The Delegation Grows

We can make no attempt at this time to list completely the alumni who were elected to high governmental positions in November. We congratulate them all and hope to bring news of them as we continue to survey our alumni. As representative of all who were elected we might mention Governor A. A. Ribicoff, LLB'33, of Connecticut; Senator Roman L. Hruska, 32, of Nebraska; Attorney-General-elect Stanley Mosk, '35, of California; and Congressman-elect William S. Boylston, JD'50, of Florida.

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a business, to make it impossible for the owner to hide behind an irresponsible agent. This explanation applies also to the common-law liability of secret partners. Furthermore, the rules establishing agents' fiduciary duties and disabilities represent attempts to promote responsible action by agents in the interest of their principals. Again, the rule that agency powers are ordinarily revocable, even when stated to be irrevocable, represents another striking effort to check the irresponsible action which might result from irrevocable separation of risk and control. This interpretation explains also the exception to this rule in the case of powers coupled with an interest or powers given as security. The exception permits one who thus participates in the risks of the enterprise to be given irrevocably a share in its control.

These rules reflect concern lest responsible management be jeopardized by arrangements separating risk, control, and profit. They leave great freedom, however, for the allocation of these elements. For example, one who lends money or sells goods to a partnership may agree to look solely to partnership assets, thus assuming a share of the enterprise risk. A lender may agree to take a share of the profits in lieu of interest, or an employee may do so in lieu of fixed salary. They thus become participants in both the profits and the risks of the enterprise, but without sharing the liability of partners. The variety of these voluntary arrangements for sharing risk, control, and profit is enormous. As already indicated, a primary function of the law of business organization is the setting of limits to the possible variations. When the corporate form of organization is made available by statute, the principal legislative question is whether there are special threats to irresponsibility inherent in the corporate form which require special restraints on the freedom to allocate risk, control, and profit. "Philosophies" of corporate statutes reflect divergent answers to this question. Some of these theories will first be stated briefly; in the next part, representative statutory provisions will be examined to ascertain the relative influence of the various theories; and then we should be in a position to consider whether there is a dominant philosophy of the "new look."

1. The first contemporary theory which I shall consider is the theory that a corporation statute should be merely an "enabling act." Under this theory, the privilege of incorporation with "limited liability" should be made freely available, and promoters should have freedom in defining the scope of the enterprise and in allocating risk, control, and profit through the corporation's security structure. This theory prescribes also that relatively unhindered procedures should be available to meet changing conditions by effecting changes in corporate purposes and security structures.

No special conditions on the use of the corporate form are deemed necessary. This theory implies that decisions for commitment of funds are the individual responsibility of the investor or lender, protected, however, by the law of deceit. Adherence to the agreed allocation of risks is deemed adequately assured by the rules of contracts and fraudulent conveyances; management loyalty is adequately promoted by the rules concerning fiduciary duties and disabilities. This theory reflects also a skepticism as to the effectiveness of protective devices suggested by alternative theories. It is feared also that incomplete legislative protections may result in relaxation of individual efforts at self-protection, efforts which are deemed indispensable if investment decisions are to be responsibly made.

Advocates of the "enabling act" theory reject the notion that a corporation statute should deal with the problem of possible monopoly. This theory, therefore, calls for no limitations of size, duration, purposes, or general powers. 2

The "enabling act" theory does not mean that an adequate corporation statute can be simple and brief. To serve effectively as an enabling act, it must make its grants of power and its authorized procedures sufficiently detailed to minimize doubts, including doubts which might arise from previous statutes and their judicial interpretation.

2. The second theory, like the first, is grounded on the premise that the social interest is best served through responsible individual decisions in the furtherance of individual interests. The second, however, reflects a belief that for corporate organization, the basic common-law doctrines of contracts, torts, and agency are inadequate to assure responsible individual decision, that these doctrines should be elaborated and supplemented at various points to make it less likely that agreements as to division of risk, control, and profit may be inadvisedly made or ineffectually implemented.

For example, to provide a setting for responsible in-