
LARRY RIBSTEIN'S FEDERALISM SCHOLARSHIP AND THE UNFINISHED AGENDA

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Professor Larry Ribstein's scholarship, which applied rational choice theory and market competition concepts to areas of the law like private contracting and limited liability companies, helped to explain why efficient laws were adopted in some cases but not in others. Along with a few other scholars, Professor Ribstein shifted the corporate choice of law discourse from a documentation of Delaware's dominance to a discussion of whether that dominance is a good thing from an efficiency point of view.

Professor William J. Carney, whose own scholarship paralleled Professor Ribstein's in corporate choice of law, identifies questions which are yet to be answered. Professor Carney asks whether states, which have trended toward uniformity in corporate law, will adopt efficient laws.

Professor Carney notes that Delaware is protected from competition by a first mover advantage. Few corporations choose to incorporate in states other than their home states and Delaware. Consequently, other states engage in bilateral competition with Delaware to keep their home based corporations at home.

Professor Carney next questions whether there is significant jurisdictional competition in other areas of law. In the area of closely held enterprises, the answer appears to be no. One reason may be that the NCCUSL is not sufficiently influential to educate the informed, aware lawyers who are essential for robust jurisdictional competition.

Professor Carney concludes that the account of how rational choice works in selecting statutes is incomplete. Inefficient laws persist over centuries, and when legislators respond to interest groups there is often a lack of transparency. One possibility for filling out the account of law making, Professor Carney notes, is the public good provided by lawyers who donate many valuable hours to drafting model codes.

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I. A POINT OF PERSONAL PRIVILEGE

I knew Larry Ribstein from his early years at Mercer. I moved to Emory in 1978, and we met not too long thereafter. I confess I had no idea then what a giant intellect he possessed. But I will take some credit for at least one of the opportunities that gave his scholarly career direction. In the early 1980s, I received an inquiry about serving as reporter for a committee of the State Bar of Georgia that planned on replacing Georgia's nineteenth century English version of the partnership act. I demurred, not only because I had other projects, but also because I did not see that partnership law was where the action was. Larry took on the task, which led to adoption of a revision of the Uniform Partnership Act ("RULPA").¹ After successfully completing that task he served again as reporter for revision of Georgia's Limited Partnership Act, which was adopted in 1988. Here he led a drastic revision of the control rule of old Section 7 of the 1916 Act that imposed personal liability on a limited partner if he "takes part in the control of the business."² The 1976 revision had softened the rule, but had not completely eliminated the risk if the limited partner "takes part in the control of the business."³ The Georgia revision of RULPA section 303 provided that "[a] limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become so by participating in the management or control of the business."⁴ Ultimately the 2001 version of RULPA followed Larry's lead.⁵ If this had happened earlier there might have been no demand for LLCs.⁶

1. 1984 Ga. Laws 1439; 1984 Ga. Laws 1436; *see also* Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 MERCER L. REV. 443 (1985).

2. UNIF. LTD. P'SHIP ACT § 7 (1916).

3. REVISED UNIF. LTD. P'SHIP ACT § 303(a) (1976).

4. GA. CODE ANN. § 14-9-303 (2014).

5. REVISED UNIF. LTD. P'SHIP ACT § 303 (2001).

6. While the Wyoming LLC Act was adopted in 1977 and Florida adopted an LLC statute in 1982, it was not until the Internal Revenue Service gave a favorable ruling on the tax status of LLCs as partnerships in 1988 that the form became popular, and other states followed suit. William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 857-859 (1995).

There are several things we can see in this history. First, Larry was involved very early in critiquing uniform laws, and assuring that they were not adopted uniformly in Georgia, where he had a better idea. Second, by this move in Georgia he was laying the foundation for the “unincorporation,” where several statutes could all offer roughly the same attributes, and with less regulation than corporation statutes. Third, his impetus with the Georgia statute pushed other states to compete with it, both through their own amendments to their limited partnership acts and through adoption of competing but similar forms such as LLCs. The attractiveness of these forms pushed states in the direction of limited liability partnerships as well, thus completing the circle of limited liability entities. I confess that, had I taken on the reporting duties, I would never have seen these opportunities.

II. INTRODUCTION

Until Larry began writing, most business law scholars who thought about federalism issues began with William L. Cary’s famous article about the race to the bottom and Ralph Winter’s responses.⁷ It was all about corporate law and whether Delaware’s apparent dominance was a good or bad thing. Winter had argued that Delaware could not attract charters with a law that was inefficient.⁸ Roberta Romano showed that corporate law was dynamic, and that Delaware was not always the leader, but a quick follower of useful innovations.⁹ There followed a long and possibly trivial debate over whether the chartering competition was all over.¹⁰ A large number of trees were sacrificed to establish what was largely common knowledge, in terms of Delaware’s dominance in attracting large publicly traded firms.

In ordinary settings, competition works through price signals. This makes it relatively simple for buyers to compare prices of substitute goods and to send signals to producers about their preferences. Stigler defined a market as a situation where prices of homogeneous goods are identical.¹¹ Most empirical work on corporate chartering competition did

7. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). The notion was first expressed by Justice Brandeis, dissenting, in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (“The race was one not of diligence but of laxity.”).

8. See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 258–62 (1977).

9. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 233–42 (1985).

10. See, e.g., Lucian Ayre Bebchuk & Alma Cohen, *Firms’ Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389–91 (2003) [hereinafter Bebchuk, *Firms’ Decisions*]; Lucian Ayre Bebchuk & Assaf Hamdani, Essay, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L. J. 553, 555 (2002); Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?* 90 CALIF. L. REV. 1775, 1820 (2002) [hereinafter Bebchuk, *Competition in Corporate Law*]; Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571 (2002); Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 33 (2004).

11. GEORGE J. STIGLER, *THE THEORY OF PRICE* 85 (3d ed. 1966).

not use price as a measure, but rather the frequency of chartering.¹² If price had been used, Delaware would have been seen to have a superior good, since its franchise fees are very much higher than those in other states. The nature of the debate changed when Robert Daines employed Tobin's Q to measure value in Delaware corporations versus others.¹³ He found that incorporation in Delaware added approximately five percent to the value of a firm.¹⁴ Other studies have disagreed.¹⁵ Guhan Subramanian was able to show a decline prior to 2004, but Delaware's dominance remained clear.¹⁶ There was general agreement, following Winter's analysis, that jurisdictional competition produced efficient results. Implicit in this was that the "race," if it was such, was about improving corporate flexibility through minimizing mandatory rules and maximizing contractual flexibility.

Larry and his coauthors extended this analysis to other areas of the law, such as limited liability companies and private contracts. With limited liability companies, they followed the assumptions of the rational choice theory implicit in the corporate analysis: that increased contractual flexibility was efficient, in the sense of welfare maximizing.¹⁷ In their foray into choice of law rules, the same rationale underlay the work—that freedom to choose governing law is efficient for contracting parties.¹⁸ What Larry and his two wonderful coauthors did was go back to basics—particularly to public choice theory, which had been introduced by Macey and Miller—to explain why efficient laws were adopted in some cases but not in others, using interest group theory for this purpose.

My goal here is not only to appreciate this body of work, but to outline the difficult questions left for study. The first involves transaction costs in the choice of law. Most would agree that when price competition sends clear signals and there are no third party effects, competition is an unmitigated good. But my doubts in this area arise from the lack of visible price competition. Laws are complex products without price tags. Even many lawyers are not fully aware of all the nuances of these statutes, and they certainly do not have a thorough grasp of the judicial interpretations in various jurisdictions. I recall being told by a lawyer that when Orbitz was formed, it was able to utilize Delaware's freedom of contract clause to modify fiduciary duties to expressly permit competition among its members.¹⁹ When its members decided to reorganize as a

12. Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 528–29 (2001).

13. *Id.* at 553–56.

14. *Id.* at 533.

15. Bebchuk, *Competition in Corporate Law*, *supra* note 10, at 1785–86. Note that Daines' results are not consistent across the period studied. See also Paul A. Gompers et al., *Corporate Governance and Equity Prices* 26–29 (Nat'l Bureau of Econ. Research, Working Paper No. 8449, 2001).

16. Subramanian, *supra* note 10, at 41–44.

17. Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464, 467 (1996).

18. Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1163 (2000).

19. See DEL. CODE ANN. tit. 6, § 18-1101(e) (2014).

corporation, only one lawyer representing an airline reminded them of the prospective dangers of the loss of this valuable protection under corporate law.

Coauthors and I have shown that when lawyers choose a jurisdiction in which to incorporate, most of them operate under conditions of severe bounded rationality.²⁰ Recently Michael Klausner has argued that lawyers generally do not make efficient choices or provide much innovation in corporate charters,²¹ a conclusion about which I have doubts. John Coates has argued that deal lawyers who work in mergers and acquisitions make more efficient choices on takeover defenses than those who work in other areas such as securities law,²² which is supported by my own work.²³ All of this raises serious issues about the jurisdictional and contractual choices of market participants.

The other difficulty is inherent in public choice. While public choice is helpful in understanding the forces driving legislative action after the fact, and in identifying the apparently powerful interest groups that prevailed, it is much more difficult to employ as a predictive tool.²⁴ So I will end by asking what more researchers can do to fill in the gap between indeterminate public choice theory and rational choice theory.

III. THE FEDERALISM PROJECT

Larry and a few others changed the debate about corporate choice of law from documenting Delaware's dominance to whether this was a good or bad thing, from the point of view of efficient law. Ralph Winter began that line of argument in a theoretical way by arguing that market pressures from investors on firm stock prices would force firms to choose

20. William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 125 (2012).

21. Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1329 (2013). Klausner's conclusion is based on his research showing that IPO charters rely on both default rules and statutory options, exhibiting little innovation. My own view is that in most states these rules and options provide IPO firms with powerful antitakeover defenses often needed by early stage companies with uncertain valuations. Further, his study ignores the defenses that can be employed in bylaws, such as preclusion of removal of directors except on supermajority votes. Finally, the most powerful takeover defense—the poison pill—is outside these documents, and can be held “on the shelf” for quick adoption in the event of an imminent threat, avoiding adverse governance ratings by proxy advisory firms. See generally John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271 (2000).

22. John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301, 1383 (2001).

23. Carney et al., *supra* note 20, at 143 tbl.4 (showing that issuer's lawyers are more skeptical about Delaware advantages in the area of proxy fights and mergers and acquisitions than underwriter's lawyers, who are more likely to be specialized in corporate finance).

24. Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) (“[T]heories [including public choice] do not always yield crisp, readily testable predictions”); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1841 & n. 75 (2002) (citing Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989)); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 902 (2002); Frederick Tung, *From Monopolists to Markets?: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 WIS. L. REV. 1363, 1427 (2002) (noting the indeterminate debate over issuer choice of regulatory jurisdiction).

shareholder-friendly law; Romano argued that the choice of Delaware occurred because of Delaware's well known assets—a large body of case law, a responsive legislature that had bonded itself by a constitutional supermajority voting rule, knowledgeable judges and an efficient Secretary of State's office.²⁵ Jon Macy and Geoffrey Miller responded that there was an interest group involved in all of this—lawyers, and particularly trial lawyers, who profited from litigation in the Chancery Court.²⁶ But there was still no evidence to support either conclusion. Daines began to fill this gap with a Tobin's Q test of the performance of Delaware firms,²⁷ which Subramanian promptly challenged with later data.²⁸

Larry and I were like two ships passing in the night in our scholarship in this area. I wrote two principal articles in this area, in 1997 and 1998, in which I did not cite Larry, and Larry's work largely did not cite mine.²⁹ One of Larry's articles predated mine, and I should have been aware of it.³⁰ But Larry's voyage was far longer than mine, encompassing uniform laws, unincorporated entities ("uncorporations" in Larry's terms), and contractual choice of law and venue. Larry employed public choice in a rigorous and encompassing manner. His work was always grounded in a sound economic model. It is a much larger and broader body than a brief comment can cover, so I will confine myself to a question, and a possible research agenda for future inquiry.

A. *The Broad Conclusions about the Results of Jurisdictional Competition*

The conventional wisdom has been that Delaware, for better or worse, has won the jurisdictional competition.³¹ Larry and his coauthors asked, if the race were all over, as some suggested, why did other states continue to amend their statutes, often liberalizing them as much as (or

25. Romano, *supra* note 9, at 233–42.

26. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987).

27. Daines, *supra* note 10.

28. Subramanian, *supra* note 10, at 33.

29. William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEG. STUD. 303 (1997) [hereinafter Carney, *Political Economy*]; William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715 (1998) [hereinafter Carney, *The Production of Corporate Law*]; see also William J. Carney, *Federalism and Corporate Law: A Non-Delaware View of the Results of Competition*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 153 (William Bratton et al., eds., 1996); William J. Carney, *Explaining the Shape of Corporate Law: The Role of Competition*, 18 MANAGERIAL & DECISION ECON. 611 (1997).

30. Kobayashi & Ribstein, *supra* note 17.

31. Bebchuk, *Competition in Corporate Law*, *supra* note 10, at 1778. In one of his last articles Larry described this market as "a 'local' market in which about half of publicly held firms choose their home state over Delaware, and a 'national' market for out-of-state corporations that Delaware dominates." Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, 1167 n.15 (2012); see also Bebchuk, *Firms' Decisions*, *supra* note 10, at 395 tbl.5 (finding substantial numbers of incorporations in several states with a fifty-seven percent of companies which chose to incorporate outside of their home state incorporated in Delaware).

more than) Delaware?³² And why has Nevada liberalized its liability rules and behavioral rules for directors with bright line rules, if not to offer a clear alternative to Delaware?³³

More importantly, perhaps, Larry and his coauthors mounted a challenge on another margin, closely held entities. With Bruce Kobayashi, he observed that Delaware dominates only incorporation of large publicly held firms, while smaller corporations tend to stay at home.³⁴ This dominance extends to limited liability companies, as Delaware has aggressively sought LLC organization business as well.³⁵ Like others in the corporate law area, he concluded that these entities were attracted by Delaware's expert judiciary.³⁶ He argued that because these statutes generally contain few mandatory provisions, the quality of LLC statutes in general was a less important factor.³⁷ Default rules can be contracted around by larger firms at relatively low cost, and the cost of contracting would only be important to smaller firms.

At the moment I am more interested in his conclusions about uniformity of outcomes in this jurisdictional competition. I have written that U.S. corporate law statutes have converged to a great extent.³⁸ I have argued that local lawyers, largely through bar associations, engage in crafting revisions to local law. They do this to retain some of the incorporation and litigation work that might flow to Delaware if each state did not offer a competitive alternative.³⁹ The prediction of uniform state laws in a competitive market is hardly original.⁴⁰ My study used the Model Act as the basis for comparisons, and found relative uniformity across states. For mandatory provisions of the Model Act, I found an average adoption rate of eighty-seven percent of the states,⁴¹ which is consistent with Larry's findings on limited liability companies, i.e., adoption rates of sixty-two percent for third party and tax provisions.⁴² Considering that the

32. One example of greater liberality is found in the provisions for shareholder approval of asset sales. Compare DEL. CODE ANN. tit. 8., § 271, with MODEL BUS. CORP. ACT § 12.02 (the latter providing a bright line safe harbor, and the former offering no such guidance). See also *Hollinger, Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342 (Del. Ch. 2004) (Strine, V.C.) (struggling with the meaning of "substantially all" in section 271, and almost wistfully comparing the clarity of the Model Act). Larry has pointed out that Nevada has liberalized fiduciary duties with bright line rules. Kobayashi & Ribstein, *supra* note 31, at 1168–69.

33. Kobayashi & Ribstein, *supra* note 31, at 1168–69. For another more critical view, see Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 935 (2012) (describing Nevada law as "shockingly lax").

34. Bruce H. Kobayashi and Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 93.

35. *Id.* at 94–95.

36. *Id.* at 135–36.

37. *Id.*

38. Carney, *The Production of Corporate Law*, *supra* note 29, at 731.

39. *Id.* at 726–28.

40. See Romano, *supra* note 9, at 229 & n.4 (citing Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967), and Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983), as having made such predictions).

41. Carney, *The Production of Corporate Law*, *supra* note 22, at 731.

42. Bruce H. Kobayashi & Larry Ribstein, *Evolution and Spontaneous Uniformity*, *supra* note 17, at 476 tbl.III.

Model Act's 1984 revision was the basis for my 1998 study, and LLC adoptions were much more recent, this rate is interesting for several reasons. First, was this the result of a competition, or just a natural internal development in each state? In the case of the LLC, the forms were originally driven by tax considerations that suggested these entities had to possess no more than two out of four corporate characteristics, while the other characteristics had to be more "partnership-like," which strongly influenced their form.⁴³ All of this is consistent with competition leading to efficient outcomes, but equally consistent with local rationality in face of tax rules leading to the same results, regardless of what was happening in other states. Indeed, in later work Larry found that the promulgation of what he regarded as inefficient provisions in later versions of the Uniform Limited Liability Company Act was "undermining uniformity rather than furthering it."⁴⁴ If these provisions, described as the result of interest group influences on the National Conference of Commissioners on Uniform State Laws ("NCCUSL"),⁴⁵ were inefficient, one has to ask why any state would adopt them, if spontaneous law making tends toward uniformity and efficiency?

B. Choice and Competition Under Bounded Rationality?

The essential underpinning for arguments in favor of federalism is freedom of choice. Given the power to exit, whether physically or by contract, from the burdens of restrictive and costly governments, states will have incentives to ignore interest group pressures for rent extractions, and to produce efficient laws for those subject to them, which will include the right of contractual choice of law. I have observed this in my own work on comparative corporate laws.⁴⁶ The challenging question is not whether interest groups are constrained, but whether, in a laboratory of fifty states, the laws adopted will tend to be efficient, which will inevitably lead to a strong degree of uniformity.

Here I offer two arguments. First, the law of Delaware is hardly as investor friendly and efficient, as vigorous competition would suggest. I have argued that other laws, such as the Model Act, are more efficient. Delaware seems to be protected from vigorous competition by a first mover advantage that includes an experienced and speedy albeit costly court system. Other states engage in a bilateral competition with Delaware—trying to keep home-based corporations incorporated at home, rather than in Delaware. So when Delaware has an efficient innovation, we can expect to see other states imitate it rather quickly. Apparently Delaware returns the compliment.⁴⁷

43. *Id.* at 469, 477.

44. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 329 (2009).

45. *Id.* at 342–43.

46. Carney, *Political Economy*, *supra* note 22, at 304.

47. Romano, *supra* note 9, at 280.

With closely held enterprises, there does not appear to be any such competition. Larry has pointed out that Florida, not Delaware, leads in the number of LLCs organized there. Is there a competition among jurisdictions for organization of closely held enterprises? From the supply side, franchise fees are not a sufficient motivation. Lawyers seem to be unlikely to worry about losing these enterprises to other jurisdictions. I know from experience that Florida's adoption of an LLC statute led to south Georgia firms organizing under it, which motivated the Georgia State Bar Association to propose its own statute. But this was not caused by fear of loss of much business, as it was by concern that Georgia lacked any provision to honor the internal affairs of a foreign LLC, or even to recognize it as a limited liability entity, thus exposing participants to significant liability risk. Moreover, the Georgia committee did not look to Florida's statute for guidance, but rather to an ABA prototype statute that was in circulation, as well as analogous provisions of other Georgia statutes.⁴⁸ Larry's work concludes that this ABA prototype was more influential on uniformity of LLC statutes than the NCCUSL's uniform act.⁴⁹

This raises the question of whether there is significant competition in many areas of law that might be more or less uniform. I begin with the assumption that any such competition requires informed lawyers, who are aware of improvements in laws of other jurisdictions. In corporate law, the Committee on Corporate Laws serves much of that function by using skilled and dedicated committee members to follow corporate law changes, and to initiate such changes in many cases. It then becomes relatively easy for local bar committees to become aware of Model Act changes and decide whether to recommend them to the local legislature. One might think that NCCUSL would serve that purpose. But Larry and Bruce Kobayashi have concluded that NCCUSL is just not that influential, at least where it produces a Uniform Limited Liability Company Act with what they conclude are inefficient provisions.⁵⁰ They conclude that NCCUSL's processes may be undermining uniformity rather than enhancing it. If this is true for limited liability company laws, is it likely that they can do better in other areas of business law?⁵¹

C. *How Efficient Is Private Choice of Law?*

Larry's work tells us that encouraging private choice of law is a key force in encouraging legislators to ignore interest groups seeking rent extractions, because of the fear of losing business, and the key role lawyers

48. PROTOTYPE LTD. LIAB. CO. ACT § 106 (ABA 1992). The Georgia Act, GA. CODE ANN. §§ 14-11-307, 313 and 801-805 (2014), governing rights of members to dissent, inspect records and bring derivative actions, was drawn from Georgia's version of the Model Business Corporation Act. Larry wrote me criticizing these mandatory provisions.

49. Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 980 (1995).

50. Kobayashi & Ribstein, *supra* note 44, at 330.

51. The answer is "no." *See id.* at 344 n.43.

seeking clients' business play in this part of the legislative process.⁵² My own work on the production of U.S. corporate law describes the part lawyers play in producing corporate laws, and my work comparing U.S. and European corporate laws shows how jurisdictional competition weeds out interest group preferences in corporate law.⁵³

The question that ultimately intrigues me is how successful lawyers are at private choice of law. Do they seek out the most efficient law, or are their choices limited by bounded rationality, or perhaps one-sided bargaining power in some cases? My coauthors and I were not much impressed by the breadth of vision of lawyers choosing states of incorporation in IPOs.⁵⁴ So the question I ask is whether, given the fact that this is a heavily lawyered transaction, if there are limits on rationality here, why should it be different in other types of transactions?

There is a recent literature on this subject that can begin the process of enlightening us. I question how typical the contractual choices are, because they all take place in the context of the biggest event in the existence of at least one of the parties—a merger agreement. The problem here is that we have no real way of measuring the relative efficiency of the laws chosen. Eisenberg and Miller's initial inquiry offered one explanation—that the Delaware Chancery Court's knowledgeable judiciary and ability to dispose of the merits of many disputes on a motion for preliminary injunction provides some certainty about the application of law and the efficiency and speed of administration.⁵⁵ Accordingly, it is not surprising that they find a large percentage of firms incorporated in Delaware opt into Delaware law and forum choices.⁵⁶ There were at least two other influences on choice of law and forum—a firm's physical location and the location of its lawyers.⁵⁷ For these choices, it is difficult to conclude that the merits of the law and forum are necessarily dominant. Location of a business headquarters often leads to selection of local outside counsel, and for many lawyers, greater comfort with local law and judges than strangers in another jurisdiction.

Eisenberg and Miller expanded their data set in a subsequent study to include a larger variety of contracts, including asset sale/purchase contracts, financing agreements, employment agreements, licensing agreements and a variety of others.⁵⁸ The choice of law changes dramatically from Delaware to New York in this study. Excluding merger agree-

52. Larry E. Ribstein, *Delaware, Lawyers and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1016 (1994); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 279–82 (1993).

53. Carney, *Political Economy*, *supra* note 29, at 311; Carney, *The Production of Corporate Law*, *supra* note 29, at 716.

54. See Carney et al., *supra* note 20, at 123.

55. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1982 (2006).

56. *Id.* But not all Delaware incorporated companies selected Delaware law and forum.

57. *Id.* at 1982–83.

58. Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1488 (2009).

ments, New York law was chosen in over fifty percent of the contracts.⁵⁹ As a national center for financial transactions, New York's dominance in financing contracts of all kinds is not surprising. There was no clearly dominant choice in four kinds of contracts—employment, licensing, settlements and trust contracts.⁶⁰ Their study shows that the locale of the parties to the transaction strongly correlated with choice of law, although I was not clear on the rationale for selection of “first” or “second” parties in their work.⁶¹ Excluding locational advantages, the vast majority of contracts that select a jurisdiction with which there is no other contact select New York.⁶² Consistent with New York's dominance in finance they find a high lender insistence on New York law.⁶³ This extends to bond indentures, to underwriting agreements and, to a lesser extent, to security agreements, credit agreements, and stock purchases.⁶⁴

Much of this evidence addresses laws chosen, without addressing the question of whether those choices were efficient, or simply a function of relative bargaining power or skill of the parties or their attorneys. If bargaining power were equal, why would New York win so often? Certainly not because lawyers in Illinois or Texas are sufficiently informed about New York law to make a rational choice. Miller addressed this issue in a subsequent article, where he explored why parties choose New York over California law—a choice between New York's bright line interpretation and California's broader (and less certain) search for the intent of the parties outside the four corners of the document.⁶⁵ But in other contexts, such as where neither New York nor Delaware are points of contact, John Coates has found that the experience of the lawyers involved matters in both forum selection and specific performance clauses, where less experienced lawyers frequently omit both of these clauses.⁶⁶ This suggests that only a select group of lawyers and firms are likely to be experienced enough in various areas of law to be aware of the importance of jurisdictional and remedy choice, much less the relative quality of competing laws.

Miller's work leaves us with a two-state competition—between large and economically dominant jurisdictions, in his case, California and New York. How does that affect the remaining jurisdictions? Referring to the corporate law debate, is there really a national competition, or some kind of bilateral competition with several dominant states? And if some of the dominant players reside in New York, what chance is there that they will agree to the laws of, say, Colorado, even if Colorado has a supe-

59. *Id.* at 1489–92.

60. *Id.* at 1502.

61. *Id.* at 1492–1500.

62. *Id.* at 1499–1500.

63. *Id.* at 1511.

64. *Id.* at 1491 tbl.3.

65. Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 *CARDOZO L. REV.* 1475, 1478 (2010).

66. John C. Coates, IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 *HARV. BUS. L. REV.* 295, 298 (2012).

rior statute?⁶⁷ Lawyers would fear that unknown traps were being laid if the other party insisted on using the law of a jurisdiction with which neither party had substantial contacts.

This leaves us without a full account of how rational choice works in selecting statutes. We can return to one of the earliest of articles Larry coauthored in this area, where he and Bruce Kobayashi looked to Armen Alchian's famous article⁶⁸ and assumed that efficient results will flow, despite some individual bounded rationality, simply because of the forces of the economic system.⁶⁹ I understand the workings of markets where there are prices that allow individual choices from a wide array of goods and services that send signals to producers and sellers throughout the market. But I am less comfortable where the prices are charged by legislators to interest groups. They are rarely fully transparent, and may only signal other legislators how much they can charge.⁷⁰ Some clearly inefficient laws persist over centuries, such as usury laws, which are widespread and restrict the availability of credit in ways often considered paternalistic.⁷¹ One might wonder how unorganized borrowers could exercise such influence against more highly organized lenders.⁷²

IV. CONCLUSION

Questions of how laws are chosen and whether participants ever have signals as clear as price in doing so present ongoing issues for future researchers. Larry and his coauthors were seminal writers in this area, and we have much for which to thank them. While Larry recognized that lawyers may compete for corporate chartering to earn fees from corporate litigation, I think there are more reasons, at least one of which involves general representation of local entities. But I think the larger story, which I have attempted to tell in the context of corporate laws, is the public-regarding role of lawyers, which coincides with the benefits of representation.⁷³ I would begin with the ABA's Committee on Corporate Laws, where members devote a large number of valuable hours to drafting the Model Act, including regular review and revisions. This is a public good, although members probably gain some professional prestige for their service. The same process is replicated at the state level, where information costs are reduced by the presence of a Model Act, and pro-

67. Thomas E. Rutledge, *Going to Delaware(?)*, J. PASSTHROUGH ENTITIES, July-Aug. 2013, at 59, 59. This article raises doubts about the quality of Delaware's LLC law, as well as other entity laws.

68. See generally Armen A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J. POL. ECON. 211 (1950).

69. Kobayashi & Ribstein, *supra* note 17, at 466.

70. While cash campaign contributions are likely to be reported in all jurisdictions, other forms of compensation, such as speaking engagements at luxury resorts, meals, volunteer assistance in campaigns, etc. may not be disclosed everywhere.

71. See a summary of these laws at *State Interest Rates & Usury Limits*, THE 'LECTRIC LAW LIBRARY, <http://www.lectlaw.com/files/ban02.htm> (last visited Feb. 9, 2014).

72. I leave aside the question of whether these laws are in borrowers' interests, since they cause credit to be rationed without borrower choice of whether to pay a higher price.

73. Carney, *The Production of Corporate Law*, *supra* note 29, at 717.

fessional benefits may be somewhat more direct. This activity is not new to corporate law, but has a long history back to at least the 1920s.⁷⁴ But when I served as reporter for the Georgia committee, I witnessed the huge number of hours devoted by the chair, which must have exceeded his billable hours during much of that period. Other members contributed generously of their time, too. It would be useful to learn how many areas of law benefit from such services, and what number of states have benefitted from these efforts. I think this story might serve to fill out the account of law making in business law.

74. Harwell Wells, *The Modernization of Corporate Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 626 (2009).

