the hands of large life insurance offices, banks and bank nominees, and during the same period there had been a decrease in ownership by individual holders.¹⁷⁵ Davies considered whether the same phenomena were occurring in mid-sized and small companies and found that, while the institutions were unquestionably holding shares in the larger, more marketable sector, they were also quite strongly represented as shareholders of the mid-sized companies.¹⁷⁶ A later study by Marshman and Davies indicates that from 1960 until at least 1986 institutions were net purchasers and individuals were net sellers of shares in Australia.¹⁷⁷ In 1995 Stapledon published a study which contained comparative data for Australia and the United Kingdom for 1991 and 1992 respective-

¹⁷³ Ian M Ramsay and Mark Blair, ‘Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies’ (1993) 19 *Melbourne University Law Review* 153, 168.

¹⁷⁴ *Ibid.* The only more up-to-date figures on ownership concentration come from La Porta et al’s use of a much smaller sample, whereby they examined the average and median ownership stakes of the three largest shareholders in the 10 largest publicly traded companies in a number of countries: La Porta et al, ‘Law and Finance’, above n 5, 1116. The median stake across the 49 countries studied was 45 per cent, with the Australian median at 28 per cent, while the United States and United Kingdom sat at 12 and 15 per cent respectively: at 1147–8 (Table 7: Ownership of 10 Largest Nonfinancial Domestic Firms by Large Shareholders: Cross Section of 49 Countries). The authors conclude ‘[d]ispersed ownership in large public companies is simply a myth. ... Presumably, if we looked at smaller companies, the numbers we would get for ownership concentration would be even larger’: at 1146.

¹⁷⁵ Davies, above n 164, 322–8 [5.3].

¹⁷⁶ *Ibid.* 353 [6.6].

¹⁷⁷ Peter Marshman and Peter Davies, ‘The Role of the Stock Exchange and the Financial Characteristics of Australian Companies’ in Robert Bruce et al (eds), *Handbook of Australian Corporate Finance* (Butterworths, 4th ed, 1991) 78, 93.

ly.¹⁷⁸ In 1992 the percentage of the United Kingdom listed equity market owned by institutional investors was at least 60.4 per cent and the percentage owned directly by individual investors was 21.3 per cent. In 1981 those figures had been 57.6 per cent and 28.2 per cent respectively.¹⁷⁹ By comparison, in 1991 the percentage of the Australian listed equity market held by institutional investors was 36 per cent, and 28 per cent was owned by individuals.¹⁸⁰ While individuals held a larger proportion of local equities in Australia than they did in the United Kingdom (28 per cent in Australia, compared to 21.3 per cent in the United Kingdom), according to Stapledon the proportion held by individuals in Australia had declined in the previous decades.¹⁸¹ By 1997 Australian institutional investors owned around 35 per cent of the Australian listed share market, and overseas institutional investors owned a further 10–15 per cent, but these institutional ownership patterns were smaller than those prevailing in the United States and United Kingdom.¹⁸²

Does this matter? One view is that institutional investors will play a less intrusive role in corporate management than will private block-holders. This is because institutional investors are largely driven by financial metrics and, as Davies has pointed out in the context of the rise of institutional investment in the United Kingdom, from the point of view of the investors, exit is the less costly choice than the exercise of voice in many cases.¹⁸³ In this sense, the presence of institutional investors is still consistent with the emergence of a management-controlled model of corporate governance. That is, management will be more independent in companies that have a higher percentage of institutional investors than managers in those companies that have a higher percentage of non-institutional block-holders. On this basis, Australian share ownership arguably could be described as a dispersed model (or at least as moving towards such an outsider model), even while block-holdings persist,

¹⁷⁸ G P Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 *University of New South Wales Law Journal* 250.

¹⁷⁹ *Ibid* 253 (Table 1: Ownership of UK Equities, 1963–92). Stapledon also includes a figure for overseas beneficial owners of equities. It is possible that some of the investors in this category could be institutional investors.

¹⁸⁰ *Ibid* 254 (Table 2: Ownership of Australian Equities, 1991). Again, Stapledon provides an additional figure for overseas beneficial owners, a category that he admits may include institutional investors.

¹⁸¹ *Ibid* 253–4.

¹⁸² Stapledon, 'Share Ownership and Control in Listed Australian Companies', above n 151.

¹⁸³ Paul Davies, 'Shareholder Value, Company Law and Securities Markets Law: A British View' in Klaus J Hopt and Eddy Wymeersch (eds), *Capital Markets and Company Law* (Oxford University Press, 2003) 261, 275–6.

as long as institutions, rather than individuals or families, are increasingly the block-holders. However, recent studies suggest that while many institutional investors are indeed passive, institutions are becoming increasingly influential.¹⁸⁴

The presence of institutional block-holders might then indicate a model of insider ownership and control whereby a coalition of relatively few institutional shareholders or fund managers acting on their behalf may be able to exercise effective control in any given company. Furthermore, the size of their holdings in any one company can make them illiquid, as the sale of large holdings tends to depress the price of the very shares a fund might wish to sell, creating an incentive to retain holdings. Indexed funds, by definition, are limited in their capacity to sell shareholdings as they are required to keep their portfolios weighted in accordance with the market.¹⁸⁵ Thus, the rise of institutional shareholdings suggests the emergence of shareholdings with both an enhanced capacity and an increased incentive to intervene in the management of listed companies.¹⁸⁶

Although it is difficult to draw strong conclusions given the limitations in the available data, we would argue that the bulk of the empirical work carried out on corporate ownership in Australia shows a relatively concentrated ownership pattern which has persisted over time. While we accept that the rise of institutional investors complicates this picture somewhat, we do not believe that institutional shareholders are sufficiently different from other block-holders to cause us to revise our overall finding that Australia is more appropriately classified as a concentrated rather than a dispersed ownership system.

¹⁸⁴ See, eg, Shelley Marshall, Kirsten Anderson and Ian Ramsay, 'Are Superannuation Funds and Other Institutional Investors Acting Like "Universal Investors"?' (2009) 51 *Journal of Industrial Relations* 439.

¹⁸⁵ John W Cioffi, 'Governing Globalization? The State, Law, and Structural Change in Corporate Governance' (2000) 27 *Journal of Law and Society* 572, 584. Coffee refers to the trade-off between liquidity and control, whereby the reduced liquidity of large holdings raises the incentive for governance activism as the preferred strategy for improving companies' financial performance: John C Coffee Jr, 'Liquidity versus Control: The Institutional Investor as Corporate Monitor' (1991) 91 *Columbia Law Review* 1277.

¹⁸⁶ On the scope for the rise of institutional investors to transform corporate governance in the United Kingdom, see Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11. For an Australian perspective, see Marshall, Anderson and Ramsay, above n 184.

B *Stakeholder Protection in Australia*

Following the argument through, it will be apparent at this stage that the evidence on share ownership and corporate control in Australia casts doubt on those theories which would attempt to explain the emergence of shareholder-centric corporate law systems by reference to dispersed patterns of share ownership. However, as we noted in our discussion in Part III, several theories of comparative corporate governance also suggest that in any given national system the degree of shareholder protection will also be matched with a particular type of labour protection system, in the form of social security and labour laws. We turn now to examine the Australian evidence on this point.

Recent studies on the evolution of labour law in Australia, both qualitative and quantitative, suggest a more complex picture than the one that emerged from studies on the evolution of shareholder protection law.¹⁸⁷ When measured quantitatively according to the 40 variables employed in Deakin, Lele and Siems' longitudinal labour regulation index¹⁸⁸ it was found that Australian labour law had largely remained stable, in terms of levels of worker protection, from 1970–2010,¹⁸⁹ notwithstanding the apparent rise and fall of various neoliberal and de-collectivist government strategies over the same period.¹⁹⁰ Comparatively speaking, throughout this period Australian labour law was ranked as less protective than the civil law countries included in the study, ranked about midway between one other common law country (India) and the lowest ranked common law system (the United States), and ranked about equally with the United Kingdom in terms of worker protection at the end of the period, though with some divergences between the two over the full four decades of the study.¹⁹¹

Complicating these findings are more general observations about the inherent nature of the Australian labour law system viewed historically. Here we can give only a brief overview. Ahlering and Deakin have suggested a useful stylised way of understanding the distinction between labour market regulation in liberal market/common law origin and coordinated market/civil law

¹⁸⁷ See above Part II.

¹⁸⁸ See Deakin, Lele and Siems, above n 69.

¹⁸⁹ Richard Mitchell et al, 'The Evolution of Labour Law in Australia: Measuring the Change' (2010) 23 *Australian Journal of Labour Law* 61, 72–82.

¹⁹⁰ See Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, 55–63.

¹⁹¹ See Mitchell et al, 'The Evolution of Labour Law in Australia', above n 189, 84 (Figure 7: Aggregate Labour Regulation (40 Variables), International Comparisons).

origin countries.¹⁹² First, in liberal market/outsider (common law origin) systems, the predominant form of employee voice within the company, and thus the key instrument of employee influence in enterprise management (corporate governance) is ‘voluntarist’ in the shape of one or more forms of bargaining.¹⁹³ Although there is great diversity in the national legal form of these bargaining systems, and the extent to which employers are obliged to recognise and to bargain with workers and unions under them, all these systems have a very limited role in relation to key areas of managerial prerogative. Second, this voluntarist approach also tends generally to be associated with a partial, rather than an extensive, regulation of the labour market.¹⁹⁴ That is to say, outside the reach of the bargaining systems, the extent of regulation governing minimum terms and conditions of employment tends to be uneven and partial amongst and between groups and classes of workers.

The relational/insider (civil law origin) systems on the other hand have tended to feature the integration of employee voice into the decision-making structures of companies through legally supported mechanisms. These include employee representation on company boards in some European countries, works councils, and laws requiring employees and their representatives to be informed and consulted about business matters. In addition, the regulation of the employment contract through legislation and bargained agreements also tends to be more comprehensive (what Ahlring and Deakin label ‘universalism’).¹⁹⁵ As a result many of these minimum standards take effect as a form of social rights.

Notwithstanding its common law background, the Australian system of compulsory industrial arbitration has at times been characterised, superficially at least, as being qualitatively different from the systems of its most usual comparators in terms of regulatory style and impact. It is argued, for example, that the compulsory aspects of Australian labour law rendered it comparatively far-reaching, both in operational scope and regulatory content, when compared with the United States and the United Kingdom.¹⁹⁶

¹⁹² See Ahlring and Deakin, above n 53.

¹⁹³ *Ibid* 874.

¹⁹⁴ *Ibid* 875.

¹⁹⁵ *Ibid*.

¹⁹⁶ Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, 45–55. It is possible that this observation and the discussion that follows below overstates the differences between the Australian regulatory style in labour markets and those of the supposedly more voluntarist and partial collective bargaining systems of other Anglo-American types:

In Australia, the compulsory application to industry and workers of awarded work conditions more or less compelled employers to recognise and bargain with trade unions. The unions themselves occupied a statutorily supported and legally privileged role in representing workers, far more so than unions in the United Kingdom and the United States, where recognition often had to be fought for through industrial campaigns.¹⁹⁷ The compulsory application of awards also meant a very high level of application of prescribed employment conditions: compared with some other similar countries, such as the United States and Canada, Australian employers found it difficult to escape the regulatory net. A further dimension of this regulation concerned the depth of detail in awards, which were fully-fledged sets of regulations governing everything from wages, annual and sick leave, overtime and penalty rates, and the settlement of disputes between the parties.¹⁹⁸

In certain respects, then, there is some basis to suggest that Australian labour market regulation, at least for a significant period of its history, and perhaps until relatively recently, was more like a coordinated market system than a liberal market system of capitalist economy.¹⁹⁹ Employee representation at the workplace seems to have been more compulsory than voluntary, and the regulation of the labour market appears to have been more universal than partial. Prior to the 1990s, as a consequence of its relatively comprehensive coverage of labour standards, in international studies Australia's system of bargaining tended to be ranked closer to those with centralised arrangements than with the decentralised systems of the United Kingdom and the United States.²⁰⁰

see K D Ewing, 'Australian and British Labour Law: Differences of Form or Substance?' (1998) 11 *Australian Journal of Labour Law* 44, 63–4. This is an issue requiring more detailed historical research. Of course, if these counter-observations are correct, it merely deepens the doubt over the utility of drawing these kinds of distinctions between the so-called liberal market/common law style and the coordinated market/civil law style of regulation.

¹⁹⁷ Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, 49.

¹⁹⁸ Richard Mitchell and Malcolm Rimmer, 'Labour Law, Deregulation, and Flexibility in Australian Industrial Relations (1990) 12 *Comparative Labor Law Journal* 1, 13–15.

¹⁹⁹ See Richard Mitchell and Peter Scherer, 'Australia: The Search for Fair Employment Contracts through Tribunals' in Joop Hartog and Jules Theeuwes (eds), *Labour Market Contracts and Institutions: A Cross-National Comparison* (Elsevier Science, 1993) 77, 80.

²⁰⁰ Hugh Armstrong Clegg, *Trade Unionism under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Basil Blackwell, 1976); Franz Traxler, 'Collective Bargaining and Industrial Change: A Case of Disorganization? A Comparative Analysis of Eighteen OECD Countries' (1996) 12 *European Sociological Review* 271, 274 (Table 1: Coverage Rates in Eighteen OECD Countries).

However, at the same time there are also reasons for distinguishing Australian labour market regulation from many coordinated market systems. These have to do with the nature of employer/union relations and the influence of formalised employee voice within enterprises. Historically the Australian labour law system did not empower unions and employees with much influence over managerial prerogatives, nor did it develop into a kind of corporatist cooperative style of capital/labour relations that has characterised many European systems.²⁰¹ While unions were highly integrated within the system overall, arbitration in operation narrowed the scope of collective bargaining to a legalistic interpretation of 'industrial matters' which effectively excluded employee voice from many aspects of managerial decision-making.²⁰²

Assessed in general terms, we would argue that the Australian system is comparatively protective of workers, particularly when measured against the United States as a key example of a liberal market/common law origin country, and, at various times, more protective of workers than the United Kingdom.²⁰³ This standing would, we suggest, be confirmed when we include the broader dimensions of stakeholder protection provided through social welfare measures. As we noted in Part III above, several theories that attempt to account for cross-national diversity in corporate law consider not only the role of labour law but also that of laws relating to social security provision, health insurance and so on. For example, Roe relates a particular style of corporate governance to social democratic policies more generally;²⁰⁴ legal origin theorists have included certain social security indicators in their measure of worker protection;²⁰⁵ and Bruner places particular emphasis on

²⁰¹ See Christopher Wright, *The Management of Labour: A History of Australian Employers* (Oxford University Press, 1995) 109; Arthur McIvor and Christopher Wright, 'Managing Labour: UK and Australian Lawyers in Comparative Perspective, 1900–50' (2005) 88 *Labour History* 45; Gill Palmer, 'Corporatism and Australian Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 313.

²⁰² McIvor and Wright, above n 201, 54.

²⁰³ See above n 191 and accompanying text. Over the past 40 years, United Kingdom labour law has varied to an appreciable degree in its level of protection. This appears to be explainable principally by political effects (that is, changes of government) and the impact of transnational harmonisation through the directives of the European Union: see Deakin, Lele and Siems, above n 69, 145–6.

²⁰⁴ See above n 78 and accompanying text.

²⁰⁵ See above n 66 and accompanying text.

the differences between the United States and United Kingdom welfare states in explaining a corresponding divergence in their corporate law.²⁰⁶

Australia has sometimes been grouped together with the United States and United Kingdom as a liberal welfare state, largely based on its low level of overall spending on social security and its restricting access to benefits through extensive means testing.²⁰⁷ We would question this characterisation on two grounds. First, as the foregoing discussion indicates, for much of the 20th century Australia's social security system operated in the context of 'functionally equivalent welfare guarantees implanted in the labour market via the wage arbitration system'.²⁰⁸ When this form of labour market regulation is factored in, commentators have recognised that what initially appeared to have been a fairly extreme case of a liberal, means-tested social assistance system, takes on something more essentially social democratic in its effects, at least insofar as male breadwinners and their households were concerned.²⁰⁹

Second, as is the case with corporate law (see Part II above), we suggest it is mistaken to collapse the United States, United Kingdom and Australian social welfare systems into an undifferentiated liberal type when there are crucial design differences between them. Broadly speaking, the United Kingdom and Australian systems had evolved to produce, by the late 1940s, a roughly similar set of welfare protections. In Australia, pensions for old age and invalidity were introduced at the federal level in 1908.²¹⁰ The range of benefits was then widened in the 1940s, with the introduction of pensions for widows and deserted wives (1942),²¹¹ and unemployment and sickness benefits (1944),²¹² along with a universal (that is, non-means-tested) system of family allowances (1941).²¹³ It is apparent, then, that by the immediate post-World War II period, the Australian social welfare platform provided a fairly comprehensive safety net paid at a modest, flat rate, for a wide range of contingencies, although most of the benefits were means-tested and, at least

²⁰⁶ See above nn 94–115 and accompanying text.

²⁰⁷ Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990) 74–5.

²⁰⁸ Gøsta Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford University Press, 1999) 89, citing Francis G Castles and Deborah Mitchell, 'Three Worlds of Welfare Capitalism or Four?' (Discussion Paper No 21, Graduate Program in Public Policy, The Australian National University, 21 October 1990).

²⁰⁹ Esping-Andersen, *Social Foundations*, above n 208, 89.

²¹⁰ *Old-Age Pensions Act 1908* (Cth).

²¹¹ *Widows' Pensions Act 1942* (Cth).

²¹² *Unemployment and Sickness Benefits Act 1944* (Cth).

²¹³ *Child Endowment Act 1941* (Cth).

until the 1970s, the rates were relatively ungenerous when compared with average earnings or real income per head of population.²¹⁴ The most notable difference between United Kingdom and Australian stakeholder protection in the immediate postwar decades was the absence in Australia of a health insurance and medical benefits scheme. However, a compulsory national health insurance scheme financed partly through a special tax levy and partly through general revenue was eventually put in place in the early 1980s.²¹⁵ The following decade also saw the establishment of a system of compulsory contributory retirement benefits as a supplement to the old age pension, along with a strengthening of payments to low- to middle-income households with children.²¹⁶ The contrast with aspects of United States stakeholder protection is stark: a key feature of the United States system is that unemployment and health benefits are overwhelmingly occupational benefits, linked to continued labour market attachment to a particular employer,²¹⁷ whereas the Australian — and United Kingdom — welfare states offer a safety net, however imperfect, that is independent of a citizen's occupational standing.

V DISCUSSION AND CONCLUSIONS

We return now to the core issues of our inquiry. The evidence we have assembled in the course of the argument suggests three things. First, it is well established that Australia has a comparatively shareholder-centric system of corporate law, one which is at the high end of shareholder protection and power when it comes to corporate governance. What is more, this analysis stands up when Australia is compared with a mixture of both common law and civil law systems. Second, Australia has what we have determined to be a

²¹⁴ The United Kingdom system in the immediate postwar period, unlike Continental social insurance schemes, was also based around flat-rate benefits but distinguished between contribution-based benefits, which were not means-tested, and a means-tested supplementary social assistance scheme: see *National Insurance Act 1946*, 9 & 10 Geo 6, c 67; *National Assistance Act 1948*, 11 & 12 Geo 6, c 29. However, over the past few decades, this distinction has become of little practical importance. Over the course of the 1980s, the threshold of contributions required to access insurance benefits was raised and, as regards unemployment benefits at least, the flat-rate, means-tested, social assistance scheme became the main form of assistance: see Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005) 177–9.

²¹⁵ See *Health Legislation Amendment Act 1983* (Cth); *Medicare Levy Act 1983* (Cth).

²¹⁶ *Superannuation Guarantee (Administration) Act 1992* (Cth). See further Terry Carney, *Social Security Law and Policy* (Federation Press, 2006) 37–9.

²¹⁷ Bruner, 'Power and Purpose', above n 2, 636–9. In terms of Bruner's argument, this makes the worker particularly vulnerable in the case of corporate restructuring: at 638.

comparatively protective system of worker protection, which embodies both labour law and broader dimensions of social policy. But it is important to note that this is a difficult issue. Australia ranks higher than some common law systems on some measures of labour law, but at the same time lower than other common law countries and the civil law systems included in the study relied upon in Part IV of our analysis.²¹⁸ There is also a residual issue concerning some of the comparisons of labour law between several common law countries; this is an area requiring further research.²¹⁹ Third, we have stated the Australian position on share ownership to be of a concentrated rather than dispersed character. As with our other measures referred to here, this is both an elastic and a relative assessment. Moreover, some recent research has begun to challenge in its entirety the argument that common law countries (including both the United Kingdom and the United States) are characterised by dispersed ownership patterns.²²⁰ Be that as it may, we proceed in this paper from the more orthodox position that there is a divide in this respect between some prominent common law countries (such as the United States and the United Kingdom) and those of the civil law, and that Australia is a concentrated shareholding system when compared with the United States and the United Kingdom.

The questions for us to address are these: is the evolution of a shareholder-centric form of corporate law and governance in Australia associated with the relatively protective model of stakeholder (worker) regulation? What, if anything, is its association with what we perceive to be a pre-existing, and now coexisting, relatively concentrated pattern of Australian share ownership? Or are these regulatory and empirical characteristics of the Australian political economy separate spheres of policy organisation with little or no bearing upon one another?

Taking the varieties of capitalism discourse first, the argument embodied there would suggest that the regulatory position on Australian corporate law would fit clearly enough into the liberal market group of countries insofar as its investor protection and corporate governance laws are concerned. However, even here there are, as noted, sufficient gaps between the Australian/United Kingdom position and the United States position to support the possibility of

²¹⁸ See Mitchell et al, 'The Evolution of Labour Law in Australia', above n 189.

²¹⁹ See above n 196 and accompanying text.

²²⁰ See Holderness, above n 155; Prabirjit Sarkar, 'Do the English Legal Origin Countries Have More Dispersed Share Ownership and More Developed Financial Systems?' (2009) 16 *International Journal of the Economics of Business* 73.

there being ‘varieties of liberalism’,²²¹ just as there are different varieties of the other catch-all group, coordinated market economies.²²²

However, even if we were to suppose that Australia makes a reasonably good fit into the liberal market category on the strength of its corporate law, it is far less clear that it would do so in respect of the other two institutional features under discussion. For example, it might be argued that Australian labour law largely regulates wages so as to remove them as an instrument of competition in the labour market, and provides strong worker protection, although laws on redundancy and dismissals were relatively late in arriving. That would mean that Australia is not an example of a system which particularly favours shareholders’ interests over workers’, nor an example of a system where a highly marketised set of corporate arrangements are matched by highly marketised labour arrangements.²²³ We acknowledge, however, that Australian labour law may be viewed less generously, and as closer in its levels of worker protection to other economies, such as the United Kingdom and the United States, in the liberal market economy group, and accordingly would slot more easily into the varieties of capitalism explanation of institutional association.

All of this is made yet more difficult by the fact that the relative concentration of share ownership in Australia also is a feature that fails to correspond with the varieties of capitalism categorisation, which generally associates strong shareholder-centric systems with dispersed shareholding patterns, in addition to weak labour laws. If we assume that Australia sits between those countries with highly dispersed shareholding systems and those with high levels of block-holding, we might expect it to follow that its shareholder protection laws would be similarly ranked at a mid-level. But in point of fact Australia ranks highest among a group of six common law and civil law countries in terms of shareholder protection.²²⁴ Again, of course, as we have noted, the true relative nature of Australia’s shareholding patterns is complex, but, based on this evidence at least, Australia appears not to conform to the liberal market categorisation, possibly on two of three counts.

On the other hand, as we have noted in passing,²²⁵ there are various ways in which institutions might be seen to complement each other, and it remains

²²¹ See Mahon, above n 37.

²²² See Schröder, above n 36.

²²³ Cf Hall and Soskice, above n 28, 17–19.

²²⁴ Anderson et al, ‘The Evolution of Shareholder and Creditor Protection in Australia’, above n 15, 184–6.

²²⁵ See above nn 45–54 and accompanying text.

possible that some other types of relationships, perhaps responding to Deeg's logic of synergy or logic of contrast,²²⁶ might help to explain the evolution of a strong shareholder protection law as being consistent with, rather than antagonistic to, strong labour laws in a particular political economy. These possibilities are considered further in the discussion below dealing with explanations derived from political orientation.

In conclusion, on this point we would suggest that it is not possible simply to explain Australia's shareholder-centric system of corporate governance in terms of its being complemented by a relatively weak system of labour law, and either a response to, or a precondition of, a dispersed pattern of share ownership. As noted elsewhere,²²⁷ the evident complexity of the Australian situation suggests that there is a need for caution in grouping nations into styles of regulation and economy, and this includes developing explanations for the evolution of corporate law as part of a network of complementary institutions.

Similar arguments to these arise when we turn to consider the relevance of legal origin as an explanation for the evolution of shareholder protection law. *Prima facie*, the high levels of shareholder protection law which characterise the Australian political economy would tie in with the suggestion by legal origins proponents that such forms of regulation are derived from a common law history, which, when compared with the civil law system, is both more adaptable to changing economic circumstances, and less susceptible to regulatory capture through state-based power groups. According to La Porta and his colleagues, the common law legal system itself explains superior investor protection,²²⁸ and this is true not merely for originating countries but for adopting countries also. For many years Australian corporate law tended to follow United Kingdom developments, and, as we have noted, there are some similarities in the levels of shareholder protection law across both the United Kingdom and Australia which would tend to confirm the legal origins outlook. However, it is also the case that the comparative research indicates that there is greater divergence in shareholder protection among the common law countries than the civil law countries: shareholder protection levels in Australia, for example, are ranked far closer to the civil law systems of

²²⁶ See above nn 48–52 and accompanying text.

²²⁷ See Mitchell et al, *Law, Corporate Governance and Partnerships at Work*, above n 6, 196–9.

²²⁸ Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 298.

Germany and France than they are to the common law United States system.²²⁹

This suggests that an approach to understanding the evolution of corporate law in Australia by reference to its legal origins is at least highly problematic,²³⁰ and, as our earlier discussion indicates,²³¹ the same problem arises when one turns to apply the theory to the evolution of Australian labour law. The leximetric studies carried out comparing aspects of labour law in Australia with a mix of other states of both common law and civil law heritage have generally arrived at the conclusion that whereas there is a perceptible legal origins effect indicating ‘a tendency towards similarity among the [labour] laws of civil law countries ... and [those] of the common law group’,²³² that is only because at a level of generality the systems might be divided into two groups denoting higher (civil law systems) and lower (common law systems) grades of worker protection. That is, however, an indication of only a very weak legal origins effect. The studies have also shown that some of the common law countries are closer to some civil law countries in terms of strength of worker protection than they are to members of their own legal group. As a consequence the studies have concluded that there is little, if anything, ‘to suggest that legal origins sets legal systems on a pre-determined path of evolution’.²³³

Finally, it remains only to point out that our characterisation of Australia does not fit with the supposition of La Porta and his colleagues that common law systems are also associated with ‘higher ownership dispersion’.²³⁴ Potentially, then, Australia fails to fit with legal origins theory on all three grounds examined here.

²²⁹ See Anderson et al, ‘The Evolution of Shareholder and Creditor Protection in Australia’, above n 15, 185 (Figure 3: Aggregate Shareholder Protection Index (60 Items), Six-Country Comparison, 1970–2005).

²³⁰ ‘[O]ur findings do not provide support for legal origins theory’: *ibid* 207.

²³¹ See above nn 196–203 and accompanying text.

²³² Peter Gahan et al, ‘Economic Globalization and Convergence in Labor Market Regulation: An Empirical Assessment’ (2012) 60 *American Journal of Comparative Law* 703, 736.

²³³ *Ibid*. See also Mitchell et al, ‘The Evolution of Labour Law in Australia’, above n 189, 86–9; Gordon Anderson et al, ‘The Evolution of Labor Law in New Zealand: A Comparative Study of New Zealand, Australia, and Five Other Countries’ (2011) 33 *Comparative Labor Law & Policy Journal* 137, 162–5. These conclusions are also founded on the fact that there are also quite erratic periods of convergence and divergence in labour law within the common law group which appear attributable to political factors.

²³⁴ La Porta, Lopez-de-Silanes and Shleifer, above n 228, 298.

This brings us finally to the question of state political orientation as an explanation for Australia's regulatory style in corporate law and governance. As we have noted in Part III(C), several scholars have argued that the form which a society's share ownership patterns and shareholder protection laws take is substantially a matter of political choice, and that this choice also plays out in the way in which society arranges its preferences between corporations and investors, and between shareholders and other stakeholders, and so on.

One broad approach here has been to point to a divide between countries with left-leaning (social democratic) governments as compared with those of a right-wing orientation. It is argued that countries of the latter variety (for example, the United States) favour shareholders' interests above those of labour, and also have more widely dispersed patterns of share ownership, whereas those of the former variety generally preserve labour's interests above shareholders', as well as have more concentrated share ownership patterns.²³⁵ The kind of complementarity which this broad argument suggests would include Deeg's logic of synergy²³⁶ whereby, in the case of the right-wing group, the labour law system allows for inexpensive job shedding and labour redundancy, and hence supports investors looking for shareholder value.

As we noted, there is considerable debate over the efficacy of this kind of approach. However, for the purposes of our discussion we propose to take the argument at face value and to ask how our evidence on the Australian position would appear to fit in with the right/left dichotomy. Australia has been grouped, in this debate, as among the countries of left-wing orientation. There are reasons to be cautious about this characterisation.²³⁷ However, if we assume that, as we have argued, Australian labour law is relatively strongly protective of the interests of non-shareholder stakeholders, and that the Australian state is quite like other social democratic regimes, are we to conclude that the right/left cleavage explains the shape of Australian corporate law accordingly? Plainly the answer to this question is that it does not. There is no complementarity in Australia of a strong labour law/weak shareholder protection law type. As our evidence shows, shareholder protection law in Australia is comparatively very strong, and its persistent strengthening over the past two decades or more (see Part II above) has coincided with the retention of a fairly strong labour law framework. This lack of fit by Australia into the right/left dichotomy is also confirmed by our evidence suggesting that

²³⁵ See above nn 77–87 and accompanying text.

²³⁶ See above n 49 and accompanying text.

²³⁷ Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia', above n 15, 191–2.

Australia's share ownership is of a concentrated rather than a dispersed pattern.

Christopher Bruner's argument, on the other hand, while also advancing the importance of sociopolitical influences in shaping institutional configurations, provides an alternative viewpoint which would allow, in certain circumstances, for the coexistence of both strong stakeholder (labour and social security) laws and strong shareholder protection laws. In Bruner's argument, where a pattern of shareholder dispersal occurs away from a state of concentrated ownership, provided there is an existing state of strong worker/social protection in place, then so too will a strong set of shareholder protections laws evolve. Bruner's illustrative example of this set of arrangements is the United Kingdom (which he contrasts with the United States).²³⁸ In the United Kingdom the existence of relatively strong social welfare/labour law meant that, as the share ownership pattern gradually became more dispersed, United Kingdom policy extending stronger shareholder protections laws was not strongly opposed politically by other stakeholders who were otherwise secured in cases of capital reorganisation. Broadly this would fit with Deeg's logic of contrast notion of complementarity.²³⁹

However, our argument would be that notwithstanding a certain degree of similarity between the United Kingdom and Australian positions, both with respect to the strength of labour law and the strength of shareholder protection law, there remains one outstanding problem regarding Australia's conformity with this theoretical approach. Our supposition, based on the available evidence, that Australia has not developed into a dispersed ownership-type state means that it fails to meet the preconditions of Bruner's model. What we have, instead, is a coexisting shareholder-centric corporate law and a strong stakeholder protection system in the context of a relatively concentrated system of share ownership. That conglomeration of institutional arrangements fails to fit readily into any of the political explanations which might be advanced to explain the evolution of a highly shareholder-centric model of corporate law in Australia.²⁴⁰

The question thus remains: how are we to understand the emergence of the very high levels of shareholder protection law which have evolved in Australia over recent decades? Why has Australia ranked comparatively highly in terms of its laws protecting shareholders against the actions of corporate boards

²³⁸ See above nn 94–111 and accompanying text.

²³⁹ See above nn 51–2 and accompanying text.

²⁴⁰ But see Bruner, 'Power and Purpose', above n 2, 644 n 333, for a qualification of his point.

when measured against several other countries of both civil law and common law background since 1970?²⁴¹ Why has its level of shareholder protection against other shareholders (minority protection) been appreciably higher than other comparable countries since 1970?²⁴² And why has its aggregate level of shareholder protection shown a propensity to strengthen consistently since about 1990?²⁴³ These developments are not, apparently, explainable in terms of legal heritage, political trade-off, or regulatory style in a particular variety of capitalist economy. In short, there seems to be little direct evidence to suggest that in Australia corporate law developments are closely related to the degree of shareholder dispersal in the economy, or to the degree of stakeholder protection beyond shareholder interests. Whatever has been driving the development of shareholder protection law in Australia, the status of labour law and other social protections appear unrelated, and we have been unable to find any evidence to suggest otherwise. Similarly, Anderson et al have found no correlation between which political party is in power (that is, whether the government is labour- or capital-oriented in policy preference) and the rise of shareholder protection.²⁴⁴

In a recent article on the evolution of Australian labour law, the authors concluded that

the timing of stages of economic development, perhaps the type of labour market and industry structure, and changes in the political environment, may all be more important in explaining the direction of legal evolution than legal origins.²⁴⁵

For reasons that we have observed in passing throughout this paper, the same might have been said for explaining the evolution of labour law in terms of a

²⁴¹ See Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia', above n 15, 182 (Figure 1: Protection against Boards (42 Items), Six-Country Comparison, 1970–2005).

²⁴² Ibid 183 (Figure 2: Protection against Other Shareholders (18 Items), Six-Country Comparison, 1970–2005).

²⁴³ Ibid 185 (Figure 3: Aggregate Shareholder Protection Index (60 Items), Six-Country Comparison, 1970–2005).

²⁴⁴ Ibid 192–3. Left unaddressed in this discussion is the possible relevance of cross-class coalitions pointed to in the work of Gourevitch and Shinn: see above nn 88–9 and accompanying text. But again, the problem in the Australian case lies not so much in the nature of the possible institutional configurations (say, as between management/labour, investors/labour, and management/investors), but in the lack of evidence to suggest that there is any direct influence by one policy area (for example, the interest of labour) upon the other (that is, the degree of shareholder protection).

²⁴⁵ Mitchell et al, 'The Evolution of Labour Law in Australia', above n 189, 87.

variety of capitalism discourse, or on a right/left political divide. The conclusion drawn by Mitchell et al in the labour law article points instead to the relevance of nuances particular to the domestic political economies of individual countries, rather than the search for an overarching theory which can explain the general orientation of many.²⁴⁶ Our analysis of shareholder protection laws in Australia and possible explanations for the strength of these laws compared to other countries similarly points to limitations in endeavouring to locate Australian developments within broad theories that seek to classify countries according to matters such as types of capitalism, legal origins or political orientation.

²⁴⁶ *Ibid* 86–9.