Commentary on Sitkoff

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Building on McChesney's political extortion model of rent extraction,1 Rob Sitkoff offers new, innovative contributions to the literature on corporate political speech.2 This Commentary addresses only one segment of Sitkoff's Article, the one that applies McChesney's theory to the debate on the efficiency of the market for corporate charters.3 The main goal of this Commentary is to clarify Sitkoff's argument and examine its limits. I begin with a short introduction on the economics of regulation, which I believe is essential to understanding Sitkoff's Article as well as this Commentary. The next three parts of my Commentary examine Sitkoff's main claim, namely, that Delaware's dominance in the market for corporate law may be explained by the weak extortion power that Delaware's legislators hold vis-à-vis corporations and by its liberal campaign finance laws. I conclude with an analysis of Sitkoff's objection to federal corporate law and, in particular, to Bebchuk and Ferrell's call for an optional federal takeover law.4

I. INTRODUCTION TO THE ECONOMICS OF REGULATION: FROM GEORGE STIGLER TO ROB SITKOFF, THROUGH MANCUR OLSON AND FRED MCCHESEY

A. Stigler

Traditional economics treated regulation as a black box aimed at fixing market failures and redistributing wealth. Public choice theorists, mainly in the second half of the twentieth century, started to show interest in the way governments operate. One of the pioneers in this area is George Stigler. Under Stigler's model, firms compete for

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1 See generally Fred S. McChesney, Money for Nothing (Harvard 1997). See also notes 7–10 and accompanying text.


3 This Commentary does not address the first two parts of Sitkoff's Article, discussing the rationale for the federal ban on contributions to campaign finance.

4 Lucian Arye Bebchuk and Allen Ferrell, A New Approach to Takeover Law and Regulatory Competition, 87 Va L Rev 111, 143 (2001) (suggesting that an optional federal takeover law will enhance shareholder choice and, therefore, should be supported by all scholars who endorse competition for corporate charters).
rents in the political market and politicians sell rents to the highest bidder. One important insight from Stigler's model is that the inefficiencies of regulation stem not only from its interference with the efficient operation of the market, but also from the fact that it encourages firms to waste resources in the search for rents.

B. Olson

Mancur Olson supplements Stigler's model with the observation that the market for regulation operates in favor of interest groups that can more cheaply organize to lobby for regulation. Thus, for example, due to free-riding problems, consumers have difficulty organizing to lobby for price caps; producers, on the other hand, are relatively few in number and can therefore easily form a lobby for a law prescribing a minimum price.

C. McChesney

McChesney's model builds upon Stigler's and Olson's models, but presents a mirror image: Market agents pay ransom in response to legislators' threats to extract rents. The difference between McChesney's and Stigler's models seems semantic in nature, but I believe there is more to it than meets the eye. While under Stigler's model, producers are the entrepreneurs in the market for legislation and legislators are passive actors, under McChesney's model, legislators are portrayed as entrepreneurs and firms respond to their threats. In Stigler's model, legislators create and sell rents; in McChesney's model, on the other hand, legislators threaten to extract rents. Whereas Stigler and Olson suggest that consumers are disadvantaged by their lack of organization, McChesney argues that consumers' lack of organization is to their advantage, arguably even premeditated, because it protects them from extortion. Likewise, whereas Stigler's model views consumers and producers as rivals who compete for rents, according to McChes-

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7 McChesney summarizes the innovation of his book: "The ability of the politician to gain, not by creating rents for some but by causing losses to others, has never been considered.... That is the subject of the rest of this book." McChesney, Money for Nothing at 19 (cited in note 1).

8 "The rent-extraction model focuses specifically on politicians. It views them not as mere brokers redistributing wealth in response to competing private demands, but as independent actors making their own demands to which private actors respond." Id.

9 "Under existing models, greater interest-group organization is unambiguously good. But this interpretation is incorrect, or at least incomplete.... Group organization lowers politicians' transaction costs. The resulting lower costs of extracting surplus mean that more extractive regulation will be threatened, and so more surplus lost." Id at 151.
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NEY, CONSUMERS AND PRODUCERS MAY BE EQUALLY EXTORTED BY POLITICIANS' THREATS TO INTRODUCE NEW TAXES OR TO LIMIT PRODUCTION.

D. SITKOFF ON CAMPAIGN FINANCE

As Sitkoff shows very persuasively in Parts II.B and II.D of his Article, both the Stigler and McChesney models can explain corporations' support for bans on contributions to political campaigns. Under Stigler's scheme, such bans operate like a cartel to restrict competition in the market for regulation and, therefore, serve the interests of all bidders in the regulatory auction market. Under McChesney's model, on the other hand, organized interest groups support bans on contributions because such bans protect them from shakedowns. One might easily demonstrate the distinction between the two models by taking the extreme example of only one organized interest group operating in society. Under Stigler's model, this interest group would not be interested in any restriction on contributions; under McChesney's model, in contrast, even this solo interest group might need protection from extortion, and it would therefore lobby for a ban on contributions.

E. SITKOFF ON STATE COMPETITION FOR CORPORATE CHARTERS (AND THE ORGANIZATION OF THIS COMMENTARY)

But Sitkoff's main innovations, the ones I address in this Commentary, are his attempts to mobilize McChesney's rent extraction theory into the debate on state competition in the market for incorporation. Sitkoff's primary claim is that Delaware's dominance in the market for corporate law may be explained by the weak extortion power that Delaware's legislators possess vis-à-vis corporations. Sitkoff attributes this weakness mainly to the fact that Delaware legislators have no other interest group to which to turn for contributions.

10 "Unlike the rent-creating version of economic regulation, the rent-extraction model notes that producers and consumers are often affected alike by threats to regulate. As already-organized producers repurchase more of their own surplus by buying off legislators' threats of taxation, they are simultaneously repurchasing consumer surplus for their buyers." Id at 152.

11 In Part I of his Article, Sitkoff shows that popular explanations for these bans, such as the protection of shareholders from managers or the protection of the political process, are not theoretically sound and cannot explain the historical evidence of managers' support for these bans.

12 Obviously, politicians who auction these bans charge a price for this product; the losers are the future politicians who will find it more difficult to charge a price for the rents they create or for retreating from their threats to extract rents.

13 McChesney, Money for Nothing at 168 (cited in note 1) ("Contribution limits, often coupled with proposals for public funding of candidates, are often offered as a way out of the current morass in which politicians can shake down private parties for contributions in lieu of expropriating even more from them.").
other than Delaware firms—Part II of this Commentary addresses this claim. The second claim about Delaware’s attraction that Sitkoff makes, to be addressed in Part III of this Commentary, is that Delaware’s liberal campaign laws, coupled with the weak extortion position of Delaware’s legislators, allow firms to engage in rent seeking without the fear of being subject to shakedowns. Another source for Delaware legislators’ weakness that Sitkoff points at, to be examined in Part IV of this Commentary, is the procedural limitations that Delaware’s constitution and norms impose on initiatives to amend Delaware’s General Corporation Law. Finally, in Part V of this Commentary, I analyze Sitkoff’s claims regarding the implications of his theory for the desirability of a federal takeover law.14

II. WEAK LEGISLATORS CONSTITUTE A STRONG LEGISLATURE

According to Sitkoff, firms opt to incorporate in Delaware in part because Delaware’s legislators are in a relatively weak position to extortion corporations. At the same time, Sitkoff argues, Delaware’s relatively liberal rules on campaign financing allow corporations to influence Delaware’s legislators.15 To put Sitkoff’s argument in McChesney’s jargon, Delaware corporations feel safe to lobby Delaware’s politicians for rent creation (Stigler’s model) without subjecting themselves to extortive threats of rent extraction (McChesney’s model).

The main source of weakness for Delaware’s legislators, according to Sitkoff, is the fact that no other significant industry operates in Delaware.16 Sitkoff explains:

Exortive threats by Delaware legislators . . . are less credible than similar extortive threats by legislators in other states. Credible extortive threats require independent alternative consumers of legislation, and with respect to corporate law, Delaware legislators have few alternative interest group sponsors. On the federal level and in most other states, in contrast, there are numerous interest groups that regularly compete with managers on corporate law issues, perhaps most importantly labor.17

This claim adds an important element to Romano’s credible commitment explanation for Delaware’s dominance.18 Whereas

14 My Commentary does not address Part IV.B of Sitkoff’s Article, in which he applies his theory to the debate on issuer choice.
15 Delaware’s rules on campaign finance are more liberal than other states but are still quite restrictive. See Sitkoff, 69 U Chi L Rev at 1144 n 169 (cited in note 2).
16 Another important source of weakness that Sitkoff points at is the procedural limitations on the amendment of the Delaware General Corporation Law. I address this source in Part IV of this Commentary.
18 Roberta Romano, The State Competition Debate in Corporate Law, 8 Cardozo L Rev
Romano's focus is on the interests of the Delaware legislature, Sitkoff points at the weak extortion position of the Delaware legislators as an explanation for why these legislators do not sabotage Delaware legislature's goal. In Sitkoff's words:

The traditional account of Delaware's credible commitment, which is most closely associated with Professor Roberta Romano, focuses on Delaware's relative dependence on franchise tax revenue as well as its extensive and sunk investment in legal and judicial capital. . . . But this account represents an oversimplification of the political process. Individual legislators cannot fully internalize the benefits of increased tax revenues, which are in effect a public good. 19

Sitkoff's claim may also provide a more general contribution to local government theory, far beyond its contribution to the literature on the market for corporate charters. His claim implies that local governments that offer their residents a bundle of public goods would be less competitive than local governments that offer only one public good. 20

I examine Sitkoff's claim in four stages. First, I show that as long as the interest groups operating in a state are not competing with one another, it is not clear whether firms would prefer to incorporate in a state that hosts fewer or more groups. Second, I argue that even when interest groups do compete firms cannot escape extortion by incorporating in a state that does not host competing interest groups. Third, I argue that competing interest groups do operate in Delaware. Fourth, I show that Sitkoff's argument is strengthened by introducing voting power into the model.

A. Does One Interest Group Do Better than Two Noncompeting Interest Groups?

Consider a federal system with only two identical states and two organized interest groups with the two interest groups facing the dilemma of whether to operate in the same state or to operate in different states. Their only consideration is the minimization of political extortion.

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709, 721–33 (1987) (suggesting that Delaware's dependence on franchise revenues and its sunk investment in servicing Delaware firms provides a credible signal for Delaware's commitment to continue servicing the interests of firms incorporated in Delaware).

19 Sitkoff, 69 U Chi L Rev at 1141 (cited in note 2).

20 The question of whether it would be more efficient to have fewer large local governments, each providing several services, or many more governments, each providing one service, has been addressed by others, but from a different angle. See, for example, Robert D. Cooter, The Strategic Constitution 120–24 (Princeton 2000).
In this section I examine the case in which the two interest groups do not compete; namely, rents extracted from one interest group do not benefit the other, and vice versa. Nevada, with its strong gambling industry and relatively large number of incorporated firms, provides a good example for this setting of two noncompeting interest groups: Legislation that benefits (harms) the gambling industry may harm (benefit) Nevada gamblers or residents, but it probably has no effect on firms incorporated in Nevada. Similarly, any amendment to Nevada corporate law that runs against or promotes the interests of firms incorporated in Nevada will have no effect on the gambling industry.

Arguably, and contrary to Sitkoff’s initial claim, the two interest groups would minimize their susceptibility to extortion by operating in the same state. Assuming the number of robbers in a dark alley is constant and that each robber can rob only one person at a time, the prospects of being robbed in this alley decline with the number of people walking in the alley. Similarly, assuming there is a certain limit on the dollar amount that legislators actually need for their campaigns, the two interest groups will be better off splitting the costs or the risk of being extorted by the legislators of one state.

But one can look at this problem from a different angle and reach the opposite conclusion, as I believe Sitkoff does:

In reply one might argue that if Delaware legislators have nowhere else to turn, they will focus their rent extraction on corporations. But such efforts would be hampered by the lack of leverage stemming from the absence of alternative interest group patrons.21

The problem that Sitkoff probably points at is the credibility shortage from which extortionists often suffer. If a threatener does not benefit from acting upon his threat, the target of the threat will not ascribe any credibility to the threat. In our context, we may describe the problem in the following way: When only one interest group is operating in the state, legislators derive no gain from extracting rents from that group. In fact, extracting rents from that group will reduce the wealth of that group and, therefore, will constrict the main source of funds on which legislators can rely for contributions. The fact that legislators gain nothing and may even lose from acting upon a threat to extract rents impedes the credibility of their threat.22

The fact that few noncompeting interest groups operate in a state does not reduce the adverse effect that such rent extraction may have

22 In contrast, if for some reason legislators do benefit from moving against the only interest group in town, they may find it hard to convey a credible commitment not to act upon their threat after the interest group has supported their campaign.
on the resources of potential patrons. But the fact that more than one interest group is around may increase the politician’s cost of not carrying out the threat. Assuming the threatener publicizes the threat, the target (interest group) knows that retreating from the threat would hurt the threatener’s credibility in the eyes of the other potential targets of extortion. Similarly, when contributions are publicized, acting against the interests of contributors would impair a legislator’s future ability to raise funds from other groups. Thus, a legislator facing several interest groups will find it easier to convince targets of extortion that he will act upon the threat if they do not pay and that he will not act against them after they have contributed to his campaign.

The argument that one interest group cannot be credibly extorted seems, however, overstated. The important factor that determines credibility is not the number of potential targets for extortion, but the infinite horizon of extortion incidents the legislator faces. If legislators face only two potential targets for extortion and can extort each group only once, the first target of extortion will know that at the next stage the legislators will face the endgame in which they can make no credible threat. Thus, the threat to extort the first interest group is actually the last extortion game they play, which, for the same reason, will not carry much credibility either. Whether legislators face one or two interest groups, therefore, they may be able to earn credibility only by establishing long-term extortion relationships with the interest groups they extort. As in any prisoner’s dilemma game, playing repeatedly helps create an environment of trust and credibility. The larger the number of interest groups in a state, the easier it would be for its legislators to create such an infinite horizon, but that does not mean that such long-term relationships cannot be established with one interest group.

We may conclude, therefore, that there is a payoff: the more interest groups operating in a state, the lower the probability of any one of them being subject to extortion, but the higher the credibility of each extortion. Thus, the mere fact that Nevada hosts the gambling industry cannot explain why most firms prefer Delaware over Nevada.

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23 This proposition holds only as long as the interest groups involved are not competing. The case of competing interest groups is analyzed below.

24 In the conference version of his Article, Sitkoff made the following claim (now deleted):

Consider Nevada, the would-be “Delaware of the West.” Nevada has (albeit imperfectly) mimicked Delaware’s corporate code and at the same time has declined to treat corporate campaign spending differently than that of individuals. Yet in Nevada there exist powerful competitors to managers in the market for legislation, such as the gambling industry, which increases the exposure to legislative shakedowns.

Following this Commentary, Sitkoff now concedes that the Nevada example does not serve his argument and he focuses only on states with competing interest groups like New York—I address the case of these states in the next Part. Indeed, Sitkoff may even claim that the absence of
B. The Case of Two Competing Interest Groups

The argument that extortion power increases with the number of interest groups is more convincing when the interest groups do compete, namely, when legislation that benefits one interest group harms the other, and vice versa. First, when two interest groups compete, legislators can use one initiative to extort both groups. Hence, assuming the initiation of legislative reforms is costly, legislators would find it cheaper to extort competing interest groups. Second, and more importantly, when the two interest groups are competing, the rents extracted from one group are transferred to the other group. Consequently, a threatened interest group knows that the benefiting interest group would reward the threatener. The fact that the threatener benefits from acting upon his threat attaches credibility to the threat.

Corporations and labor unions are one example: labor unions tend to support minimum wage laws that corporations tend to oppose. Corporations would lobby for laws that will allow them to maximize net present value, while labor representatives would prefer corporate statutes that restrict firm risk-taking. Similarly, labor groups often oppose takeover laws that firms support, and vice versa. In Sitkoff's words:

Thus, just as the lack of competing lobbies in Delaware means that investors and managers need not fear efforts by others to obtain legislative rents at their expense through the enactment of private interest provisions in the corporate code (the traditional economic model of regulation), the lack of competing lobbies in Delaware means that investors and managers need not worry about extortive ultimatums by politicians either (the McChesney model). In New York, however, not only is there exposure to rent seeking by labor unions in the form of, say, large-shareholder statutory liability for employee wages, there is also exposure to rent extraction by politicians in the form of threats to enact such provisions.

Now suppose that for some historical reason, all the labor force in our two-state federal system is concentrated in one state (for example, New York), to be called the labor state. Firms may choose whether to competing interest groups operating in Nevada may explain the fact that Nevada wins the silver medal in the race for corporate charters.

25 "Extraction of private rents and creation of political rents need not be mutually exclusive strategies for politicians. Maximum gains for legislators may involve a combination of the two." McChesney, Money for Nothing at 34 (cited in note 1).

26 For a vivid description of such a battle between labor groups and firms, see Romano, 8 Cardozo L Rev at 726–27 (cited in note 18).

incorporate in the labor state or in the second state, in which no competing interest group is operating (for example, Delaware). At a first glance it seems they would prefer to incorporate in the second state. As Sitkoff suggests, if corporations choose to incorporate in the labor state, they will be making themselves subject to legislators who can pit the two interest groups against each other. Indeed, Sitkoff suggests that the source of Delaware’s attraction is in the fact that Delaware does not regulate labor relationships or any other market activity:

[T]he point is that Delaware is not in the business of regulating the ongoing business activities of the firms it charters, so a Delaware legislator cannot pit one set of managers against another . . . . In contrast, a federal legislator who sits on a committee that superintends, say, the telecommunications industry, could easily pit MCI against AT&T and hold up both for donations.28

As we have shown, the argument that legislators’ threats are more credible when they face competing interest groups is, of course, logical.29 The question, however, is whether it can help explain Delaware’s dominance in the market for incorporation. One point of doubt is that even if legislators can better extort when they can pit one interest group against another, it seems they can do so just as well when the other interest group is located in a different state.30 If firms incorporate in the labor state—the state that regulates their employment market—legislators in the labor state will be able to pit labor groups against corporations by threatening to amend both corporate law and labor law. On the other hand, if firms incorporate in the second state, the state in which no competing interest groups reside, the legislators of the labor state will still be able to extort the two groups by initiating amendments to employment law, and legislators of the second state will now be able to threaten both interest groups with corporate law amendments.

Hence, as long as there are no restrictions on out-of-state campaign contributions, it is not at all clear that incorporating in a state with no competing interest groups like Delaware will reduce the level

28 Id at 1149.
29 See note 25 and accompanying text.
30 Indeed, Sitkoff seems to ignore the extortion power Delaware legislators may have vis-
à-vis foreign interest groups. As long as there is no prohibition on contributions from foreign sources, it seems that foreign interest groups may have an interest in the Delaware General Corporation Law, and this interest may not necessarily align with those of Delaware firms. Thus, even if we assume that all firms share the same interest, an issue to which I will return, there are reasons to assume that other interest groups, perhaps operating and incorporated outside of Delaware, may have opposing interests. Suppose, for example, that all firms incorporated in Delaware want hermetic protection against hostile takeovers. Investment bankers, which specialize in planning and financing hostile bidding wars, would certainly oppose laws that provide such protection. Delaware’s legislators can take advantage of this conflict and extort the two groups.
of extortion to which firms are exposed. Again, assuming a certain limit on the dollar amount politicians actually need, it may even be argued that corporations will be better off incorporating in the same state that regulates their activities in the employment market or the product market, like New York, than subjecting themselves to extortion threats coming from two groups of legislators—for example, New York’s and Delaware’s legislators.

C. Is There Only One Interest Group in Delaware?

One reason firms in Delaware may feel better protected from extortion than anywhere else is the fact that Delaware hosts the largest number of firms. As shown above, the larger the number of firms, the lower any one firm’s exposure to extortion. Hence, irrespective of why Delaware was able to gain a leading position in the market for corporate charters, once it gained this position, other firms had an incentive to follow simply because of the large number of firms already there.

Against this explanation one can argue that the large number of firms may also support the credibility of legislators’ threats, because it provides an infinite horizon of extortion opportunities. According to this argument, the fact that so many firms are incorporated in Delaware increases the risk of extortion firms are exposed to in Delaware. But legislators would be able to take advantage of the large crowd of firms only if they could differentiate between firms. If legislators could promote an initiative that would run against the interests of one firm or a small group of firms, leaving other firms untouched or better off, such an initiative could be a “milker” that would draw the interested parties into paying the entrepreneur behind this legislation. If all firms in Delaware share exactly the same interests, however, it will be impossible to generate a milker that would force one or a few firms to jump in and pay the ransom needed. Due to free-riding problems, firms would not be extorted.

31 A similar claim, although from a Stiglerian perspective, was made by Roberta Romano, The Political Economy of Takeover Statutes, 73 Va L Rev 111, 141 (1987): “[B]ecause hundreds of large corporations are domiciled, though not headquartered, in Delaware, no one firm has [ ] substantial political influence.” Romano bases her argument (that Delaware is attractive because of the large number of firms incorporated in Delaware) on other grounds as well. See Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J L, Econ, & Org 225, 276–78 (1985) (suggesting that the large specific investment by Delaware in servicing Delaware firms signals a strong commitment of Delaware to cater to firms’ interest, a signal that other states cannot mimic). See also Romano, 8 Cardozo L Rev at 723 (cited in note 18) (suggesting that the large number of firms increases the volume of case law and, therefore, creates a more predictable legal system).

32 See note 9.
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The assumption that all Delaware firms share the same interests is, therefore, crucial to Sitkoff's argument. Indeed, Sitkoff claims that Delaware firms share similar preferences:

In Delaware, moreover, with the possible exception of takeover statutes—it is home to potential bidders and targets—corporate demand for legislation is more or less homogenous. Therefore this is not a claim that all managers of Delaware corporations want precisely identical law. . . . Rather the point is that Delaware is not in the business of regulating the ongoing business activities of the firms incorporated there, so a Delaware legislator cannot pit one set of managers against another.3

As shown in the previous section, however, the mere fact that Delaware "is not in the business of regulating ongoing activities" does not make Delaware firms more extortion-proof than firms incorporated in states that do regulate business activities. Thus, for example, a firm that does business in New York cannot escape New York regulators' extortion by incorporating in Delaware. In other words, moving from one state to another can only affect the exposure of corporations to threats to amend corporate law. The interesting question, therefore, is whether there is any reason to believe that demand for corporate law is more homogenous in Delaware than elsewhere. Sitkoff himself recognizes as an exception the fact that bidders and targets, both residents of Delaware, have different, probably conflicting, preferences for takeover law.4 But this is not a trivial exception. Takeover law is the main area of law in which states take different stands. The conflict of interests between potential targets and bidders invites political pressures.5 The conflicts and the pressures intensify in the midst of an actual fight for corporate control.6 Moreover, the conflicting interests in takeover law are not only between bidders and targets, but also between labor unions, investment bankers, and other groups who may be affected by changes in Delaware takeover law.7 As shown in the pre-

3 Sitkoff, 69 U Chi L Rev at 1147 (cited in note 2).
4 In fact, as shown in the previous section, see Part II.B, even if only targets were incorporated in Delaware and all bidders were incorporated elsewhere, the extortion power of Delaware legislators would still not be weakened, for they can exert out-of-state bidders just as well as state bidders or targets.
5 For a nice illustration of such conflicts and pressures, see Romano, 73 Va L Rev at 120–36 (cited in note 31) (discussing the lobbying efforts and political processes behind Connecticut's adoption of a second-generation takeover statute in 1984).
7 Romano, 8 Cardozo L Rev at 730–31 (cited in note 18):

Delaware is better able to resist political pressures for takeover laws because of the large
vious section, the fact that some of these interest groups do not operate or incorporate in Delaware should not stop Delaware legislators from exercising their extortion "rights" against them.

Moreover, corporations in Delaware may have different preferences with regard to issues other than takeover laws. In fact, the premise of homogeneity in firms' preferences seems very problematic in light of the fact that firms adopt different charters and different capital and organizational structures. Thus, there seems to be no reason to assume they would all agree on the same law. Sitkoff's answer to that claim would probably be that as long as Delaware corporate law is liberal enough to allow firms to adopt such different charters or structures, they can all agree on the same statute. But this response takes Delaware's liberal approach for granted. The fact that the current Delaware General Corporation Law is so liberal does not mean that a "milker" cannot be put to floor, which will outlaw (or mandate) certain provisions that few firms have (or do not have) in their bylaws.

Consider, for example, a trivial initiative to prohibit the dual role many chief executives play when they serve as the firm's chairman of the board as well. Clearly, only agents who play such a dual role will be willing to pay the ransom needed to cool down such an initiative. Firms in which such separation of powers is already in place would not find such an initiative offensive. Or consider a more material initiative, one that threatens to amplify the duty of care standards. Such an amendment in Delaware law would impose higher costs on high-risk firms than it would on low-risk firms. Since firms incorporated in Delaware differ in their exposure to risk, such an initiative would single out the high-risk firms. Corporations may also hold different views regarding the regulation of self-dealing. Whereas parent corporations would probably be threatened by an initiative to restrict their freedom to compete or deal with their subsidiaries, firms with dispersed ownership might find such restrictions favorable as they make them less attractive for takeover by looters.

The conflict of interests between firms and financial intermediaries also is not restricted to takeover laws. Financial intermediaries are interested mainly in increasing volume of trade and, therefore, would lobby for laws that promote market liquidity. Firms, on the other hand, may be more interested in the efficiency of their production lines.

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number of incorporated firms, which includes both acquirers and targets. . . . In addition, other interested parties who oppose restricting takeovers, such as financial intermediaries, would find it more worthwhile to lobby in Delaware than in other states because its statute would have a greater impact on acquisitions, as it would apply to so many firms.

38 Sitkoff, 69 U Chi L Rev at 1147 (cited in note 2).
39 Such a rule was recently adopted in Israel and was vigorously opposed by CEOs, who play this dual role.
Thus, for example, firms and financial intermediaries may hold different views regarding the regulation of proxy contests or insider trading.40

Lastly, one obvious area of conflicting interests is the franchise tax. As Kahan and Kamar have shown very convincingly, the current structure of Delaware's franchise tax discriminates against large publicly held firms.41 Any initiative to shift the burden from large to small firms could be used as a "milker" that would extort both large and small firms.

We may conclude, therefore, that the lack of extortion in Delaware cannot be explained by firms' homogenous demand for legislation.42 The fact that so many firms can operate under the same regime is not due to the firms' homogenous demands but rather to the enabling philosophy of Delaware corporate law, which permits each firm to adopt the contractual terms that fit its needs.

D. The Importance of Voting Power

As we have seen so far, the main deficiency in Sitkoff's thesis is the lack of a clear model explaining why the lack of another strong interest group operating in Delaware reduces the extortion power that Delaware legislators possess against Delaware corporations. The fact that other states host more interest groups, readily available for extortion, seems an insufficient explanation, especially given that legislators in Delaware could initiate amendments that would divide the universe of firms incorporated in Delaware into many subgroups, conquer and

42 Sitkoff answers my argument as follows:

Professor Yadlin suggests that Delaware legislators could attempt to "divide and conquer" by introducing amendments on divisive issues of corporate law. But that threat is more hypothetical than real. There is a strong legislative norm in Delaware in favor of deference to the Corporate Law Section of the Bar Association, and amendments to the Delaware General Corporation Law are recommended only "when there is a demonstrable consensus in the corporate community that such changes are advisable." It is therefore likely that none of Professor Yadlin's hypothetical divide-and-conquer proposals would ever get before the legislature. In effect, issues of Delaware corporate law for which there is no strong consensus—the sort of issues that would invite rent seeking and political rent extraction—are punted to the Delaware courts. This further reduces the potential for traditional rent seeking and political rent extraction.

Sitkoff, 69 U Chi L Rev at 1145–46 (cited in note 2) (footnotes omitted). In other words, Sitkoff suggests that even if the weakness of Delaware legislators cannot be explained by the search preferences of Delaware firms, there is an alternative source for this weakness—the procedural limitations on the amendment of the Delaware General Corporation Law. I address this claim in Part IV of this Commentary.
The missing link in Sitkoff's rent extraction explanation for Delaware's dominance, I believe, is the significance of voting power. If we ignore voting power, Delaware and New York legislators are in the same position to take advantage of the effect of their corporate laws on corporations, labor unions, and financial intermediaries to extort them no matter where the labor unions or financial intermediaries operate. Voting power changes the equation. The credibility legislators derive from the popularity of their actions against corporations is dependent on the existence of a competing interest group with voting power inside the state. In states in which the interests of many voters conflict with those of firms, therefore, legislators may gain popularity among voters by extracting rents from firms. Thus, the threat of rent extraction is more credible in states in which such competing interest groups actually reside and vote.

The voting story implies that threats of rent extraction are credible only in states in which a large constituency with significant voting power resides, and whose interests are in sharp conflict with the interests of firms. Consider the case of New York. As I have shown, if we were to ignore voting and if the legislator game were all about the money, it seems Delaware legislators could pit targets against bidders and against financial institutions just as effectively as New York legislators do. What makes New York legislators' threats against targets more credible is the fact that employees of financial institutions and the labor force of many Delaware firms, who may benefit from certain anti-target amendments, reside and vote in New York. Thus, acting upon such threats may provide New York legislators with votes that Delaware legislators cannot gain. The threat of New York legislators,

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therefore, is more credible than threats coming from Delaware legislators.44

Voting, therefore, can explain why firms prefer Delaware to New York or California. It cannot provide any reasonable explanation for why the existence of a gambling industry in Nevada should have pushed firms away from Nevada to Delaware. As long as there are no conflicts of interest between employees or customers of the gambling industry and the interests of firms incorporated in Nevada, the threat of Nevada legislators to extract rents from firms would not benefit Nevada voters and thus would not be credible.45

The voting story, therefore, can explain why Delaware wins the race against states like New York and California. It cannot explain why Nevada, and other states in which no competing constituency resides, are left behind Delaware. But arguably, once Delaware gained its dominance, voting could explain why Delaware kept and expanded its dominance. The fact that a large number of firms were incorporated in Delaware created whole industries specializing in the provision of services to these firms. Thus, in addition to the fact that no competing interest groups reside in Delaware, this state also has the advantage of having a large constituency whose main interest is in expanding the number of firms incorporated in Delaware.46 Hence, for a Delaware legislator, the cost of acting upon a threat of extracting rents from firms is much larger than it is for a Nevada or other state legislator.

The argument that the large number of firms incorporated in Delaware can explain its dominance is not novel. As Roberta Romano

44 Notice that New York legislators cannot credibly commit to refrain from extorting firms simply by forming a single-purpose legislative body, dedicated solely to corporate law. As long as legislators are elected to this body from the same population and are dependant on the same voters for reelection, their threats are just as credible as the threats of legislators in the all-purpose legislature.

45 See Coffee, 8 Cardozo L Rev at 762-63 (cited in note 43):

Another distinctive fact about Delaware as a jurisdiction is the relative absence of countervailing lobbies. In California, which probably has the most “activist,” least lax body of corporate law, the law-making process may involve a number of contending groups: labor, environmentalists, public-interest lobbies, etc. But Delaware is sparsely populated and hence resembles a relative vacuum in terms of interest groups. It is interesting to note that Delaware shares this characteristic with Nevada (the “Delaware of the West”), which also has competed successfully for charters. The common denominator is that both states can concentrate on marketing their corporate law to consumers because there is little inherent interest in the topic among their citizens. In contrast, the labor unions in New York have had a clear impact on the New York Business Corporation Law, as evidenced by its unique provision for large-shareholder liability for wages.

46 Id at 762 (“Nor is it only lawyers who are affected [in the absence of countervailing pressures]. Delaware’s corporate preeminence supports satellite industries. For example, Wilmington hotels are filled with out-of-state litigators preparing to argue in the Chancery Court. Additionally, Delaware residents are employed by corporate service firms.”).
and others argued long ago, the large specific investments that Delaware's government and citizens made in servicing Delaware firms would be lost if those firms left Delaware, thus signaling the state's strong commitment to cater to the firms' interests. States that have not made such investments cannot mimic Delaware's signal. Sitkoff's rent-extraction explanation for Delaware's dominance supplements Romano's by arguing that the same specific investments can also explain why Delaware legislators cannot credibly threaten to extract rents from firms—voters' preference for catering to the interests of firms increases the costs of acting upon such threats and, therefore, undermines their credibility. The fact that Delaware legislators cannot benefit from extortion aligns the interests of Delaware legislators with the interests of Delaware, and therefore supports the credibility of Delaware's commitment to cater to the interests of its firms.47

III. DELAWARE'S LIBERAL(?) CAMPAIGN FINANCE LAWS

So far I have analyzed the conditions under which Sitkoff's thesis, attributing Delaware legislators' weak extortion power to the fact that no other interest group operates in Delaware, may be conceivable. I have argued that Sitkoff's explanation may be valid only if interest groups operating in other states compete with firms, in the sense that rent extracted from firms is transferred to these groups, and only if these competing groups enjoy significant voting power. Compared with these states, Delaware enjoys a comparative advantage because no competing interest groups reside and vote in Delaware.

But Sitkoff's theory has another element that, until this point, I have ignored. Sitkoff argues that the fact that firms in Delaware are allowed to contribute to legislators' campaigns, coupled with the weak extortion power of Delaware legislators, allows firms to engage in lobbying without the fear of being extorted. This, according to Sitkoff, is an additional source of Delaware's attraction:

The combination of few competing bidders and the failure to discriminate against corporate political speech lowers the cost of

47 See, for example, Romano, 1 J L, Econ, & Org at 273–81 (cited in note 31) (analyzing the incentives of legal professionals involved in reincorporations and legal institutions with regard to migrating firms).

48 This argument resembles Macey and Miller's explanation for Delaware's dominance. See Jonathan R. Macey and Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex L Rev 469, 471 (1987) ("A complete theory of Delaware corporate law requires analysis of the ways in which the state's legal system responds to two broad constituent groups: (1) the 'consumers' of Delaware corporate law (principally out-of-state shareholders and managers); and (2) the interests within the state that stand to benefit in various ways from the state's chartering system."). All my analysis adds to Macey and Miller's theory is that the fact that the interest groups that reside and vote in Delaware want to sustain Delaware's dominance also protects firms from extortion.
[amending corporate law], if not by increasing the avenues through which it might be purchased, then by offering a jurisdiction in which reform may be sought without exposure to extortionate demands. Put another way, Delaware’s political dynamic not only protects corporations from extortive threats, but it also increases the odds of successfully agitating for legislative changes to Delaware’s corporate law without triggering a cascade of rent extraction.⁴⁹

I find this argument much more problematic than the previous one. Once we relax the assumption that all firms want the same law and we recognize the conflicts of interest between firms, we must also recognize that under both McChesney’s and Stigler’s models, firms should opt for a regime that bans contributions to campaigns of Delaware legislators.⁵⁰ In fact, this is the main point that Sitkoff makes in Part II of his Article. Such bans become even more essential once we recognize the conflicts of interest between shareholders and management. Like any other business decision, management has discretion with regard to investment in lobbying. Managers may use this discretion to lobby for laws that serve management’s interest and harm shareholders’ interests. Thus, the argument that the liberal campaign finance law makes Delaware attractive to shareholders seems unlikely.

Sitkoff is aware of this objection and dismisses it by citing evidence showing that incorporating in Delaware improves shareholders’ wealth. But this reply is far from convincing. Evidence showing that Delaware law increases shareholder value cannot provide any support for Sitkoff’s claim that this value stems from Delaware’s liberal approach to campaign contributions.

An alternative argument that Sitkoff could raise (and did raise in the pre-conference version of his Article) is that managers’ opportunism is not consistent with investors’ rationality, because rational investors should have found ways to constrain such opportunism. Indeed, rational investors recognize agency costs and deal with them by adopting contractual limitations on management’s power, in particular on management’s power to amend these contractual limitations. By allowing managers to lobby for corporate law amendments, however, Delaware law allows managers to lobby for amendments that would override their contractual commitments. In this sense, and contrary to Sitkoff’s claim, there is a sharp distinction between management investment in rent seeking, which may be used to evade contractual limitations, and its investment in charity, which is subject to such contractual limitations. Arguably, Sitkoff may claim, if rent seeking by management

⁴⁹ Sitkoff, 69 U Chi L Rev at 1147 (cited in note 2).
⁵⁰ See notes 11–13 and accompanying text.
were a major concern for (rational) investors, they would have forbidden management lobbying; the fact that (rational) investors do not impose such limits suggests that they want firms to engage in lobbying. But, as Sitkoff himself recognizes, such self-imposed limitations would place a firm in a disadvantageous position in the market for legislation."

Sitkoff's reply may be convincing only if we endorse his previous assumption, namely, that there are no significant conflicts of interest between firms with regard to corporate law. But even under this assumption it is not clear why firms would want to spend money and effort lobbying for legislation that serves the interests of all Delaware corporations. Under this homogeneity assumption firms would prefer free-riding, letting other firms spend their money on lobbying. Thus, if we endorse the homogeneity assumptions, the strongest claim we can make is that whereas on the federal level firms have a strong interest in banning contributions, in Delaware firms would not spend money on lobbying even if they were allowed to do so. Hence, Delaware firms are not motivated to fight aggressively against Delaware's liberal campaign finance law.

Lastly, I would argue that even if we ignore such conflicts of interest, namely, if we assume management always lobbies on behalf of the shareholders' interest, it is still not clear that shareholders would opt for a regime that allows lobbying for corporate law amendments. Shareholders want to be able to precommit to certain contractual limitations on their power to amend the corporate charter and bylaws. Such precommitments allow shareholders to ensure minority shareholders, employees, creditors, and incumbent management that their interests will be protected, thereby reducing the cost of establishing contractual relationships with these third parties. If firms are allowed to purchase amendments that serve the interests of the majority of shareholders, the credibility of these precommitments would be lost.

We may conclude, therefore, that under all reasonable assumptions concerning conflicts of interests with regard to Delaware corporate law, there are reasons to believe that Delaware firms would prefer to ban contributions to Delaware politicians. Arguably, such bans do exist in Delaware. Although Sitkoff describes Delaware campaign laws as liberal, in fact the same limitations on contributions that are imposed on individuals are also imposed on firms. Thus, the contributions that each Delaware firm is allowed to make are so trivial that, arguably, they can be neglected.

52 See note 15.
IV. DELAWARE'S PROCEDURAL RESTRICTIONS ON CORPORATE LAW AMENDMENTS

The second source of Delaware legislators' weakness that Sitkoff identifies is the procedural limitation on Delaware legislators' power in the area of corporate law. Sitkoff explains:

[T]he constitutional requirement in Delaware of a two-thirds vote of both houses of the legislature to amend the General Corporation Law also diminishes the credibility of extortive threats generally and the likelihood of a divide-and-conquer strategy in particular.\(^5\)

The supermajority requirement clearly ensures stability in Delaware corporate law, and this in itself, as Sitkoff points out, may be a virtue. Less obvious is the argument that the two-thirds requirement reduces extortion.

First, in states where corporate law can easily be amended by a simple majority of legislators, the durability of the product legislators can sell is much lower than that of the product Delaware legislators are selling. Arguably, therefore, although Delaware legislators may find it hard to convince firms that they can form the two-thirds coalition (and obtain support from the bar) needed to support their threat, firms know that if the threateners do elicit such support, it will be much more damaging than similar legislation in other states. Thus, although the plausibility that Delaware legislators will be able to carry out a threat to extract rents may be lower, the magnitude of the harm Delaware legislators would inflict if they do so is much larger. The price that Delaware legislators will be able to charge for each amendment, therefore, should be much higher than the price legislators can charge in other states.

Second, while it is true that a two-thirds majority reduces the power of each legislator to promote legislation, at the same time this supermajority requirement increases the holdout power of each legislator. Thus, if firms lobby for a corporate law amendment, the extortion power of each legislator is much higher under this regime.\(^4\) The argument that firms will be less extorted in such a regime, therefore, relies heavily on firms' preference for the status quo. Firms' preference for stagnation in the legislature can be explained not only by

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\(^4\) In fact, if we ignore the extortion position that this veto power affords to legislators, it seems other states could relatively easily mimic Delaware by adopting a two-thirds requirement as well. The reason other states cannot adopt such a rule is that, where other interest groups operate and vote, such a veto power increases the extortion power of legislators. Thus, in fact, the potential for extortion that the two-thirds requirement generates is essential for Sitkoff's main claim.
their risk aversion, \textsuperscript{55} but also by their trust in the judiciary. The harder it is to pass legislation, the broader the scope of judicial discretion and judicial power to regulate corporate law.\textsuperscript{56} Thus, the fact that the legislature is in stagnation does not necessarily mean that the law remains stable—all it means is that the power to modify the law is in the judiciary's hand. With an unreliable court in the background, therefore, firms would have considered the supermajority requirement a burden and a facilitator of extortion. Thus, the argument that a supermajority requirement restricts extortion relates to the approach that attributes Delaware's dominance to its professional judiciary.\textsuperscript{57}

Lastly, the two-thirds majority seems to raise further impediments to Sitkoff's claim that firms find Delaware attractive because of its liberal campaign finance laws and the safe environment Delaware provides to lobbyists. The two-thirds majority requirement increases significantly the costs of such lobbying, thereby sending firms a clear message that the price of buying legislation in Delaware is far higher than anywhere else. The fact that, in practice, the Delaware norm is that amendments to the Delaware General Corporation Law are conditioned upon the Delaware bar's approval further suggests that money cannot buy amendments to the Delaware General Corporation Law.\textsuperscript{58} Thus, it seems the procedural limitations on corporate law amendments may provide an additional explanation for why firms do not fight aggressively against Delaware liberal campaign finance law, but it can hardly provide support for Sitkoff's claim that the reason firms prefer Delaware is that it enables them to buy off legislation.

V. SITKOFF VERSUS BEBCHUK AND FERRELL

The last stage in Sitkoff's Article is his criticism of Bebchuk and Ferrell's call for a federal takeover law.\textsuperscript{59} The federal statute Bebchuk

\textsuperscript{55} Romano, 8 Cardozo L Rev at 722 (cited in note 18):

While the [two-thirds] provision would appear to make future changes equally difficult, if firms are risk averse when it comes to corporation codes, they might favor a maximin strategy in which the constitutional provision would be desirable, since it helps to ensure that the legal regime will never be worse than it is at the time of incorporation.


\textsuperscript{57} Romano, J L, Econ, & Org at 277 (cited in note 31) ("[T]he continuity in and small size of Delaware's chancery court, which hears corporation law cases, while facilitating the development of judicial expertise in the field, also makes Delaware decisions more predictable than those of other states.").

\textsuperscript{58} See Sitkoff, 69 U Chi L Rev at 1148 n 190 (cited in note 2).

\textsuperscript{59} Bebchuk and Ferrell, 87 Va L Rev at 115–17 (cited in note 4) (proposing an optional federal takeover law that would provide less protection to incumbent managers than current state law, in addition to a mandatory procedural rule allowing shareholders to vote on whether to opt in to the optional law).
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and Ferrell propose would not be mandatory, but rather, shareholders
would be able to pick this statute instead of the takeover law offered
to them by their state of incorporation. Bebchuk and Ferrell argue
that such a choice-enhancing federal law could not make matters
worse and only has the potential to improve the legal system.\footnote{Id.}

Sitkoff disagrees: “The Bebchuk and Ferrell proposal would be a
‘milker,’ moreover, even if the substance of the proposed rules were to
be optional. . . . Federal legislators could simply threaten to make the
option mandatory.”\footnote{In other words, what Sitkoff fears is that once
Congress adopts an optional federal takeover law, federal legislators
will threaten to turn it into a mandatory rule, only for the sake of ex-
torting those who oppose such a mandatory takeover regime.\footnote{In
fact, Sitkoff makes an even stronger claim: “Perversely, an optional
statute might be worse than a mandatory one, because it would allow
these legislators to threaten credibly to make it mandatory at a future
time.” Id. This claim is, of course, tautological. If optional laws are
indeed worse than mandatory laws because legislators can threaten
to turn them into mandatory rules, then mandatory rules are even worse than optional rules because legislators may threaten
to turn them into optional rules (which are worse than mandatory rules, etc.).\footnote{In the post-conference version of his Article Sitkoff tries to remedy this failure. See id at
1163–64 (cited in note 2).}}

Sitkoff’s criticism does not spell out exactly how Bebchuk and
Ferrell’s optional legislation would help legislators do something they
could do even in the absence of such legislation. After all, nothing is
stopping legislators from coming up with a proposal to amend the
federal mandatory regime of the Williams Act and add to it the same
provisions that Bebchuk and Ferrell want in their optional legisla-
tion.\footnote{Alternatively, Congress could empower the SEC to regulate
management’s conduct in the face of a takeover threat. Thus, Bebchuk
and Ferrell’s proposal, assuming it is indeed optional, cannot be ac-
cussed of helping federal legislators extort firms.\footnote{Sitkoff may claim
that the existence of optional legislation reduces the cost of threaten-
ing to introduce mandatory legislation because the threatener does not have to draft a whole bill. But it seems the costs involved in drafting such a bill are trivial.}}

What Sitkoff really advocates has nothing to do with the Bebchuk
and Ferrell proposal, but rather is related to the constitutional separa-
tion of powers between the federal government and the states. As long
as there is no constitutional limitation on Congress’s power to regulate
corporations in general and takeovers in particular, federal legislators
will be able to initiate such “milkers” irrespective of whether Bebchuk
and Ferrell’s law is in place. Ideally, therefore, the Sitkoff constitution
would forbid the federal government from regulating takeovers. Only
such constitutional limitation on the central government’s power could
constrain legislators’ power to extort firms.
Sitkoff also ignores the bright side of Bebchuk and Ferrell’s proposal. If, indeed, firms are bothered by extortion, the one area in which they are most likely to be extorted is the area of takeovers. The main refuge from extortion in this area is the firm’s ability to reincorporate in a different state. Thus, any proposal that would reduce the cost involved in such an exit would reduce the extortion power of state legislators. If, indeed, under Bebchuk and Ferrell’s optional takeover law, firms would be able to opt out of their state takeover code at a very low cost, the credibility of a state legislator’s threat would be significantly undermined. Thus, looking at the problem solely from McChesney’s and Sitkoff’s perspective, it is not that obvious that the Bebchuk and Ferrell proposal should be rejected. Arguably, the federal option would help firms to cope with threats emanating from state legislators.

Having said all this, I still think Sitkoff could raise a “McChesney argument” against Bebchuk and Ferrell. The problem I identify in Bebchuk and Ferrell’s proposal, from Sitkoff’s perspective, is that although their legislation is optional, the option they write is mandatory and it is up to the shareholders’ sole discretion whether to exercise it. Bebchuk and Ferrell, in their proposal, suggest that firms would be allowed to opt out of the optional federal law, but they would be allowed to do so only through a charter amendment.6 Thus, their proposal is indeed optional for firms that will go public after the Bebchuk and Ferrell law is enacted. However, for all the current universe of publicly held corporations, the federal option would transfer rents from management to shareholders. Managers would have to pay shareholders for agreeing to opt out of the federal option. Bebchuk and Ferrell may be right that such a transfer of rents is justified both on efficiency and on distributive grounds.66 But the fact that their optional legislation transfers rents suggests that shareholders and managers would care a lot about the content of this option and, therefore, federal legislators would be able to pit managers and shareholders one against the other and extort both groups.67 Hence, from Sitkoff’s

65 Bebchuk and Ferrell, 87 Va L Rev at 148 (cited in note 4):

If shareholders wished to opt out of the process rule itself, there is no reason why they should not be allowed do so through a charter amendment. The process rule would only be mandatory in the sense that regardless of state law, shareholders will have the option, if they did not forego it in their charter, to have their corporation opt into or out of the federal takeover regime. The goal of the choice-enhancing intervention is to increase, not limit, shareholder choice.

66 See id (“States, however, would not be allowed to opt out of the process rule through their corporate law because states have not been willing to give shareholders meaningful choice on whether they actually want certain takeover arrangements.”).

67 To avoid this problem, Bebchuk and Ferrell should have adopted an opposite process, according to which shareholders would be allowed to exercise the federal option only if the firm
perspective, namely if our sole policy goal were to minimize legislators’ opportunities to extort firms, we should have objected to Bebchuk and Ferrell’s proposal even if they could promise us that federal legislators would never threaten to make it mandatory.

CONCLUSION

Sitkoff’s main contribution lies in the introduction of McChesney’s rent extraction model to the debates on state competition for corporate charters. Nothing in this Commentary was meant to downplay the importance of this innovation. All this Commentary tries to do is to clarify Sitkoff’s argument and examine its limits.

The first claim I address in this Commentary is that Delaware’s dominance in the market for corporate charters may be explained by the weak extortion position that Delaware legislators possess vis-à-vis corporations. Whereas Sitkoff attributes this weakness to the fact that legislators in Delaware have no other competing interest group to turn to for contributions and to the homogenous preferences of Delaware firms, this Commentary suggests that other interest groups do operate in Delaware and firms do hold opposing views with regard to the optimal corporate law. The main source for this weakness, according to this Commentary, is the fact that unlike New York, California and similar states, the competing interest groups do not have voting power in Delaware. Unlike New York and California voters, who have a strong interest in extracting rents from corporations, Delaware voters have no such interest. Hence, threats by Delaware legislators to extract rents are less credible.

Another source for Delaware legislators’ weakness that Sitkoff points at is the burdensome procedure that the Delaware constitution and norms impose on corporate law amendment. Although I believe this argument is valid, the third part of this Commentary has offered a few caveats. I have argued that the constitution’s requirement that any amendment to the Delaware General Corporation Law must be supported by two-thirds of the legislature increases the veto power of legislators and, therefore, increases their extortion power in cases in which firms are interested in amending corporate law. Thus, Sitkoff’s claim assumes firms prefer the status quo. More accurately, limitations on the legislature’s power to amend corporate law empower the judiciary. Hence, Sitkoff’s claim relies heavily on firms’ trust in Delaware’s judiciary. Without such trust, firms would often lobby for legislative override of a court decision and, therefore, would be subject to the amended its charter to opt into the federal option. But, of course, this process rule would undermine the main goal of Bebchuk and Ferrell’s proposal—to allow shareholders to escape the takeover arrangements that were imposed on them midstream by state legislators.
significant veto power that Delaware legislators enjoy by virtue of the two-thirds requirement. The trustworthiness of the Delaware judiciary, therefore, is a precondition for Sitkoff's claim that the two-thirds requirement reduces extortion.

In the second part of my Commentary I expressed my doubts concerning Sitkoff's suggestion that firms find Delaware attractive because of its liberal campaign finance laws. Delaware's procedural restrictions on corporate law amendment, in the form of the two-thirds requirement and the unofficial gatekeeper power of the Delaware bar, makes lobbying in Delaware even less attractive. Hence, the argument that Delaware liberal campaign finance law is a source of attraction, I believe, is an exaggeration. It seems the best we can say about Delaware's liberal campaign finance law is that it probably does not scare firms away.

In the last part of my Commentary I addressed Sitkoff's criticism of Bebchuk and Ferrell's proposal for an optional federal takeover law. I agree with Sitkoff's argument that despite the optional nature of the Bebchuk and Ferrell proposal, it might subject firms to extortion threats coming from federal legislators, but my reasons are slightly different. Sitkoff's main criticism is that federal legislators would extort firms by threatening to turn Bebchuk and Ferrell's optional law into a mandatory law. I suggested that Bebchuk and Ferrell's proposal would be a "milker" even if it were coupled with a strong commitment to remain optional. The main reason for this is that Bebchuk and Ferrell's proposal provides shareholders with an option they currently do not have and, therefore, it transfers rents from management to shareholders. Thus, managers and investors would have strong conflicting interests in the content of this option. Federal legislators would be able to take advantage of this conflict and extort from both groups.