

LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Not the least significant of the many factors that have contributed to the commercial and industrial pre-eminence that this country presently enjoys is the mode of organization that our business enterprise has come characteristically to employ. Early recognizing the limitations and drawbacks of less sophisticated techniques, and aided by a friendly—even inviting—legislative and judicial climate, the business community has warmly embraced and improvised upon the corporate form, whose versatility has thus far enabled it sensitively to respond to the needs of a dynamic economy. The concomitant separation of the elements of risk, control, and profit that this development has entailed, however, has posed, at least potentially, a serious threat to responsible investment and management. Regulatory legislation, accordingly, has universally been proposed and enacted, but the exact nature and extent of the restraints it should impose has caused considerable controversy.

Numerous theories, each mirroring a different conception of the appropriate role that government should play in this area, have been advanced. At one extreme, under the so-called “enabling act” theory, the privilege of incorporation would be made freely available, with a minimum of special conditions and limitations. Somewhat more restrictive is another theory whose adherents, although essentially persuaded of the social efficacy of enlightened self-interest, favor the interposition of legislative safeguards at critical junctures where experience has indicated that difficulties may arise. Another theory would, by legislative prescription, even more systematically impinge on freedom to contract, not only to protect investors and creditors, but to create and preserve the atmosphere of public confidence so necessary for business prosperity. And, finally, at the other extreme, the proponents of the so-called “social responsibility” theory urge that corporate power be exercised not primarily for the benefit of investors and creditors, or even customers and employees, but rather for the benefit of the general public.

The ideological dispute that these various rationales reflect has come into new prominence lately, with the almost wholesale re-examination and revision of corporation statutes that the past decade has witnessed. It is, therefore, to a more precise definition and evaluation of these competing philosophies, and to a survey of the manner and extent to which they have found expression in current legislation that the articles in this symposium have been addressed. In this connection, inquiry

has been directed to such basic matters as the roles of management and shareholders in corporate government; the substance and function of legal capital, surplus, and dividends; share characteristics; the fixity of class shareholders' rights; the rights of minority and dissenting shareholders in fundamental changes; the indemnification of insiders' litigation expenses; the special problems of the close corporation; and others.

No surprise, perhaps, will be occasioned by the revelation that, with a few notable exceptions, an "enabling act" philosophy continues to dominate corporation law in this country. Recent attempts at modernization—the "new look," if you will—although changing the appearance of the package in some respects, like Paris fashions, has left the fundamental contours largely unaltered. Whether or not this is a healthy situation, however, is a question on which our contributors have differed quite sharply—the academic lawyers seemingly taking a more critical attitude than their practicing brethren.

In these decisive times, when our own future and the future of the rest of the world may turn on the resilience and resourcefulness of our economic system, the role of the corporation, for better or for worse, in enabling it effectively to cope with the challenges that confront us may be crucial. It is, therefore, hoped that the ventilation of issues that this symposium affords will stimulate creative thinking about corporate problems and, at least in a small way, conduce their optimal solution.

MELVIN G. SHIMM.