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## *Preface*

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[To be updated.] This book provides material for the introductory Corporations or Business Associations course. Our users typically divide among those who emphasize closely held businesses, those who emphasize the public corporation, and those who devote substantial time to both, as well as between teachers who primarily emphasize the corporation and those who introduce business entities more broadly. This book can be adapted to any of these approaches with ease. We have structured the chapters so that most topics can be moved and used effectively out of their original order. The book can also be adapted to teach an advanced course with several different emphases—mergers and acquisitions, securities regulation, or business litigation. Nonetheless, the current organization reflects a coherent combination of material ordered in a way that will be helpful to someone who is approaching business associations for the first time.

This edition continues the commitment made to users at publication of the first edition—and with each subsequent edition—to provide a casebook that can grow and change with the subject it addresses while providing continuity to users. Thus, the core structure is designed not to reflect current fancy but rather to illustrate what we believe are central, recurring issues and themes. Each edition, therefore, continues to feel like an old friend to continuing users, though it contains new materials reflective of the constant changes in law, business enterprise, and society.

The corporate governance landscape is much different than a generation ago. Independent directors now hold the great majority of all board seats, institutional shareholders hold a supermajority of all shares in public corporations, and activist shareholders have become a recurring player in entity governance. Long gone is the view that shareholders are powerless and boards supine. One consequence of this change is the continuing evolution in the role of judicial review and the constant judicial tinkering with standards of review in deciding the extent to which courts will defer to directors or controlling shareholders. This evolution is on display in recent Delaware cases included in Chapters 4 and 8, setting out conditions for “cleansing” of conflicts by board and shareholder action that can produce review under the business judgment rule. In addition, new material in Chapter 3 continues our comprehensive treatment of the shareholder role in the modern corporation. The goal there is to help students grasp the interaction of traditional state corporate law, newer and still growing federal law, and the changing private motivations of institutions that arise outside of formal law.

The evolution in the law of closely held firms has also been dramatic over the last two decades, and this too is reflected in the ninth edition. LLCs now account for most

new closely held businesses. Chapters 2, 3, 5, and 6 permit students to build their knowledge of the distinctive legal characteristics of the public corporation, the modification of those characteristics for closely held businesses using the corporate form, and the further modification of those same core principles in the LLC. In Chapter 6 we develop a distinctive part of LLC law that is particularly visible in Delaware. That state and its judiciary have focused on legal rules seemingly aimed at sophisticated entities (as contrasted with, for example, the traditional “mom-and-pop” enterprise that is more of the focus of Chapter 5) whose participants are willing to take the time and pay the costs of developing a specialized template to govern their business relationship. Thus, we have picked cases to illustrate the extent to which parties can waive the fiduciary duties provided by law or the ability of investors to seek involuntary dissolution from courts. Two new cases in Chapter 6 reflect the continued evolution of Delaware law for sophisticated users and the emergence of case law in other jurisdictions applying oppression-of-minority-investor approaches to deal with potential abuse of power by LLC majorities.

Building off of the seventh and eighth edition introduction of the benefit corporation, the ninth edition adds new material reflecting the continuing debate over the purpose of the corporation, which has received heightened public attention in the wake of the COVID-19 pandemic, and with growing evidence of inequality and climate change. Chapter 4 introduces the classic view that a corporation should be managed for the benefit of its shareholders, contrasts that position with modern commentary advocating in favor of a stakeholder governance model, and includes an updated discussion about the benefit corporation movement. Chapter 9 recognizes the expansion of the purpose debate with respect to corporations generally.

Any examination of the law of American business enterprises necessarily includes a discussion of the relative costs and benefits of using private ordering and markets versus government regulation in structuring collective entities. Two severe shocks to the financial system in the new millennium—the collapse of the dot-com bubble and the financial meltdown in 2008—leading to renewed government regulation and more recent efforts to revisit those rules, are discussed at various places in the book. In corporate law, this discussion of private ordering versus regulation often tracks the interaction of federal and state laws, as state law since the 1890s has taken a *laissez faire* approach and federal law a more regulatory approach to address perceived gaps. In Chapters 9-11, we provide the detail to fill out the initial survey of federal law contained in Chapter 3, including the issue of insider trading, which remains one of the most visible and accessible contexts for viewing the impact of law on corporate behavior. Mergers and other corporate acquisitions provide the most recurring context for federal law covered in this book. In putting most of the federal material after the presentation of the state law structure of these transactions in Chapters 8 and 9, we hope that students will better understand the factual setting and can better evaluate the legal rules.

Despite the growth of federal law, state law (and, in particular, Delaware law) remains the dominant source for legal rules for corporations. State law reflects a strong preference for private ordering; this law continues to be built around trusting directors to govern corporations and permitting them to make use of a variety of incentives and monitoring devices made available in the private sector and

by government regulation. Under this view, the government's role is focused on providing essential background rules and a judicial forum for shareholders to bring fiduciary duties claims as a check on the broad power given directors to control "other people's money." This essentially common law process is visible throughout the book, but Chapter 4 is particularly designed to introduce this theme.

The ninth edition continues its emphasis on building blocks that enable students to digest these more advanced concepts. Unlike many of the "private" law courses found in the traditional first-year law school curriculum, corporation law does not respond to problems commonly experienced in discrete transactions or interactions between "strangers." Instead, the law of corporations and other business associations addresses the governance of a collective, relational enterprise. For example, the key recurring issue is the ongoing relationship of shareholders to directors and officers and the extent to which any individual or group can speak for or direct the enterprise. The corporations or business associations course is many law students' first extended contact with the intricacies of business relationships. Thus, it is especially important to help students grasp new terminology, develop an understanding of what motivates individuals to invest their human or money capital in a cooperative business venture, and recognize how law and private ordering interact to protect participants' reasonable expectations. Economic learning advances the discussion of these issues. An understanding of how markets work and of the incentives that commonly motivate people in economic transactions enriches students' ability to interpret and use the law, so we discuss these concepts in the early chapters. Understanding the economic concepts of "collective action" and "rational apathy" can help to explain why legal rules will be different for an enterprise with many dispersed passive participants than for one with a few close-knit investors.

Although we provide economic-based tools for understanding, the thematic framework of this book is how the law shapes collective business relationships. In the first few chapters, we compare the various forms of doing business: sole proprietorships, partnerships, limited partnerships, limited liability companies, close corporations, and publicly held corporations. A comparative analysis of these forms continues throughout the book in a variety of legal contexts.

We ask students to recognize the various methods used by law to regulate collective business relationships. In examining what legal constraints there should be on the behavior of those who control corporations, a student who has read this book will have considered:

- Voting and other governance rules imposed by law before any transaction has occurred
- Fiduciary duty applied by courts to specific transactions after they have occurred
- Disclosure rules mandating information to be provided in corporate relationships
- Specific legal remedies like appraisals or buyouts

This examination is designed to give students an appreciation for the different ways that law works and the relative advantage of each method as it is applied in particular circumstances, with consideration given to the possible market or private ordering alternatives. Is law supplemental or mandatory? Does it seek to provide the rules that

the parties would have agreed to if they had thought carefully about the situation, or does it seek to impose a penalty or an incentive to encourage one side or the other?

At the beginning of each relevant part, section, or subsection, we have noted the statutory or regulatory material to which students should refer when studying that segment. This reflects our view that this material is best studied in close relation to the statutory law. Our comparative approach asks students to think about how the Delaware statute differs from the Model Business Corporation Act, the two most commonly referenced statutory guideposts for corporation law in this country. Throughout the casebook we use the Model Business Corporation Act to refer to the current version of that Act.

Many case, statutory, and other citations have been omitted from quoted material without indication. Most footnotes have also been omitted from quoted material without indication, but those that remain retain their original numbers. Bracketed material in a quoted source indicates transitional or summary materials that we have provided.

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