

CONCLUSION

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JUSTICE HOLLAND: I would also like to join in commending Professor Hamermesh for convening this conference. I thought it was probably not just a coincidence that this symposium was convened the same week that the new Star Wars movie opened. When I was thinking about Star Wars, my focus naturally turned to outer space. The one thing that occurred to me about corporate law in Delaware is that it didn't develop in a vacuum and certainly it wasn't the result of a big bang theory. It really was an evolution. If we're going to look at the next century, it might be appropriate to reflect on the last two centuries.

Various speakers in the last day-and-a-half have commented on the coincidence that corporate laws in Delaware are the result of an unusual combination of factors. If we reflect on the last two centuries, what we have seen is somewhat to be expected. Corporate law in Delaware is really part of the natural progression of the rest of the law in Delaware.

I start in 1776 — although I'm well aware of my time limit — and in 1776, Adam Smith was writing the *Wealth of Nations*¹ that was published in Europe. And as we know, we were forming a country. In 1776, Delaware, like all states, had to form a new government.

One of the things that's unique about Delaware that continues to this day is that we're able to make a prompt response through legislative action. Delawareans convened in August of 1776 to consider forming a Constitution. That was accomplished within thirty days. In that Constitution, Delaware looked to the common law of England and decided that we should keep it. We looked to the Declaration of Rights of other states. We also did some unique things. For example, the Delaware Constitution prohibited the importation of slaves.

We heard about how Delaware is looked to by other states as our law has developed in the corporate area. But Delaware's has been a leader in financial matters throughout the last two centuries. Under the Articles of Confederation, the government wasn't working. In particular, commerce wasn't working. When the convention convened in Annapolis to decide how we could get the country back on track commercially, John Dickinson of Delaware was the leader. That Annapolis Convention resulted in the call for

¹ADAM SMITH, *WEALTH OF NATIONS* (P.F. Collier 1901) (1776).

a 1787 Convention in Philadelphia, which resulted in the formulation of the United States Constitution.

Delaware currently leads the debate in corporate law. For two centuries, Delaware has lead important debates in other areas. When the United States House of Representatives decided to debate the proposal for a Bill of Rights, even though it had been introduced by James Madison, the chairman of the committee that formulated the final version of the Bill of Rights was chaired by a Congressman from Delaware, John Vining.

Delaware's congressional delegation returned from our nation's capital after the Bill of Rights was debated to decide what to do about our own state government. In 1792, Delaware enacted our first Constitution after the United States Constitution had been adopted. In that first Constitution, Delaware decided to retain the Court of Chancery, something that became very important during the next 200 years.

In 1831, Delaware had another opportunity to look at its Constitution. One of our national leaders at the time was John M. Clayton, who chaired the judiciary committee in the United States Senate. He was Delaware's senator. He was later Secretary of State under Zachary Taylor. Clayton came back to Delaware in 1831 and took the lead in the debate on the Constitution. Notwithstanding the momentum of Jacksonian democracy to elect judges, Clayton successfully advocated that Delaware should have appointed judges.

After the Civil War, as the country was going through the Industrial Revolution, Delaware was trying to decide how it should conduct its internal affairs. The Delaware Constitution of 1897 included several significant provisions. It retained the appointment of judges.² It provided for the enactment of a general incorporation statute,³ which we've been celebrating in the last day-and-a-half, it also retained the Court of Chancery.⁴

As Chancellor Allen said yesterday, we were fortunate that the Delaware Constitution of 1897 retained the Court of Chancery and assigned the issues of corporate governance to the Court of Chancery's jurisdiction. Under the leadership of Chancellor Wolcott, that law was developed. Delaware was given an opportunity and, because Delaware was able to shine, more and more people came to Delaware.

Chancellor Seitz continued and enhanced the tradition of excellence established by Chancellor Wolcott. But, the Court of Chancery's jurisdiction is not limited to deciding corporate cases. The fiduciary principles that the Court of Chancery applies are venerable equitable principles. When Chief

²DEL. CONST. OF 1897 art. IV, § 2.

³DEL. CONST. OF 1897 art. IX, § 1.

⁴DEL. CONST. OF 1897 art. IV, § 1.

Justice Renquist was in Delaware to celebrate the 200th anniversary of the Court of Chancery, he said the proudest day in the history of the Court of Chancery was when Chancellor Seitz ordered the integration of Delaware schools and advocated that *Plessy v. Ferguson*⁵ be overruled. That same equitable sense of justice is brought to bear when Delaware, in its Court of Chancery, examines fiduciary duties in a corporate context.

Delaware has also been fortunate that the same legislative responsiveness that permitted the adoption of a state constitution within thirty days in 1776 is still extant. The corporation statute was revised by Delaware lawyers. It was implemented promptly by the Delaware General Assembly.

The Delaware courts have also been responsive to advancing the common law in corporate areas. Delaware has not been content with just having an appointed judiciary. Governor DuPont, who spoke yesterday, established the first judicial nominating commission by an Executive Order that he issued in 1978. That system imposed merit selection upon Delaware's appointed process. The chairman of that commission at the present time, James Gilliam, Jr. is here with us today. Delaware did not adopt the merit selection commission only for the Court of Chancery. We adopted it for all courts in Delaware. The five current members of the Court of Chancery, and the other members of the Delaware judiciary, are all testaments to the wisdom of having merit selection and an appointed judiciary.

The Delaware legislature has continued to be responsive to judicial decisions. As we heard, the response to *Smith v. Van Gorkum*⁶ was the enactment of 102(b)(7).⁷ But not only has Delaware been able to enact statutory responses to judicial decisions, it has also been able to amend our constitution. In the last day-and-a-half, we've heard a great deal about state and federal interaction. When the Delaware constitution was amended within the last decade, it provided for state supreme courts and federal courts from all over the United States to certify questions on any matter of Delaware law, including corporate law, to the Delaware Supreme Court.

The United States Supreme Court has had an opportunity to comment on Delaware's corporate jurisprudence. In the *Kamen*⁸ case, the Seventh Circuit tried to adopt the American Law Institute's demand proposal as a matter of common law. In deciding a case that was based on Maryland law,

⁵163 U.S. 537 (1896).

⁶488 A.2d 858 (Del. 1985).

⁷DEL. CODE ANN. tit. 8, § 102(b)(7) (1991 & Supp. 1998).

⁸*Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991).

the United States Supreme Court cited Delaware's precedence on demand as an example of the substantive law.⁹

More recently, the United States Supreme Court has had to consider whether or not there could be settlements of class actions in state courts that would also extinguish federal claims. The basis for that decision originated in Delaware. In concluding that state court settlements could extinguish federal claims, the United States Supreme Court discussed the virtues of the system in Delaware for approving class action settlements, where the Delaware Court of Chancery must make an independent judicial determination that the settlement is meritorious. You have also heard reference to recent Congressional responses with approval to Delaware's corporate law jurisprudence and the Delaware carveout that was part of the 1998 federal law.

Delaware has been the focus of the corporate debate throughout this century and it also continues to lead the debate. Some of the most learned corporate law treatises are published by members of the Delaware Bar. Delaware has the ability to consider and respond to divergent points of view. Professor Coffee has described that as interest group negotiations. Because of Delaware's ability to not only provide a forum for the debate but to respond to those debates in an even-handed manner, Delaware has remained the nation's leader on corporate law matters.

Delaware today still has people like John Dickinson, John Vining, and John N. Clayton. They are listened to in the corporate context because they are also prominent in non-corporate areas. Both of Delaware's United States Senators are members of the Delaware Bar. Our United States congressman is also a member of the Delaware Bar. Senator Biden is the ranking member of the Foreign Relations Committee. He was the chairman of the Judiciary Committee. He recently introduced legislation about violence against women. Because of his credibility in those areas, when he speaks on corporate matters, he is listened to also.

Senator Roth chairs the Finance Committee. We know about his Roth IRA. He recently lead the hearings on the IRS reform. Because of his leadership in divergent areas, when he speaks about corporate matters, he's listened to also.

Congressman Castle, who is our two-term Governor, is now leading a coalition in the House of Representatives that exemplifies for America Delaware's bi-partisan manner of moving things forward.

On a state level, Governor Carper is the head of the governors of the entire United States. That's not something that he's doing automatically. He was elected by other governors. He's taken the lead in education. He's taken

⁹*Id.* at 102-03.

the lead in mentoring. When Governor Carper speaks on corporate areas, those other initiatives serve to enhance his credibility.

Chief Justice Veasey is going to be the head of the conference of Chief Justices this August. He also chairs the ABA commission on what ethics should be in the next century. It's because of his credibility for being a scholar and having high ethical principles, that when he speaks about corporate matters, he also has an enhanced credibility.

So the Delaware corporate law has developed in this context of having a legislature, a chief executive, and a Bar and a Bench that can respond in a timely way and make appropriate incremental changes in the law. Delaware was referred to by Thomas Jefferson as a diamond among the states. Diamonds, we know, are brilliant, but they're also durable. The Delaware corporate law, like a diamond, has had its facets carved and polished in incremental ways.

We've been asked to make predictions. One prediction that I'm confident in making is that Delaware is going to go into the next century at warp speed through cyberspace and that's how the corporate law is going to develop. I also predict that Delaware will continue to be the forum in which divergent interests will continue to debate corporate law issues, because only in Delaware are we going to be able to respond in a timely and incremental way. When those divergent interests are suggesting that we change direction, especially at warp speed, it is going to be particularly important that we do so in a thoughtful, incremental, but timely way.

In closing, based on Delaware's experience over two centuries, I would like to hope, using the Star Wars analogy, that the same forces that have converged during the last 200 years to bring Delaware to national prominence in corporate law matters will be with us in the next millennium.

Professor Hamermesh has asked me to thank you all for attending and we're adjourned.

(The seminar was concluded at 12:30 p.m.)

