

History Lessons: Explaining the Origins of Corporate Charter Competition

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Sarath Sanga, *On the Origins of the Market for Corporate Law*, available at [SSRN](#).

Professor Sarath Sanga's paper titled [On the Origins of the Market of the Corporate Law](#) is a thought provoking challenge to popular beliefs concerning the origins of the market for corporate law and state charter competition, that is: (1) Supreme Court jurisprudence helped create a national market for corporate charters; and (2) Delaware became a market leader *only* because New Jersey (the initial leader) repealed its liberal corporate laws in 1913.

Instead, the paper contends that these two popular claims are wrong. It offers an alternative explanation: organic industrial expansion and interstate commerce led to the emergence of the market for corporate law and that New Jersey declined as a market leader due, in part, to other states copying its laws.

Paper's Central Findings

The paper contains an explanation of its methodology and data collection, so I will not focus on it here. (Pp. 12-17.) Instead, I will focus on the paper's findings and the implications for scholars, firms, and policymakers. The first central claim is that Supreme Court jurisprudence, particularly the often-cited holding from [Paul v. Virginia](#), did not set in motion the path to a national market for corporate law. Instead, the paper argues that *Paul v. Virginia* is "one in a long line of cases that opposed a national market and empowered states to discriminate against foreign corporations." (Pp. 11-12.) Relying on historical sources and Supreme Court jurisprudence, the paper asserts that the Supreme Court did not promote a national market for corporate law. Instead, the Supreme Court throughout the 19th century and into the 20th century, regularly affirmed the states' ability to discriminate against corporations with out-of-state, i.e., foreign charters. (P. 4.)

The second traditional claim the paper challenges is that New Jersey's "Seven Sisters" regulation, repealing its liberal holding company statute in 1913, led to massive corporate migration, particularly to nearby Delaware. The paper relies on empirical evidence to show that New Jersey's decline as the premier site of incorporation began shortly after 1903, nearly a decade before the "Seven Sisters" legislation and nearly seven years before Woodrow Wilson campaigned for governor in 1910. (P. 16.)

By the late 19th century, according to the paper, "the market for corporate charters was an accomplished fact." (P. 18.) It contends that New Jersey's liberal corporate statute, which long predated 1913, catalyzed greater migration to New Jersey by attracting foreign firms with "little or no connection to New Jersey." (P. 19.) In essence, New Jersey's early emergence as a leader in corporate charters is evidence of a somewhat competitive market for corporate law.

But if neither the 1913 Seven Sisters legislation nor Woodrow Wilson's campaign for governor led to New Jersey's decline, then what explains New Jersey's earlier decline in the charter market? The paper maintains that basic competition from other states, copying New Jersey's liberal pre-1913 corporate statute, explains New Jersey's decline.

Paper's Contribution to the Existing Body of Literature

Alternative Historical Account of New Jersey's Decline

The paper supports an earlier timetable for the creation of a corporate law market and New Jersey's decline as a premier site of incorporation. It maintains that the primary force behind the corporate law market was not necessarily a function of Supreme Court jurisprudence. Instead, it was a more organic process influenced by financial returns generated by firm expansion and multi-state operation. (P. 5.) Moreover, New Jersey's preeminence was significantly undermined by jurisdictional competition and not solely due to the 1913 legislative changes.

Delaware's Dominance and the Nature of Competitive Advantage

Although the paper deals primarily with New Jersey's emergence and decline in the corporate chartering market, what does this narrative say about Delaware's emergence and longstanding dominance? It suggests how a jurisdiction's points of parity, such as statutory innovations that are easily replicated by other states, will not necessarily lead to sustained dominance. We should instead look to a jurisdiction's points of differentiation, that is, its unique advantages, to account for sustained dominance in the charter market. Indirectly, the paper's findings reinforce the body of literature suggesting some other factors besides law may account for Delaware's sustained dominance in the corporate charter market, e.g., its court system, its brand, the preferences of corporate lawyers, and franchise taxes.

Paper's Implications for Scholarly Debate and Future Research

Historical Trends Provide Valuable Context to Modern Debates

Whereas the paper addresses Supreme Court jurisprudence and New Jersey legislative developments at the turn of the 19th century, it simply acknowledges, but does not discuss, concomitant developments in other states like Delaware. According to some commentators, the provisions of Article IX of the 1897 Delaware State Constitution “radically changed the complexion of Delaware incorporation law and helped to propel Delaware to the position of corporate law pre-eminence that it occupies today.”¹ Specifically, these state constitutional provisions abolished incorporation by special act and created a general incorporation act that had significant influence. Prior to this time, incorporations occurred primarily through special acts of the Delaware legislature and the average wait time was two years.² Opponents of the special act procedure feared it inspired corporate “lobbyists” to exercise undue influence over Delaware politicians. As a consequence, Delaware established a general incorporation procedure as the exclusive method of incorporation for all Delaware entities (except for banks).³ Two years later, in 1899, Delaware adopted a comprehensive general incorporation law that, similar to other states, replicated aspects of New Jersey’s liberal corporate statute. Complementing a liberal corporate statute, Delaware adopted a franchise tax structure significantly more favorable than New Jersey’s.⁴ This parallel Delaware historical narrative complements the paper and its data by suggesting that Delaware’s ascendancy began earlier than New Jersey’s repeal of its liberal corporate statute in 2013. (Pp. 29-33.)

Modeling Incorporation Decisions

Incorporation decisions are not likely driven by a single variable. Perhaps it makes sense to view incorporation decisions akin to the purchase of a bundled product.⁵ Such an approach accommodates multiple contributing factors (e.g., regulatory environment, courts, and taxes) and may reconcile seemingly competing claims. From this vantagepoint, the interstate competition and firm expansion claim is consistent with New Jersey eventually being perceived as less competitive or in parity with other states, and Delaware emerging and sustaining its dominance through differentiation advantages.

In conclusion, Sanga’s paper is an insightful read for scholars interested in the origins of state charter competition and potentially its future.

1. Randy J. Holland and Harvey Rubenstein, **The Delaware Constitution of 1897: The First one-Hundred Years** 159 (1997).
2. *Id.* at 161.
3. S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 **De. J. Corp. L.** 1, 7 (1976).
4. William E. Kirk III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-eminence*, 10 **J. Corp L.** 233, 254-55 (1984).
5. Roberta M. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 **J. L. Econ. & Org.** 225, 233-35 (1985).

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