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Corporate Governance and Social Welfare in the Common Law World

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CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER. By Christopher M. Bruner. New York, New York: Cambridge University Press, 2013. 309 pages. $110.00.

Reviewed by David A. Skeel, Jr.*

Introduction

Sometime around 1990, American corporate governance scholars discovered that corporate law and corporate governance do not work the same way everywhere in the world. This was not the first time American corporate governance scholars had made such a discovery. Comparative corporate governance scholarship flourished for a few years in the 1970s, and earlier generations had done their own comparative spadework.[1] But the new wave of scholarship is not shaped in discernible ways by its predecessors and has brought new tools and perspectives to bear.

Many of the articles at the beginning of this wave used the comparisons primarily to shed light on American corporate governance, often to demonstrate that features of American governance are not inevitable. Perhaps most prominently, Mark Roe contrasted governance patterns in Germany and Japan in connection with his political theory of American corporate governance.[2] In Roe's account, the separation between ownership and control in America's "Berle–Means" corporations was not simply caused by economic imperatives, as corporate law scholars often

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* S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School. I am grateful to John Armour, Brian Cheffins, David Garland, Jennifer Hill, Dionysia Katelouzou, and Mark Roe for helpful comments and conversations, and to the editors of the *Texas Law Review* for inviting me to write this Review.

1. *See, e.g.*, Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 378 (1996) (noting that in the 1970s American legal scholars compared the German approach to legal and institutional arrangements in corporate governance, including the two-tier board and codetermination).

2. *See, e.g.*, Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 59–61 (1991) [hereinafter Roe, *Political Theory*] (comparing bank involvement in German and Japanese firms with bank involvement in the United States); Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927, 1929 (1993) [hereinafter Roe, *Corporate Structure*] (explaining that differences between the corporate governance structures of Germany and Japan on the one hand and the United States on the other can be explained by an economic model that takes into account political histories, cultures, and paths of economic development).

tended to assume.[3] Politics also played a starring role, with populist pressures first forcing the fragmentation of American financial channels in the nineteenth century and then forcing the fragmentation of American corporate ownership at key junctures when institutions had begun to acquire major stakes in American corporations.[4] But were outcomes other than the American one possible? Germany and Japan offered a startling contrast. In each country, banks held or controlled major stakes in the nation's largest corporations and exerted much more direct influence over corporate governance.[5]

A few years later, additional theories of comparative corporate governance began to emerge, some challenging Roe's political theory, or at least providing additional explanations for the American outcome. In a series of much-criticized and highly influential empirical articles, economists Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny identified a variety of factors which, they argued, shape the quality of a nation's corporate governance.[6] Among other things, countries that protect minority shareholders are likely to see more diffuse ownership than those that do not[7] and countries with common law origins fare better than their civil law counterparts.[8] Turning his sight more fully to Europe, Roe offered an alternative account of corporate governance differences, one not tied to legal origin. In Roe's account, corporations in countries with social democracies tend to have more stakeholder-oriented corporate governance, with greater solicitude for employees, whereas countries that lack long-term social democratic control are more shareholder oriented.[9] Operationally, when labor was able to make strong claims on large firms' cash flow, as he said was common in the post-World War II decades, concentrated ownership with blockholders and controlling shareholders was more likely to preserve value for shareholders than diffuse ownership and managerial-centered firms.[10] In a similar vein, more recent

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3. Roe, *Political Theory*, *supra* note 2, at 10; Roe, *Corporate Structure*, *supra* note 2.

4. MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 39–42 (1994). These political determinants are a central theme of Roe's influential book. *See id.* at xiv–xv.

5. *Id.* at 186.

6. *See, e.g.*, Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3, 24 (2000) [hereinafter La Porta et al., *Investor Protection*] ("[S]trong investor protection is associated with effective corporate governance . . . ."); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1132 (1997) [hereinafter La Porta et al., *Legal Determinants*] (listing the origin of a country's laws, its investor protections, and quality of law enforcement as influencing a country's external finance).

7. Rafael La Porta et al., *Agency Problems and Dividend Policies Around the World*, 55 J. FIN. 1, 4 (2000).

8. La Porta et al., *Legal Determinants*, *supra* note 6, at 1137, 1149.

9. *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 29–37 (2003).

10. *See id.* at 17, 199.

work on varieties of capitalism contrasts liberal market economies, on the one hand, with coordinated markets on the other.[11]

These comprehensive theories tend to draw a sharp distinction between corporate governance in the United States and United Kingdom as compared to governance elsewhere in Europe and Japan.[12] The distinction is sensible, given that U.S. and U.K. corporations do not seem to have controlling shareholders,[13] governance in the two countries is more shareholder oriented than governance elsewhere in the world,[14] and the nations share a common history.[15]

But a strange thing happens if, after conducting these comparisons at 30,000 feet, we make our way down to the actual details of U.S. and U.K. corporate governance: at close range, they do not look so similar at all.[16] In the United Kingdom, shareholders can call a shareholders' meeting and displace the directors, or effect a major change, in any corporation at any time.[17] In the United States, by contrast, shareholders cannot replace the directors of a firm that has an effective staggered board without cause, and they cannot initiate fundamental changes on their own.[18] Similarly, if a hostile bidder makes an offer to the shareholders of a U.K. firm, the board of directors cannot interfere with the bid,[19] as the directors of Manchester United[20] and, more recently, Cadbury's are (from their perspective, at least) all-too-well aware.[21] In the United States, by contrast, target directors have considerable flexibility to fend off unwanted suitors.[22] What are we to make of these very significant differences, which suggest that U.K.

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11. *See* Peter A. Hall & David Soskice, *Introduction* to VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 8 (Peter A. Hall & David Soskice eds., 2001).

12. *See* Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE 147, 147 (2006) (noting the tendency in scholarship to separate Anglo-American forms of corporate governance from Continental European and Japanese forms).

13. ROE, *supra* note 9, at 16; *see also* La Porta et al., *supra* note 7, at 3 (stating that in the United States and United Kingdom, large firms are generally controlled by managers).

14. *See* Aguilera et al., *supra* note 12.

15. John Armour, Brian R. Cheffins & David A. Skeel, Jr., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VAND. L. REV. 1699, 1715 (2002).

16. Each of the distinctions noted in this paragraph is described in detail in the book under review, CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013).

17. *Id.* at 29.

18. *Id.* at 39.

19. *Id.* at 33.

20. Jere Longman, *American Not Welcome in Manchester*, N.Y. TIMES, Oct. 26, 2004, http://www.nytimes.com/2004/10/26/sports/soccer/26united.html?pagewanted=print&position=.

21. BRUNER, *supra* note 16, at 253–56.

22. *Id.* at 41.

governance is more truly shareholder oriented, whereas the United States protects managerial discretion?

One response to this kind of puzzle is to tease out the distinctive features of each system without attempting to reconcile them. Alternatively, one might simply chalk up the differences to the idiosyncracies of the United Kingdom, which confounds nearly every general account of corporate governance.[23] Another response is to take an opposite tack. Rather than emphasizing the unique features of each system, as contextualists might, functionalist accounts often resolve tensions at a high level of generality. The preeminent functionalist account of corporate law, *The Anatomy of Corporate Law*, identifies three agency cost problems—conflicts of interest between shareholders and managers, conflicts between controlling and minority shareholders, and conflicts between shareholders and creditors and other third parties—as the central concern of corporate governance in every developed nation.[24] From this perspective, the United States and United Kingdom (like the other developed countries considered by *The Anatomy of Corporate Law*[25]) are addressing the same problems in similar, but not identical, ways.

Like La Porta et al. and Roe, Christopher Bruner seeks in *Corporate Governance in the Common-Law World* to claim a middle ground by identifying a key feature—an independent variable or variables, as an empirical scholar might say—that explains enough of the differences to be worth highlighting—as did political economy for Roe and legal origin for La Porta et al. For Bruner, differences between the United States and United Kingdom that confound other governance theories can be understood by focusing on a new variable, each nation's social welfare system.[26] If a country has a robust social welfare system, he argues, corporate law can and will focus more narrowly and more strongly on the interests of shareholders.[27] If the country's social welfare system is weak, by contrast, corporate governance is likely to fill in the gaps by inviting managers to take the concerns of employees into account rather than attending solely to the shareholders' interest.[28] This explains why corporate governance is so shareholder oriented in the United Kingdom, which has universal healthcare and generous unemployment benefits,[29] while shareholders' powers are more attenuated in the United States, with its

23. For discussion of the difficulties of fitting the United Kingdom within current theories of comparative corporate governance, see Armour, Cheffins & Skeel, *supra* note 15, 1714–20.

24. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 36 (2d ed. 2009).

25. *Id.* at 3.

26. BRUNER, *supra* note 16, at 4.

27. *Id.* at 4–5.

28. *See id.* at 5.

29. *See id.* at 145, 169.

much weaker social welfare protections.[30] Turning to the two other major common law countries, Australia and Canada, Bruner concludes that they fall in between but are more similar to the United Kingdom in their welfare protections and shareholder orientation.[31]

Bruner's social welfare account of corporate governance is a partial theory rather than a theory of everything. The thesis applies only to countries whose corporations tend to have dispersed ownership and does not speak to the many countries whose corporations tend to have a controlling shareholder or shareholders.[32] It suggests, in a sense, that Roe's social democracy insights invert when stock ownership is dispersed, with robust social welfare protections traveling together with highly-shareholder-oriented governance.[33] Or it at least qualifies Roe's argument that labor's capacity to make strong claims on a firm's cash flow is complementary with concentrated ownership. Unlike Roe, Bruner has a refined sense of social democracy: a social democracy that has powerful labor inside the firm might lead to concentrated ownership, but a social democracy that has government satisfy the social democratic demands outside the firm will lead to fewer social democratic demands inside the firm and, hence, will open up political and social space for a more intense shareholder orientation of the firm. Britain fits this latter case, Bruner argues.[34]

After describing Bruner's theory and evidence in more detail in the first Part of this Review, I poke at it from several angles in the two Parts that follow. In Part II, I consider whether there is a mechanism that adequately explains the connection between social welfare and shareholder orientation; interestingly, despite the book's title, Bruner does not suggest that the common law plays any particular role.[35] In Part III, I consider whether shareholders in the United States may have more power than their limited formal rights suggest, and in Part IV I ask whether the United States (rather than the United Kingdom, as is conventionally assumed) may simply be an outlier, due in large part to federalism and as reflected by the United States' weak social welfare system. I then conclude.

Although I will be playing devil's advocate throughout this Review, Bruner's insights are a revelation. As I emphasize by way of conclusion, he has identified a critical, new dimension of our understanding of corporate law.

30. *See id.* at 166–69.
31. *Id.* at 176, 200.
32. *Id.* at 3–4.
33. *Id.* at 120–23.
34. *See id.* at 143–66.
35. *See id.* at 117–19 (critiquing arguments suggesting that relative levels of shareholder-centrism depend on the systems of law of particular countries).

I. Corporate Governance and Social Welfare: The Central Thesis

Corporate Governance in the Common-Law World is no mystery story. Bruner states his thesis about shareholder-centeredness and social welfare at the outset then avers to it repeatedly throughout the book. He writes:

> My core claim is that greater regard for the interests of employees in other regulatory domains has tended to insulate certain corporate governance systems from political pressure to show regard for employees and other "stakeholders," permitting more exclusive focus on shareholders without precipitating backlash – a key political determinant of the relatively higher degree of shareholder-centrism exhibited in Australia and the United Kingdom, and to a lesser (but nevertheless substantial) degree in Canada as well.[36]

In the United States, by contrast:

> [W]eaker regard for the interests of employees in other regulatory domains has tended to result in greater political pressure being brought to bear on corporate governance to do so, inhibiting exclusive focus on shareholders – a key political determinant of the relatively lower degree of shareholder-centrism exhibited in the United States.[37]

Bruner's claim—that the robustness of these four countries' social welfare systems determines how shareholder-centered the corporate governance of each is (and thus that "the political foundations of shareholder power effectively lie outside corporate law itself"[38])—is elegant, though substantiating it is inevitably more of a slog. In the first of the two heftiest chapters of the book, Bruner outlines the extent of shareholder-centeredness of the corporate governance in each of his four countries.[39] Bruner begins by describing the shareholder-centric features of U.K. governance and the limits on U.S. shareholder influence—including directors' ability to defend against takeovers and the shareholders' inability to adopt bylaws that constrain directors' discretion.[40] Australian corporate governance is more shareholder oriented than the United States, as evidenced by the outcry that attended the decision by Rupert Murdoch to move the incorporation of his News Corp. empire from Australia to the United States.[41] Canada is a more complicated case. Although its securities

36. *Id.* at 22–23.

37. *Id.* at 23.

38. *Id.* at 27.

39. *See id.* at 28–107.

40. *Id.* at 29–65.

41. *Id.* at 71–73. Bruner's discussion of News Corp. draws extensively from a careful study by Jennifer Hill. *Id.* (citing Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010)).

and takeover law, which is regulated by the provinces, is quite proshareholder, Canada's corporate law makes important reference to the interests of other constituencies.[42] Based in part on an analysis of the high-profile *BCE Inc. v. 1976 Debentureholders*[43] case, Bruner concludes that its effect is more shareholder oriented than the law on the books seems to suggest.[44] Here and elsewhere in the book, Bruner illustrates the comparisons with helpful charts highlighting the salient corporate governance features of the four countries.[45]

In the book's other major chapter, Bruner conducts a similar exercise with social welfare, while keeping the parallel history of corporate governance in each country continuously in view.[46] Although the United Kingdom first began to construct its social welfare system in the early twentieth century, its full flourishing came after World War II, which brought universal healthcare and substantial unemployment benefits.[47] In the United States, by contrast, social welfare benefits come primarily through an employee's corporate employer, and healthcare coverage is much more spotty.[48] The contrast is reflected in labor's different response to the rise of takeovers in the two countries. After initially opposing shareholder-friendly takeover rules, British labor accepted them in the 1960s,[49] whereas American labor continued to call for limits on takeovers.[50] Australia is in some respects the most interesting case study because its stance on takeovers shifted. After initially seeming to permit directors to defend against takeovers, Australia adopted the U.K. shareholder-centric approach in the early 2000s.[51] Bruner argues that the shift was made possible by Australia's expansive, new, social welfare framework put in place between the 1970s and 1990s.[52]

In the book's final chapter, Bruner begins by contrasting the dispersed shareholder regimes of the four countries under discussion with the concentrated share ownership in countries like Germany.[53] "[I]n a country where blockholding predominates," he writes, "the principal regulatory issue remains how to counteract the blockholders' innate power over

42. *Id.* at 77–78, 84–89.
43. [2008] 3 S.C.R. 560 (Can.).
44. BRUNER, *supra* note 16, at 89–92.
45. *See, e.g.*, *id.* at 53, 68, 78, 83.
46. *Id.* at 143–220.
47. *See id.* at 145–47.
48. *Id.* at 167–71.
49. *Id.* at 153.
50. *See id.* at 166–67 (describing how U.S. corporate law favored promanagement takeover rules through the 1980s).
51. *Id.* at 192–93.
52. *See id.*
53. *Id.* at 223, 225–29.

corporate affairs through various forms of stakeholder-oriented protections."[54] The interests of shareholders are secondary. Bruner also considers three countries that might seem to confound his theory: China, Japan, and the Netherlands.[55] In each of these countries, blockholder share ownership is even lower than in the United Kingdom or United States, he notes, "yet these countries have not historically exhibited the forms of shareholder orientation that I associate with a high degree of ownership dispersal."[56] In China, the government has effective control over most large corporations, and in the Netherlands shareholder influence is stymied by a standard trust arrangement that holds voting control of the corporation.[57] In Japan, crossholdings by lenders traditionally neutralized the influence of ordinary shareholders, although they now appear to be breaking down.[58] Bruner speculates that "deeply entrenched historical, cultural, and political commitments" pull China, the Netherlands, and Japan toward effective concentrated ownership, whereas a different set of historical, cultural, and political commitments tug Australia and Canada in the opposite direction.[59] In the second half of the chapter, Bruner considers shifting shareholder patterns in the United Kingdom and postcrisis developments in the United Kingdom and United States, which he describes, drawing on a framework developed by Peter Gourevich,[60] in terms of shifting coalitions among shareholders, managers, and employees.[61] The United Kingdom has seen increasing shareholder power, while employees' power and welfare protections have declined,[62] whereas shareholder and employee power have both increased in the United States, thanks to a handful of shareholder-centered provisions in the Dodd-Frank Act and the enactment of healthcare legislation.[63]

Along the way, Bruner manages to work in succinct discussions of each of the major corporate governance debates in the American scholarly literature. In addition to a chapter critiquing each of the main comparative

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54. *Id.* at 228.

55. *Id.* at 229–36.

56. *Id.* at 229.

57. *Id.* at 230–32.

58. *Id.* at 233.

59. *Id.* at 236.

60. *See id.* at 131 (locating the notion of shifting coalitions of stakeholders in a prior Gourevich work).

61. *Id.* at 242–86.

62. *See id.* at 286 (noting that "the postcrisis response[] of the United Kingdom" has "strengthened shareholders yet weakened protections for stakeholders").

63. *See id.* at 280–81, 283–84, 286 (explaining that postcrisis reform efforts in the United States "have tended to promote both shareholder-centric corporate governance and greater social welfare protection for working families" and referencing both the Dodd-Frank Act and health insurance reforms as specific examples of these efforts). For an earlier argument about the increasing influence of shareholders, see Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEXAS L. REV. 987 (2010).

corporate governance theories currently on offer,[64] Bruner discusses the debate over Delaware's status as the leading state of incorporation[65] and the limitations of the passivity thesis of corporate takeovers,[66] as well as the Platonic guardian,[67] team production,[68] and shareholder primacy theories of the proper role of directors.[69] For anyone who is interested in sampling the concerns of recent corporate governance scholarship, *Corporate Governance in the Common-Law World* is a helpful primer.

Given the book's title, one surprise is that the common law tradition plays no direct role in Bruner's thesis. Bruner does speculate that ongoing and historical ties among the four countries may help to explain why all have wound up on the dispersed-ownership side of the governance map and that pulls toward the United States or United Kingdom may shape Australian and Canadian governance. But unlike with La Porta et al., who argue that the nature of the common law process has had a formative influence on the corporate governance of common law nations,[70] the common law does not figure in Bruner's theory. In fact, Bruner's theory posits that factors other than the common law—the nature of social welfare policy and its implementation—are more powerful determinants of shareholder orientation than legal origin. In this sense, his social welfare-based theory can be seen as implicitly rejecting claims that the common law is a key determinant of corporate governance.

To my knowledge, almost the only other recent work arguing that employee-oriented legislation outside of corporate law is essential to understanding the contours of American corporate governance is an

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64. BRUNER, *supra* note 16, at 111–42.

65. *Id.* at 276–77.

66. *See, e.g.*, BRUNER, *supra* note 16, at 55 (discussing Easterbrook and Fischel, who suggest that weak shareholder rights are acceptable "because management can be sufficiently disciplined through the market for corporate control, which depends critically on free capacity to accept hostile tender offers"); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1194 (1981) (proffering the passivity thesis that "managers of target companies should acquiesce when confronted with a tender offer").

67. *See, e.g.*, BRUNER, *supra* note 16, at 55; *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550–51 (2003) (explaining that under the Platonic guardian theory, corporate boards of directors are not "mere agent[s]" of shareholders but are "*sui generis*" bodies "serving as the nexus for the various contracts comprising" a corporation).

68. *See, e.g.*, BRUNER, *supra* note 16, at 57–59; *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999) (indicating that team production problems "arise in situations where a productive activity requires the combined investment and coordinated effort of two or more individuals or groups").

69. BRUNER, *supra* note 16, at 60–64.

70. *See* La Porta et al., *Investor Protection*, *supra* note 6, at 8–9 (explaining that "[c]ommon law countries have the strongest protection of outside investors" for various reasons).

insightful article by Adam Winkler.[71] Responding to laments by advocates of stakeholder governance that American corporate governance is too shareholder oriented, Winkler pointed out that corporations are subject to a wide range of noncorporate regulations that have stakeholders in mind.[72] The employment laws regulate collective bargaining and provide protections for employees, for instance, and the environmental laws impel firms to take the environment into account.[73] If we expand our frame of reference beyond corporate law, Winkler argues, the overall system is quite stakeholder oriented.[74]

Bruner's theory can, in a sense, be seen as a dynamic account of some of the same noncorporate laws that Winkler drew attention to. Bruner suggests not only that we need to include noncorporate law in our thinking about corporate governance but that there is a feedback effect between two key areas of regulation: corporate governance and the social welfare system.

II. What Is the Mechanism?

Any theory that makes causal claims about regulatory evolution must be prepared to address two questions. The first is whether the connections that the scholar asserts are real. For Bruner's theory, the question is whether shareholder orientation does indeed vary with the scope of a country's social welfare system. Second, if the relationship is real, the scholar must also marshal evidence that the connection is causal rather than simply a potentially unexplained correlation—here, that some mechanism links an increase or decrease in shareholder orientation with the robustness of a country's social welfare system.

On the first issue, whether the relationship between social welfare and shareholder orientation genuinely does exist, Bruner assembles an impressive amount of evidence. Not surprisingly, given that Bruner is a corporate law scholar, the evidence tilts toward the corporate side of the equation. But he gives an impressive survey of the emergence of a robust social welfare system in the United Kingdom and the absence of comparable protections in the United States, which has less unemployment protection and, until recently, lacked a national healthcare system.[75] The

71. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109 (2004).

72. *See id.* at 111 (expounding that "progressive principles of stakeholder protection" that are "outside of corporate law" are "powerful forces shaping the choices available to corporate management concerning basic operational and organizational decisions").

73. *See id.* (observing that corporate decisions "are made under the mandatory legal rules embodied in employment and labor law, workplace safety law, environmental law, consumer protection law, and pension law").

74. *Id.*

75. *See supra* notes 46–48 and accompanying text.

story in Australia and Canada is more complicated and less stark, but generally consistent. Overall, the connections seem to be real.

A few nagging doubts remain. Several of the most important shareholder-empowering U.K. rules predate the post-World War II expansion of the United Kingdom's social welfare system.[76] The principal development in the past generation was the United Kingdom's adoption of a similarly shareholder-oriented stance toward hostile takeovers starting in the 1960s.[77] These doubts suggest that the relationship between social welfare and shareholder orientation is not pristine, but overall Bruner's case seems strong.

The second issue—the claim that there is a causal relationship between social welfare and corporate governance—is much trickier. If social welfare and shareholder orientation are related, as Bruner claims, we ideally would want to see a direct cause-and-effect relationship between the two. Perhaps after the implementation of strong employee protections we would see a sudden shift in the shareholder orientation of corporate law or perhaps even a direct bargain: in return for strong unemployment benefits, labor leaders agree to strong, shareholder-oriented corporate law reforms. Or, in return for a weakening of collective bargaining protections, investor interests might drop their objections to reforms that would weaken the powers of shareholders in corporate law. Alternatively, the weakening of collective bargaining protections might prompt a backlash against shareholder-centric corporate law rules.[78] How does Bruner fare in providing this kind of evidence?

In some respects, surprisingly well, especially with the United Kingdom. In the United Kingdom, the highly proshareholder takeover rules emerged under the Labour government of Prime Minister Harold Wilson.[79] Labour's embrace of proshareholder rules followed both an initial period of opposition and a steady strengthening of the United Kingdom's social welfare system.[80] Bruner points out, for instance, that "the Redundancy Payments Act of 1965," which significantly enhanced unemployment

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76. Arguably more consistent with Bruner's thesis, U.K. governance does not appear to have been especially shareholder oriented (at least in practice) early in the twentieth century. *See, e.g.*, BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 33–40 (2008) (claiming that a shareholder's right to call meetings was established in 1900 but a right to remove directors was not available until 1948).

77. This history is recounted in John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1756–64 (2007).

78. At several points in the book, Bruner suggests that the possibility of backlash may play a causal role in the patterns he detects. *See, e.g.*, BRUNER, *supra* note 16, at 22–23 (describing "backlash" as a key component of the "relatively higher degree of shareholder-centrism exhibited in Australia and the United Kingdom").

79. *Id.* at 151, 160.

80. *See id.* at 147–49.

benefits, "predates by three years the Labour government's reinforcement of an extremely shareholder-centric takeover regime through the creation of the City Code and the City Panel."[81] Although Prime Minister Margaret Thatcher sought to cut back on welfare protections, the combination of fulsome social welfare protections and strong shareholder protections endured;[82] Bruner quotes a recent study finding that "U.K. welfare expenditures remained 'remarkably stable' between 1973 and 1996."[83]

Bruner's survey of developments in Australia is similarly suggestive. When takeovers first emerged, Australia experimented with a U.S.-style approach, which gave the directors of a target corporation discretion to defend against takeovers under some circumstances.[84] But in the early 2000s, Australia shifted direction, creating a Takeover Panel modeled on the United Kingdom and forbidding takeover defenses.[85] The shift, in Bruner's telling, came after the Labour government had put in place a full panoply of welfare protections over a twenty-year period.[86] I will leave it to others to assess whether Bruner's historical description is accurate,[87] but it appears to nicely support his core thesis about social welfare and shareholder orientation.

With Canada, however, the story muddies considerably. Canada has far more extensive social welfare protections than the United States,[88] which suggests that its corporate governance should be more shareholder-oriented. On its face, however, Canadian corporate law seems to protect stakeholders as well as shareholders.[89] This suggests that Canada may combine social welfare protections and stakeholder governance, a combination that should not be sustainable if Bruner's theory is correct. Bruner solves the problem in two ways. First, based on a lengthy analysis

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81. *Id.* at 159.

82. *See id.* at 160.

83. *Id.* (quoting John Clarke et al., *Remaking Welfare: The British Welfare Regime in the 1980s and 1990s*, *in* COMPARING WELFARE STATES 71, 76 (Allan Cochrane et al. eds., 2d ed. 2001)).

84. *Id.* at 192–93.

85. *Id.*

86. *Id.*

87. It seems a little puzzling that Australia toyed with the U.S. approach at all rather than simply adopting the U.K. approach. Jennifer Hill has suggested that the apparent shift came as a result of the cases first arising in the courts, before the Takeover Panel was set up. *See, e.g.*, Jennifer G. Hill, *Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance* 5–6 (European Corporate Governance Inst., Working Paper No. 168/2010, 2010) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704745. For an argument that the mode of regulation—self-regulation in the United Kingdom, courts in the United States—has shaped the diverging U.S. and U.K. approaches to takeovers, see Armour & Skeel, *supra* note 77, at 1767–84.

88. BRUNER, *supra* note 16, at 200.

89. *See id.* at 83, 213 (discussing aspects of Canadian corporate law that make it appear more stakeholder friendly than it actually is).

of the *BCE, Inc.* case, Bruner contends that Canadian corporate law is far less stakeholder oriented in practice than it appears to be.[90] Although the analysis veers perilously close to the domain of special pleading, Bruner's conclusions seem more or less plausible. And it is of course essential to consider the law as it actually functions, not simply the law on the books. (Indeed, I will raise precisely this kind of concern about Bruner's characterization of U.S. law below.)

Second, Bruner characterizes Canada (as well as Australia) as occupying a middle ground between the United States and the United Kingdom, with governance that is more shareholder oriented than the United States but not quite so shareholder-centric as the United Kingdom.[91] Although this characterization seems accurate, it also is more worrisome for the explanatory power of Bruner's theory. If the shareholder and social welfare relationship is a continuum rather than a clear distinction, the theory becomes very difficult to falsify. Country A, which is somewhat shareholder oriented and has somewhat robust social welfare protections, and thus fits the theory, becomes hard to distinguish from Country B, which is somewhat shareholder oriented but has rather weak social welfare protections, or from Country C, which is not especially shareholder oriented but has fairly strong social welfare protection. In Bruner's defense, he does not put Canada in this category. He argues that both Canada and Australia are considerably closer to the United Kingdom than to the United States.[92] But a theory that allows for endless gradations and lacks clear causal relationships may be hard to sustain, given the inevitable messiness of history and the theory's reliance on only four countries as its data points.

The absence of crisp causal connections also raises the question whether omitted factors might further complicate the apparent relationship between shareholder-centrism and social welfare. One obvious candidate for consideration might be antitrust or competition law. In a country that permits concentrated industries, both shareholders and employees might favor a shareholder-centric approach. The United States has traditionally been more aggressive in enforcing competition law than the other three countries,[93] although regulators' easing up on antitrust enforcement in the late 1970s and early 1980s was one of the contributing factors to the U.S. takeover wave of the 1980s.[94]

90. Bruner spends six full pages developing his explanation of *BCE, Inc. Id.* at 89–95.

91. *Id.* at 77, 200.

92. *Id.* at 176.

93. *See id.* at 154 (describing the prevailing view that "U.K. competition regulation . . . was 'modest' in comparison with U.S. antitrust regulation").

94. George Bittlingmayer, *The Antitrust Emperor's Clothes*, REGULATION, Fall 2002, at 46, 48–49.

III. How Weak Are U.S. Shareholders?

In the next Part, I will consider the possibility that the United States is simply an outlier, while the United Kingdom, Australia, and Canada coherently combine social welfare and shareholder orientation. But let me first raise the question whether the analysis accurately describes the United States and the relationship between corporate law and social welfare in this country.

One question, it seems to me, is whether shareholders really are as weak in the United States as the Bruner thesis suggests. Although U.S. shareholders lack many of the powers seen in the United Kingdom, they have one lever that U.K. shareholders do not: a robust right to sue.[95] Due primarily to the generous rules for compensating plaintiffs' attorneys, shareholders can much more easily sue in the United States than in the United Kingdom.[96] From this perspective, shareholder litigation may supply an *ex post* substitute for the *ex ante* powers U.K. shareholders have. Bruner recognizes this possibility but rejects it.[97] Although shareholder litigation may be a partial substitute, it falls far short of closing the gap. "If greater capacity to sue were truly intended to substitute for strong shareholder governance powers," he argues, "then we might expect to find similarly strong expressions of commitment to shareholders in the articulation of directors' duties."[98] But to the contrary, Bruner concludes "the divergence between the express shareholder-centrism of the U.K. Companies Act and the ambivalent formulation of directors' fiduciary duties in Delaware is every bit as stark as the divergence between the shareholders' governance powers in the two jurisdictions."[99]

I think Bruner is right about this. Even effective *ex post* remedies are unlikely to fully substitute for *ex ante* governance powers, and the efficacy of shareholder litigation is subject to particular doubt.[100] But I am

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95. *See, e.g.*, John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUD. 687, 688–90, 721–22 (2009) (testing the hypothesis that the United States is more "litigation-friendly" with respect to private enforcement of corporate law and concluding that the United States has a higher "intensity of formal private enforcement[, which] may compensate for [its] modest substantive protections, producing a 'shareholder-friendly' end result").

96. *See, e.g.*, *id.* at 692 ("For instance, various features of civil procedure . . . are more favorable to plaintiffs in the United States. In particular, the facilitation of class actions and the use of contingency fees stimulate entrepreneurial attorneys, whereas the United Kingdom's 'loser pays' fees rule will discourage representative litigation.").

97. BRUNER, *supra* note 16, at 104–05.

98. *Id.* at 105.

99. *Id.*

100. Bruner notes one reason for this doubt: the difficulty of determining litigation's effectiveness in deterring director misbehavior. *Id.* at 101–02. The fraud-on-the-market doctrine—which presumes reliance if the stock in question is actively traded and which is a key feature of most securities litigation—is under serious attack, both in the courts and among

somewhat skeptical about his characterization of U.S. corporate governance for a different reason. Although Delaware's takeover jurisprudence is far less shareholder oriented than the United Kingdom's, as Bruner points out at length,[101] the directors of target corporations are now far less likely to resist a shareholder-benefitting takeover than they were in the early years of the 1980s takeover wave.[102] In the 1990s, directors and managers were increasingly paid in stock and stock options, rather than cash, which made them much less likely to thumb their noses at a lucrative takeover offer.[103] During this same period, shareholders have made much more active use of the governance levers they do have at their disposal. As a result, some commentators have argued that publicly held companies in the United States are run in a highly shareholder-oriented fashion.[104] Delaware doctrine may not be shareholder oriented, the reasoning goes, but the behavior of Delaware corporations is.

If this characterization is accurate, as I believe it is, one possible response might be to predict that this recent shareholder orientation will be accompanied by increasingly robust social welfare protections. The obvious evidence to marshal in support of this thesis is the enactment of healthcare legislation in 2010,[105] which Bruner mentions at several points[106] but does not really explore. One problem with such an account is that it is very hard to see the causal relationship between the new shareholder-centric reality and the recent healthcare reform. Perhaps this is, in part, because the legislation, like the Dodd-Frank reforms enacted shortly thereafter,[107] and which Bruner does discuss,[108] is still too new to put in historical perspective. There is a second, very different problem as well: if the United

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academics. For an important recent academic critique, see William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69 (2011).

101. *See* BRUNER, *supra* note 16, at 36–42.

102. Marcel Kahan and Ed Rock were the first to draw attention to the implications of this development. Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871 (2002).

103. *See id.* at 896.

104. *See, e.g.*, *id.* at 899 (stating that managers have now adopted shareholder value maximization as their mantra). Ed Rock has recently suggested that shareholder–manager agency costs may no longer be the most important issue in U.S. corporate law. Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1910 (2013). U.S. corporations are run in so shareholder oriented a fashion, at least at present, that shareholder opportunism vis-à-vis creditors is a more relevant risk. *Id.* at 1910–11.

105. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

106. BRUNER, *supra* note 16, at 284–85, 290.

107. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 2, 5, 7, 12, 15, 18, 22, 26, 28, 31, 42, and 44 U.S.C.).

108. BRUNER, *supra* note 16, at 267–68, 270–72, 280–84. As noted earlier, Bruner focuses primarily on several provisions in the Dodd-Frank Act that give new authority to shareholders. *See supra* note 62 and accompanying text.

States is shareholder-centric too, all four countries line up on the same side of the spectrum. This would suggest that the diversity that motivated the book in the first instance is more illusory than real, although it also would raise the intriguing question of whether countries whose stock ownership is relatively dispersed will inevitably gravitate toward the shareholder-centric, robust social welfare side of the spectrum.

Let me speculate for a moment about this last possibility. The conventional explanation for the United Kingdom's robust social welfare system is that it was spurred in important part by the devastation England suffered from bombing in World War II, as well as the costs of the war in general.[109] Although Australia and Canada did not endure the same hardships, they were influenced by developments in the United Kingdom.[110] The United States, by contrast, charted a different course, adopting more limited social welfare protections and looking to employer-provided protections during a period when U.S. industry was dominant.[111] Perhaps this was unsustainable, and the United States also is headed toward the same shareholder-centrism and robust social welfare system as Bruner identifies in the other three common law nations.

IV. Is the United States Simply an Outlier?

I suggested in the last Part that U.S. corporate law currently may be more shareholder-centric than shareholders' limited formal powers suggest. In this Part, I will consider another possibility. Perhaps the United States is simply peculiar, an odd duck. I pursue this possibility by considering the impact of American federalism and the puzzling weakness of the American social safety net.

A. Federalism and the Limits on Shareholder-Centrism

The leading contemporary account of the political economy of American corporate law identifies federalism and American populism as two of the (mutually reinforcing) political reasons that managers have traditionally been strong and shareholders comparatively weak.[112] Thanks to populism, financial institutions have long been prevented from actively controlling American corporations, both by legal prohibitions on their stock ownership and by strong norms against their exerting control.[113] Managers

109. *See* John Clarke et al., *The Construction of the British Welfare State, 1945–1975*, *in* COMPARING WELFARE STATES, *supra* note 83, at 29, 34–44.

110. *See* BRUNER, *supra* note 16, at 176 (stating that the social welfare models of Australia and Canada resemble, "for broadly similar reasons," that of the United Kingdom, but that the resemblance is due to a unique set of factors).

111. *See id.* at 166–76.

112. *See* ROE, *supra* note 4, at x.

113. *Id.* at 48–49.

have been an important beneficiary of this straitjacket.[114] States' efforts to attract corporate business has further strengthened managers' hands, since managers tend to decide where companies incorporate and where they open a new plant.[115] Both sides in the endless (and now thankfully waning) debate over whether Delaware's dominant share of incorporations reflects a race to the top or a race to the bottom agree that Delaware is acutely sensitive to managers' interests, disagreeing primarily about whether managers' interests are aligned with those of shareholders'.[116]

One thing Delaware does not have is any particular reason to show concern for employees and the robustness of the social welfare system. Very few corporations have a significant number of employees in Delaware, since their headquarters and significant assets are elsewhere.[117] By contrast, nearly 20% of Delaware's annual income depends on the state continuing to keep the managers and/or shareholders of its corporations happy.[118] Delaware's resolution of most corporate governance issues—including takeovers, in stark contrast to both the United Kingdom and Australia—through common law judicial decision making also tends to favor the interests of managers.[119]

This does not refute the Brunerian thesis, of course. Even if Delaware does not have any particular interest in employees, it may nevertheless face pressure to take their interests into account. When the Delaware Supreme Court shifted from a relatively proshareholder approach to hostile takeovers (though still much less proshareholder than the United Kingdom) to a much more manager-oriented standard in 1989,[120] some commentators suggest that it is possible to attribute the shift to concerns that Congress might enact

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114. *See id.* at 5 (describing the rise of "professional managers").

115. This feature has been discussed more by sociologists than by corporate law scholars. *See, e.g.*, Jacob S. Hacker & Paul Pierson, *Business Power and Social Policy: Employers and the Formation of the American Welfare State*, 30 POL. & SOC'Y 277, 290 (2002) (discussing concerns amongst state social policy reformers that reform efforts would discourage business development).

116. For the founding articles in this debate, see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974), and Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). *See also* Armour & Skeel, *supra* note 77, at 1765.

117. Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 136 (2004).

118. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 6–8 (1993) (noting that up to 17.7% of Delaware's total tax revenue comes from franchise taxes and noting that this number is very high compared to other states).

119. For a much more detailed analysis of this point in the takeover context, see Armour & Skeel, *supra* note 77, at 1780–84.

120. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1142 (Del. 1989) (deferring to Paramount's managers' decision not to accept Time's offer because the offer was reasonably perceived by Paramount's board as a threat).

legislation discouraging takeovers, thus intruding on Delaware's turf.[121] Employees and their representatives were one of the groups urging congressional action.[122] If Delaware's shift was an effort to blunt the campaign for federal intervention by rendering it unnecessary, employees may thus have contributed indirectly to the Delaware ruling. Roe has offered a similar analytic on Delaware–Washington interaction: Delaware has limited reason to promote employee and other social welfare interests in the corporation, as it is boards and shareholders who decide whether to incorporate in Delaware.[123] If American corporate law were fully made in Washington, stakeholder interests would be more prominently involved.[124] Shareholders could put up with a Delaware tilt to managers (and an occasional venting of stakeholder interests), as the results for shareholders if corporate law were made in Washington might not be to their liking.[125]

Although Delaware's comparative disinterest in employees does not undermine Bruner's thesis, it does suggest that managers, whom Delaware clearly does attend to,[126] should be a central part of any story about American corporate law. Managers with authority may do a little extra for employees. The most obvious explanation for the manager-centrism of American corporate law, as compared to the United Kingdom's shareholder orientation, is American federalism. More nuanced historical factors, such as the contractual and self-regulatory traditions of U.K. corporate law and the more direct governmental role in the life of corporations in the United States may also have played a part.[127] Whatever the mix of factors, managers lie at the heart of corporate law in the United States but not in the United Kingdom. The general weakness of shareholder rights seems more closely related to managerial influence than to the limitations of the U.S. social welfare system. That is, Bruner's thesis needs to explain why American managerialism leads to both weaker shareholder power (than the United Kingdom) and some managerial noblesse oblige, in that the managers at times do things that are in employees' interest. Or, more subtly, perhaps managers, to maintain their authority in the firm over the long run, need to have political and social allies, such as employees and stakeholders.

121. *See* Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1964–66 (1991) (explaining the argument that Delaware courts might have taken into consideration possible congressional action in making their ruling).

122. *See id.* at 1965.

123. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2500–02 (2005).

124. *Id.* at 2502–04.

125. *See id.* at 2515–16.

126. *See supra* notes 114–16 and accompanying text.

127. *See, e.g.*, Armour & Skeel, *supra* note 77, at 1767–84 (describing the importance of self-regulation to differences in U.S. and U.K. takeover law).

As astute an observer as he is, Bruner is well aware of this. In the final major chapter of the book, he increasingly relies on coalition theory—which posits that corporate governance is shaped by shifting coalitions of employees, managers, and shareholders[128]—to assess recent developments such as the U.K. government's retrenchment on social welfare protections and the United States' augmenting of social welfare through healthcare reform and inclusion of shareholder-oriented provisions in the Dodd-Frank Act.[129] This has the benefit of making managers a much more central factor in the story, but it complicates Bruner's own core story about social welfare and shareholder power as the key features of corporate governance, with the structure of the former being the primary determinant of the latter.

B. Why Is the U.S. Safety Net So Weak?

Perhaps the real puzzle is not why or whether the United States is so much less shareholder oriented than the other three common law countries. Perhaps the real puzzle is America's social safety net. Developed non-common law countries tend to have extremely robust social safety nets (in some cases probably too well developed, but that is another story).[130] Although the social safety nets have been somewhat more contested in the United Kingdom, Canada, and Australia, each has much more protection than the United States.[131] From this perspective, the most puzzling feature of the social welfare–shareholder centrism equation is the weakness of the U.S. social welfare system. Why is the U.S. safety net so much weaker than everyone else's?

Although social welfare experts would offer a more nuanced account, four distinctively American factors seem to me to figure in the contrast between the United States and other common law countries. The first is the federalism concerns I noted in the previous subpart. The ability for businesses to move out of states that require generous provisions for employees, or impose other costs, acts as a constraint on states' abilities to provide generous benefits. Given states' interests in local control, this factor may also translate to some extent to limits on federal programs.

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128. BRUNER, *supra* note 16, at 130–31.

129. *See id.* at 265–67 (discussing coalitions and their effect on the post-crisis reform efforts and concluding that some reforms that would shift power to shareholders did make it into the Dodd-Frank Act); *id.* at 280–84 (noting that shifting dynamics have tended to promote greater social welfare protection (such as the health care law) in the United States); *id.* at 286 (noting the diverging postcrisis response in the United Kingdom, which has weakened stakeholder's interests).

130. *See, e.g.*, Liz Alderman, *Why Denmark Is Shrinking Its Social Safety Net*, ECONOMIX, N.Y. TIMES (Aug. 16, 2010, 12:12 PM), http://economix.blogs.nytimes.com/2010/08/16/why-denmark-is-shrinking-its-social-safety-net/ (discussing Denmark's "expensive, generous welfare state" and why it is shrinking).

131. *See* BRUNER, *supra* note 16, at 143.

The second is race.[132] The American experience with slavery and Jim Crow segregation complicates the politics of American social welfare in ways that sharply distinguish the United States from the other three countries under consideration. The most obvious beneficiaries of many forms of welfare legislation in the twentieth century would have been poor whites and poor blacks. Yet the racial divisions of the Jim Crow era and after made it nearly impossible to create a coalition consisting of both poor whites and poor blacks. This has created a very different politics of welfare legislation than is the norm in the United Kingdom, Canada, or Australia.

The third factor is ideological. The ideology of self-reliance that was once associated with the American Frontier has a stronger pull in the United States than elsewhere—especially as compared to European countries. This is reflected in the insistence that Americans who receive welfare benefits work for those benefits.[133] Although legal scholars periodically insist that every American should be entitled to a minimum level of income,[134] this contention has never seemed compelling to most Americans.[135]

The final factor is related to the third. America's bankruptcy discharge is considerably more generous than the discharge in most other countries, including the other common law countries. In the United States, a financially troubled consumer debtor nearly always has access to an immediate discharge of her debts based on the premise that both the debtor and her creditors are better off if an "honest but unfortunate"[136] debtor sheds her debts and is given a second chance.[137] In the United Kingdom, by contrast, debtors often receive a less generous discharge, and sometimes no discharge at all.[138] The American approach does less to discourage excessive borrowing, but it also appears to facilitate entrepreneurship, since an entrepreneur is not saddled by the obligations of a failed initial venture.[139] More importantly, it also serves as a partial proxy for the social

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132. Thanks go to Mark Roe for encouraging me to consider the implications of race.

133. *See, e.g.*, THEDA SKOCPOL, THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY 24–27 (2000).

134. *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 21–44 (1999) (proposing that every citizen be given a sum of money when they reach maturity).

135. Dylan Matthews, *Obama Doesn't Want to Just Write Welfare Recipients Checks. But What If We Did?*, WONKBLOG, WASH. POST (Aug. 8, 2012, 3:54 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/08/obama-doesnt-want-to-just-write-welfare-recipients-checks-but-what-if-we-did/ (describing the idea of a universal basic income as unpopular).

136. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

137. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 100 (2001).

138. *See id.* at 2, 238.

139. *See, e.g.*, John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship*, 10 AM. L. & ECON. REV. 303, 337 (2008) (stating that a generous bankruptcy discharge is associated with greater levels of self-employment in a sample of developed countries); Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. &

welfare benefits that are not available in the United States and accords with the ideological commitment to self-reliance rather than governmental support for those who are struggling.

The key question with the American preference for bankruptcy rather than robust social welfare protections is whether it is likely to endure, or whether the United States will eventually fall more closely in line with other developed nations. Predicting is always hazardous, but my guess is that the distinctions will remain. To be sure, a partial convergence may be underway, with Western Europeans retrenching somewhat on issues like the length of the workweek and age of retirement,[140] while the United States has added universal healthcare. But the structural and political factors that distinguish the United States from other common law countries, and from continental Europe, have not disappeared.

The Brunerian thesis easily accommodates these observations. If the American social welfare system remains weaker than that of other countries, the thesis would predict that shareholder powers will remain more limited in the United States. But the fit seems imperfect in at least two respects. First, as discussed earlier, U.S. governance appears to be much more shareholder oriented in practice than seems the case if we only consider Delaware doctrine. This shareholder-centrism seems real, and it does not seem connected in any discernible way with the recent, still greatly contested expansion of the U.S. social welfare system.

Second, Delaware corporate law has long oscillated between an emphasis on shareholders' interests, on the one hand, and a less shareholder-oriented emphasis on the corporate entity as a whole, on the other.[141] If shareholder-centrism is tightly linked to the strength of a country's social welfare system, we might expect to see some connection between these oscillations and changes in the social welfare system. But there do not seem to be any evident connections between the two.

Conclusion

Over the past several months, I have described the Brunerian thesis to a wide range of corporate law scholars—most from the United States, but some from the other common law countries as well—and asked them whether they find the thesis persuasive. Nearly every one has given one of

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ECON. 543, 563 (2003) (claiming that there is more entrepreneurial activity in U.S. states that permit greater exemptions in bankruptcy).

140. *See, e.g.*, Ian Traynor, *Eurozone Demands Six-Day Week for Greece*, GUARDIAN, Sept. 4, 2012, http://www.theguardian.com/business/2012/sep/04/eurozone-six-day-week-greece; Robert Winnett, *Queen's Speech: Retirement Age Delayed to 67 to Fund Flat-Rate Pension Scheme*, TELEGRAPH, May 8, 2013, http://www.telegraph.co.uk/news/politics/queens-speech/10043364/Queens-Speech-retirement-age-delayed-to-67-to-fund-flat-rate-pension-scheme.html.

141. The classic account is William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–75 (1992).

two responses, at least initially. Some explain why the thesis cannot be correct, and the others conclude that its insights are obvious. The reactions sound suspiciously similar to a definition I once heard of a successful scholarly presentation. The best papers and presentations, I was told, are the ones in which the audience is initially convinced that the scholar's thesis is completely wrong, and eventually concludes that it is obvious.

Bruner's claim that strongly shareholder-oriented governance—which sniffs of Wall Street rather than Main Street—is associated with robust social welfare protections—which sounds much more like Main Street—is both counterintuitive and plausible. Even if Bruner had not marshaled extensive supporting evidence, it would be a thesis that corporate law scholars, and perhaps social welfare experts as well, would need to grapple with. The elaborately detailed case that Bruner presents adds to its importance.

As my quibbles suggest, I am not sure whether Bruner is right. The mechanism that links the two halves of the thesis together is somewhat unclear, with connections that are more indirect than direct. But there is an undeniable logic to his thesis, and I do not believe that the connections he identifies are imaginary. Any future scholar who purports to provide an explanation of comparative corporate governance will need to consider how social welfare legislation may be shaping what he or she sees in the corporate governance of a particular country. It is hard to imagine a more compelling demonstration that U.S. corporate law scholars need not only to continue looking outside the United States but also to venture beyond the narrow confines of corporate law.