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Federal Chartering Revisited

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FEDERAL CHARTERING REVISITED

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When talk of corporate reform became serious in the 1970s, a number of critics sought reform through federal legislation.[1] Some reform proposals were sweeping while others were more modest, but they shared the view that Congress was the vehicle for progressive change.

It is understandable that reform-minded critics thought in terms of federal legislation. During the preceding ten years, Congress had addressed the most serious of social problems, adopting broad civil rights reforms, voting rights reforms, an environmental program; Congress even declared war on poverty.

By contrast, the state law of corporations lacked a focused policy.[2] In Bayless Manning's memorable phrase, state corporation statutes were "towering skyscrapers of rusted girders, internally welded together and containing nothing but wind."[3] If reform was to be achieved, it would have to come from another source.

Strong national leadership ruled the Congress, and it was able to respond to the urgings of its senior leaders. The seniority system determined leadership roles, giving Congress a continuity and institutional memory that it probably has since lost. Clearly, things could happen in Congress that did not occur to state legislators to consider.

By the time scholars and practitioners of corporation law began debating the merits of federalizing corporation law, however,

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1. *See, e.g.*, R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976); Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976).

2. State corporation law has traditionally been promanagement. Shareholders in larger corporations typically are scattered geographically, and thus do not command an effective voice in state legislatures. Hence, state statutory corporation law has tended to grow haphazardly in response to management concerns. *See generally infra* note 20 and accompanying text.

3. Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962).

national solutions to problems had lost much of their lustre. Proponents of reform viewed the political process associated with legislation as a threat to achieving a balanced solution. Moreover, Congress appeared paralyzed when it came to acting on any kind of meaningful corporate legislation.

More importantly, the merits of a federal solution to the problems of corporation law were sharply disputed, and even staunch proponents of reform had to concede that there was much to learn before solutions could be reformulated. Furthermore, state courts, ready to assume a greater role in corporate law, rendered important decisions that showed a better understanding of shareholders' problems.[4]

The business community had reexamined the manner in which it exercised its power, and managers initiated a number of important reforms that had been at the center of legislative reform attempts. Thus, boards of directors became more professional, more critical, more attentive, and more independent.[5]

The forces of the marketplace, operating largely through hostile tender offers, furnished another reason not to legislate.[6] No more effective accountability mechanism was ever devised by legislative crafting than the thrust of an unwelcome raider.[7]

This author, who had proposed sweeping federal legislation to replace state corporation law for the largest of our corporations, recanted[8] after the American Law Institute (ALI) seriously began its Corporate Project.[9] I preferred the more informal efforts of the ALI, working in its usual deliberative fashion, to the uncertain results likely to emerge from the hurly-burly of the political arena. Enough time remained to consider the need for fed-

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4. *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) (holding that purchase of minority shares in a cash-out merger was subject to an intrinsic fairness standard).

5. For example, larger public corporations began to establish audit committees to monitor the selection and findings of the independent accountants. The audit committee typically is composed of nonmanagement directors to provide an independent check on management.

In the same vein, corporations began to be more conscious of duty of loyalty problems. Procedures were established requiring approval of transactions in which one director had a pecuniary interest by those members having no interest in the transaction. *See generally* Committee on Corp. Laws, Section of Corp., Banking & Business Law, Am. Bar Ass'n, *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1599 (1978).

6. *See generally* Weiss, *Economic Analysis, Corporate Law and the ALI Corporate Governance Project*, 70 CORNELL L. REV. 1 (1984).

7. *See* Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, in KNIGHTS, RAIDERS, AND TARGETS 77 (1988).

8. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 587 (1984).

9. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (Tent. Draft No. 2, 1984).

eral legislation after the ALI's efforts had been completed and state legislatures had a chance to study and respond.

I still enthusiastically support the ALI's efforts. I hope the final product is worthy of the enormous effort that its participants have already expended. One must remain on guard, however, with respect to the prognosis. I think that it is too early to bury the idea of federal legislative reform as a concept or, perhaps, as the only realistic method for reforming corporation law. At most, I think the idea ought to be tabled rather than rejected.

Critics of corporation law have become increasingly alarmed by a nationwide trend that seriously erodes standards of corporation law. This has occurred in the areas of greatest importance to investors and to others concerned about corporate policy. The areas most seriously affected concern the duties of directors, the remedies available to shareholders for breach of those duties, and the market for corporate control.

State legislatures have virtually eliminated liability for breach of the duty of care.[10] To be sure, the subject was one of concern and in need of reform. Draconian liabilities did not serve the shareholder interest, but rather made courts hesitant to impose liability. The result was a lowering of the duty of care standard. When the Delaware Supreme Court, in *Smith v. Van Gorkom,*[11] held that directors had breached their duty in approving a merger in a manner the court regarded as ill-informed and hasty, the result caused corporate managers and their counsel to secure legislation in enough states to prevent the *Van Gorkom* result from recurring. I do not intend to defend or attack *Van Gorkom,* though surely there are situations where managers act too hastily and should suffer liability. Where the recent statutes apply, such liability is highly unlikely. These laws effectively eliminate any kind of liability based upon a breach of the duty of due care—in some cases, even where the conduct of the defendant director is reckless.

One may argue that there are sufficient market forces at work to make it unlikely that directors will be so careless as to be exposed to liability for the breach of due care, and responsible scholars have urged that the law eliminate liability.[12] It is not

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10. *See, e.g.,* DEL. CODE ANN. tit. 8, § 141 (Supp. 1988); IND. CODE ANN. § 23-1-35-1(e) (West Supp. 1987); OHIO REV. CODE ANN. § 1701.59 (Anderson Supp. 1986); 42 PA. CONS. STAT. ANN. § 8364 (Purdon Supp. 1987).

11. 488 A.2d 858 (Del. 1985).

12. *See, e.g.,* Scott, *Corporation Law and the American Law Institute Corporate Governance Project,* 35 STAN. L. REV. 927 (1983); Weiss, *supra* note 6.

seriously argued, however, that liability for breach of the duty of loyalty should be eliminated.[13] Nonetheless, recent developments seriously threaten this most fundamental of director and officer obligations. Economic theorists argue that the corporation is essentially at the core of a nexus of voluntary contracts and that stockholders are merely stakeholders who have contracted for certain entitlements.[14] Under this approach, it is a small step to allow the contracting parties to arrange their affairs and their expectations so as to eliminate liability for a breach of the duty of loyalty, or at least to submit all disputes concerning alleged breaches of the duty of loyalty to resolution by means other than judicial determination. The theory might further minimize the role of the courts, which have long stood as a bulwark against unfairness in self-dealing transactions, for the parties could contract the courts out of their traditional role.[15]

Of more immediate and practical significance is the disquieting trend in the law to sterilize the remedy for breaches of the duty of loyalty.[16] The stockholder derivative suit serves its most significant function in providing a remedy for such defalcations, and this is an area where market forces play a smaller role. The derivative suit serves as the main deterrent against unfaithful conduct.

The Supreme Court of Delaware, in the 1981 case of *Zapata v. Maldonado*,[17] seemed to apply the brakes to a runaway force that threatened to destroy the derivative suit. Other courts—most notably the New York Court of Appeals in

13. Likewise, the case law remains unequivocal concerning duty of loyalty issues. *See, e.g.*, Production Finishing Corp. v. Shields, 158 Mich. App. 479, 405 N.W.2d 171 (1987); Brudney & Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997 (1981).

14. Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). *But see* Brudney, *Corporate Governance, Agency Costs and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (1985).

15. The contract approach would allow management to write contracts that would prohibit or limit certain conduct in the event of a takeover attempt. It might be possible to write a contract in such a way that it would not be necessary to obtain shareholder approval in advance. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385, 387.

16. For cases illustrating the trend toward diluting the effectiveness of shareholder derivative suits, see Grobow v. Perot, 539 A.2d 180 (Del. 1988) (dismissing shareholder derivative suit for failure to state facts which, if taken as true, would create a reasonable doubt either of director disinterest or independence, or that the transaction was other than the product of the board's valid exercise of business judgment); Kaplan v. Wyatt, 484 A.2d 501 (Del. Ch. 1984) (granting motion to dismiss a shareholder derivative suit on the grounds that a special litigation committee had previously found that the suit had no merit and that it was not in the best interest of the corporation to proceed with the suit).

17. 430 A.2d 779 (Del. 1981).

Auerbach v. Bennett,[18]—have allowed a board of directors to terminate a derivative suit where the decision to do so is made by an independent committee. The review is limited to an inquiry of the decision under the business judgment rule. Initially, the cases in which courts sustained committee action terminating the suit involved only a breach of the duty of due care, but this limitation was short-lived.[19] Soon the corporate community applauded the use of such committees as a device to cure the abuses of derivative suits. The limitation, however, cured only abuses by plaintiffs and threatened to render impotent a crucial check on management discretion.

Zapata held that the business judgment rule did not apply to the determinations of the committee in the case before it and offered many sound policy reasons for this result. The court determined that the case before it was one in which a demand on the directors was not required. In dictum, the court mentioned that if a demand were required, then the decision of a committee would be upheld unless it was "wrongful."[20] Thus, the business judgment rule was considered the appropriate standard in a "demand required" case, an issue not necessary to the resolution of the case.

Subsequently, Delaware decided *Aronson v. Lewis*,[21] in which demand was required of a shareholder in a case involving a self-dealing transaction by a person who owned forty-seven percent of the stock of the corporation. The court reasoned that demand was necessary because the directors to whom demand would be addressed were persons not threatened with liability unless they themselves were unprotected by the business judgment rule. This being the case, the decision not to proceed with the suit would be judged under the business judgment rule. The irony is striking. If the suit were judged on its merits, the self-dealing transaction with the dominating shareholder would not be judged on the basis of the business judgment rule. But the court never reaches the merits, because of the need to make a demand, the denial of which is then judged under the business judgment rule. So much for the standard of fairness in a self-dealing transaction. Further impairing the plaintiff's remedy was the *Zapata* court's determination that whether a plaintiff would be entitled

18. 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979).
19. *See, e.g.*, Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979).
20. *Zapata*, 430 A.2d at 784.
21. 473 A.2d 805 (Del. 1984).

to some discovery regarding a committee's decision not to sue is a matter of discretion for the trial court.[22]

The combination of these forces again threatens the derivative suit with practical extinction unless legislatures, or the ALI, can rescue it. There seem to be few advocates for a legislative solution. State corporate legislation is largely influenced and instigated by association committees composed mainly of corporate lawyers whose clients would find reform anathema, and who themselves have long become conditioned to their clients' point of view.[23]

Finally, there is the tender offer.[24] A tender offer means many things in our corporate society. Inefficient management can be replaced with more efficient, responsible, and innovative management. Opportunistic corporate swashbucklers can make quick profits from largely unproductive activity. Bankers and lawyers can make obscene profits. Corporations can be broken up into various pieces, sometimes making them leaner and tougher, and at other times making them dangerously vulnerable. Our economy can become highly leveraged, which can result in greater efficiency or dangerous overextension. Shareholders of target companies can reap great profit. In the aggregate, a tender offer is all of these things and more. In view of its multifaceted nature, the tender offer ought not to be seen as uniformly beneficent or evil.

Perhaps the worst legislative approach to tender offers is the adoption of a one-dimensional viewpoint about their desirability. As a practical matter, this means that the worst kind of legislation imposes barriers against a tender offer and sides with the viewpoint of corporate management, which for obvious self-protective reasons opposes the very institution of the tender offer. One-sided legislation to foster tender offers is equally offensive, but is a myth. Federal legislation in this area, as reflected in the Williams Act,[25] refrained from passing judgment on the virtue of tender offers, but instead required full disclosure and prohibited the worst features of tender offers. By not taking a viewpoint in favor of or against tender offers, Congress subtly

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22. Kaplan v. Wyatt, 484 A.2d 501, 507 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985); Levine v. Smith, Fed. Sec. L. Rep. (CCH) ¶ 93,581 (Del. Ch. 1987).

23. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 514 (1985).

24. For an article discussing the tender offer as a tool for corporate governance, see Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145 (1984).

25. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982 & Supp. IV 1986)).

expressed its view that the institution of the tender offer occasionally had value.[26]

State laws responded to a different constituency, and states enacted statutes with little deliberation or debate.[27] In any event, public attitudes regarding tender offers (except for the attitudes of shareholders) turned hostile. It was not difficult to portray voracious raiders as greedy, Boesky-like vultures who ought to be stopped. A significant restraint on the states, however, appeared to be the Constitution. The Supreme Court in *Edgar v. MITE Corp.*,[28] in 1982, found that a state tender offer statute unconstitutionally interfered with interstate commerce because tender offers were nationwide transactions exceeding the legitimate concerns of the particular state. That restraint was largely removed by the 1987 decision of the Supreme Court in *CTS Corporation v. Dynamics Corporation.*[29] The *CTS* Court indicated that there was much greater latitude for the states to enact legislation that would have the practical effect of restraining or perhaps eliminating hostile takeover bids.[30] First, *CTS* permitted states to copy the Indiana statute that was upheld in *CTS*. Second, *CTS* encouraged states to legislate more potent antitakeover devices.[31] A majority of states now have antitakeover laws, most of which were adopted hastily and, in many cases, at the urging of a particular target company.[32]

This trend has seriously impaired the utility of the tender offer as a device to make management more accountable to shareholders. This development and the developments discussed pre-

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26. *See* Edgar v. MITE, 457 U.S. 624 (1982).

27. For example, Dayton Hudson Corporation, one of the largest employers in Minnesota, was able to convince the state legislature to pass speedily an antitakeover law in response to a hostile tender offer by the Dart Group. *Dayton Pushes Takeover Law,* N.Y. Times, June 25, 1987, at D5, col. 6.

28. 457 U.S. 624 (1982).

29. 481 U.S. 69 (1987).

30. For commentary on the decision, see Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96 (1987); Regan, *Siamese Essays: (I)* CTS Corp v. Dynamics Corp. of America *and the Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation,* 85 MICH. L. REV. 1865 (1987).

31. In fact, many states have enacted more stringent antitakeover statutes since the *CTS* case was decided. *See* Lawrence, *Post* CTS Corporation v. Dynamics Corporation of America: *A Comparison of Reforms in State Control Share Acquisition Laws,* (National Conference of State Legislatures 1987).

32. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 10-1201, 10-1211-1217 (Supp. 1988) (extending jurisdiction under post-*CTS* control-share statutes to nonresident corporations); DEL. CODE ANN. tit. 8, § 203 (Supp. 1988); FLA. STAT. ANN. §§ 607.109-10 (West Supp. 1988); MASS. ANN. LAWS ch. 110D (Law. Co-op. Supp. 1988); *see also supra* note 27 and accompanying text. Delaware and New York are notable exceptions in that they acted deliberately.

viously have made shareholders dangerously vulnerable to underperforming or greedy managers. While managers like to point to tender offers and lawyers as the source of American noncompetitiveness in world markets, this claim lacks the ring of truth. In fact, a good claim can be made that keeping managers insecure and on edge enhances American competitiveness.[33]

A related trend in new legislation has been to establish an array of factors that boards may consider in evaluating the best interests of the corporation. These statutes typically allow for consideration of political, economic, and social factors, including effects of corporate action on employees, suppliers, customers, and the community in which the corporation is located. Although courts have reasoned that these elements may be valid considerations, enabling directors to meet their fiduciary responsibilities to shareholders, tribunals have given weight to these factors only where there is an ultimate benefit to shareholders. Further, while these factors may be relevant from a community relations standpoint, they make it difficult to evaluate directors' conformance to the duty of loyalty to shareholders, particularly in the tender-offer context. Absent these statutes, the issue of loyalty could be seen as an inquiry about whether the decision maximized shareholder values. As it stands, these statutes may allow directors to cloud the issues.

For progressive critics of the corporation, the newly enunciated standard poses a dilemma. On one hand, they would be expected to favor permitting directors to consider the effect of corporate action on the community as a whole—although they believed such power already existed. On the other hand, one doubts whether management sheds crocodile tears for the community, and suspects rather that management seeks only to preserve its position of power—a task made easier by a dilution of its duty to the shareholders. In any event, the newer statutes may surrender too much control over the managers without any clear articulation of how managers can be all things to all people.

Thus, the case for corporate reform today seems at least as strong as it did in the early 1970s, if not stronger. Moreover, the tide of events that has accelerated the dangers threatens to overwhelm the ALI's worthwhile efforts to put reform on a firm, not

33. *Takeover Tactics and Public Policy, 1984: Hearings on H.R. 2371 Before the Subcomm on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess; 183-99 (1984) (statement of Carl Icahn, President and Chairman, Icahn & Co.).

legislated, footing. For example, it is highly unlikely that the ALI can reverse the trend of exculpating directors from liability for breach of the duty of due care. The efforts of a private, self-selected group of lawyers, judges, and academics may be simply too weak to withstand the force of an enacted statute. The ALI effort is more likely to be influential with respect to judge-made law, such as the rules that have surrounded derivative suits; even there, however, the restrictions on derivative suits may be incorporated into legislation as a result of possible changes in the Revised Model Business Corporation Act.

The ALI effort began on an aggressive and strident tone. In fact, in its earliest descriptions of governance reform and the business judgment rule, the ALI was needlessly hostile and not sufficiently mindful of the sensitivities and viewpoint of the corporate community. That changed as the Project matured. The later versions of Parts III and IV, dealing with corporate structure, and with the duty of due care and the business judgment rule respectively, were balanced and were overwhelmingly endorsed by the members of the ALI. Similarly, Part V, dealing with the duty of fair dealing, including the duty of loyalty, was tentatively approved by a wide margin.

As the Project began to deal with more controversial areas, such as derivative suits and transactions in corporate control, the governing body of the Institute, its Council, grew more cautious and less receptive to the views of its reporters. Consequently, far more modest reforms are likely to emerge from the final product of the Project than once appeared to be the case. There are varied explanations for this. At one end of the spectrum, the reporters may have been wrong, and the Council may have corrected them. At the other end, the Council may have lost its vigorous desire to support reform.

Some knowledge of the origins of the ALI Project and its subsequent development is necessary to understand what has transpired. The ALI decided in 1978 to undertake the Project at a time when the SEC placed corporate governance high on its agenda and when members of Congress were urging and drafting federal legislation. The prospects of a federal role in corporate affairs appeared real. With the election of President Reagan in 1980, that was no longer the case. Consequently, in the early 1980s, when the Project began to show results which to a large extent would have been those predicted in 1978, political tempers had changed. Those who had favored an ALI Project in preference to federal legislation, and used the ALI Project in preference to federal legislation, now saw no need for any reform effort at all. If it was too late to eliminate the Project entirely, there was still time to weaken it and attack its particular recommendations.

Another ironic development occurring in the 1980s makes federal legislation a more tenable thought. Corporate managers, who argued strenuously against legislation in the 1970s, now favor federal legislation that would serve an important interest of theirs—deterring hostile tender offers. Thus, the advisory group on tender offers, established by the SEC in 1983, recommended federal legislation to address certain tender-offer practices, such as greenmail payments.[34] Others have urged federal legislation that would intrude into traditional state-law areas in order to facilitate defenses against tender offers. These one-time opponents of federal legislation who opportunistically favor selective federal laws should scarcely be heard to complain about the principle of federal legislation in the corporate area on grounds that this is no place for Congress to be, a position that the business community vigorously argued in the 1970s.

In July 1988, the Securities and Exchange Commission adopted rule 19c-4, its so-called "one share, one vote rule."[35] This is a complex conpromise rule that limits the ability of companies to adopt a two-tier voting structure that would curtail the voting power of publicly traded stock. The context of adoption was the rejection of a proposed amendment to the New York Stock Exchange (NYSE) rules that would abrogate the long-standing requirements that all common stock listed on the Exchange have full voting rights. Because neither the American Stock Exchange nor NASDAQ imposed such a requirement, the NYSE sought to stop the erosion of listing by its constituencies as they attempted to erect a defense against hostile tender offers. The NYSE board did not believe that they alone should be left holding the flag for corporate democracy.

The complexities and exact nature of the compromise need not detain us. What is worth observing is that the nature of this problem, certainly at first glance, is essentially one of corporate control and corporate governance for which the traditional solution lies with the state legislatures. That is where the voting rights of shareholders are determined; that is where flexibility of assigning the rights of shares is fixed.

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34. ADVISORY COMM. ON TENDER OFFERS, SEC, REPORT OF RECOMMENDATIONS (1983).

35. Voting Rights Listing Standards—Disenfranchisement Rule, Exchange Act Release No. 25,891, 25, MIA [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,247 (July 7 and 13, 1988).

The Commission held an extraordinary open meeting on July 7, 1988, to consider the rule, and adopted it by a 4-1 vote.[36] One striking feature of that meeting is that the public statements of each of the commissioners included a strident disclaimer that approval of this rule signified embarking on a path of federal chartering of corporations. Each commissioner renounced that as an objective or an effect of the adoption of the rule. Nonetheless, each commissioner who approved the rule must have realized that no state, much less all the states, could as a practical matter adopt such a law, nor could any single self-regulatory organization (SRO). To achieve the objective the Commission deemed worthy required the SEC itself to adopt a rule or to amend the rules of the SROs to deal with the practice. Thus, the Commission recognizes the need for a federal role in the governance of the corporation, albeit reluctantly, and surely does not embrace widespread federal intervention.

CONCLUSION

The protections that corporation law provided to shareholders and to our economic community against the excesses and complacency of corporate directors and managers have undergone a general weakening. Although it is uncertain whether the ALI can accomplish effective and meaningful reforms, this effort may be the most important attempt by the corporate community to reform itself.

ALI reform efforts are superior to legislative reform efforts because current federal legislation is likely to be less sweeping than the chartering proposals that were advanced in the 1970s. If Congress is called upon to act, it will perhaps find it preferable to pursue Professor Cary's approach of dealing with specific problems rather than the entire subject.[37] It is impractical to expect Congress to do more; even this task is formidable. Legislative reform will require support and agreement from principal Congressional leaders and the SEC—as well as considerable support from the private sector—to stand a chance of passage. Most important, a change in the political climate must occur, but that is known to be cyclical.

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36. Open Meeting of the Securities Exchange Commission, July 7, 1988 (copy of tape available from the Office of the Secretary of the Commission).

37. Cary, *supra* note 1, at 696-705.

The final returns are not in. At best, the ALI project is several years away from completion. What is necessary in the time remaining for its completion is that the Institute recognize the discouraging trend in corporate law and reaffirm the basic standards of loyalty, prudence, and accountability, all of which are under severe attack. If the private sector cannot achieve these reforms, reformers will be forced to rely on the unpromising alternative of Congressional reform.