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## TABLE OF CONTENTS

**INTRODUCTION** ............................................ 53

**I. THE TRADITIONAL AMERICAN CORPORATION LAW MODEL AND THE TREND OF VARIATION FROM IT** 56

A. **BEGINNING REVISION IN THE UNITED STATES** 57
   1. The Hypothetical Transaction Circa 1965 58
   2. The Hypothetical Transaction Today 59
   3. The Hypothetical Transaction Under the Revised Model Act—More Flexibility for the Future 62

B. **THE REVISED MODEL ACT—FURTHER EVALUATION** 68
   1. The “Need” for Flexibility 68
   2. The RMA’s Reliance on Fiduciary Duty 70
   3. Conclusion of RMA Analysis 72

**II. VARIATIONS FROM THE TRADITIONAL MODEL—AN OPPOSITE TACK IN BRITISH COMPANY LAW** 72

A. **THE TRADITIONAL COMPANY LAW MODEL** 73
B. **VARIATIONS FROM THE MODEL—A DISCLAIMER** 75
C. **INTEGRITY OF CAPITAL** 76
D. **DISCLOSURE** 79
E. **CONTROLS ON MANAGEMENT COMPENSATION AND PERQUISITES** 82
F. **DISQUALIFICATION OF DIRECTORS AND OTHER MEANS OF SHAREHOLDER PROTECTION** 85
G. **SUMMING UP THE FIRST TWO COUNTERTRENDS—MODEL ACT REVISION AND BRITISH COMPANY LAW REFORM** 88

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INTRODUCTION

After years of relatively somnambulant existence, corporation law has awakened to the tune of major movements. A major movement in the United States is the American Bar Association's Committee on Corporate Laws' monumental project to review and restate in its entirety the authoritative Model Business Corporation Act. Another effort by an authoritative source in the United States is the American Law Institute (ALI) Principles of Corporate Governance and Structure: Re-

1. In part the awakening has been foreshadowed by sometimes shrill and nonauthoritative criticism and proposals initiated by groups outside the corporate establishment, such as a Nader group's campaign for federal chartering of corporations. See, e.g., R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR FEDERAL CHARTERING OF GIANT CORPORATIONS (1976); R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976).

2. The Model Business Corporation Act (MBCA) first appeared in 1950. In 1960, the MBCA Annotated appeared. The MBCA Annotated Second was published in 1971, and, as amended, is the version currently in use and cited herein, MBCA (1979). MBCA Third, or the REVISED MODEL BUSINESS CORPORATION ACT (Exposure Draft 1983) (RMA), was published for comment in March 1983. See Goldstein & Hamilton, THE REVISED MODEL BUSINESS CORPORATION ACT, 39 BUS. LAW. 1019 (1983). The RMA is the work product of the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association. Robert W. Hamilton, Schmidt Professor of Law at the University of Texas, served as reporter for the project.
statement and Recommendations, the ALI's initial foray into corporation law. In Great Britain, Parliament has enacted Companies Acts in 1967, 1976, 1980, and 1981, all amending the basic statute, Companies Act 1948. Company law is said to be "in greater disarray than at any time since the beginning of the century—both in content and in form."

All three of these corporation law movements proceed in distinctly different directions. Moreover, each movement marches on with little or no awareness of what is occurring in the other spheres. Most importantly, all seemingly proceed on the basis of "buzz word" philosophies and without clear thought about what goals they seek to achieve or what roles corporation law should play.

In both the United States and Great Britain commentators have made little effort to distill the trend of corporation law. Instead, discussions of corporation law frequently involve excessive examination of controversial and radical proposals, such as federal chartering in the United States and worker participation in corporate governance in Europe.

The goal of this Article is to divine, from legislation and other authoritative sources, the directions in which corporation and company law actually have proceeded in the last two decades. The last extensive comparison of American corporation and British company law was made by Professor L.C.B. Gower.


7. See infra notes 318-24 and accompanying text.


Against the backdrop of corporation and company law developments over the past three decades, this Article discusses a third trend, the ALI Principles of Corporate Governance and Structure: Restatement and Recommendations. Analyzing all three trends makes clear that there exists a dearth of fresh thought on a philosophy of corporation law or about what ends corporation law reform should seek to achieve.

I. THE TRADITIONAL AMERICAN CORPORATION LAW MODEL AND THE TREND OF VARIATION FROM IT

Based upon the concession theory, American corporation law has traditionally been restrictive. A fictional entity, a corporation had only those powers conceded to it by the state. In the past three decades, however, many American jurisdictions have moved away from restrictive toward consensual or enabling views, especially with regard to small, closely held corporations.

Even before this change, Justice Brandeis stated that some key American commercial states engaged in a race "not of diligence but of laxity" for the benefit of large as well as small corporations. In competition for incorporations within their borders, these states tried to "out-Delaware Delaware." In a few states, the philosophy of regulation was to impose as few controls as possible, allowing corporations to obtain the privileges of corporate existence without any corresponding bur-

11. "A corporation is a creature existing, not by contract, but, in this country, is created or authorized by statute; and its rights, and even modes of action, may be, and generally are, defined and marked out by statute; and where they are, they can not be changed, even by the contracts of the corporators." Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, 295 (1860).
14. As late as 1972, in Michigan's adoption of a laissez-faire corporation law, to "out-Delaware Delaware" was the drafters' avowed aim. See Downs, Michigan to Have a New Corporation Code?, 18 WAYNE L. REV. 913, 914 (1972).
dens. It was, in effect, no philosophy at all. That state of the law was extensively noted, and even satirized, years ago.

About the time that Professor Gower compared American and British corporation laws, and for some years thereafter, however, thirty-five to forty other American states remained in the middle of the restrictive-to-enabling spectrum. Those states retained requirements from which corporations could not vary or, in permitting variations from the model the statute envisioned, set relatively high minimum standards. Those corporation statutes had substantive content; they contained affirmative commands and definite prohibitions. Through their corporation laws these states attempted to retain at least a modicum of shareholder, if not creditor, protection and to hold corporate directors and officers to relatively high standards of conduct and procedure. Flexibility had not yet become supreme.

A. BEGINNING REVISION IN THE UNITED STATES

In the 1960s the march of American state corporation law became a march toward uniformity. The Model Business Corporation Act (MBCA) became the dominant state corporation law, spreading from sixteen states in 1966 to thirty-four in 1977. Moreover, many of those thirty-four states joined the

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16. The late Professor William Cary concluded that there is "[p]erhaps . . . no public policy left in Delaware corporate law except the objective of raising revenue." Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 684 (1974). Of corporation law in general it has been said that significant "rights . . . once attributed to the shareholder interest . . . have long since been sacrificed on the altar of corporate flexibility." Borden, Going Private—Old Tort, New Tort or No Tort?, 49 N.Y.U. L. Rev. 987, 1020-21 (1974).


18. See infra note 98.


20. See, e.g., MBCA § 32 (unless otherwise provided, shareholder quorum is a majority "but in no event shall a quorum consist of less than one third"); In re Wm. Faehndrich, Inc., 2 N.Y.2d 468, 141 N.E.2d 597, 161 N.Y.S.2d 99 (1957) (higher quorum requirements struck down where found in bylaws rather than articles).

21. See, e.g., MBCA §§ 19 ("Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares.") and 47 (corporation may not lend money to directors absent shareholder authorization).

MBCA, which had traditionally been a mildly restrictive, middle-of-the-road scheme, in casting their lot with the philosophy of "enabling" and "flexibility." 23

To illustrate the MBCA's course, it might behoove one to compare today's treatment of a hypothetical transaction with MBCA treatment of the same transaction some years ago. 24 An illustrative case might be the protection the Act gives to minority shareholders in cases involving the issuance of shares. Assume that those in control of a corporation with 10,000 shares outstanding propose to authorize and issue 10,000 new shares to friends or associates. The price is to be relatively attractive: somewhat but not drastically below book value and, hence, in the particular corporation, somewhat but not drastically out of line with probable market value. A purpose of the issuance is to dilute by one-half the minority share interest's voting power, perhaps causing the minority to lose a directorship they had been able to control through cumulative voting.

1. The Hypothetical Transaction Circa 1965

To increase the authorized shares the controlling shareholders might first have had to amend the articles of incorporation at a shareholders' meeting. At the time the MBCA required a quorum of at least a majority of shares present for valid action to take place. 25 At the meeting, for the amendment to pass, two-thirds of the shares would have had to approve it. 26

Even if the amendment were adopted and the shares duly authorized, the directors would still have faced the issue of preemptive rights. The MBCA provided that unless the articles of incorporation expressly took them away preemptive rights still existed in the corporation. 27 The controlling shareholder-directors would then have had to give the minority shareholders an opportunity to purchase pro rata portions of the proposed new issuance, thus maintaining their proportionate voting and own-

23. The individual noting the MBCA's shift toward laissez faire was Professor Melvin Eisenberg, School of Law, University of California—Berkeley. See Eisenberg, The Model Business Corporation Act and the Model Business Corporation Act Annotated, 29 Bus. Law. 1407 (1974).
24. For comparative purposes, the current Washington Business Corporations Act, WASH. REV. CODE, §§ 23A.04.010-98.030 (1974) will be used as a Model Act of the older vintage. The Washington Act has not been substantially revised in the last decade and is only now undergoing revision by a state bar committee.
25. Id. § 23A.08.290.
26. Id. § 23A.16.020.
27. Id. § 23A.08.220.
ership rights. If, however, for lack of financial wherewithal or some other reason, the minority shareholders could not exercise their preemptive rights, the controlling shareholders still would not have been free to place shares in the friendly hands of their associates.

Through the mid-1960s the MBCA left treatment of the ever-present conflict-of-interest problem to case law. Thus, if it appeared that directors were attempting to serve their own interests or those of associates rather than the best interests of the corporation, the three-pronged common law test applied. First, the directors had to disclose their personal interests, the interests of friends, associates, or persons controlled by the directors, and the corporation's interests in the proposed transaction. Next, a majority of the disinterested directors, with interested directors perhaps not even being counted for quorum purposes, had to approve the transaction. If a quorum or approval could not be obtained because of a number of directors being interested in the transaction, shareholder approval might be necessary. Finally, even with full disclosure and the vote of a majority of the disinterested directors, the transaction would have had to have been fair to the corporation. Thus, even beyond preemptive rights and other safeguards, the fiduciary duty of loyalty would have been applicable to the directors' proposed issuance of shares, calculated as it was to consolidate incumbent directors' control of the corporation.

Hence, in the 1960s and early 1970s, minority shareholders threatened with dilution by a new issuance of shares had, as plates of armor, several statutory and common law protections. Any one of these protections would not have been a complete safeguard, but together they formed a shield which the board of directors or those otherwise in control of the corporation would find difficult to penetrate.

2. The Hypothetical Transaction Today

Today under the MBCA the picture would be markedly dif-

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28. Not until 1966 was a section on director conflict of interest added to the MBCA. See MBCA § 41 comment at 842.

29. See generally id. at 842-44; Bulbulia & Pinto, Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards, 53 NOTRE DAME LAW. 201, 203 (1977). In addition, fairness sometimes meant fairness in operation as well as on the face of the transaction. Thus, directors and their affiliates were subject to having their transactions judged with the tint of hindsight. See Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 121 N.E. 378 (1918) (Cardozo, J.).
ferent. The quorum for the meeting of shareholders to authorize new shares could be set as low as one-third of the shares,\textsuperscript{30} giving an added opportunity for holders of mere working control to consolidate their position. Once the meeting had been convened, a simple majority, rather than two-thirds, of shares entitled to vote could amend the articles.\textsuperscript{31}

When faced with the issuance of new shares and potential dilution, minority shareholders in the corporation might also find that they no longer had preemptive rights. Today's MBCA provides that "shareholders of a corporation shall have no preemptive right" unless expressly granted by the articles of incorporation.\textsuperscript{32}

The shareholders might even find themselves without power to challenge the issuance of shares to friends, associates, or other sets of friendly hands. The MBCA has now codified conflict-of-interest procedures\textsuperscript{33} weaker than the common law required, and perhaps so watered down that corporate officers' and directors' duties no longer include any duty of loyalty. The MBCA, like Delaware law, now provides that no act of directors shall be void or voidable if disclosure has been made and if, based upon disclosure, the disinterested directors approve the transaction,\textsuperscript{34} interested directors being counted for quorum purposes. Even if disclosure and approval have not taken place, however, the MBCA provides that, alternatively, the transaction will remain valid if "fair" to the corporation.\textsuperscript{35} The old three-pronged common law test has been cut in two, making it disjunctive—disclosure and vote or fairness will suffice.\textsuperscript{36}

\textsuperscript{30} MBCA § 32.
\textsuperscript{31} MBCA § 59. \textit{See also supra} note 23 and accompanying text. If the corporation had implemented lower quorum requirements, only one-sixth (one-half of one-third) of the shares could, in theory, take action short of organic change such as merger or sale of assets. Thus, for example, one-sixth could approve transactions where a majority of directors are interested. MBCA §§ 32 (majority represented at meeting can take valid action), 41(b) (shareholder ratification or authorization in conflict-of-interest situations). One-sixth might be able to remove a director. MBCA §§ 32, 39 (removal by a majority entitled to vote for the election of directors).
\textsuperscript{32} MBCA § 26.
\textsuperscript{33} MBCA § 41.
\textsuperscript{34} \textit{See Del. Code Ann. tit. 8, § 144} (1967); MBCA § 41.
\textsuperscript{35} MBCA § 41.
\textsuperscript{36} Prominent authority reads state statutes as having that effect. \textit{See E. Folk, The Delaware General Corporation Law} 82-86 (1972). \textit{But see Remillard Brick Co. v. Remillard-Dandini, 109 Cal. App. 2d 405, 418, 241 P.2d 66, 74 (1952)} (even though the statute's disclosure and vote requirements are met, "transactions that are unfair and unreasonable to the corporation may be avoided.").
Fairness connotes as its opposite damage or a likelihood of damage to the corporation. Thus, with fairness alone as the touchstone, corporate officials' duty becomes merely a duty of not harming the principal, rather than a duty of loyalty. At common law, since the duty was one of loyalty, either damage to the corporation or benefit to the agent could result in liability. Moreover, regardless of whether the result was ultimately "fair" to the corporation, the common law required approval by disinterested directors in all cases in order to inculcate in the agent fidelity and obedience toward the principal.

In the hypothetical posited above, the minority would charge that, through issuance of the shares, the directors seek to serve their own interests rather than the corporation's interests. Under a fairness-alone conflict-of-interest analysis, as permitted by the current MBCA, however, the tendency of courts will be to look only at price. If the shares are issued at a price which approximates market value, the issuance is fair to the corporation. It is of little importance who receives the shares or that the substantial benefit inures to those in control.

The hypothetical just discussed provides a good illustration of what flexibility means in a corporate statute, and demon-


[An] allegation of damages to the corporation... has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiffs for wrongs committed... but... "to prevent [wrongs], by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others...." (emphasis in original) (citation omitted).

38. Hence, regardless of fairness of the transaction itself, "nondisclosure" by a corporate official of his or her conflict of interest was "itself unfair." Hayes Oyster Co., 64 Wash. 2d at 382, 391 P.2d at 984. See also Marsh, Are Directors Trustees? Conflicts of Interest and Corporate Morality, 22 Bus. Law. 35 (1966).

39. In truth, even before the Model Act changes, courts gave varied treatment to transactions such as the hypothetical posed. Compare Hyman v. Vel sicol Corp., 342 Ill. App. 489, 97 N.E.2d 122 (1951) (majority's intent to squeeze out minority and to consolidate its own position is irrelevant if share price is adequate and independent business purpose exists for the share issuance) with Browning v. C & C Plywood Corp., 248 Or. 574, 434 P.2d 339 (1967) (intent to squeeze minority is to be examined regardless of alternative purpose for the stock issuance). The varied treatment courts have given to such cases even with the presence of such safeguards may be a reason to retain or strengthen those safeguards.
strates the veer toward pro-management interests the MBCA has taken. Other examples of those same two phenomena exist in other sections of the MBCA.40 It becomes apparent from the illustration that corporate law no longer has protection of shareholders deeply at heart.41 In large part due to the MBCA, the “enabling” or “consensual” philosophy now reigns supreme in the corporation laws of almost every American state. Few affirmative commands or other substantive regulations remain. Flexibility has become the talisman.

3. The Hypothetical Transaction Under The Revised Model Act—More Flexibility for the Future

The proposed Revised Model Business Corporation Act (RMA) has features which represent an improvement over prior MBCA versions. The proposed statute's organization alone is an improvement.42 Some of its substantive provisions, as well, seem to provide workable, creative solutions, even in an absolute sense.43

Even so, in order to evaluate the RMA, “you must,” in Justice Holmes' words, “look at it as a bad man, who cares only for the material consequences . . . knowledge enables him to predict” and “not as a good one, who finds his reasons for conduct . . . in the vaguer sanctions of conscience.”44 The RMA's drafters predicate the overwhelming majority of their revisions on a need for yet more flexibility, and apparently find justification for those revisions in notions of good faith, fiduciary duty, and

40. See, for example, the MBCA's possible relaxation of directors' duty of care and allowance of increased delegation by directors of their functions, MBCA §§ 35, 42, and the directors' and officers' nonexclusive indemnification provision, MBCA § 5.


42. MBCA lumps many of its important provisions into a lengthy chapter entitled “Substantive Provisions.” MBCA §§ 3-52. RMA adopts a functional, chronological arrangement and, thus, there are discrete RMA chapters on Incorporation (Ch. 2), Purpose and Powers (Ch. 3), Name (Ch. 4), Office and Agent (Ch. 5), Shares and Distributions (Ch. 6), Shareholders (Ch. 7), Officers and Directors (Ch. 8), and other corporations topics.

43. See, e.g., RMA § 13.01-31 (a comprehensive and innovative approach to dissenters' rights).

44. O.W. HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 171 (1920).
“the vaguer sanctions of conscience” in those to whom they would entrust that flexibility.

In the hypothetical previously discussed, a corporation’s directors propose to dilute by one-half a minority share interest’s voting power. If successful in diluting the minority interest, the directors would perhaps cause the minority to lose a directorship which it had in the past been able to control through cumulative voting. In a corporation formed under the RMA, however, the directors may not even need to dilute the minority interest. The RMA eliminates presumptive cumulative voting, instead requiring articles of incorporation to take affirmative steps to install cumulative voting.45

Cumulative voting promotes minority representation on the board. It can also result in the election of directors who perceive their task as representation of special interests the minority may have. Cumulative voting can thus result in fractionalism. Just as frequently, however, the presence of two or three directors elected cumulatively can serve to stir up a complacent board of directors and management.46 Through the interaction of cumulative voting, which promotes minority representation, and state law provisions for staggered boards of directors, which can eliminate representation for all but large minority shareholders,47 representation by minority holdings with significant stakes is a frequent result of cumulative voting. It is frequently a very constructive result in a corporation. The RMA drafters sweep away even this limited protection for minorities with no analysis whatsoever.48

Even assuming the existence of minority representatives to eliminate, under the RMA the board of directors can act with a quorum of as few as one-third, rather than the traditional majority.49 If, therefore, the directors need to preface the minor-

45. RMA § 7.28.
47. See, e.g., W. Cary & M. Eisenberg, Cases and Materials on Corporations 254-61 (5th ed. 1981). For example, with a nine-person board, under cumulative voting a minority of 11% plus could elect one director. When the same board is staggered, for example, into three classes of directors with a class of three elected each year for three-year terms, a minority must hold at least a third of the shares to obtain representation, even though cumulative voting still exists.
48. See RMA § 7.28 (eliminating cumulative voting with no analysis or comment).
49. Compare MBCA § 40 (quorum of a majority) with RMA § 8.24 (quorum can be as low as one third).
ity's dilution with an increase in authorized shares, as few as one-third of the directors can formulate the needed amendment to articles of incorporation.\(^{50}\) Moreover, the RMA now provides that a majority of the shares voting on an amendment, that is, those present in person or by proxy, rather than a majority of the shares entitled to vote, can in many instances amend the articles.\(^{51}\) Thus, at a shareholders' meeting, as few as one-sixth of the total outstanding shares could approve the amendment to increase authorized shares.

To eliminate minority representation, however, a share issuance may not even be necessary. The RMA authorizes common stock redeemable at the corporation's option.\(^{52}\) If redeemable common stock exists in the corporation and the minority holds shares of it, the directors could cause redemption of the redeemable common, on either a discriminatory or non-discriminatory basis,\(^{53}\) and thereby dilute or eliminate the minority interest.

Common shares are likely to be both the residual ownership and voting interests in a corporation. The objection to redeemable common shares has been that the device gives management the power "of reducing common stockholders," the residual interests, "to the status of impotent money-providers,"\(^{54}\) For that reason, such shares have had little currency in American corporation law. A corporation has had to have at least one broad class of non-redeemable stock holding the residual interest.\(^{55}\) The RMA drafters, though, analogize redeemable common stock to typical and ubiquitous share transfer restrictions, more commonly known as buy-sell agreements.\(^{56}\)

Buy-sell agreements often give a corporation an option to

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50. RMA § 8.24.
51. Compare MBCA § 59(3) (majority entitled to vote) with RMA § 10.03 (majority of those present unless amendment would give rise to dissenters' rights). Prior amendments to the MBCA permitted shareholder quorums as low as one-third and reduced vote requirements from two-thirds to a majority. See supra notes 25-27 and accompanying text.
52. RMA § 6.01(d).
55. See, e.g., MBCA § 15 (allowing only special or preferred classes of stock to be redeemable). Cf. RMA § 6.01(d)(1)(ii) (permitting redeemable common shares, but only "if there exists at least one class of voting common shares not subject to redemption").
56. RMA § 6.01 comment 3.
acquire a shareholder's common shares. The right to exercise that option, however, is contingent upon specified triggering events, such as an attempted share sale to a third party, termination of an employee-shareholder's employment, or a shareholder's death or disability. The RMA drafters conspicuously fail to note that with redeemable common shares the only triggering event will be management's unilateral decision to redeem. Of course, a desire to silence or eliminate minority shareholdings can in whole or in part motivate that decision.

If the minority does have a voice in the corporation through cumulative voting and redeemable common shares do not exist or are not held by the minority, analysis again reverts to a share issuance as the means to dilute and silence the minority. Under the RMA the corporation can issue the shares to friendly hands who can pay for the shares not only with cash or property but even with promissory notes or the mere promise of future services.

Traditionally, American corporation statutes have refused to accept future services or promissory notes as valid consideration for shares. Knowledgeable lawyers, though, could effectively evade the prohibition by using par value stock and ensuring that par value was low, for example, fifty cents per share. The share subscriber in effect paying with future services would pay par value while other subscribers paid full or market value, say, five dollars per share. If the lawyer had so structured the transaction, the five dollar subscriber could base a complaint only upon a loose construct known as the rule of equitable contribution. That rule states that, beyond the legal requirement to pay par value, similarly situated subscribers only have to pay about the same consideration if purchasing at about the same time. Courts, though, usually find the sub-

57. See, e.g., G. Seward & W. Nauss, supra note 22, § 9.11, at 380-82 (sample buy-sell agreement).
58. RMA § 6.21.
59. See, e.g., MBCA § 19. Cf. Nev. Rev. Stat. § 78.210 (1979) (labor, services, personal property, or real estate may be consideration for shares, but only if the consideration is paid in full prior to issuance of the shares).
60. An additional effect may be to keep the corporation's annual franchise or license fee low, since the fee sometimes is based upon par value of the authorized shares. See, e.g., Wash. Rev. Code § 23A.40.060 (1974). Cf. MBCA § 130 (tax based on number of shares rather than aggregate par values).
scribers not to have been similarly situated.63

The RMA drafters cite this ease of evasion as the reason for eliminating the prohibition on stock for future services or for promissory notes.64 They fail, however, to discuss the policies underlying the rule. Through the years commentators have given various reasons for the prohibition, including, for example, that a promise of future services would yield nothing for creditors upon insolvency.65 A real reason for the prohibition may be simply that many frauds or sharp deals start out that way. Promoters or insiders tendering future consideration may pay little or nothing for shares, while innocent third parties pay the full price.

Disclosure may palliate the problem to some degree.66 With state law prohibitions on stock for future services, however, the medium may have been the message. Statutes clearly signaled that something could often be askew with stock for services or notes. The RMA drafters have given little thought to beefing up the prohibition. Instead they have adopted the easy choice, elimination of the prohibition.67

In the hypothetical corporation, directors could also issue shares to themselves. The RMA would facilitate that transfer. A new provision expressly empowers directors to approve share options as incentive plans for directors, officers, and employees, without shareholder approval.68 As a further precaution against future trouble from a minority, including, for example, a potential tender offeror, the corporation could have options outstanding to directors and other sets of friendly hands. Exercise of these options would dilute the interest of the minority, or potential tender offeror with a toehold or larger minority position.

As noted above, the RMA allows a corporation to accept promissory notes or future services as consideration for shares. Under the RMA it could also lend corporate funds to directors.

64. RMA § 6.21 comment.
65. Herwitz, supra note 61, at 1105-06.
66. Where federal securities laws require registration, disclosure is affirmatively required. SEC Securities Act Release No. 5278 (July 16, 1972) (hydrograph disclosure of cheap or free stock). See also SEC Rule 253(c), 17 C.F.R. § 230.253(c) (1982) (in addition to disclosure, escrow of stock for services required).
67. A physically remote section of the RMA does require disclosure when stock is issued for future services or promissory notes. See RMA § 16.21(b).
68. RMA § 6.24.
officers, and employees for use in the purchase of shares.\textsuperscript{69} Prior MBCA versions have required two-thirds shareholder approval for loans to directors and officers.\textsuperscript{70} Some MBCA jurisdictions went so far as flatly to prohibit such loans.\textsuperscript{71} The RMA now sweeps away all restrictions on corporate loans to officers and directors.\textsuperscript{72} Directors could, for example, pledge the shares themselves as collateral for the loans. Both accounting practice and common sense dictate that such collateral is often of little value since a corporation's own shares have no worth in the corporation's own hands.\textsuperscript{73} Nevertheless, the RMA discusses neither the risk nor the appearance of abuse that loans to directors or officers can involve.

Finally, if the RMA corporation under discussion were to be a little old-fashioned, electing to have preemptive rights, a share issuance to directors and officers could nonetheless be the means of diluting the minority. Where preemptive rights do exist, the MBCA alternative section and the RMA do a service by codifying standard exceptions to the preemptive rights doctrine.\textsuperscript{74} These exceptions existed at common law, but in varying and ambiguous form.\textsuperscript{75} The RMA alternative provision, however, invents and inserts a new exception, one unknown to common law preemptive rights formulations. This exception makes preemptive rights inapplicable to "shares issued as incentives to directors, officers, or employees."\textsuperscript{76}

As the hypothetical under discussion has demonstrated, shareholders have never had complete protection against a

\begin{itemize}
\item \textsuperscript{69} See RMA §§ 3.02(12), 8.32.
\item \textsuperscript{70} See, e.g., WASH. REV. CODE § 23A.08.440 (1974) (two-thirds); MBCA § 47 (majority).
\item \textsuperscript{71} See, e.g., ALASKA STAT. § 10.05.213 (1962).
\item \textsuperscript{72} RMA §§ 3.02(12) (general corporate powers include power to lend money and credit to directors, officers, employees, and agents), 8.32 (board of directors may promulgate "a general plan authorizing loans and guarantees" for directors).
\item \textsuperscript{73} See, e.g., P. DEFLEISE, K. JOHNSON & R. MACLEOD, MONTGOMERY'S AUDITING 617-19 (9th ed. 1975) (valuation of treasury stock).
\item \textsuperscript{74} See MBCA § 26A; RMA § 6.30.
\item \textsuperscript{75} Compare Yasik v. Wachtel, 25 Del. Ch. 247, 17 A.2d 309 (1941) (no preemptive right in shares issued pursuant to original plan of financing) with Ross Transport, Inc. v. Crothers, 185 Md. 573, 45 A.2d 267 (1946) (no preemptive right where shares are part of original issue unless conditions have changed). See also N.Y. Bus. Corp. Law § 622(c)(5) (McKinney 1963) (no preemptive right in originally authorized shares issued in first two years of corporate existence). Cf. RMA § 6.30(e)(3) (no preemptive right in first six months after incorporation).
\item \textsuperscript{76} RMA § 6.30(e)(i). Cf. MBCA § 26A(a)(i) (no preemptive right in shares issued to directors, officers or employees if issuance previously authorized by a shareholder vote).
\end{itemize}
squeeze or freeze-out by means of a share issuance. Fifteen years ago, however, the shareholders did have several statutory and common law shields, none of which afforded complete protection. In combination, though, the protection afforded would in most cases prevent management from achieving nefarious ends. Tomorrow under the RMA, or even today under the MBCA, all or most of these shareholder protections are gone. In addition, the RMA will give corporate management a proliferating choice of swords to use, although, perhaps, no one of them may be capable of striking a death blow to the minority. In combination, though, the RMA provisions give, and have as an avowed aim the bestowal of, an almost infinite range of choices for corporate management to use for good or for evil as they wish.

B. THE REVISED MODEL ACT—FURTHER EVALUATION

Many other RMA provisions also purposefully eliminate all substantive or other control over corporate entities. Some of these provisions have surface appeal. Others run flatly counter to well-developed state or federal policy.

1. The “Need” for Flexibility

All of this elimination is done in the name of flexibility. Repeatedly, the RMA official comments reason that this or that relaxation or elimination of a formerly required procedure or substantive command is required because “flexibility” is

77. See supra notes 25-29 and accompanying text.
78. See, e.g., RMA §§ 2.03 (secretary of state or analogous official no longer required to ascertain upon filing if articles of incorporation conform to law), 6.03(b) (directors may be granted blank check authority to determine relative rights and preferences of new issuances of preferred shares), 6.40(d) (directors have power to revalue corporate assets for purposes of declaring a dividend or making other distributions), 11.03(g) (in surviving corporation, no shareholder vote required on merger if merger will not cause more than 20% increase in shares outstanding).
79. See, e.g., RMA § 7.28 (elimination of cumulative voting); supra notes 45-47 and accompanying text. Seven state constitutions mandate cumulative voting. Ten other states statutorily mandate cumulative voting in all corporations. W. Cary & M. Eisenberg, supra note 47, at 260. See also RMA § 3.02(16) comment (permitting corporate “contributions . . . that may not be charitable, such as for political purposes or to influence elections”). Federal law, of course, makes criminal direct corporate contributions to political campaigns. See 2 U.S.C. § 441b (1982), construed in Cort v. Ash, 422 U.S. 66 (1975). Indirect corporate support for elections, such as through political action committees, is also currently a matter of some debate. See, e.g., Isaacson, Running with the PACs, Time, Oct. 25, 1982, at 20.
needed and "discretion" is necessary. Curiously, in their comments the RMA drafters use the passive voice. The question that arises is flexibility and discretion for whom. The answer is flexibility and discretion for corporate managements and, secondarily, for their counsel. At a minimum, the RMA could forthrightly use the active voice in telling legislators and opinionmakers that it is management who purportedly needs additional flexibility.

The RMA is a lawyers' product. Members of the ABA Committee on Corporate Laws are corporate lawyers. When faced with a choice between substantive commands or "flexible" organizational guidelines, they consider the former but adopt the latter. They do so not because of any ulterior motive, but rather because they understandably believe the corporate bar to be comprised of persons of rectitude and ability. Naturally, such individuals would not allow the flexibility the statute grants to be used for mean or sharp dealing. Coincidently, however, that flexibility also may make easier counsel's task of advising management, structuring a transaction, or authoring an opinion letter. Under older MBCA versions, attorneys sometimes found it difficult to defend the legality of a transaction because a substantive prohibition or command directly or indirectly impinged on the transaction. Yet the RMA drafters fail to heed Justice Holmes's admonition to approach and evaluate the proposed statute from the perspective of a "bad man." Undoubtedly, there exist some members of the corporate bar with only a modicum, or less, of integrity. There are also corporate managers whom even the "vaguer sanctions of conscience" do not affect.

80. See, e.g., RMA § 6.03 comment ("desirable flexibility"). See also Letter from Elliott Goldstein to Stanley A. Kaplan (Jan. 25, 1982) (ALI project should provide "flexible guidelines"); concepts of corporate governance should "evolve flexibly").

81. See, e.g., RMA §§ 6.03 comment ("This section therefore permits prompt action and gives desired flexibility."), 3.02 comment ("It is clear that narrow and limited powers clauses are undesirable.").

82. And their circle is closed. Although membership on the myriad ABA Section on Corporation, Business and Banking Law committees is open, membership on the Committee on Corporate Laws is closed. Wheeler, Chairman's Message, 38 Bus. Law., at viii (Nov. 1982).

83. Moreover, as A.A. Sommer has pointed out, few complex transactions can go forward without a corporate lawyer's participation. Sommer, The Emerging Responsibilities of the Securities Lawyer, Address to the Banking, Corporation and Business Law Section, New York State Bar (Jan. 24, 1974), reproduced in part in R. Jennings & H. Marsh, supra note 46, at 1181-82, 1209-10.
2. The RMA's Reliance on Fiduciary Duty

In truth, though, the seemingly infinite flexibility the RMA will grant is not infinite. Corporate directors have independent fiduciary duties of care and loyalty.\textsuperscript{84} Time and again the RMA official comments, and occasionally the proposed statute itself, remind the reader that exercise of this flexibility remains subject to fiduciary duty. Loans to corporate directors and officers, redemption of redeemable common shares, issuance of stock for future services or promissory notes, the directors and officers exemption to preemptive rights, amendments to articles of incorporation, and other enabling provisions, the reader is reminded, are all subject to the command that directors act with due care, in good faith, and in the corporation's best interests.\textsuperscript{85}

Considered together with the ever-escalating degree of flexibility the statute grants, all of this RMA effort to remind of fiduciary duty has several effects. First, it appears that the entire edifice of corporate law has begun to totter on the head of a pin. Every issue comes directly or indirectly to fiduciary duty. Moreover, that fiduciary duty is not the strict common law variety which even at its best produced inconsistent results. Instead, it has become a much weakened statutory variety designed, in the main, as a safe harbor into which corporate managements may sail.\textsuperscript{86}

Second, commentary reminding lawyers and judges that fiduciary duty overrides the enabling statutory provision is just that—commentary. In the process of enactment and subsequent use, the commentary accompanying the statute often becomes lost or mired down in a morass of other commentary and precedent. Even if the official commentary remains central, the statute and its enabling language will most often carry the day. The commentary's reference to fiduciary duty will play a role only in case of ambiguity or a void in the statute itself.

A third consequence of dependence on fiduciary duty is that it leaves aggrieved shareholders with no clear or easy means of resolving their grievances. The presence of "bright-

\textsuperscript{84} See supra notes 28-29 (fiduciary duty under state law).

\textsuperscript{85} RMA §§ 3.02(12) comment, 6.01(d) comment, 6.21(c) comment, 6.30 comment, 10.01 comment. See also id. § 6.40 (fiduciary duty as a control on directors' reevaluation of assets and declaration of dividends).

\textsuperscript{86} See supra notes 33-39 and accompanying text. The inconsistency that even strong forms of fiduciary duty can produce will be discussed infra text accompanying notes 284-91.
line rules" containing substantive prohibitions could prevent a dispute from arising in the first place or may enable parties to resolve a question through negotiation. In litigation, a substantive rule may enable the parties to resolve issues before trial, such as on motion for summary judgment. Under the RMA scheme of reliance on fiduciary duty, "the bright line" fades and questions of fact abound. Good faith is an issue likely to be ubiquitous. The accompanying issue of fairness, another question of fact, will also remain. Resolution in advance of trial, such as on motion for summary judgment, will become only a remote possibility. The plaintiff-shareholder will have the burden of proving the transaction unfair, a heavy burden indeed when the parties' relative resources are compared. Although noble in purpose and sentiment, the higher call to fiduciary duty may foreclose vindication of all claims except those where the stake is very large or the shareholder very bitter.

Finally, in recent years corporate counsel have dusted off and resurrected a few older precedents which permitted a board of directors to dismiss a derivative action as not in the best interests of the corporation. Courts have generally accepted this premise. Noteworthy is that a defendant officer or

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88. Under the RMA, if directors have had disclosure and a vote on a transaction, the shareholder challenging the transaction has the burden of proving it not fair at the time it was "authorized, approved, or ratified." RMA § 8.31.

89. A court will grant summary judgment only if no issue as to a material fact exists and the moving party is entitled to succeed on that issue as a matter of law. Thus, summary judgment is inappropriate where the issue of good faith plays a dominant role. See Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

90. Shareholders must stake discovery costs out of their own funds, including costs for counsel's attendance at the numerous depositions the defending corporate law firm is likely to schedule and the retention of experts such as appraisers and financial analysis. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980) (a lawyer cannot advance or guarantee financial assistance or litigation expenses for a client).

91. Burks v. Lasker, 441 U.S. 471 (1979), first revived the possibility of director power to dismiss as a matter of state law. The Supreme Court view apparently was based upon a few older state law decisions: McKee v. Rogers, 18 Del. Ch. 81, 156 A. 191 (1931); Rice v. Wheeling Dollar Sav. & Trust Co., 130 N.E.2d 442 (Ohio Ct. App. 1954); Goodwin v. Castleton, 19 Wash. 2d 748, 144 P.2d 725 (1944) (unanimous shareholder, rather than director, vote to dismiss). See, e.g., Burks v. Lasker, 441 U.S. at 487 (Stewart, J., concurring). Auerbach v. Bennett, 47 N.Y.2d 619, 333 N.E.2d 994, 419 N.Y.S.2d 920 (1979), and Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979), cert. denied, 449 U.S. 869 (1980), are two decisions in the first wave of cases implementing the doctrine. Recently, how-
director could have violated the duty of care or loyalty the derivative action seeks to vindicate and the directors could have previously refused to take action on the demand of the shareholder bringing the action. Nonetheless, in a second bite at the apple, the board can decide that the suit is not in the corporation's best interests. The court would then apply the business judgment rule, not delve into the merits of the action, and dismiss the suit based upon the directors' recommendation. These developments make a charade of the RMA's feigned sensitivity to and near total reliance upon fiduciary duty.

3. Conclusion of RMA Analysis

These criticisms of the RMA are not to say that corporation laws should instead become sumptuary laws, regulating corporate officers' and directors' every action. On the other hand, corporation laws should have more content and philosophy than mere flexibility alone. Yet American state corporation laws have gone so far in that direction, increasingly under the banner of the MBCA and now of the proposed RMA, that state corporation law now has little apparent content. Flexibility has become pandemic.

II. VARIATIONS FROM THE TRADITIONAL MODEL—AN OPPOSITE TACK IN BRITISH COMPANY LAW

In the last extensive comparison of British and American corporation law, published in 1956, Professor L.C.B. Gower suggested that the two systems had sufficient similarities to make a comparison possible yet sufficient differences to make it fruit-

the Delaware Supreme Court has adopted a stricter, two prong test for such dismissals. See Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

92. FED. R. CIV. P. 23.1, and similar rules in most state civil practice acts, require that a shareholder have made a demand on the board of directors before being allowed to proceed with a derivative action.


94. But see Zapata Corp. v. Maldonado, 430 A.2d 779, 788-89 (Del. 1981) (court first determines that directors dismissing the suit acted in good faith and then exercises its independent business judgment as to whether the suit is in the corporation's best interest).

95. See, e.g., Folk, State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct, 31 BUS. LAW. 1031 (1976). Cf. RMA § 3.01 comment (where the RMA drafters speak of the "limitless lawful purpose corporation"—an apt summary of the entire RMA's intent and practical effect).
ful. Gower concluded that
[1]he constitution of the English business corporation is still regarded
as essentially contractual. Whereas the American statutes tend to lay
down mandatory rules, the British Companies Act relies far more on
the technique of the Partnership Act, providing a standard form which
applies only in the absence of contrary agreement. . . .

Thus, British company law and the model it creates has always
been thought to be, in American parlance, "consensual" or "enabling." As exemplified by the Revised Model Act, how-
ever, American corporation law has greatly become enabling. A
question that arises then is whether, in their permissive as-
psects, American statutes have surpassed even British company
law. A short answer is the affirmative, especially since the last
several years have seen a little-noticed trend moving company
law back toward a restrictive model. Recent companies acts
contain numerous substantive commands and set limits be-
yond which solicitors and their clients cannot go in providing
otherwise. To a great degree, company law has become an
example of what American corporation law once was.

A. THE TRADITIONAL BRITISH COMPANY LAW MODEL

The British counterparts of American articles of incorpora-
tion and bylaws are the memorandum and articles of associa-
tion. The memorandum of association will be brief, but not as
brief as typical American articles of incorporation. The memo-
randum sets forth the company's name, whether the registered
office is in England, Scotland, or Wales, and the company’s pur-
poses or "objects." In most American jurisdictions, where
the corporate purpose "may be stated to be . . . any or all law-
ful business," the typical corporate purpose clause will be
brief. The British ultra vires doctrine, however, still voids ultra
vires acts, causing firms to list long detailed statements of

96. Gower, supra note 10, at 1370. There have been more recent compari-
sions in the related securities law area. See, e.g., Branson, Some Suggestions
From a Comparison of British and American Tender Offer Regulation, 56 COR-

97. Gower, supra note 10, at 1376. A short comparative work is Peppiatt,
British and American Business Law: A Brief Comparison, 16 BUS. LAW. 54
(1960).

98. See infra notes 121-202 and accompanying text.

99. Companies Act, 1948, 11 & 12 Geo. 6, ch. 38, §§ 1-10 [hereinafter cited as
CA. 1949].

100. C.A. 1948, § 2. See also L. LEIGH, V. JOFFE & D. GOLDBERG, NORTHEY &
LEIGH'S INTRODUCTION TO COMPANY LAW 65-66 (2d ed. 1981) [hereinafter cited as
NORTHEY & LEIGH].

101. MBCA § 54(c).

the company's objects in the memorandum. Unlike the common American practice, British memoranda of association can never merely state that the object of the company is any lawful purpose.\(^{103}\)

The memorandum must indicate whether the company is unlimited, limited by guarantee,\(^{104}\) or, most commonly, limited by shares. The amount of share capital and how it is to be divided into shares of one or more classes must follow.\(^{105}\) Finally, the memorandum sets forth the association clause, in which the share subscribers state their desire to form the company and to take the number of shares set opposite their names.\(^{106}\) In contrast, American statutes do not require any listing of subscribers at all.\(^{107}\)

The articles of association in a British company bear little resemblance to bylaws in an American corporation. Ostensibly, both documents govern the corporation's or company's internal affairs, that is, date and place of shareholders' or members' meetings, quorums, officers' or managing directors' responsibilities, and the like.\(^{108}\) Yet American practice typically has left many of these items to statute. In addition, in many instances the model a traditional American statute sets up cannot be varied. Or if variance from the statutory model is permitted, the statute sets limits beyond which the parties cannot go in providing otherwise.\(^ {109}\)

Traditional British articles of association are longer than typical American bylaws, and deal with more important matters. Restrictions on share sales, rights attached to various

\(^{103}\) Cf. MBCA § 7 (ultra vires acts merely voidable rather than void and only when "equitable").

\(^{104}\) See, e.g., NORTHBY & LEIGH, supra note 100, at 81 ("long and prolix objects clauses"). Professor Gower has urged that in the American fashion company law should permit broadly stated clauses. L.C.B. GOWER, supra note 5, at 179. Cf. MBCA § 3 (corporations can form for any lawful purpose).

\(^{105}\) "[A] company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up . . . ." C.A. 1948 § 1(2)(b).

\(^{106}\) C.A. 1948 § 2(4)(a).

\(^{107}\) Id. §§ 1-2.

\(^{108}\) See, e.g., MBCA § 54 (contents of articles of incorporation).

\(^{109}\) See C.A. 1948, sched. 1, Table A; MBCA § 27.

\(^{109}\) See, e.g., MBCA § 32 (unless otherwise provided shareholder quorum is a majority "but in no event shall a quorum consist of less than one third"). See also In re Wm. Faehndrich, Inc., 2 N.Y.2d 468, 141 N.E.2d 597, 161 N.Y.S.2d 99 (1957) (higher quorum requirement struck down because in bylaws rather than articles). Cf. C.A. 1948 § 134(c) (In a private company two members and in the case of any other company as few as three members can constitute a quorum).
share classes, the number of directors, and directors’ rotation, will all be dealt with in articles of association.\footnote{110} There is a statutory model: the famous “Table A” in the First Schedule of Companies Act 1948. Table A, though, is only a model.\footnote{111} Solicitors can and do vary Table A articles. Moreover, company law gives few limits beyond which the drafter cannot go in providing otherwise. Last of all, unlike the American states where by-laws remain an internal document, in Britain the statute requires that the articles of association as well as the memorandum be filed with the Company Registry.\footnote{112} The articles thus become public documents.

B. VARIATIONS FROM THE MODEL—A DISCLAIMER

In certain respects, the base for comparison between American corporation and British company law is imperfect. Cumulative voting, for example, has never existed in company law.\footnote{113} Commentators have praised its effect in the United States, but have suggested other means of accomplishing similar effects in Great Britain.\footnote{114} The derivative action is relatively obscure in Britain.\footnote{115} The society is less litigious than the United States.\footnote{116} Contingent fee arrangements are unethical. And the losing party must always pay the prevailing party’s costs.\footnote{117} Finally, the rule of Foss v. Harbottle\footnote{118} does not permit a member to make a claim based upon a corporate

\footnotetext{110}{See generally L.C.B. Gower, supra note 5, at 308-09; Northey & Leigh, supra note 100, at 90-92.} 
\footnotetext{111}{See C.A. 1948 sched. 1, Table A.} 
\footnotetext{112}{C.A. 1948 § 12. A company limited by shares need not file articles but, if filing is omitted, Table A will apply. Id. § 8(2). Since most all companies will want to vary Table A in one or more respects, articles are routinely filed. See L.C.B. Gower, supra note 5, at 309.} 
\footnotetext{113}{Northey & Leigh, supra note 100, at 110.} 
\footnotetext{114}{See, e.g., Gower, supra note 6, at 397-98.} 
\footnotetext{116}{See, e.g., Benston, Accounting Standards in the United States and the United Kingdom: Their Nature, Causes and Consequences, 28 VAND. L. REV. 235, 251, 258 (1975) (peer pressure rather than litigation plays a major role); Branson, supra note 96, at 715 n.150 & 723 n.184 (possibility of adverse publicity or censure rather than litigation plays major policing role).} 
\footnotetext{117}{See Grossfeld & Ebke, Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe, 26 AM. J. COMP. L. 397, 419 (1978).} 
\footnotetext{118}{[1843] 2 Hare 461. For a more recent case applying the rule, see Edwards v. Halliwell [1950] 2 All. E.R. 1064 (C.A.).}
right if the shareholders could have, but not necessarily have, ratified the act of which the member complains.\textsuperscript{119} All of these factors make derivative actions different and less frequent in Great Britain. Instead, to a great degree company law relies upon other sanctions or remedies, such as criminal penalties and inspections of companies' affairs by the Department of Trade.\textsuperscript{120}

Keeping in mind, then, that the edifices on top of which a comparison is to be mounted are not completely equivalent, a comparison can nonetheless go forward.

C. INTEGRITY OF CAPITAL

Company law allowed no preemptive right until 1980. At a time when the American MBCA, and now the RMA, winnow away the preemptive right,\textsuperscript{121} company law now requires for the first time that companies give members the opportunity to preserve their proportionate ownership and voting rights.\textsuperscript{122} The preemptive right is only presumptive in private companies.\textsuperscript{123} Such companies can eliminate preemptive rights by provision in the memorandum or articles.\textsuperscript{124} Even public companies, by special resolution approved by the members, can resolve that the preemption right will "not apply to a specified allotment of equity securities."\textsuperscript{125} Public companies cannot, however, eliminate the preemption right on a permanent basis.\textsuperscript{126}

As with the preemptive right, much of recent company law

\begin{thebibliography}{99}
\bibitem{119} The rule, however, does admit of many exceptions. \textit{See} L.C.B. \textsc{Gower}, \textit{supra} note 5, at 644-48; \textsc{Northey \& Leigh}, \textit{supra} note 100, at 197-98. Moreover, the courts have demonstrated a readiness to create new exceptions whenever "natural justice" so requires. \textit{See} \textsc{Davies}, \textit{supra} note 115, at 417.
\bibitem{120} \textit{See}, \textit{e.g.}, \textit{infra} notes 130, 142, and accompanying text (criminal penalties); \textit{infra} note 183 (appointment of inspectors).
\bibitem{121} \textit{See} \textit{supra} note 32 and accompanying text.
\bibitem{122} Companies Act, 1980, ch. 22, § 17(1) [hereinafter cited as C.A. 1980].
\bibitem{123} Private companies are those which do not offer shares to the public. C.A. 1980 § 1. It is an offense punishable by fine for a private company to attempt to sell shares to the public. \textit{Id.} § 15(1). All other restrictions on private companies, such as the limit of members to 50, have been removed. \textit{Id.} sched. 4 (repealing C.A. 1948 § 28).
\bibitem{124} \textit{Id.} § 17(9).
\bibitem{125} \textit{Id.} § 18(2).
\bibitem{126} Thus, it has been said that the new "pre-emption right" will not have "much or any effect on British corporate practice." \textsc{Northey \& Leigh}, \textit{supra} note 100, at 234. The stock exchange has long required preemptive rights and companies have found the right useful. "More new capital is raised by this method than by any other form of issue . . . ." \textsc{L.C.B. Gower}, \textit{supra} note 5, at 343.
\end{thebibliography}
amendment has related to raising capital. To become a public company, that is, one entitled to sell shares to the public, a company must now register as such. A company must have paid in £50,000 ($82,500) in share capital before it can register. For the future, Parliament has empowered the Secretary of State for Trade to adjust the amount, presumably upward, should inflation occur or abuse persist with the £50,000 requirement. Severe penalties exist for breach of the minimum capital limitation upon going public.

Such a limitation on access to other people's money would cut against the grain of American egalitarianism. Some years ago the MBCA eliminated even the state corporation law requirement that a corporation have $1000 paid in before the corporation commenced business. Moreover, the full and fair disclosure philosophy of American federal securities law has long held that if an entity fully discloses, even complete penury will not prevent the offer of securities to the public.

An advantage of the new British minimum capital requirement is that the scheme has forced thought not only about the process of raising money but also about the necessity of maintaining capital after incorporation or after registration as a public company. For example, British public companies which issue shares for property must have an independent, qualified person appraise the property. The appraiser must report the valuation methods used, the date of the valuation, and that the valuation is reasonable. By contrast, under American statutes directors rather than independent third parties value property to be received for shares. In the absence of fraud, American statutes deem directors' valuation "conclusive."

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127. Under C.A. 1980 §§ 5-10, public companies have had to register as "new" public companies or, if they did not meet the new minimum capital and other requirements, as private companies. Before offering shares to the public, private companies must register as public, demonstrating compliance with the requirements. Id. § 5(1).

128. C.A. 1980 § 15(1). For purposes of this article conversions have been made at a rate of $1.65 U.S. per £.


130. See, e.g., C.A. 1980 § 15 (criminal penalties); id. sched. 3, ¶ 27 (company subject to being wound up by order of court).


132. See, e.g., Securities Exchange Commission, The Work of the SEC, 2 (1980) ("factors affecting the merits of securities have no bearing on the question whether securities may be registered").


134. See, e.g., MBCA § 19; Nev. Rev. Stat. § 78.210 (1979) (in the absence of "actual fraud" directors' judgment shall be "conclusive").
In Britain the substantive rules become more complex when the company issues shares in exchange for property of a director, including managing directors.\textsuperscript{135} Rather than relying on general concepts such as fiduciary duty, as the American RMA has done,\textsuperscript{136} new company law provisions require a members’ vote when a director or member of a director’s family offers non-cash consideration for shares, or cash, of the company.\textsuperscript{137} These provisions apply whenever the ostensible value of the consideration exceeds £50,000 ($82,500) or ten percent of the company’s net assets, and may apply in addition to an independent appraisal.\textsuperscript{138}

To insure integrity of capital, several other types of transactions, or share allotments, now come under substantive control. In British public companies, services are no longer eligible consideration for shares.\textsuperscript{139} No British company, public or private, can issue shares at a discount—all share allottees must pay the same nominal value, as well as any premium that other allottees pay.\textsuperscript{140} Violation of these provisions subjects the allottee to liability in cash for the shortfall or disregard of the tainted shares.\textsuperscript{141} In addition, for unlawful share allotments the company and any responsible officer are guilty of an offense, punishable by fine.\textsuperscript{142}

In Britain, boards of directors have authority to issue authorized shares for five years only. Before expiration of that period, directors must return to the members for renewal of their authority.\textsuperscript{143} Such a provision guards against directors using shares authorized years before to silence the minority, a situation possible in the United States. In the early halcyon days of corporate existence, shareholders may have approved articles of incorporation authorizing many shares in order to bestow upon directors flexibility to pursue opportunities as they arose. Years later, directors could use those authorized shares to dilute or squeeze out a troublesome minority or a tender of-
A recent British provision aimed at maintenance of capital once raised requires directors to call an extraordinary general meeting whenever the company's net assets fall below one-half of its paid-up share capital. Failure to call the members' meeting within 28 days after knowledge of the condition or to hold such a meeting within 56 days is an offense, punishable by fine. Thus, in Britain, when its stewardship fails, management must call the members' attention to that fact. Shareholders, or members, need not wait until the horse is gone, as in the United States, where the annual report or annual financial statements may or may not alert shareholders to a deteriorating condition.

A last example of company law's opposite tack is the 1981 provision disallowing capital structures in which the company can redeem all shares. At precisely the same time, in the interest of flexibility the American RMA drafters propose new statutory authority for redeemable common shares.

Not all the recent British revisions are improvements or good in an absolute sense. This comparative, and merely partial, exposition of finance and integrity of capital does show, however, that as flexibility reaches a zenith in American corporation law, British company law is retreating from a scheme once thought to be the apotheosis of flexibility.

D. Disclosure

In the United States, corporation law requires a corporation to furnish shareholders with annual financial statements, but only if the corporation prepares financial statements. No affirmative requirement, however, states that corporations must...

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145. C.A. 1980 § 34.
146. Id.
147. Companies Act, 1981, ch. 62, § 45(2) [hereinafter C.A. 1981]. See also id. § 46(3) (company may not repurchase so as to eliminate all but redeemable shares).
148. Under the RMA, however, at least one class of common shares must remain unredeemable. See supra notes 52-58 and accompanying text.
prepare financial statements.\textsuperscript{150} In Britain, the Companies Acts of 1967, 1976, 1980, and 1981 have refined and increased the corporate disclosure companies must furnish not only to members but also to the public. In addition company law has installed a number of safeguards to insure the quality of such disclosure.\textsuperscript{151}

All British companies must appoint an auditor who is a member of one of the Institutes of Chartered Accountants or the Association of Certified Accountants.\textsuperscript{152} The auditor must render an opinion based upon the British statutory “true and fair view” standard.\textsuperscript{153} By contrast, American corporation law does not require an audit or independent review of any kind. If they are prepared at all, financial statements can be compiled by the most unschooled of bookkeepers.\textsuperscript{154}

In addition, the MBCA requires only that financial statements, if they are prepared at all, be prepared “in accordance with generally accepted accounting principles.”\textsuperscript{155} Conformance to generally accepted accounting principles gives rise only to a \textit{probability} that the accounts present a true and fair view. The British true and fair requirement goes further.\textsuperscript{156}

In Britain, all companies must both prepare and file annual accounts.\textsuperscript{157} Hence, a member or any interested person can obtain financial information through the Registry of Companies.\textsuperscript{158} The accounts so filed must present “a true and fair view of the state of affairs of the company” and of “the profit or

\textsuperscript{150} The RMA does propose to delete the MBCA limitation, making provision of financial statements mandatory for all corporations. RMA § 16.20.

\textsuperscript{151} See infra notes 152-64 and accompanying text.

\textsuperscript{152} Companies Act, 1976, ch. 69, §§ 13(1), 14(1) [hereinafter cited as C.A. 1976].

\textsuperscript{153} See C.A. 1948 § 149(1) (“true and fair view” standard); id. § 149(6), amended by C.A. 1976, sched. 2 (criminal offense for failure to comply with accounting standards).

\textsuperscript{154} See, e.g., MBCA § 52; Knauss, \textit{supra} note 149, at 487.

\textsuperscript{155} MBCA § 52.

\textsuperscript{156} For a view that in actual practice the British standard does not go far beyond, see Benston, \textit{supra} note 116, at 267-68. For shades of meaning inherent in fairness and generally accepted accounting principles standards, see United States v. Simon, 425 F.2d 796 (2d Cir. 1969), \textit{cert. denied}, 397 U.S. 1006 (1970).

\textsuperscript{157} See C.A. 1948 §§ 124-26, 128; Companies Act, 1967, ch. 81, § 2 [hereinafter C.A. 1967]. See also L.C.B. GOWER, \textit{supra} note 5, at 501-02. The 1967 Act eliminated the exempt private company, a company of fewer than 50 members which did not have to file accounts. The view taken was “that the privilege of limited liability ought to bear with it an obligation to make financial disclosure in the interests of creditors and the public generally.” NORTHEY & LEIGH, \textit{supra} note 100, at 11.

\textsuperscript{158} See C.A. 1948 § 426.
loss for the financial year.”

Directors of British companies must include a directors’ report with the annual accounting. The report must comment on the financial statements, including results in the accounting period. The report also must comment on the company’s state of affairs, the amount recommended as a dividend, the amount of any reserves the directors have had to establish, and other matters the statute lists. Using the accounts they have prepared, the auditors must then corroborate the required directors’ report and report any inconsistency between the two. Under American state corporation laws’ minimal requirements, no commentary of any kind need accompany financial statements which, as has been seen, do not even have to be prepared in most instances.

Completing the disclosure package, all British companies must make all directors’ service contracts available for inspection. Although mere appointment as a director does not constitute a service contract, any further arrangement with a director must be reduced to writing and made available to the company’s members.

On an internal basis, every British company must keep accounting records sufficient (i) to show and explain the company’s transactions, (ii) to disclose the company’s financial position at the time, and (iii) to enable the directors to ensure that any balance sheet or profit and loss account prepared by them gives a true and fair review of the company’s state of affairs. Under American state law, corporations need only keep “correct and complete books and records of account.”

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159. The standard is found repeatedly in the various companies acts. See, e.g., C.A. 1967 § 14(c); C.A. 1976 § 1(9); C.A. 1980 sched. 3, ¶ 41 (3); C.A. 1981 § 1(1). Nonetheless, British case law has held that an auditor is not bound to be a “bloodhound.” In re Kingston Cotton Mill Co. (No. 2) [1896] 2 Ch. 279.


163. C.A. 1980 § 26. In addition, companies must limit service contracts in time and in scope. See infra note 172 and accompanying text.

164. See C.A. 1980 § 47. The contract need not be in writing. The terms of an unwritten contract must be set out in a written memorandum, which is then filed like a written contract. See C.A. 1967 § 26.

165. C.A. 1976 § 12(1)-(3).

American corporation law prompts only the most scant disclosure. Typically the only affirmative requirement is an annual report to the secretary of state in the state of incorporation, a report listing the directors and officers but containing no financial information whatsoever. Frequently, American corporations make even this minimal return in an incomplete manner, perhaps listing only a single corporate official's name and address. Such an incomplete return is not of great significance. The American report's principal purpose is to prompt payment of the annual license or franchise fee, not to force corporate disclosure. Only when American corporations come under the aegis of federal securities laws do those companies come under meaningful, affirmative disclosure requirements. Federal securities laws apply only when a corporation has $3 million or more in assets and a class of equity security held by 500 or more persons. For smaller or more closely held corporations, American corporation law presents a vacuum, or even a black hole, on the subject of disclosure. Over the last fifteen or so years, British company law has proceeded in precisely the opposite direction.

E. Controls on Management Compensation and Perquisites

As has been seen, American corporation law relies heavily on a weakened concept of fiduciary duty as the sole control of management compensation. By contrast, senior managers in British companies are subject to a number of new substantive controls on management compensation. The Companies Act 1981 does reduce the scope of filed accounts and director's report for medium sized companies, those with turnover (sales) of less than £3.75 million ($7.63 million), balance sheet total less than £2.80 million ($4.62 million), and employee number less than 250. C.A. 1981 § 8(3). The Act further reduces requirements for small companies: £1.4 million ($2.3 million) turnover, £700,000 ($1.2 million) balance sheet total, and 50 or fewer employees. Id. § 8(2).

166. This is referred to as 12(g) status. See Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 77l(g) (1976). See also SEC Securities Act Release No. 18,647 (April 15, 1982) (increase from $1 million to $3 million asset requirement).


168. See supra note 149, at 481. Dean Knauss estimates there are 100,000 American corporations with from 11 to 499 shareholders and, hence, subject to no meaningful disclosure requirements. Id. at 481.

169. See Knauuss, Corporate Governance—A Moving Target, supra note 149, at 484. Dean Knauss estimates there are 100,000 American corporations with from 11 to 499 shareholders and, hence, subject to no meaningful disclosure requirements. Id. at 481.
restrictions on both compensation and perquisites.172 Company law also sets standards for disclosing directors' interests in the company, for loaning funds to directors, and for purchasing assets from or selling them to directors.173

A British company must maintain a register disclosing directors' interests in the company's shares and debentures and any changes in those ownership interests.174 Under American law, only if corporations reach 12(g) status do they need to make such disclosure. Moreover, American federal law requires the director or officer, rather than the firm, to file the disclosure statement with the Securities and Exchange Commission.175 Share ownership data for senior managers, therefore, will not necessarily be available to shareholders through the American corporation's principal offices, as it will be in Britain.

At the same time the RMA is proposing removal of all restrictions on loans, loan guarantees, and similar benefits for senior managers,176 the British Companies Act of 1980 sets up a thicket of restrictions on company loans and perquisites for directors or “connected persons.”177 For example, although a British company can advance funds for the purpose of enabling directors to perform their duties, such advances are limited to a rolling maximum of £10,000 ($16,500) for any one director. Moreover, at a general meeting, the members must approve the plan for advances.178 Beyond approved advances, the new provisions severely limit loans, loan guarantees, or “quasi-loans”179

172. For example, without the members' approval in a general meeting, directors' service contracts cannot exceed five years. C.A. 1980 § 47. The term “employment” is “wide enough” to bring contracts for employment as managing director or otherwise, contracts for services, and “consultancy contracts” within the section. See id.; see also J. TINNION, THE COMPANIES ACT 1980, § 47 comment (1980).
173. See infra notes 174-84 and accompanying text.
176. See supra notes 69-73 and accompanying text.
177. C.A. 1980 §§ 49-51. A “connected person” is a member of a director's immediate household or a related trust or company. Id. § 64.
178. Id. §§ 50(5), 51.
179. The last category includes a substantial number of what Americans term “perks,” for example the provision of credit cards to directors. See, e.g., NORTH & LEIGH, supra note 100, at 120. Separate company law provisions isolate and make unlawful provision of assistance to directors for acquisition of shares while in other respects relaxing the C.A. 1948 § 54 absolute prohibition...
to directors. To deter violations, the Act makes directors who approve prohibited transactions liable to the company and, in certain instances, subject to criminal penalties. Newer enactments give Department of Trade inspectors broadened discovery powers with regard to the fruits of illegal loans, quasi-loans, emoluments of office, or "any money which has been in any way connected with any act or omission, or series of acts or omissions, which on the part of [a] director constituted misconduct (whether fraudulent or not)."

The British limitations on a company's purchase, by share issuance or for cash, of assets from directors have been discussed. Those same limitations also apply to a company's sale of assets to directors.

All of these company law limitations on senior managers extend beyond persons who have formal titles. Limitations on compensation and perquisites also apply to so-called "shadow directors"—persons "in accordance with whose directions or in-

on companies assisting anyone in purchasing the company's shares. See, e.g., C.A. 1981 § 42(6) (permitting assistance for "employees share scheme[s]" but excluding directors). Under § 43, private companies can assist director share purchases if assistance is out of distributable profits, is approved by members in a general meeting, and four to eight weeks have passed with no objection having been voiced. Moreover, § 44 authorizes 10% of the company's share capital to apply to a court for cancellation of the shares purchased by a director with financial assistance from the company.

Indeed, with respect to public companies, the named transactions are flatly prohibited. C.A. 1980 §§ 49, 65(1).

180. Indeed, with respect to public companies, the named transactions are flatly prohibited. C.A. 1980 §§ 49, 65(1).


182. Id. § 53.


184. See supra note 137 and accompanying text. These new British enactments must be read against a background which, while generally enabling, has always placed severe restrictions on senior management's prerogatives. Compare C.A. 1948 §§ 191-94, (strictly prohibiting any payment to directors for loss of office, whether by takeover bid or otherwise) with Wall St. J., Sept. 8, 1982, at 31, col. 3 (noting current American practice of voting "golden parachutes" for directors and senior managers, especially in the event of a tender offer, e.g., $4 million golden parachute for single executive). See also C.A. 1948 § 448 (court approval required for indemnity of directors except in cases of successful defense). Cf. MBCA § 5 (plethora of routes to indemnity, including director vote and opinion of counsel).
structions the directors of a company are accustomed to act." American state corporation law has no counterpart to this British provision. Only under federal securities law, with its "controlling persons" provisions, does American law attempt to poke through form and inquire into substance.

F. DISQUALIFICATION OF DIRECTORS AND OTHER MEANS OF SHAREHOLDER PROTECTION

British law removes certain individuals from consideration or service as directors of companies. Undischarged bankrupts may not in the first instance serve as directors. Though not themselves bankrupt, directors also become disqualified from service whenever two companies for which they were directors become insolvent within a five-year period. This disqualification lasts for five years. Moreover, courts can also remove directors who engaged in fraudulent acts or who persistently have failed to comply with the Companies Acts. The Registrar of Companies maintains a register of all directorships held or which within the last five years have been held by directors of British companies. The register aids members or their solicitors in determining whether grounds for background disqualification exist.

In the United States, state corporation law again has no counterpart to these British provisions. Virtually anyone can serve as a director of a corporation. Only in certain limited public offerings of securities conducted under exceptions to the federal securities laws do background disqualifications for promoters or directors exist. Of course, promoters of dubious

187. See L.C.B. GOWER, supra note 5, at 142.
188. Under the procedures set forth in the Insolvency Act of 1976, the official receiver of the second insolvent corporation files an application with the court, which then issues an order disqualifying the director. Insolvency Act, 1976, ch. 60, § 9.
189. C.A. 1948 § 188, amended by C.A. 1976 § 28 and C.A. 1981 § 93. Furthermore, a court can remove a director in a single case of another company's insolvency. In that case, the person "shall not . . . be a director of or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation, or management of a company." Insolvency Act, 1976, ch. 60, § 9, amended by C.A. 1981 § 94.
191. See, e.g., MBCA § 35 (directors "need not be residents of this State or shareholders of the corporation"; no other potential restrictions listed).
192. Pursuant to Securities Act of 1933 § 3(b), 15 U.S.C. § 77c(b) (Supp. IV
backgrounds can operate outside the effective reach of federal securities laws. Indeed they can also comport with federal securities law by acting under other registration exemptions for securities offerings where background disqualifications do not exist.\textsuperscript{193}

In addition to the protection afforded members by background disqualifications for directors, British law allows members to object to alterations in the company's objects or purposes clause.\textsuperscript{194} Upon petition by fifteen percent or more of the company's share capital, the court may confirm or reject, wholly or in part, the alteration. Furthermore, the court can order the company to purchase the objecting members' shares.\textsuperscript{195} Since the ultra vires doctrine remains strong in Britain, and since a company must state its objects with specificity,\textsuperscript{196} the right to object can give minority share interests a significant control over management. Management may not be able to diversify or change the nature of the company's business as long as an unhappy minority exists within the company.

In the United States a number of commentators have examined section 210 of the Companies Act 1948.\textsuperscript{197} Section 210 gives British courts broad powers to order relief for shareholder minorities who prove oppression by majority share interests. The court may “make such order[s] as it thinks fit,” including orders for regulating the future conduct of the com-

\textsuperscript{190}, the SEC may exempt from registration offerings up to $5 million. Through so-called Regulation A, 17 C.F.R. § 230.251-64 (1982), the SEC exempts offerings up to $1.5 million. 17 C.F.R. § 230.254 (1982). Yet, the SEC denies use of the exemption where background disqualifications apply to any director, officer, general partner, or promoter. The disabling events are, inter alia, securities law criminal convictions in the past ten years, civil orders or decrees in the past five years, or entry of certain United States Postal Service fraud orders. \textit{Id.} § 230.252(d). Through SEC Rule 505, the SEC exempts from registration offerings up to $5 million sold to 35 persons plus “accredited investors.” The same Regulation A background disqualifications apply. \textit{Id.} § 230.505(b)(2)(iii).


\textsuperscript{193} Rule 505 background disqualifications, \textit{supra} note 192, do not apply to smaller offerings under the companion Rule 504, limited to $500,000 but with no limit on the number of purchasers. 17 C.F.R. § 230.504 (1982). Similarly, promoters' or directors' backgrounds do not directly affect offerings under the intrastate exemption, Securities Act of 1933 § 3(a)(11), 15 U.S.C. § 77c(a)(11) (1976).

\textsuperscript{194} C.A. 1948 §§ 5, 10, amended by C.A. 1980 § 90(3), sched. 3.

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} \textit{See supra} notes 102-03 and accompanying text.

pany's affairs, purchase of shares by other members or by the company, or alteration of the company's memorandum or articles. Hence, section 210 is seen as an important adjunct or alternative to a court's power to dissolve, or "wind up," a corporation.

Judicial power to wind up exists both in the United States and in Great Britain. In the United States, however, courts have seen dissolution as a doomsday weapon which they are accordingly loathe to use. The problem is exacerbated by the American courts' view that oppression and deadlock are black and white propositions: the court can either dissolve the entity or retain the status quo. American courts rarely exercise any inherent equity power to make more subtle adjustments in these cases.

In Britain, section 210 fills the void which exists in the United States between the extremes of black and white. Section 210, however, also gives members in a British company a check on management power, although commentators usually have viewed the section as a solution to an extreme situation rather than as a check or lever that the minority share interests can use short of deadlock or actual oppression.

Recent amendments to section 210 enhance these shareholder protections. The new enactment enables a member of a company to seek section 210 relief whenever the company's affairs are being conducted in a manner which is "unfairly prejudicial to the interests of some part of the members." Before, British courts could only regulate a company's affairs in cases of oppression, defined as "burdensome, harsh and wrongful" management conduct. Courts now can also intervene in "cases where the member complains of matters falling short of dishonesty or oppression which have nevertheless resulted in his interests being unfairly treated."

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198. Compare MBCA § 94 (involuntary dissolution) with C.A. 1948 § 222 (winding up by the court if "just and equitable" to do so).
202. NORThEY & LEIGH, supra note 100, at 214.
In the United States, statutory drafters have tended to think and act only in terms of increased flexibility for corporate management. In Great Britain, companies act drafters have begun to think in terms of expanded rights for share interests who can thereby limit management power. Beyond such governance aspects, British drafters have also sought to impose absolute substantive control over the emoluments and perquisites management can receive. With each new companies act, disclosure requirements applicable to all companies as a matter of company law have made more information available to company members and to the public. New British substantive provisions on the raising and maintaining of capital not only protect existing share interests but also aid in preventing the sale of blue sky to the public.

This less than comprehensive review of companies acts in 1967, 1976, 1980, and 1981 demonstrates that, whatever the merits of particular company law enactments, since Professor Gower compared British and American schemes nearly three decades ago the comparison has shifted diametrically. Britain has replaced the theme of complete consensualty with a number of substantive and other controls over corporate managements. On the other hand, the leading American endeavor has abandoned nearly all substantive control. Only fiduciary duty stands between shareholders and complete management arrogation of power. This sole safeguard, upon which the proposed American Revised Model Act now so steadfastly stands, in many cases may have become a mirage. In the United States, corporate directors have the ultimate enabling device—the directors' power to terminate derivative actions. "Consensual and enabling" has come to mean far more than the phrase ever meant under the Companies Act. Especially against the backdrop of developments in company law in the last fifteen years, American corporation law appears to be on the verge of flexibility's finest hour.

III. A THIRD COUNTERTRENDS: THE AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE

In 1977-78 the American Law Institute (ALI) and the American Bar Association (ABA) held a series of conferences on
corporation law.\textsuperscript{203} Out of those conferences\textsuperscript{204} grew Principles of Corporate Governance and Structure: Restatement and Recommendations, Tentative Draft No. 1 (Corporate Governance), which appeared in April 1982.\textsuperscript{205}

A. OVERVIEW OF THE THIRD COUNTERTREND

To an extent, the ALI project purports to be a “restatement of existing law.”\textsuperscript{206} In addition, however, the document is also to be a “prestatement of what the law should be” and, short of a legal mandate, “a guide to how corporations should conduct their affairs.”\textsuperscript{207} Thus, the ALI endeavor is unlike past American Law Institute projects. Other restatements attempt to improve “black letter formulations” in certain areas of law, buttressing these formulations with “refinement of analysis.”\textsuperscript{208} Those restatements take positions on issues around which controversy may swirl. In so doing, however, the ALI seeks to make incremental rather than revolutionary changes in expanses of law which have for the most part found widespread support. Restatements attempt articulation, enhanced clarity, and incremental improvement of existing law. The ALI corporation law project departs significantly from that traditional ALI format.\textsuperscript{209}

Corporate Governance also abandons traditional reform modes in the corporation law area. It does not seek to develop or refine discrete affirmative commands or prohibitions, as British company law has done. Nor does it delete command and prohibition in favor of general principle and flexibility, as many American state corporation laws have done.\textsuperscript{210} Instead, Corporate Governance seeks to dictate structure and process. The ALI reporters apparently believe that from structure and pro-


\textsuperscript{204} ALI Report No. 3, at 1 (1980).

\textsuperscript{205} See supra notes 3-4 and accompanying text.

\textsuperscript{206} ABA Section on Corporation, Banking and Business Law, 2 Business Law Memo No. 5, at 7 (1982).

\textsuperscript{207} Id. For those reasons, the ALI Council is considering dropping the word “Restatement” from the title of the project. R. Perkins, Remarks at a Forum of The Association of the Bar of the City of New York 12 (March 14, 1983) [hereinafter cited as ALI President Perkins’ Speech].

\textsuperscript{208} Restatement (Second) of Contracts forward, at viii (1981).


\textsuperscript{210} See supra notes 34-35 and accompanying text.
cess will come an increased likelihood of achieving the benefits and results which neither discrete prohibitions nor general principles previously have been able to produce in the American corporate sphere.

1. Background of the ALI Endeavor

_Corporate Governance_ has had its precursors. Under Chairman Harold Williams, the Securities and Exchange Commission (SEC) adopted positions on a number of structure and process issues. Chairman Williams repeatedly urged that save for the chief executive officer all corporate directors should be independent of management. Corporate officers, employees, investment and commercial bankers, lawyers, and similar affiliated persons were not to serve on boards of directors. In addition, the SEC promulgated for comment rules which would have required the annual proxy statements to identify directors as either "management," "affiliated non-management," or "independent." Detailed disclosures on compensation, perquisites, and services to the corporation as consultants or independent contractors would fill proxy statements. The goal was to enable investment analysts, and possibly shareholders as well, to evaluate the board's level of independence. Last of all, in agreeing to enter into consent decrees for traditional securities law violations, the Commission foisted upon defendant corporations ancillary measures dealing with structure. In order to avoid protracted litigation with the SEC; corporate defendants agreed to installation of independent directors, independent audit and nominating committees of the board, limitations on perquisites, and more. The SEC's oblique


214. See Kripke, _The SEC, Corporate Governance, and the Real Issues_, 36 Bus. Law 173, 193-205 (1981) ("[T]he staff zealously ... [loads] the settlement with provisions about corporate governance, and the respondent shrugs his shoulders. The settlement, whittled down as best they can by the respondents, is then—so far as appearances go—'offered' by the respondent and 'accepted' ... by the Commission.").
movement into internal corporate affairs stopped with the change from a Democratic to a Republican administration. Appointment of a new SEC chairman brought about a shift in emphasis.

Another precursor of Corporate Governance has been endeavor in academe, particularly the work of Professor Melvin Eisenberg. Professor Eisenberg wrote a series of articles culminating in Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants. For Professor Eisenberg, structure and process rather than command or general principle became the solution. Professor Eisenberg is the reporter of three of the existent five parts of Corporate Governance, including the heart of the document, Part III, “Structure of the Corporation.”

2. Corporate Governance—Parts I-III

a. The Monitoring Model

The heart of Corporate Governance has been the imposition of the so-called monitoring model. Traditionally, corporation law has affirmatively provided that “the business and affairs of a corporation shall be managed by a board of directors.” In large corporations especially, that formulation does not accord with reality. Corporate officers, not the board of directors, generally manage the corporation’s business and affairs. Typically the board of directors meets bimonthly or quarterly to review or contribute to management’s decisions. A fast-paced business world filled with complex choices does not, and cannot, permit management by a group such as the board, or the leisure of decisionmaking on a bimonthly or quarterly basis.

In 1975, the ABA Committee on Corporate Laws amended the MBCA to take reality into account. The MBCA shifted to


216. “Corporate law is constitutional law; that is, its dominant function is to regulate the manner in which the corporate institution is constituted. . . .” M.A. EISENBERG, supra note 215, at 1.

217. See CORPORATE GOVERNANCE, supra note 3, at v.

the proviso that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors."\textsuperscript{219} The change from a simple imperative to a softer formulation recognized that the board's proper role is supervision, review, and policy making. Gone was the traditional command: "Thou Shalt Manage."

The monitoring model builds upon these developments. \textit{Corporate Government} installs yet another command: "[M]anagement of the business . . . shall be conducted," not by the board of directors, as of old, and not under "the authority of" a board of directors, as in recent times, but "by or under the supervision of such senior executives as may be designated by the board of directors . . . ."\textsuperscript{220} In turn the role of directors becomes nearly wholly "‘monitoring,’ in its sense of to observe carefully and oversee."\textsuperscript{221} In fact, with one exception, "managing" is to be "separated from the function of monitoring management."\textsuperscript{222} The exception states that the board of directors shall retain the power of initiative, as well as the responsibility, to "[s]elect, evaluate, remove, and replace the principal senior executives."\textsuperscript{223} To a large degree, \textit{Corporate Governance} reduces the board's plenary power, substituting the doomsday weapons of selection and removal.

Under the monitoring model, in its relationship with management the board of directors assumes a role not unlike the role shareholders play with respect to the board. Under corporation law, shareholders have little power to determine a firm's courses of action and still less power of initiative. Shareholders do have the ultimate weapon, however. If the course of corporate events has not pleased a majority of shareholders, the majority can remove and replace the directors.\textsuperscript{224} Similarly, under the monitoring model, if management has not pleased the directors, the board's central function is not to interfere in individual decisions but to evaluate, and if necessary replace, senior management.

\textsuperscript{219} MBCA § 35 (1975).
\textsuperscript{220} \textit{Corporate Governance}, \textit{supra} note 3, § 3.01 (emphasis added).
\textsuperscript{221} Id. § 3.02 comment a, at 59.
\textsuperscript{222} Id.
\textsuperscript{223} Id. § 3.02(a)(1).
\textsuperscript{224} The tableau is well described by \textit{In re Auer v. Dressel}, 306 N.Y. 427, 118 N.E.2d 590 (1954). \textit{See also} Annot., 48 A.L.R.2d 615 (1956) (remedies to restrain or compel holding of stockholders' meeting).
b. *Independent Directors*

The monitoring model suggests or installs several devices to insure that boards of directors can effectively implement their new roles. A majority of directors in a corporation must be independent, that is, "free of any significant relationships with the corporation's senior executives." Investment or commercial bankers and lawyers who do business with the corporation, traditional candidates for service on the board, would not be free of significant relationships. As directors, therefore, they could not be counted in testing the independence of a majority of directors. In addition, candidates with "extremely close personal relationships [with senior management] or significant interlocking directorships" could serve as directors but could not count in meeting the majority of independent directors requirement.

To insure selection of truly independent directors, *Corporate Governance* removes the traditional power of management to nominate directors from where it has traditionally lodged, in management, principally in the chief executive officer. The monitoring model requires a nominating committee. The committee is to be "composed exclusively of directors who are not officers or employees of the corporation." Nominating committees, and not senior managements, will identify and test the independence of candidates for the board.

Once in place, the independent directors on the board should have at their disposal the wherewithal to evaluate management's stewardship. *Corporate Governance* thus makes clear the power of independent directors "[t]o retain separate counsel, accountants, or other expert assistance . . . and to incur reasonable fees and charges at the corporation's ex-

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225. *Corporate Governance*, *supra* note 3, § 3.03(a). In February 1983, the ALI Council voted to delete the requirement as mandatory. It will remain in the document as "good corporate practice." ALI President Perkins' Speech, *supra* note 207, at 11.

226. Empirical evidence shows that at times those sources have accounted for one-fifth of the directors in large publicly held firms. See, e.g., Smith, *Interlocking Directorates Among the 'Fortune 500'; Antitrust L. & Econ. Rev., Summer* 1970, 47, 48-49 (survey of directors in 495 largest companies).

227. *Corporate Governance*, *supra* note 3, § 3.03 comment d, at 76.

228. Section 3.06(a) of the current draft of *Corporate Governance* provides that "every large corporation shall have a nominating committee," but subsequent drafts are expected to delete this requirement. See ALI President Perkins' Speech, *supra* note 207, at 20, 23.

229. *Corporate Governance*, *supra* note 3, § 3.06(a)(1).

230. *Id.* § 3.06 comment d, at 103-06.
Coupled with their power "[t]o inspect corporate records and interview corporate counsel and other personnel," the independent directors' authority to retain experts should enhance their ability to evaluate management in sensitive as well as complex settings. Traditionally, the board as a whole had the authority to retain experts, but no subset of directors clearly had this power.\textsuperscript{233}

c. The Audit Committee

As a further means of aiding directors in evaluating corporate management, \textit{Corporate Governance} mandates installation of an audit committee. The audit committee is to be "composed exclusively of directors who have no significant relationships with the corporation's senior executives."\textsuperscript{234} The monitoring model would be nearly impossible to implement if management retained power to select the corporation's outside auditors. Management could sift through the ranks of auditing firms until it found a pliable auditor who would present to the independent board the financial picture management wants to present.\textsuperscript{235} Even if management cannot freely change auditors, under the present system management can select from the available array of accounting principles that principle best calculated to disguise or conceal a management \textit{faux pas} or more serious failure.\textsuperscript{236}

The monitoring model's audit committee would have the power to review auditors' independence, the scope of audits, the adequacy of internal accounting controls, and "[a]ny disputes between management and the independent auditor."\textsuperscript{237} In addition, the audit committee rather than management would decide any "material question" as to "the appropriate accounting principles . . . to be used in preparation of the corporation's financial statements."\textsuperscript{238} Increasingly, audit

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} \textsection{} 3.04(b).
\item \textsuperscript{232} \textit{Id.} \textsection{} 3.04(c).
\item \textsuperscript{233} \textit{Id.} \textsection{} 3.04 comment a, at 80.
\item \textsuperscript{234} \textit{Corporate Governance, supra} note 3, \textsection{} 3.05(1).
\item \textsuperscript{235} The SEC has, however, undertaken several steps to strengthen auditors' independence from management. For example, whenever a reporting company's auditor is dismissed or resigns, the company must file Form 8K, reporting any disagreements between the auditor and management in the prior two years, including disagreements resolved to the auditor's satisfaction. \textit{SEC Securities Act Release No. 5550} (Dec. 20, 1974).
\item \textsuperscript{236} For illustrations of this phenomenon, see Briloff, "We Often Paint Fakes," \textit{28 VAND. L. REV.} 165 (1975).
\item \textsuperscript{237} \textit{Corporate Governance, supra} note 3, \textsection{} 3.05(a)(2)(E)(iii).
\item \textsuperscript{238} \textit{Id.} \textsection{} 3.05(a)(2)(F). For a description of an audit committee's work, see
committees have been viewed as a means of heightening auditors' independence from senior management. Corporate Governance envisions the audit committee as a means also to heighten the directors' independence from the corporation's management. The audit committee would give the independent board its own power to set standards regarding the integrity of the information the board will use in evaluating management.

3. Corporate Governance—The Remaining Parts

The heart of Corporate Governance, the monitoring model, emphasizes a more independent board of directors with a newly defined, or newly emphasized, set of responsibilities. In placing such reliance on the board, the ALI must re-examine general principles which brood over the new model or structure. Part IV does so by restating and, in small ways, reinforcing the fiduciary duty of care. Corporate Governance leaves the other prong of fiduciary duty, the duty of loyalty, for a subsequent draft.239

Part IV of Corporate Governance makes clear that corporate officers as well as corporate directors operate under the standard of care.240 The ALI comments and examples also make clear that the duty of care carries with it some modicum of skill. Thus, the duty of care conjures up "the image of a generalist who has the basic intelligence appropriate to the task at hand."241 Examples make it clear that "'a weak head' is not a defense: the slow witted or foolish will be held to an objective standard."242 Reflecting the opposite view, the 1975 MBCA codification of a standard of care deleted skill from the usual common law formulation.243 Common law rubrics to the contrary, the MBCA comments deny that skill has ever been an ingredient of the standard of care.244

Corporate Governance also attempts to eliminate any "blind eye" defense to an alleged duty of care violation. In order to comply with the ALI standard of care, directors and of-
Officers must make "reasonable inquiry" into corporate affairs. Furthermore, directors must be "reasonably concerned with the existence and effectiveness of monitoring programs, including law compliance programs" within the corporation.

Last of all, Corporate Governance, Part IV, section 4.01(d), codifies the business judgment rule. Courts will not second-guess or review the merits of board decisions made in good faith and with the requisite care. Corporate Governance, though, fleshes out the prerequisites that exist for entry into the safe harbor that the business judgment rule represents.

First, for entry into the safe harbor, directors must have made "an informed decision and reasonable inquiry." The business judgment rule does not protect from review decisions other than "deliberative decisions" because no judgment has been exercised by the board. Directors who rubberstamp or sleep through management decisions cannot gain the rule's protections. Second, directors cannot enter the safe harbor if they have a "disabling" conflict of interest. The business judgment rule, of course, never has applied to conflicts of interest. Courts can and should review the propriety of directors' decisions which confer a benefit on directors, their families, or their friends and associates. When a conflict of interest is involved, directors cannot shield the decision from scrutiny on the ground that the board exercised care in reaching its decision. Finally, in order to enter the business judgment rule safe harbor, directors must have a "rational basis" for the challenged decision.

245. Corporate Governance, supra note 3, § 4.01(b).
246. Id.
247. "[A] Board of Directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake." Hodges v. New England Screw Co., 3 R.I. 9, 18 (1853), quoted in Arst, The Business Judgment Rule Revisited, 8 Hofstra L. Rev. 93, 99 (1979).
248. Corporate Governance, supra note 3, § 4.01(d) comment b, at 205.
249. Id. at 195. A subsequent draft, however, is expected to eliminate the word "deliberative" in describing the kinds of decisions protected by the business judgment rule. All President Perkins' Speech, supra note 207, at 9.
250. Corporate Governance, supra note 3, § 4.01(d) (2).
251. See, e.g., Arst, supra note 247, at 101-111.
252. A shortcoming, however, is that Corporate Governance does not define "disabling" conflicts of interest. For example, a director who serves on another corporation's board does not know whether every corporate transaction with that other corporation can be subjected to plenary review by a court. The forthcoming Part VI apparently will attempt to define the term, but in a section remote from the business judgment rule codification. See Corporate Governance, supra note 3, § 4.01(d) comment c, at 208.
253. Id. § 4.01(d) (3).
be reasonable, in the colloquial, directors must at least have had a peg on which to hang their hats. They must be able to point to a reason for their decision. So long as that reason is not unconnected with reality, under Corporate Governance a court will not review the business wisdom of the decision.

Corporate Governance’s longest chapter, Part VII, deals mainly with derivative actions and the power of the board to dismiss them. In effect the chapter retains the recently reincarnated directorial power to cause dismissal by declaring that the derivative action is “adverse or detrimental to the corporation’s best interests.” In so doing, however, Corporate Governance adopts the intermediate position developed by the Delaware Supreme Court, but which only a minority of other courts have followed. Thus, under Corporate Governance, although the power to dismiss exists, “the decision to terminate” a derivative action is not merely “but another application of the business judgment rule.” The court can review the “business justification” a committee of directors has advanced for dismissal. Under the majority business judgment rationale, of course, a court would limit itself to a review of the litigation committee’s independence as an indicia of good faith and the diligence and scope of the committee’s work as an indicia of care. A court following the Corporate Governance approach would also review the merits or reasonableness of the justification advanced for dismissal.

B. CRITICISM OF Corporate Governance—A BOOTSTRAP

Corporate Governance chooses one corporation law reform proposal, the monitoring model, from among the many which have surfaced in the last eight to ten years. With no empiri-

254. See id. § 4.01(d) comment e, at 209-11.
255. Id. § 7.03(c).
258. Corporate Governance, supra note 3, § 7.03 comment a, at 304.
259. Id. § 7.02(c)(i). An exception exists when the action is against a third party, in contrast to a “corporate fiduciary.” In those cases the board’s judgment will be protected by the business judgment rule. See id. § 7.03(a)(i). The rationale is that “[a] decision to terminate a derivative action against a third party or a low level corporate employee represents little potential for abuse.” Id. § 7.03 comment a, at 304.
260. See, e.g., id. § 7.03 comment d, at 325-329.
261. Among the proposals advanced for corporate reform are federal chartering, see supra notes 1, 8, and accompanying text; corporate uniformity statutes, see Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83
cal evidence, Corporate Governance labels that proposal "a major trend." From this "trend," Corporate Governance extrapolates what "good corporate practice" is. In many instances, the ALI draft goes even further, suggesting that failure to live up to the monitoring model's dictates would be relevant in determining whether or not a corporation is complying with existing law, regardless of whether any state ever codifies the monitoring model. Despite the merit or lack of merit in a monitoring model, Corporate Governance's espousal of it is a bootstrap of considerable proportions.

The bootstrap is not evident to all—a mass of detail shrouds it. The reader gets the impression that the ALI reporters attempted to focus debate on individual trees, this or that detail, while successfully pushing an entire forest, the monitoring model, past the ALI Council. Thus, Corporate Governance reads like an operating manual, the like of which few, if any, corporations have ever included in bylaws or elsewhere. It warns, for example, that

[c]are should be taken that the assumption or imposition of additional board functions, other than by law, not compromise the monitoring function by injecting the board into management. However, whether a given function should be treated as ordinary management in any given corporation is ultimately a matter to be determined by the judgment of the board.

Filled with detail, the commentary reads like specifications for a machine.

While § 3.03(b) does not require that a majority of the boards of second tier and demonstrably owner controlled first tier corporations be

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Yale L. J. 663 (1974); and corporate social accounting and disclosure, see Branson, Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility, 29 Vand. L. Rev. 539 (1976). For a summary of other proposals, see generally id. at 659-68 (public interest directors, one shareholder one vote, broadened public interest proxy solicitation rule, and other proposals).

262. Corporate Governance, supra note 3, § 3.02 comment a, at 59. The comments rely, for example, on a statement from the Corporate Directors Guidebook, 33 Bus. Law. 1591, 1621 (1978), that the "role of a director is to monitor." Corporate Governance, supra note 3, § 3.02 comment a, at 59. The Corporate Directors Guidebook, of course, is altogether a horse of a different stripe. It is a guide to be followed from within, rather than the source of a legal standard to be imposed from outside, the corporation. Another principal source of authority for a monitoring model is the ALI reporter's own work. See, e.g., id. at 71 (citing M. Eisenberg, supra note 215).

263. See, e.g., Corporate Governance, supra note 3, §§ 3.05 comment a, at 88-87 (failure to have audit committee), 3.07 comment a, at 109 (failure to have a compensation committee), 4.01 comment a, at 149 (standard of care as there set out should be established by case law as following "principal doctrinal lines already established by state law").

264. Id. § 3.02 comment h, at 69-70.
free of § 1.24 relationships, it does provide that these boards should have at least three such directors. (The number three is chosen because it is regarded as the minimum number of directors necessary to attain a critical mass on the board.)  

Moreover, the detail is often petty, at times stating the obvious to anyone schooled in business affairs. It provides, for example, that "[t]he term 'annual and quarterly financial statements,' as used in § 3.05(a)(2)(E), encompasses annual and quarterly statements filed with regulatory bodies (such as Form 10-K) as well as those intended for issuance to shareholders and creditors." Such a detail adds little to the monitoring model, yet by its mere presence may divert debate from underlying structure to the mass of detail.

The myriad specifications and details also give Corporate Governance an intrusive aspect which has caused the business community to view the ALI design as a wholesale invasion of traditional management prerogatives. Corporate managers might well accept a few specific modifications to the present corporate structure. Packed with excess baggage, as in Corporate Governance, however, even a few specific modifications have little hope for winning acceptance.

One bootstrap aspect of Corporate Governance is while at the same time Corporate Governance professes to restrict it expands the range of corporations it purports to cover. The primary focus is supposed to be upon "first tier" or "large publicly held" corporations. Such companies, those with 2,000 or more holders of equity securities and $100 million or more in assets, would be subject to the full panoply of ALI requirements. They would be required, for example, to have in place an independent majority of directors, auditing and nominating

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265. Id. § 3.03 comment c, at 74-75. For definitions of first and second tier corporations, see infra notes 272-75 and accompanying text.

266. CORPORATE GOVERNANCE, supra note 3, § 3.05 comment d, at 92 (documents audit committee is to review with independent auditor and management).

267. See, e.g., id. § 3.02 comment d, at 64: "[T]he board should also periodically excuse from the boardroom all directors who are senior executives, evaluate the performance of the corporation's principal senior executives individually and as a group, in a candid and reasonably thorough fashion, and follow up on such evaluations . . . ."

268. Cf. R. Smith, Remarks at the Annual Meeting of American Law Institute, 50 U.S.L.W. 2701, 2705 (June 1, 1982) (advice on good corporate practice is a matter for groups like the Business Roundtable rather than the American Law Institute).

269. See, e.g., CORPORATE GOVERNANCE, supra note 3, § 3.03 comment c, at 74 (first versus second tier).

270. Id. § 1.15.
committees, and all other ingredients of the monitoring model.\footnote{271} For "second tier" corporations, publicly held companies with 500 or more persons holding a class of equity securities and having $3 million or more in assets,\footnote{272} Corporate Governance purports merely to suggest those requirements as "good corporate practice" rather than as mandatory standards.\footnote{273} Yet what leeway the black letter provisions give the official comments seem to take away. For example, without qualification one comment states that "[b]ecause the audit committee has become so prevalent it may be that, even where the committee is not explicitly required by present law, its absence will bear upon subjecting a director to liability . . . if the corporation suffers a loss."\footnote{274} This tendency to expand the reach is reminiscent of the federal chartering movement which, like Corporate Governance, seemed eager to expand and fill every void even before it had gotten out of the gate.\footnote{275}

Last of all, Corporate Governance often adopts a sanctimonious tone. For example, in attempting to be magnanimous, Corporate Governance allows "[e]xercise of the management function by the board on a regular basis . . . in the case of second-tier corporations [sic]." It piously adds, however, that the need to do so would be "relatively unusual" and that "[management] by the board on a regular basis would not be good corporate practice even in a second-tier corporation."\footnote{276} At other points, the document permits some variation from the model only to add cautionary language as though addressing a

\footnote{271. Id. §§ 3.03(a), 3.05(a), 3.06(a).
272. Id. § 1.21.
273. See, e.g., id. §§ 3.05(b) (audit committee), 3.06(b) (nominating committee).
274. Id. § 3.05 comment a, at 86. See also id. § 4.01 comment b, at 152 ("monitoring model" is "an irreducible minimum"). But see id. § 3.05 comment c, at 89.
275. Federal chartering proposed that "[o]nly the top thousand interstate corporations . . . would be chartered." Nader, The Case for Federal Chartering, in Corporate Power in America 67, 83 (R. Nader & M. Green eds. 1973). Beyond the largest corporations, however, it became necessary to require "a national franchise . . . of a smaller corporation if it wishes to do a significant amount of business with the federal government, to operate . . . factories in foreign countries, or to engage in certain industries where there is an existing, overriding federal interest, such as energy and interstate transportation." Henning, Federal Corporate Chartering For Big Business: An Idea Whose Time Has Come?, 21 De Paul L. Rev. 915, 922 (1972).
276. Corporate Governance, supra note 3, § 3.02 comment h, at 70. In response to extensive criticism, the ALI committee has changed this section to permit active management by the board. ALI President Perkins' Speech, supra note 207, at 20.
In tone and in specific provision, Corporate Governance is sanctimonious, intrusive, and a bootstrap. Those attributes will severely limit Corporate Governance’s influence with corporate lawyers or business executives. Or, at a minimum, Corporate Governance exudes an appearance of sanctimony and intrusion. Appearance often being as important as reality itself, as presently structured Corporate Governance is not likely ever to gain the currency and influence expected of work products of the American Law Institute.

C. Corporate Governance—Substantive Criticism

Many of Corporate Governance’s shortcomings are cosmetic. In addition, however, there are more fundamental, structural flaws. The monitoring model has as its intent heightening of differences between managements’ and the boards’ of directors roles. Instead of aiding management and setting policy, boards are to “evaluate” and possibly “remove and replace” senior management. The board’s role shifts from cooperative oversight to an adversarial stance. Taken literally, the monitoring model could result in paralyzing impasses between the board and the chief executive officers. Large corporations would lose the valuable service their directors can render under the cooperative model.

Chief executive officers do look to directors for development of policy, for counsel, and for reassurance. That is not to say chief executives cannot procure advice and counsel elsewhere. They can turn to professional counselors: the lawyers, accountants, and bankers who serve the corporation. Lower level managers can also provide the expertise which executive officers need. A difficulty with those sources of advice is that they often tend to be risk averse or, alternatively, simply not capable of evaluating risk. The lawyer or banker may too often view matters in black and white. Alternatively, they may have tunnel vision, subliminally or consciously placing legal or financial aspects in the ascendency.

277. See, e.g., Corporate Governance, supra note 3, § 3.05 comment e, at 94 ("In assigning additional functions to the [audit] committee, care should be taken to avoid compromising its basic functions either by overloading the committee or by injecting it into operational matters.").
278. Id. § 3.02(a)(1).
279. See, e.g., R. Muller, New Directions for Directors 103-05 (1978).
280. Indeed, materials for the academic training of lawyers are only beginning to take note of these disabilities. See, e.g., J. Deutsch & J. Blanco, The
By contrast, board members are often selected to serve because they have had more diverse exposure to business than have bankers, accountants, or lower level corporate personnel. Middle level executives may have spent their entire working lives with the same or similar companies. Bankers or lawyers may have had experiences with many companies, but only on a superficial basis. Even though board members may be the last to view a proposal as it passes up through the corporate hierarchy, board members can often bring a wider perspective to that last stage. As near equals with the chief executive, directors can discuss proposals and policies in terms of uncertainty or shades of gray, aspects that other advisers often do not address.

*Corporate Governance*’s monitoring model would not, of course, eliminate traditional board management functions across the board. It may, however, result in inconsistent practices between firms. Some companies will adopt the monitoring model literally. Others will pay only lip service to the new structure. In between those extremes, corporations will pick and choose the features of the structure that suit them best, paying varying degrees of allegiance to the model as a whole.

There is no easy solution in tinkering with corporate governance, transferring determination of the public interest to individual boards for uneven decisions operating unfairly between competitors and unfairly against the stockholder risk-takers of those corporations. . . . 

That approach turns out to be a cop-out, a transfer of responsibility to a group of Wise Elders in a utopia, thus attempting to short-circuit the necessary effort to work for determination of the public interest in a proper fashion.\(^{281}\)

An apparent constant which would reduce the degree of possible inconsistency is fiduciary duty. Duties of care and loyalty, or liability for the breach of them, serve as some incentive to adopt and apply the monitoring model on an even and earnest basis. *Corporate Governance* makes the point repeatedly, at times on rather farfetched bases. Failure to have truly independent directors and functioning audit and nominating

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How much greater is the danger to the shareholders in companies that choose to follow the letter but not the spirit of the proposed model. It is no great trick to fashion a paper trail that allows presumably independent directors to shield managers who have subordinated shareholder rights to their own interests.
committees, as well as failure to implement faithfully other features of the monitoring model, Corporate Governance tells its reader, will "bear upon subjecting a director to liability" for breach of fiduciary duty even under present law.

The truth is that when fiduciary duty has been a sole safeguard, as opposed to a backup to a well-recognized substantive command or prohibition, it has frequently not worked well. Whether phrased in a strong as well as a weak form, at best fiduciary duty has produced inconsistent results. Recent cases illustrate the point.

In the tender offer area, boards of directors obviously intent upon preserving themselves in office have escaped all sanction under fiduciary duty. In Panter v. Marshall Field & Co., the Field board surreptitiously decided not to be taken over, no matter how high the price offered shareholders or how long they had suffered a depressed market for shares. In a subsequent derivative action based upon breach of the directors' duty of loyalty, the court denied the shareholders' claims on the basis that the business judgment rule barred review of the board's actions. The business judgment rule, however, properly applies only to duty of care claims and not to claims for breach of a duty of loyalty.

Even when the fiduciary principles courts enunciate are sound, courts vary widely in the evidence they will accept and the probity they will accord it. In the classic case of Cheff v. Mathes, incumbent managers spent millions of corporate dollars to buy off a possible threat to their control when, essentially based upon rumor and on one telephone call, they had determined that a "corporate looter" was seeking control.

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282. Corporate Governance, supra note 3, § 3.05 comment a, at 86.
283. See, e.g., id. §§ 3.02 comment b, at 60 (independent directors), 3.05 comment a, at 86 (audit committee), 3.06 comment b, at 101 (nominating committee), 3.07 comment b, at 109 (compensation committee).
284. An example might be where the statutory pre-emptive right of shareholders is backed by directors' duty of loyalty applicable to share issuances. See, e.g., Ross Transp., Inc. v. Crothers, 185 Md. 573, 45 A.2d 267 (Ct. App. 1946).
285. For weak versus strong statements, see supra notes 29-39 and accompanying text.
287. Id. at 293-97. See also Treadway Cos. v. Care Corp., 638 F.2d 357, 381 (2d Cir. 1980) (issuances of shares to dilute tender offeror's position upheld under business judgment rule). Cf. Condor Corp. v. Lunkheimer Co., 43 Del. Ch. 353, 384, 230 A.2d 769, 776 (1967) (share issuance to thwart a tender offer struck down because, inter alia, no "methodical investigation").
court held that management had acted in good faith and in what they had believed to be the corporation's best interests.290

Recently, some corporate boards have approved high amounts of severance pay for management, and in some cases for nonmanagement directors as well, after a successful corporate takeover.291 Opinion is that the business judgment rule may also protect such "golden parachutes" from scrutiny based upon breach of fiduciary duty claims.

Fiduciary duty has worked well in other cases, leading to liability, or to protection, of directors and officers whose actions shareholders have challenged.292 The best that can be said, however, is that fiduciary duty produces inconsistent results. Perhaps it should never be relied upon as the front line defense against all abuse of office by corporate officers and directors. Instead, fiduciary duty may serve best as an omnipresence which fills voids in, or serves as a backup to, substantive command and prohibition.293 Corporate Governance's stress on structure and process combined with fiduciary duty may lead to no greater consistency than does reliance upon structure and process alone.

Corporate Governance abandons substantive law in favor of organizational structure and fiduciary duty. The Revised Model Business Corporation Act, too, abandons substantive command or prohibition. It opts instead for greater flexibility with fiduciary duty as the only real control.294 Recent British company law reform represents a third countertrend. Parlia-

290. Id. at 508, 199 A.2d at 556-57.
293. In the trust area, over the centuries fiduciary duty has spawned a number of discrete common law rules over which general principles of fiduciary duty brood as an omnipresence. See, e.g., 2 A. Scott, THE LAW OF TRUSTS § 170.1-25 (3d ed. 1967) (applications of the duty of loyalty). In the corporation law area, statutory commands or prohibitions have previously served a similar function. American corporation law reform has, however, over the last decade taken the form of easing or erasing those statutory rules, substituting general principles of fiduciary duty. See supra notes 30-77 and accompanying text. In contrast, in corporation law, fiduciary duty has not spawned a great number of discrete common law prohibitions. Corporation law, therefore, is left with only a handful of general fiduciary principles to govern an area of vast applicability. A void exists.
294. See supra notes 84-93 and accompanying text.
ment has chosen to return to substantive regulation in many areas of company law.\textsuperscript{295} Perhaps in lieu of or in addition to structure, the ALI should consider revision and restatement of some discrete corporation law commands that over the years have fallen by the wayside.\textsuperscript{296}

IV. TO WHAT ENDS CORPORATION LAW REFORM?

Before adopting any course of action, the ALI, the ABA, or other reformer must devote additional thought to what it is they are attempting to achieve. There has been much discussion about goals for corporation law, much of it muddled, most of it contradictory, and some of it simply not connected with reality. That discussion has served to confuse rather than resolve the issue of what ends corporation law should serve. Before the reform and revision processes began, no consensus had been reached or single issue resolved,\textsuperscript{297} save a determination by a number of individuals that something should be done.

A. LAW AND ECONOMICS AND MARKET MODELS

One group, however, vigorously dissents even from that view. The law and economics group animus is that

\textit{[t]he purpose of corporation law is to provide a set of organizing principles under which private parties can enter into contractual arrangements that maximize their joint welfare. The function of corporation law, therefore, is rather limited. Apart from minimizing transaction

\textsuperscript{295} See supra notes 93-199 and accompanying text.

\textsuperscript{296} In support of such a course of action it has been said that

\textit{the public interest and its lawful demands on the corporation . . . should take the form of prohibition of action by law . . . or encouragement of action by command . . . . And public policy should be manifested comprehensively with fairness among competitors and among groups of shareholders . . . not by the possibly inconsistent determinations of independent groups of private persons who . . . [find] themselves in control of different individual corporations.}

\textit{I do not have to have explained to me the case against too much government interference with business. There is too much legislation, a poor legislative process, overregulation, and unsatisfactory public administration . . . . But the necessary course is to fight for their improvement. There is no easy solution in tinkering with corporate governance.}

\textit{Kripke, supra note 214, at 184 (citations omitted).}

\textsuperscript{297} See, e.g., \textit{Commentaries, supra note 203. The speeches recorded therein range from complacent, see Farrell, \textit{Corporations Are Already Overgoverned}, \textit{id.} at 188; to mildly progressive, see Kaplan, \textit{Fair Treatment of Shareholders}, \textit{id.} at 215; to somewhat strident, see Schwartz, \textit{The Paradigm of Federal Chartering}, \textit{id.} at 325, and Green, \textit{Attainment of Social Goals Requires Corporate Reform}, \textit{id.} at 265. All seem to do little more than resemble anecdotal after-dinner speeches, certainly not an adequate empirical foundation for a major restatement of corporation law.}
costs and possibly facilitating the operation of market forces that discipline management, corporation law has little role to play.  

The law and economics group does not believe that corporation law needs any change, save perhaps eliminating even more of the constraints the law imposes on corporate management. To members of this group, the market for shares provides all the protection shareholders need. If shareholders do not approve of the performance of the corporation or of management's use of corporate assets, they can sell their shares in the market, investing the sales proceeds in other corporations.  

Because the shareholder "[r]egards himself ... not as a citizen of a corporate state but as an investor ... seeking a financial return," the so-called "Wall Street rule" should govern. Unfettered markets, not corporation law, protect shareholders most effectively.

Closely aligned to the market model is the stance many in the business community adopt. The epigram "If It Ain't Broke, Don't Fix It" sums up this philosophy. Its supporters argue that, in the United States, for-profit entities have flourished under the corporate form, creating for the citizenry a high standard of living. There is, therefore, no reason to tamper with shareholder protection or with corporate governance. If anything, government overregulates companies through a multiplicity of regulatory schemes. "[T]he Securities and Exchange Commission, the Federal Trade Commission, the National Labor Relations Board, the Environmental Protection Agency, and literally hundreds of others are present at every board meeting."
The Revised Model Business Corporation Act, with flexibility as its only goal, best typifies this philosophy of corporation law.304

Both the economics and, more indirectly, flexibility schools ignore the third logical alternative. Shareholders need not remain as "citizens of a corporate state"; investors selling in the market need not reinvest in other companies. Instead, individuals can sell their shares and simply not return to the market or otherwise reinvest. Investors can use the share sale proceeds to purchase durable goods, luxury items, or otherwise to consume. Both the economics group and the business community flexibility school fail to note long term trends that may indicate existence of a malaise. They instead focus on narrow studies in order to justify a priori conclusions. Since stock prices do not fall when corporations reincorporate in Delaware, there must be nothing wrong with liberal or enabling corporation law.305

In 1972 individual investment, as measured by the number of individuals owning publicly traded stocks, declined for the first time since the New York Stock Exchange began keeping statistics in 1951.306 Share ownership peaked in 1970 with one in four adults owning publicly traded shares. In subsequent years, the incidence of share ownership has stayed well below that figure.307 Only in 1981 did the absolute number of individuals owning shares rise to the level it had reached in 1970.308 At the same time, the needs to modernize increasingly outmoded industrial plants, expand capital-intensive modern ventures, and compete in an international or global economy indicate that industry will require vastly greater amounts of capital in years ahead.309

304. See supra notes 80-85 and accompanying text.
308. NEW YORK STOCK EXCHANGE, 1981 SHAREOWNERSHIP 1 (1982).
The suggestion that the current state of corporation law has contributed to the declining number of investors is admittedly pure conjecture. Ravages of inflation, better returns in competing non-equity investments, securities regulation with overzealous protection of the individual investor,\textsuperscript{310} double taxation of dividends, growth of pension plans as substitutes for personal portfolios, and the sorry performance of equity investments over the last decade are all interrelated causes of a decline in the investor population. Decline in the number of investors leads, in turn, to a reduced rate of growth in the demand for equities, thus starting a downward spiral. Investment performance remains lackluster or worsens.

Yet as perhaps reflected in corporation law's failure to foil defenses to cash tender offers, golden parachutes, or excessive management perquisites,\textsuperscript{311} the operation of corporation law may well play a role in producing malaise among investors. It cannot with any certainty be said, as law and economics commentators have said, that "not one shred of empirical evidence" supports the view that there exists a "widespread perception that there is something wrong."\textsuperscript{312} In great number, investors have voted with their feet. Moreover, corporation law may facilitate certain forms of management conduct which, in turn, may lead to a perception by investors that something is wrong. At a minimum, the marginal cost of changes to, and strengthening certain areas of, corporation law may be exceeded by the marginal revenue that resulting increased investment and more stable share ownership represents.

In order to maintain credibility, law teachers, regulators, business executives, and others imbued with the philosophy of the law and economics and flexibility schools must delve into the thornier macroeconomic issues, such as the proper balance


\textsuperscript{312} Fischel, \textit{supra} note 298, at 914. \textit{See also} Hetherington, \textit{When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights}, 8 Hofstra L. Rev. 183, 187 (1979): "As long as management maintains and increases the firm's profitability, shareholders are likely to feel that they are getting what they came for. This attitude is surely the primary reason why . . . there has been no serious protest by those whose interests are directly involved." (citations omitted).
between consumption, on the one hand, and savings and investment, on the other. In the area of corporation law it may not be true, only convenient, to assume that there is "little in [macroeconomic issues] that could ever impact significantly on law or legal philosophy." There are problems in the corporate sector: over the longer term investment has lagged, needs for equity investment increase on an almost Malthusian basis, and reformers of the free market or other persuasions seem blissfully unaware of either development.

B. THE CORPORATE SOCIAL RESPONSIBILITY SCHOOL

Proponents of corporate social responsibility reforms seem equally unaware of a possible fundamental malaise. Without inquiry into whether the underlying economic structure is healthy, these reformers adopt a position opposite that which the free market and flexibility schools advocate. Through corporation law, they would establish responsibilities toward consumers, workers, the communities in which corporations operate, and clean air and water. Social responsibility reformers would also discard the traditional corporation law model with its central theme, regulation for the protection of shareholders. Since modern shareholders are only "gamblers in the stock market" lottery, their interests are peripheral at best. If shareholders do not think corporate social responsibility activity is in their best interest, their choice is clear. They too can sell, just as shareholders in the law and economics school can sell if they are not pleased with developments under a laissez-faire model.

The social responsibility philosophy seeks to journey to a point miles beyond corporation law's present site. By legislative fiat imposing revolutionary responsibilities upon corporations, the social responsibility reformers seek to travel that journey's last miles without first taking the initial steps. Without great numbers of investors and shareholders, the financial as well as sociopolitical footing of the corporate state may be

314. See, e.g., Henning, supra note 275, at 924 ("palpable evidence of corporate irresponsibility in our air, water, and food, on our highways, railroads and television sets, and in our sacked and gradually abandoned cities" makes such corporation law reform necessary). See generally Nader, supra note 275.
315. Flynn, Corporate Democracy: Nice Work If You Can Get It, in CORPORATE POWER IN AMERICA, supra note 275, at 105.
316. See supra notes 298-304 and accompanying text.
weak. Corporations would not be able to provide society with the desired level of goods and services, let alone be able to fulfill new or expanded social responsibilities. Investors and shareholders, as well as consumers, are a necessary first predicate to any but the most radical reform that can be proposed.\textsuperscript{317}

C. "Buzz Word" Philosophies for Corporation Law

Neither market model nor social responsibility schools have the upper hand, although corporate social responsibility reformers did have the momentum until several years ago. The introduction and failure of federal chartering in successive Congresses marked a high water point for social responsibility reform.\textsuperscript{318}

To a degree, though, \textit{Corporate Governance} has supplanted federal chartering as the standard bearer for the corporate social responsibility movement, albeit with a muted and more responsible tone. Indeed, the first substantive section of \textit{Corporate Governance} speaks to these issues:

\begin{quote}
Corporate law should provide that the objective of the business corporation is to conduct business activities with a view to corporate profit and shareholder gain, except that, even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business

(b) may properly take into account ethical principles that are generally recognized as relevant to the conduct of business, and

(c) may devote resources, within reasonable limits, to public welfare, humanitarian, educational, and philanthropic purposes.\textsuperscript{319}
\end{quote}

\textit{Corporate Governance} apparently seeks to make corporations "accountable." Beyond statements such as those in the first section, however, \textit{Corporate Governance} never articulates whether accountability is to shareholders, the society, or clean air and water, and why this accountability is necessary. To achieve the governance goals, shareholders elect an independent board that supervises management by means of auditing and compensation committees. Whether shareholders or directors desire to—or will—govern, and why the drafters selected

\begin{footnotes}
\textsuperscript{317} Share ownership would not, of course, be necessary if reform took the form of nationalization. See, e.g., \textit{J. K. Galbraith, Economics and the Public Purpose} (1973); Shepard, \textit{Public Enterprise}, in \textit{Corporate Power in America}, supra note 275, at 235.


\textsuperscript{319} \textit{Corporate Governance}, supra note 3, § 2.01. See also Comment, \textit{Corporate Ethics and Corporate Governance: A Critique of the ALI Statement on Corporate Governance Section 2.01(b)}, 71 \textit{CALIF. L. REV.} 994 (1983).
\end{footnotes}
"governance" as the route to "accountability," is at best inchoate in current thought. In both "accountability" and "governance," there seems to be included a notion of limiting managers' power. Yet the drafters never bring to the fore reasons why law must limit managers' power.

By and large, Corporate Governance steers a middle course, responsibly attempting to evolve a new but not radically different corporation law model. The difficulties arise because the document does not clearly and simply define the ends it seeks in terms capable of being kept constantly in sight. Instead, "accountability" and "governance" become at best ambiguous and at worst meaningless ends. With no simply defined goal, neither critics nor supporters can judge whether a particular measure—a new structure or process, a substantive command or prohibition, or increased flexibility buttressed by general principle—firmly grasps the nettle. Beyond a vague discomfort with the present scheme, the reformers do not even know what the nettle is.

Similar to "accountability" and "governance" is the goal of "legitimacy." With limited use, Professor Hurst's construct may have meaning. With repeated use, legitimacy comes to have no meaning or to mean "many things."

It is employed, as it was by Hurst in 1970, to embrace the criteria of utility and responsibility, or to include both criteria but with a different reading of the sources, or to refer only to the responsibility criterion. It is used without restriction, as in references to legitimating the role of the corporation in American life, or to making the corporation acceptable to the American people, or to indicating the corporation's failure to meet the public's perception of its responsibilities.

Despite this broad, amorphous meaning, reformers add "legitimacy" to "accountability" and to "governance" in forming a triumvirate of goals for corporation law reform. Corporate Governance is not alone. In revising the MBCA, the ABA Committee on Corporate Laws sails on toward "flexibility" with no thought of whether problems exist or of precisely why they are engaged in the exercise. The British amend company law on an extensive basis, returning to greater substantive regulation. They seem, however, to act only in re-

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321. Werner, supra note 281, at 1647-48 (citations omitted).
322. See, e.g., Commentaries, supra note 203, at 41, 46, 51, 52, 133, 136, 138, 139, 249, 272, 273, 327.
323. The reformers have, perhaps, given thought to the increased flexibility that will make some aspects of practice less worrisome for corporate counsel. See supra notes 80-83 and accompanying text.
response to the Council of the European Economic Community and its directives on company law, and not in light of any underlying normative philosophy.324

Reformers need a perception of the particular problems that exist with corporation law today. From the precise articulation of problems should come a formulation of goals for corporation law reform. These goals must be stated cogently so that through the discussion and drafting stages of any reform process, discussants and drafters can easily bring the central goal to mind. A simple, understandable statement must supplant "governance," "accountability," "legitimacy," or "flexibility" as a lodestar for corporation law reform.

D. SHIFTING FROM A PROPERTY TO A POLICY BASED MODEL

Shareholder protection has been the traditional goal of corporation law.325 Corporation law protected shareholders from conversion or waste of their property by corporate managers, controlling shareholders, and, on occasion, third parties such as rapacious "corporate looters."326 Thus conceived, the regulatory model protected property. Through the shareholder vote and other facets of corporate democracy, corporation law also gave shareholders a measure of ability to protect themselves.327 At many points, though, the rule of law still stood sentry duty for when corporate democracy might fail. The obligation of majority to minority shareholders, preemptive rights doctrines, or statutory provision for dissolution in cases of deadlock or oppression might intervene to protect the shareholder's property when majority rule had produced a warped or unjust result.328

Viewed as based upon a property model, corporation law

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325. See supra notes 11-14 and accompanying text.


328. See, e.g., Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947) (obligation of majority shareholders); Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 484 (1969) (same); Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960) (oppression); supra note 286 (preemptive right). Although federal proxy rule regulation has largely preempted the field, state law also can intervene to insure that some integrity exists in the democratic process itself. See, e.g., Brown v. Ward, 593 P.2d 247 (Alaska 1979) (spirit of federal proxy rules applicable as matter of state corporation law); Campbell
functionally resembles the law of torts or contracts. The law protects property in order to elevate the resolution of disputes from the streets to the more intellectual, orderly plane of law office and courtroom. Consequently, self-help and resultant violence will not undermine the social fabric.\textsuperscript{329} Because corporation law protects a pecuniary interest, not a physical interest or one otherwise closely connected to the person, the law sometimes moved more slowly to protect the property interest in the corporation.\textsuperscript{330} Yet the law did move.

What is curious, however, is that in its sometimes slow movement, corporation law never advanced beyond the goals of long ago. Indeed, corporation law has receded even from that model. Fifty years ago Adolf Berle and Gardiner Means demonstrated that insofar as shareholder democracy was an ingredient in the protection of property, the protection might not exist. More often than not those who control a corporation do not own it.\textsuperscript{331} Through efficient capital markets and modern communications, share ownership had become so dispersed that, almost by default, a small group with little or no ownership could control the property.\textsuperscript{332} Anomalously, unlike tort and contract models, the corporation law model for protection of property had less validity when Berle and Means wrote than it had had in the nineteenth century.\textsuperscript{333}

For fifty years, corporation law has had a well-known penultimate goal—shareholder control through a democratic process—which works imperfectly at best. The ultimate goal, protection of property, has not evolved beyond what it was a
century or more ago. Surely after all that time corporation law can move beyond those anachronistic ends. Corporation law should protect property not just to prevent self-help or promote shareholder democracy, but also to increase confidence in an economic system which rests heavily on savings and investment.

In corporation law, a shift in emphasis from shareholder protection, that is, protecting property, to protecting investment is a subtle but important change. The corporate sector is not well, as the indifference of investors to the marketplace indicates. Over the last decade or more, a certain malaise seems to have crept into investment and shareownership processes. Would-be corporation law reformers must determine the extent and, within the ambit of corporation law, the possible causes of that disaffection. Reform should address those causes in order to protect and even encourage share ownership. On the other hand, corporation law cannot embody policy based upon the Wall Street or similar cynical decision rules. Such policies, which concentrate on microeconomic analysis yet overlook macroeconomic needs, could have disastrous consequences. At the same time, restoration of confidence in the corporate sphere and in share ownership is a necessary prerequisite to any thought about establishing new or different responsibilities under the guise of corporation law.

V. CONCLUSION

Much like federal securities law, corporation law should adopt the goal of shareholder protection not just in the sense of protecting property but also with a view toward restoring integrity to and belief in the investment process. Unlike federal securities law, corporation law must tend toward promoting share ownership. Often investors and shareholders are best pro-


The Wall Street Rule . . . has very practical consequences . . . . When selling their interests is the primary means to express dissatisfaction, shareholders are put into a frame of mind that the only practical way to communicate . . . is through the markets. Patience, direct communi-
cation, loyalty and constructive criticism are given short shift . . . . On a lesser scale, in and out philosophies are simply ill-suited for many inves-
tors who prefer stable, controlled growth. See, e.g., R. West & S. Tinic, The Eco-
nomics of the Stock Market 5-8 (1971) (characteristics of an efficient market).
ected not by ubiquitous regulation but by the existence of great numbers of shareholders and investors in the markets. The liquidity, lack of stock price gyration, and controlled growth thus generated may protect better than any regulation.336

At other times, substantive regulation may be the best means to restore integrity to and belief in the investment process. Statutory do's and don'ts directed against real, as opposed to hypothetical, abuse may best curb conduct by corporate managers or owners that has inimical effects on shareholders' and investors' perceptions.337 Some emphasis on corporate structure, perhaps including some form of independent directors or other corporate governance proposals, may also aid in achieving the policy goal in other areas. Last of all, flexibility for corporate managers may be entirely appropriate in some, but not across all, areas of corporation law.338

What is clear from the three major trends in corporation law today is that little thought has been given to what aims those movements seek, or why the participants are about the reform or revision process in the first place. Ephemeral constructs abound, including “accountability,” “legitimacy,” and “social responsibility.” Few sideway glances have been cast, save for an occasional short pejorative burst one reform group aims at another. Little comparative, and no empirical, research has taken place. Now that corporation law has awakened, seemingly with a jump and a start, it must reaccess its course and in a systematic manner begin anew the process of reform, restatement, and revision.

336. See, e.g., id. at 56-60.
337. Even market model advocates have conceded that regulation other than market forces may be necessary in certain areas. See Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. LEGAL STUDIES 251, 274-84 (1977).
338. Although corporation law may be largely constitutional law, see M. A. Eisenberg, supra note 215, constitutional law does more than merely overlay structure and process on an association of individuals. Constitutions also impose categorical imperatives on governments and citizens alike. Also, in reality corporation law has always been a meld of agency, torts, contract, and trust, as well as constitutional principles. A multiplicity of approaches for dealing with corporation law's various aspects may then be far more realistic than treating corporation law as a unified whole.