

There are many attributes that could be a focus of remembrance of Judge Ralph Winter, such as his intelligence, warmth, hearty laugh, absolute lack of pretense, and the mentorship role he took on for students and clerks over the years. But I am going to focus on Ralph's justly famous groundbreaking 1977 corporate law article, which is the link that established our friendship, and equally, if not more importantly conveys another attribute of Ralph's character, and the one I wish to emphasize. Namely, the article exemplifies a character trait associated with an important scholar, which Ralph was, the tenacity and integrity to swim against the tide, if that is where the inquiry takes one. I will also briefly note his continuing impact on business law after he left full-time teaching for the bench.

Ralph's 1977 article, "State Law, Shareholder Protection, and the Theory of the Corporation" was a transformational article in corporate law, for it went to the most fundamental question in the field and totally changed the conversation. This description is not an exaggeration. the article has over 1,400 citations according to Google Scholar, and I believe that count considerably understates its influence, for it is at times operating in the shadows in articles without being cited. It also continues to be referenced despite having been published 45 years ago - 140 of the citations are in the last 5 years. This is an exceedingly rare phenomenon.

How was the article transformational? Ralph was a pioneer in introducing economic analysis, and in particular, the economist's perspective of the efficacy of markets, into corporate law, and he brought it to bear on, and thereby to challenge, the dominant trope by which the field was understood. That understanding was most famously characterized as a "race for the bottom" by William Cary, a law professor at Columbia and former SEC chairman. Cary believed that corporate law should not be left to the states, and in particular to Delaware, and advocated adopting federal minimum standards, because in his view managers selected Delaware as their

domicile because it facilitated corporate managers' expropriation of shareholders' wealth (citing as ostensible "proof" the business law background of Delaware judges).

In a nutshell, Ralph demolished Cary's thesis as a theoretical matter by pointing to the many markets in which firms operate that protect shareholders, by aligning managers' interest with that of the shareholders so that the managers would select the legal regime that increases share value. That is because failure to do so would increase firms' cost of capital, and thereby, the cost of their goods and services, compared to firms operating under a more shareholder-friendly regime. The hypothesis was that, such a chain of events would place managers' employment - hence wealth - in jeopardy, as the increased cost would push firms into bankruptcy or into the embrace of a hostile bidder (who would be able to increase share value by changing legal regime), scenarios in which incumbent managers are frequently fired. That, in turn, would incentivize managers to avoid such dire outcomes by selecting a legal regime that benefitted shareholders.

The engine in Ralph's hypothesis was competition and although it might seem intuitive to us today, it was a shocking conceptual move at the time. Advancing such an analysis back then was perceived by business law academics as "unsound."

In addition, the article suggested a roadmap for what has come to be the bread and butter of corporate law scholarship, empirical inquiry, as a means of arbitrating policy issues. Namely, Ralph's thesis was eminently testable: do the legal regimes that managers select - and in particular that of Delaware - enhance share value, or do they benefit managers at shareholders' expense? Using the tools of modern financial economics, we could test whether Ralph's or Cary's characterization was more consistent with reality. My connection to Ralph commenced

when I started out in law teaching and decided to investigate empirically the debate that he had provoked in corporate law regarding the efficacy of state competition for corporate charters, which came to be referred to as the Cary-Winter debate. I found that the data were most consistent with Ralph's analysis rather than Cary's.

There have been numerous twists and turns in the literature on state competition over the many decades since the article's publication, related to agency costs and political economy issues that could limit market effectiveness. Some have even asserted that there is no competition, but that position has considerable difficulty explaining a number of phenomena, such as Delaware's persistent legal innovation and responsiveness to a changing business environment. Ralph's own view also evolved in light of states' enactment of numerous antitakeover laws, as indicated in a short piece he wrote in 1989. But the core insight and contention of the 1977 article, regarding the efficacy of state competition, have been remarkably robust and enduring.

Ralph Winter continued to shape business law when he became a judge. His opinions share a similar analytic approach to that of the 1977 article, stemming from an appreciation of the centrality of incentives and markets. For example, in *Sharon Steel Corp. v. Chase Manhattan Bank*, Judge Winter not only held that courts, not juries, were to interpret boiler plate provisions in bond indentures, to facilitate interpretive uniformity thereby providing greater legal certainty, a prerequisite for efficient commercial contracting, but he also followed a purpose, rather than formalistic plain language approach to contract interpretation to interpret the standard clause at issue, the meaning of "substantially all the assets" in a successor obligor clause that defines when a corporation's debt can be assumed by the buyer of its assets. That analysis protected bondholders from the core agency problem of debt, that managers can engage in risk-shifting

activities that transfer wealth from debtholders to shareholders (i.e., an ex post increase in a business's risk renders the debt contract mispriced).

Sharon Steel exemplifies a theme animating many Winter opinions in the business law area, the need to consider not only the incentive effects a decision might have on corporate managers or contracting parties but also, equally if not more important, whether a decision will create commercial uncertainty and unnecessary transaction costs. Such an approach makes eminent sense, for while investors can often contract around untoward consequences of a judicial decision, minimizing costs that parties incur to implement their objectives is surely a desirable outcome.

I have moved quickly through the seminal substantive contribution of Ralph's 1977 article and his judicial opinions in order to be able within my allotted time to shift my focus of attention to the aspect of the article that makes plain the character trait of Ralph's that I believe made possible the originality and enduring quality of his work, both as an academic and a jurist. To not be too subtle about it, Ralph Winter was his own person. As an academic, his was a search for truth, and he did not try to please others by what he was writing, but went where his insight led him.

In particular, in 1976, at the time when Ralph was writing his pathbreaking article, 80 law professors – a list that included the overwhelming majority, if not all, of the leading corporate law faculty at the major law schools at the time– had signed a letter to Congress endorsing Cary's position, advocating a federal role in corporate law. It took considerable personal fortitude to write an article questioning the premise of their position. We know from jury studies, behavioral science research, and contemporary social media trashing of individuals by online mobs, that

peer pressure is a powerful force, quite often resulting in self-censorship by individuals in a minority. But enshrining dogma is the antithesis of the scholarly enterprise. It is individuals like Ralph, non-conformists, who see fundamental issues in a new light, free-thinkers who are not afraid to reconsider what is taken for granted at the time, and who, by doing so, make major advances in knowledge. And while I have focused on Ralph's contributions in business law, his work in labor and election law similarly questioned the ascendant view of the day and altered the terms of debate.

To me, Ralph was the proverbial rare pearl in an oyster. We would benefit immeasurably if there were many more Ralph Winters in the academy and on the bench. But we ought to be grateful to have had just one. I feel privileged to have known Ralph and to have been able to call him my friend.

*Remarks by Roberta Romano, Sterling Professor of Law and Center Director, at the Ceremonial Session of the U.S. Court of Appeals for the Second Circuit to honor the late Honorable Ralph K. Winter, May 9, 2022*