What's So Bad About Delaware?

David A. Skeel, Jr.

What's So Bad About Delaware?

David A. Skeel, Jr.

INTRODUCTION

There is something a little desperate about the relentless criticism of Delaware's bankruptcy judges.[1] Prior to 1990, nobody thought much about Delaware as a filing location for large corporate debtors. Thereafter, following in the wake (or jet-stream, perhaps) of the Continental Airlines bankruptcy, more and more large debtors began filing their bankruptcy cases in Delaware.[2] Because bankruptcy's venue provision permits debtors to file for bankruptcy

---

Professor of Law, University of Pennsylvania Law School. I am grateful to Stuart Gilson and Melissa Jacoby for helpful discussion, and to Roberta Romano for extensive and thoughtful comments on an earlier draft.

1. Delaware's bankruptcy cases have actually been heard both by the federal district court judges and by the bankruptcy judges since early 1997, when Delaware's District Court withdrew the order that automatically referred Chapter 11 cases to the bankruptcy court. For simplicity, I will refer to these judges collectively as Delaware's "bankruptcy judges."

2. As each of the participants in this exchange has described elsewhere, Delaware supplanted the Southern District of New York in the 1990s as the most popular venue destination for large corporate debtors. Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968, 983-87 (1999); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1360, 1373 (2000); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 18 (1998).

in their state of incorporation, and so many large firms are incorporated in Delaware, most large corporate debtors are entitled to choose Delaware for their bankruptcy case if they wish. Since 1990, the critics have been up in arms because many debtors have indeed opted for Delaware. These critics persuaded the National Bankruptcy Review Commission to propose in its 1997 final report that the corporate debtor's state of incorporation be removed from its venue options, and an anti-Delaware provision was subsequently inserted into proposed bankruptcy legislation. Congress has not done anything thus far, but the complaints continue.

The problem with all the hostility is that Delaware's skeptics have never developed a particularly convincing rationale for their claim that the shift to Delaware is pernicious. The bankruptcy process seems to be unusually efficient in Delaware, with nearly all of the cases leading to confirmed reorganization plans and doing so quickly.[3] Many of the district's most fervent critics have been non-Delaware bankruptcy lawyers and bankruptcy judges who will lose their chance to participate in high profile cases if all the big reorganizations go to Delaware. But self-interest of this sort obviously isn't a compelling basis for forcing large debtors to file somewhere else.[4] Rather than suggesting that it is not fair for Delaware lawyers and judges to get so many good cases, critics have come up with a series of other reasons why, in their view, Delaware should be taken off the venue map. The first complaint was that Delaware is an inconvenient location, particularly for small creditors.[5] This complaint did not ring particularly true, however, since Delaware is not especially hard to get to and most small creditors have little involvement in large cases anyway. A second objection was that Delaware's bankruptcy judges had too cozy a relationship with the

3. *See* MARIA CARAPETO, DOES DEBTOR-IN-POSSESSION FINANCING ADD VALUE? 24-25 (Mar. 12, 1999) (working paper) (on file with author) (finding that the median time of a Delaware case is shorter than elsewhere). *But see* Eisenberg & LoPucki, *supra* note 2, at 987-92 (questioning the perception that Delaware processes cases more quickly than other courts, based on evidence that the differences are not statistically significant). For a response to Eisenberg and LoPucki, see David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243, 1276-78 (2000).

4. For a more detailed discussion of the politics of venue reform and the role of bankruptcy lawyers and judges, see Skeel, *supra* note 2, at 40-44.

5. The inconvenience argument was analyzed in a 1997 report by the Federal Judicial Center that served as a lightning rod for the complaints about Delaware venue. Federal Judicial Center, *Report to the Committee on the Administration of the Bankruptcy System, Chapter 11 Venue Choice by Large Public Companies* (Jan. 9-10, 1997) (concluding that Delaware is more inconvenient than firms' principal place of business, but the difference is small if only convenience for large creditors is considered).

bankruptcy bar, and engaged in inappropriate ex parte communications.[6] This complaint had more merit, but the practice has been fixed and the judge in question has subsequently retired, so it is now largely moot. Still another complaint has been that Delaware's judges are too pro-debtor in their orientation, particularly at the outset of the case.[7]

Lynn LoPucki and Sarah Kalin's new article opens yet another new front in the ongoing battle between Delaware and its critics.[8] Based on a data set that includes every large corporate debtor emerging from bankruptcy from 1983 to 1996, LoPucki and Kalin study what happened after confirmation of a reorganization plan—in particular, whether the reorganized debtor ended up filing for bankruptcy again, and how long it took for the two-time debtors to return to bankruptcy.[9] LoPucki and Kalin find that a reorganized debtor is significantly more likely to file for bankruptcy than a publicly held firm that has not previously filed.[10] Much more surprisingly, they also find that a significant number of Delaware debtors (ten out of thirty-one) made repeat visits to chapter 11.[11] Percentage-wise, Delaware debtors are far more likely to wind up back in bankruptcy than non-Delaware firms.[12] The question this raises is whether there is something different about Delaware debtors that explains the high refiling rate. To this question, LoPucki and Kalin give a resounding "no." After rejecting several possible distinctions—that larger debtors or debtors from particular industries are more likely to bring their cases in Delaware, for in-

6. The practice that has been most loudly condemned was Judge Balick's apparent willingness to tell a debtor's bankruptcy lawyers in advance which Delaware bankruptcy judge would be likely to handle the debtor's case. *See, e.g.*, Rasmussen & Thomas, *supra* note 2, at 1378 (describing the Federal Judicial Center's discussion of this practice).

7. Here, the focus was on the Delaware judges' willingness to quickly approve so-called "first day" motions, which are requests to continue making payroll payments, to approve the debtor's use of cash collateral, and to otherwise keep the business operating smoothly. *See, e.g.*, Marvin Krasny & Kevin J. Carey, *Editors Reply to an Anonymous Letter; Why is Delaware the Venue of Choice for Philadelphia-Based Companies?*, LEGAL INTELLIGENCER, Mar. 22, 1996, at 9.

8. Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231 (2001).

9. *Id.* at 235.

10. *Id.* at 236.

11. *Id.* at 235. LoPucki and Kalin find a similar pattern for reorganization cases in New York, which was the leading district for large reorganization cases prior to Delaware. *Id.* Although New York gets equal billing in their title, LoPucki and Kalin direct most of their attention to Delaware, as will I.

12. *Id.* at 248. (finding the percentage of debtors returning to bankruptcy to be 32% in Delaware (at a refiling rate of 8.6% per year), 28% in New York (5.2% per year), and 10% in all other districts (1.7% per year)).

stance[13]—LoPucki and Kalin offer a very different explanation. They conclude that Delaware's judges do not adequately assess the feasibility of the proposed reorganization plan before agreeing to confirm it.[14]

Let me say from that outset that these are the most provocative and important empirical findings that have been brought to bear on the Delaware venue debate. Even for a Delaware enthusiast like myself, the findings give pause. I would have expected that Delaware reorganizations would be at least as thorough-going as reorganizations elsewhere. What should we make of the large number of refilings?

Unlike LoPucki and Kalin, who see a failure of Delaware oversight,[15] I suspect that Delaware cases may indeed differ from cases elsewhere in ways that influence the refiling rate, such as the complexity of Delaware firms' capital structure.[16] Moreover, regardless of whether the Delaware cases are different, Delaware's success in corporate law, and its corporate law culture, put powerful pressure on the Delaware bankruptcy judges to correct any systematic problems in their handling of the first wave of Delaware bankruptcy cases. Delaware is not perfect, and the motivations that lead a firm's managers and bankruptcy lawyers to file in Delaware may not be pure, but the synergy with Delaware corporate law gives us more reason for confidence in Delaware than with any other district.

My Reply proceeds as follows. Part I focuses on the theoretical aspects of LoPucki and Kalin's article, and it takes issue with their suggestion that the empirical evidence indicating that the value of a firm increases if it reincorporates in Delaware demonstrates only that investors "believe" Delaware is efficient. In Part II, I turn to the heart of the matter: LoPucki's and Kalin's finding that a significant percentage of Delaware debtors return to bankruptcy. In addition to suggesting several ways that Delaware debt-

13. *Id.* at 257-59.

14. *Id.* at 259.

15. *Id.* at 264.

16. As Rasmussen and Thomas point out in their reply, it is also quite possible that the benefits of a quicker and less costly Delaware reorganization more than offset the greater likelihood of a second reorganization. Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 296-98 (2001). My assessment of Delaware's performance differs from Rasmussen and Thomas' in that I am optimistic about Delaware's handling of both traditional and prepackaged bankruptcy cases, whereas Rasmussen and Thomas' confidence is limited to the prepackaged context.

ors may differ from debtors in other states, I point out an important puzzle in the findings: these reorganizations do not simply give debtors and their managers whatever they want; creditors also agree to the plans.

In attributing Delaware's high refiling rate to lax oversight by the Delaware judges, LoPucki and Kalin suggest that more diligent bankruptcy judges can avoid this problem by carefully scrutinizing the feasibility of proposed reorganization plans.[17] I am less confident of bankruptcy judges' ability to make substantive business judgments of this sort. In Part III, I consider whether LoPucki and Kalin's findings might really suggest that we need independent experts to review proposed reorganization plans. In Part IV, I turn back to Delaware, and explain why Delaware's bankruptcy courts can be expected to fix any problem that is reflected in the high refiling rates.

I. A Gap Between Investors' Beliefs and Efficiency?

Both at the outset of the article and in the last of its three major parts, LoPucki and Kalin bring a distinctive theoretical conception of markets and market efficiency to bear on their findings about the failure rate of Delaware bankruptcy cases. In contrast to the findings, which are both provocative and important, LoPucki and Kalin's theoretical discussion becomes quite puzzling at times. The puzzle stems, I think, from their view of the relationship among stock and debt prices, the "market," and the efficiency (or inefficiency) of Delaware law.

Let me explain. In the corporate law literature, scholars have long debated whether Delaware's preeminence is desirable, because state competition for charters produces a "race to the top," or whether it is undesirable, because it inspires a pernicious "race to the bottom."[18] Recent empirical evidence, which suggests that the value of a firm's securities increases if it moves to Delaware, makes the "race to the bottom" view increasingly difficult to sustain.[19] Lo-

17. LoPucki & Kalin, *supra* note 8, at 237.

18. LoPucki and Kalin briefly describe this literature at the outset of their article. *See id.* at 232. Rasmussen and Thomas give more extensive overviews elsewhere, as do I. In an article that predates the present debate, and anticipates it in some (quite accidental) respects, I used a race to the top perspective to argue that the best corporate bankruptcy framework would be one that shifted authority to the states altogether. David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

19. *See* Robert Daines, Does Delaware Law Improve Firm Value? (1999) (unpublished manuscript, on file with author) (finding that the Tobin's Q values of Delaware firms are higher than those of non-Delaware firms). *See generally* ROBERTA ROMANO, THE GENIUS OF AMERICAN

Pucki and Kalin acknowledge this evidence, and they do not question its methodology or results; they seem to accept that moving to Delaware increases the overall value of a firm's stock and debt.[20] Nor do they suggest that analysis of stock price fails to take into account some other set of values, such as the interests of employees or communities outside of Delaware. LoPucki and Kalin criticize the evidence on quite different grounds. The problem, in their view, is that the increase in value—call it the "Delaware premium"[21]—does not mean that Delaware is more efficient than other states. It suggests only "that corporate actors and investors *believe* it to be efficient."[22]

Now, this is a very different attack than Delaware usually faces in the corporate law literature. Corporate law scholars have long accepted that proof of a Delaware premium would confirm Delaware's superiority over other states as a corporate domicile. By contrast, LoPucki and Kalin suggest that, even if we can be sure that the Delaware premium stems from investors' enthusiasm about Delaware corporate governance, this does not count as evidence of Delaware's comparative efficiency. Market values tell us only about investors' "beliefs," not efficiency.

LoPucki and Kalin further complicate matters by equating the Delaware premium in corporate law with troubled firms' decision to file for bankruptcy in Delaware rather than elsewhere, as if the two are completely interchangeable. The "evidence for the efficiency of Delaware reorganization," LoPucki and Kalin argue, "was of much the same nature as the evidence for the efficiency of Delaware incorporation:"

> Delaware reorganization was thought to be efficient because the "market" chose it—debtors and their creditors, acting in concert, brought the cases to Delaware. Delaware incorporation was also thought to be efficient because the market chose

---

CORPORATE LAW (1993) (reviewing the prior evidence in detail in her seminal monograph on Delaware's role in corporate law).

20. I say "seem to" because, although they stress the difference between "true" efficiency and what investors "believe," as evidenced by stock and debt values, *see, e.g.*, LoPucki & Kalin, *supra* note 8, at 232-33, LoPucki and Kalin gesture at Lucian Bebchuk's work in their footnotes. *Id.* at 233 n.4 (noting that "Professor Lucian Bebchuk lists other reasons why the empirical evidence should not be considered conclusive," and citing Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992)).

21. *See* Daines, *supra* note 19, at 3 (alluding to "Delaware premia").

22. LoPucki & Kalin, *supra* note 8, 232-33 (emphasis in original). There is, of course, a large body of literature suggesting that markets are influenced in some respects by psychological factors, but I take LoPucki and Kalin to be making a much stronger point. They seem to argue that market evidence cannot be trusted at all, even in the aggregate and over time, as evidence of efficiency.

> it—investors were willing to pay more for a company because it was incorporated in Delaware.[23]

In each case, they argue, the evidence shows only that "market participants sincerely believed" that Delaware performed better than other jurisdictions, not that it actually did.[24]

Here's the complication: it is not intuitively obvious that the Delaware premium in corporate law and Delaware's popularity as a bankruptcy venue tell us the same things about the "market." The Delaware premium is powerful evidence of Delaware's superiority in corporate law. When a troubled firm files for bankruptcy in Delaware, on the other hand—and, as a Delaware enthusiast, I say this at the risk of making an admission against interest—the firm's managers (and their lawyers) may simply be looking out for their own interests.[25] Why, then, do LoPucki and Kalin assume that firms' decision to file in Delaware suggests that the "market" believes Delaware is a superior venue location?

The answer, I think, is that managers are not the only ones with input into the Chapter 11 process. A reorganization plan cannot be confirmed consensually unless a majority of the creditors in every class votes in favor of the reorganization plan, and the reorganizations in these cases (both in Delaware and elsewhere) are invariably consensual. Given the input of creditors, then, LoPucki and Kalin's suggestion that firms' choice of the Wilmington bankruptcy court reflects the "market" is somewhat more plausible than it seems at first glance. Yet it still seems to concede too much to Delaware enthusiasts like myself. In traditional reorganizations, at least, the debtor rather than the creditors picks the filing location. So we need to be cautious about assuming that creditors are equally enthusiastic about Delaware,[26] and I will make a somewhat different defense of Delaware in Part IV.

---

23. *Id.* 268-69 (internal citations omitted).

24. *Id.* at 269.

25. Rasmussen and Thomas emphasize this factor, though they see the problem as less severe with prepackaged bankruptcy cases. Rasmussen & Thomas, *supra* note 2, at 1386-91 (reviewing prepackaged cases); *id.* at 1392 (discussing managerial self-interest in traditional cases).

26. Rasmussen and Thomas argue, based on similar reasoning, that we can be much more optimistic about Delaware's performance in prepackaged bankruptcy cases, since both the debtor and its creditors agree to the terms and location of a prepackaged bankruptcy in advance. *Id.* at 1390. Although this reasoning is plausible, it is important to keep in mind that prepackaged plans are negotiated in the shadow of the traditional Chapter 11 process. Debtors, for instance, could use the implicit threat of a traditional bankruptcy case as a stick to persuade creditors to sign on to a Delaware prepackaged case. As a result, it seems to me that Rasmussen and Thomas put too much emphasis on the distinction between traditional and prepackaged Chapter 11 cases. My own view is that Delaware's performance is likely to be similar in both contexts.

LoPucki and Kalin's suggestion that stock prices tell us only about investor's "beliefs" and not about efficiency is similarly—and for my purposes, much more—problematic. If market valuations do not count as evidence of efficiency, we need to come up with some other yardstick. LoPucki and Kalin presumably would argue that their data on repeat Chapter 11 cases is a better measure, but refiling rates seem a far less dependable source of evidence of efficiency than market valuations. LoPucki and Kalin consider several of the complications—the possibility that different kinds of firms file in Delaware, for instance—and I will discuss several more in a moment.

LoPucki and Kalin's skepticism about market valuations raises other problems as well. If investors' beliefs are likely to be mistaken, as LoPucki and Kalin seem to suggest, we would expect their assessments to change over time as the reality of Delaware's inadequacies came to light. The existence of the gap between market valuations and investors' beliefs would therefore mean either that investors have not had enough time to evaluate Delaware and adjust, or that investors are acting irrationally. Although it is possible (though unlikely) that investors have not yet had enough time to adjust to Delaware's role in bankruptcy, this cannot explain the Delaware premium in corporate law, given that Delaware has been the preeminent state of incorporation for decades. To defend their belief that there is a gap between investors' beliefs and the reality of Delaware's effect, LoPucki and Kalin therefore need to offer some kind of theory why investors are responding irrationally to Delaware.

The real problem is not so much that market valuations reflect only what investors "believe," as LoPucki and Kalin suggest. The real problem is that it is so difficult to do the kinds of market valuations that economists use outside of bankruptcy when we get into the bankruptcy context. The best evidence as to the efficiency of Delaware's bankruptcy courts would be a market valuation like the evidence used to demonstrate the Delaware premium outside of bankruptcy. One can easily imagine how the analysis might be structured. The researcher would compare the public stock and debt values of firms that file for bankruptcy in Delaware with those that could have filed in Delaware but filed elsewhere instead. Because there would be so much "noise" in the analysis, however, generating credible results would be almost impossible.[27]

In short, we lack a convenient way to carefully analyze market reactions to a Delaware bankruptcy filing. It is this, rather than some gap between the "beliefs" of market participants and "true" efficiency, that makes it so difficult to draw firm conclusions about Delaware's influence. In the absence of stock price data, we must look to other kinds of empirical analysis. LoPucki has provided some of the best data in the literature in his earlier studies of corporate reorganizations with Bill Whitford,[28] and this article is a similarly important contribution.

II. WHAT DO THE FAILURE RATE DATA TELL US?

The data are striking, and LoPucki and Kalin deserve great credit for discovering a pattern that no one else in the literature—neither Delaware critics nor enthusiasts—seems to have noticed. The percentage of Delaware cases that required a second trip to Chapter 11, thirty-two percent, is remarkably high. It is important to keep in mind that the number of cases is quite low and Delaware's rise to prominence quite recent.[29] But the numbers call out for an explanation.

As Rasmussen and Thomas point out, one possible explanation is that Delaware's speed and administrative efficiency lower the costs enough, as compared to other bankruptcy courts, to more than offset the higher risk that a firm will end up making a second trip to bankruptcy.[30] Rasmussen and Thomas also note that looking

---

27. The most obvious source of noise would be the fact of the bankruptcy filing itself. The price effect of an announcement that the firm was filing for bankruptcy would probably be far greater than the marginal effect of choosing one bankruptcy district rather than another.

Perhaps the best alternative method of generating credible results would be to focus on objective measures such as operating profits that can be measured for bankrupt firms.

28. *See, e.g.*, Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993) [hereinafter LoPucki & Whitford, *Corporate Governance*]; Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990) [hereinafter LoPucki & Whitford, *Bargaining Over Equity's Share*]. In the corporate finance literature, the palm surely goes to Stuart Gilson for his pioneering empirical work on a variety of corporate reorganization issues. *See* Stuart C. Gilson, *Transactions Costs and Capital Structure: Evidence from Financially Distressed Firms*, 52 J. FIN. 161 (1997) [hereinafter Gilson, *Transaction Costs*]; Stuart C. Gilson, *Bankruptcy, Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control When Firms Default*, 27 J. FIN. ECON. 355 (1990) [hereinafter Gilson, *Bankruptcy, Boards, Banks*].

29. All ten of the Delaware cases that reentered bankruptcy were confirmed in 1996 or before. *See* LoPucki & Kalin, *supra* note 8, at 235, 248, 249 tbl.4.

30. Rasmussen & Thomas, *supra* note 16, at 296-98.

solely at whether a firm filed for bankruptcy a second time, as LoPucki and Kalin do, may be misleading in other respects as well. LoPucki and Kalin drop a firm from their study, for instance, if it merges with or is sold to another firm during or after bankruptcy. Yet a merger or sale may often be the best possible outcome for the creditors of the firm. If Delaware reorganizations are more likely to lead to a successful merger or sale (or less likely to lead to a harmful one), these benefits will not show up in LoPucki and Kalin's analysis.[31]

For the purposes of argument, however, let us assume that refiling rates do give us a more or less accurate picture of the success or failure of the bankruptcy process. What should we conclude from the failure rate data? After considering several possible explanations, LoPucki and Kalin offer a new twist on the standard complaint that the Delaware judges are excessively pro-debtor in orientation. LoPucki and Kalin point out that bankruptcy judges cannot confirm a reorganization plan that is "likely to be followed by . . . the need for further financial reorganization."[32] In their view, the reason so many Delaware cases wind up back in bankruptcy is that the Delaware judges fail to exercise the kind of oversight that this so-called "feasibility" requirement demands.[33] Instead, Delaware judges simply confirm every proposed reorganization that comes down the pike.[34]

There is a certain plausibility to this conclusion, and LoPucki and Kalin dredge up several newspaper articles quoting investment analysts' skepticism about proposed reorganizations that Delaware judges went on to confirm. But there is a great puzzle here, as I noted earlier: these are consensual reorganizations, and every class of creditors has to agree to the plan before it can be confirmed.[35] Creditors are the ones who lose if the reorganization fails, and they are likely to be better at assessing the prospects of the

---

31. *Id.* at 298-99.

32. LoPucki & Kalin, *supra* note 8, at 235 (quoting 11 U.S.C. § 1129 (a)(11) (1994)).

33. *See generally* Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization,* 83 COLUM. L. REV. 527, 541 (1983) (discussing the meaning of "[f]easibility" in organization).

34. LoPucki & Kalin, *supra* note 8, at 264 (criticizing Delaware's "willingness to confirm no-questions-asked reorganizations").

35. For a class of claims to approve a plan, a majority in number and two-thirds in amount must vote yes. 11 U.S.C. § 1126(c). A plan can be approved consensually only if every class votes in favor. 11 U.S.C. § 1129(a)(8). Proponents can attempt to confirm a plan over the objections of one or more classes pursuant to § 1129(b)'s so-called cramdown provisions, but the parties rarely invoke these provisions. *See, e.g.*, LoPucki & Whitford, *Corporate Governance, supra* note 28, at 682.

case than a judge. If Delaware reorganizations are so misguided, why don't creditors vote against the plan? Why don't they "just say no"?

The most obvious possibility is that creditors do not like these plans, but they vote yes because the alternative of continuing the bankruptcy case seems even worse. Bankruptcy scholars have long believed that the debtor's exclusive right to propose a reorganization plan (the "exclusivity period"),[36] together with other aspects of the bankruptcy process, enables managers to extract concessions from creditors. Creditors give up some of their rights because they fear the consequences of a prolonged bankruptcy case. I have frequently made this argument in my own work,[37] and there surely is something to it; but, for several reasons, it simply does not ring true as an explanation for the Delaware refilings. Crucial to the creditor concession story is the assumption that creditors face the cost and risk of a prolonged case if they do not give in to the debtor's demands. This story made sense when New York was the favored bankruptcy destination, given the length of many New York cases, but it is much less compelling with Delaware. The fact that Delaware reorganizations are notably fast, not slow, suggests that creditors are throwing in the towel an awful lot earlier than we would expect if they really had no confidence in the plan.

I do not want to dismiss LoPucki and Kalin's inadequate oversight thesis out of hand. This may be part of the story. But the facts that creditors agree to these plans, and that the plans seem to leave debtors with too much debt rather than too little, suggest that LoPucki and Kalin gave up too quickly on the possibility that Delaware firms are different from the firms that file for bankruptcy in other districts. What else might make Delaware firms distinctive?

At least two plausible distinctions come to mind. First, the firms that file for bankruptcy in Delaware may have more complicated capital structures—such as more classes of debt and stock—than firms that take their cases elsewhere. Complicated capital structure would offer a benign explanation as to why managers and their lawyers seek out bankruptcy judges who are known for their expertise in corporate matters, as Delaware's judges are. It also could help to explain why Delaware debtors seem to emerge from Chapter 11 with too much debt. As Mark Roe argued nearly two

---

36. *See* 11 U.S.C. § 1121(b) (giving debtor in possession exclusive right to propose plan for first 120 days of case).

37. *See, e.g.*, Skeel, *supra* note 18, at 535, 537-38 (discussing manager entrenching possibilities of Chapter 11).

decades ago, the pressures of negotiation may cause all of the parties to be overly optimistic about the amount of debt the debtor will able to service after bankruptcy.[38] Creditors recognize that a debtor that still has massive debts coming out of bankruptcy may fail again, of course, but this—ironically enough—may actually lead to even more debt, not less. If creditors are concerned about a second failure, they will care deeply about the "bankruptcy currency" they get in the reorganization; that is, they will insist on receiving cash or debt, rather than stock, since stockholders are stuck with the lowest priority in any subsequent Chapter 11.[39] The pressures I have just described are indigenous to any large scale reorganization, but their effect may be magnified in firms with complex capital structures, since many different classes of creditors need to be satisfied rather than just a few. If Delaware tends to attract firms with complex capital structures, it would therefore not be surprising that more Delaware debtors require a second trip to the bankruptcy court.

Second, the firms that file for bankruptcy in Delaware may be the ones with the most serious business problems. If this were the case, the appropriate inferences would be quite similar to those I just described with respect to complex capital structure. Firms with particularly thorny business difficulties may look to Delaware because of Delaware's corporate expertise. The fact that many of the firms wind up in bankruptcy a second time may say more about the intractability of the problems than about any failure on Delaware's part.

In their own efforts to determine whether Delaware and non-Delaware cases differ in some systematic way, LoPucki and Kalin consider and reject the possibility that Delaware cases are larger or drawn from different industries than non-Delaware cases.[40] Size might seem to correlate loosely with complexity of capital structure, and industry with seriousness of business problems. But these fac-

---

38. Among other things, Roe pointed out that the old capital structure may serve as a focal point for the parties' negotiations, despite the fact that the capital structure is precisely the problem. *See* Roe, *supra* note 33, at 541.

39. Thanks to Stuart Gilson for his helpful discussion of this possibility. In his own work, Gilson has found that firms reduce their overall debt more in Chapter 11 than in out-of-bankruptcy restructurings, but that the amount of debt remains very high even after bankruptcy. *See generally* Gilson, *Transactions Costs, supra* note 28 (suggesting that firms may keep high leverage after bankruptcy to control managerial agency costs). Gilson also concludes that there does not seem to be a statistically significant correlation between number of classes of debt and the amount of leverage remaining after bankruptcy, which suggests that we should look to see if there is more of a correlation in Delaware.

40. LoPucki & Kalin, *supra* note 8, at 257-59 (rejecting these possibilities).

tors are at least as likely to diverge. In a troubled industry, for instance, the business problems of some firms will be more acute than those of others, and these super-troubled firms will have the greatest difficulty achieving a successful reorganization. Simply focusing on the industry tells us nothing about these intra-industry distinctions. Nor is size a particularly useful proxy for the seriousness of a firm's business problems. Indeed, it is possible that larger firms will often be better able to weather the storm of bankruptcy than smaller ones. In short, there is much more work to be done before we rule out the possibility that Delaware firms are different.

Even if the *firms* that file for bankruptcy in Delaware do not differ systematically from non-Delaware firms, it is possible that *managers* have a greater expectation of keeping their jobs in Delaware than in other districts.[41] (If this once again sounds more like a critique than a defense of Delaware, it is, but I will revert to form in Part IV). Although the vast majority of these managers seem to lose their jobs before the reorganization is confirmed, in Delaware as elsewhere,[42] perhaps managers are more optimistic about their prospects when they file in Delaware. Managers are more likely to keep their jobs if the reorganization is fast, and Delaware's speed and pro-manager reputation would offer comfort on this score. In their effort to keep their jobs, managers may make too many concessions to creditors in Delaware cases, and this, together with the distinctive characteristics of Delaware cases, could be part of the explanation for the high Delaware refiling rate. I am surprised that LoPucki and Kalin do not focus more closely, and offer data, on this possibility.[43]

What LoPucki and Kalin do focus on, as I noted above, is the bankruptcy court's obligation to assess the feasibility of a reorganization plan before confirming it. The Delaware judges, in their view, let too many under-restructured firms out into the world. The

---

41. Bankruptcy attorneys benefit from Delaware's generous fee standards. *See, e.g.*, Rasmussen & Thomas, *supra* note 2, at 1392. But, attorneys' interest in fees is not likely to explain the confirmation of precarious reorganization plans.

42. One of the authors, LoPucki, has documented this tendency in an important earlier work. *See* LoPucki & Whitford, *Corporate Governance*, *supra* note 28, at 723-37 (analyzing management turnover); *see also* Gilson, *Bankruptcy, Boards, Banks*, *supra* note 28, at 356.

43. LoPucki and Kalin limit themselves to a few offhand comments. They note, for instance, that Memorex's unrealistic projections "enabled [its CEO] . . . to become one of the few CEOs of a major public company to remain in office through [its reorganization]." LoPucki & Kalin, *supra* note 8, at 261.

Although Delaware processes cases quickly, large creditors figure prominently and creditors are the ones mostly likely to pressure the firm to hire new managers. As a result, it could also be the case that managers are no more secure in Delaware than elsewhere. If not managers, it is not at all clear who benefits from the ostensibly shaky reorganizations.

suggestion is that, unlike Delaware, other bankruptcy courts carefully screen for feasibility. Perhaps close judicial scrutiny makes the difference between successful plans and failed ones, as LoPucki and Kalin believe, but I have my doubts as to how high our expectations for bankruptcy court oversight should be. Consider the prepackaged Memorex plan that LoPucki and Kalin use as their principal evidence of Delaware's laxity. Memorex's revenue projections turned out to be overly optimistic and, even after reducing its debt by $550 million, the firm found itself back in bankruptcy. Rejecting the prepackaged plan on feasibility grounds, as LoPucki and Kalin suggest the court should have done, would have required Delaware's judges to second guess the profit projections made by the parties' investment bankers. Most bankruptcy judges do not have an investment banking background, and I am not confident that they are well-positioned to make what are, at bottom, business decisions.[44]

Like Arlen Specter in the Clinton impeachment trial, then, my own inclination is to take a cue from Scottish law and vote "not proven" on LoPucki and Kalin's charges against Delaware. Delaware may simply get different kinds of cases than other districts. LoPucki and Kalin rule out a few possible distinctions, but I have suggested several others. I also am not confident that the difference between Delaware and other courts is that other courts provide more aggressive, and more effective, scrutiny of the feasibility of reorganization plans. Perhaps bankruptcy judges can head off a few of the most implausible reorganization plans—the hopeless "visionary schemes"—but I do not think we can, or should, expect judges to regularly second guess the financial projections made by experts.

III. DO WE NEED A REORGANIZATION CZAR?

Suppose that I am mistaken. Suppose that LoPucki and Kalin have it just right, and that Delaware itself, rather than the kinds of cases its judges see, is the reason for so many refilings. What should we do?

---

44. This theme is a common one outside of bankruptcy, in doctrines (corporate law's business judgment rule is perhaps the best example) that attempt to get courts out of the business of making business decisions. Skepticism about courts' ability to make feasibility determinations also has a long history in the bankruptcy literature. *See, e.g.*, Roe, *supra* note 33, at 547 ("The bankruptcy court is unlikely to make an astute independent determination of either the firm's value or the impact on firm viability of a questionable level of debt. Bankruptcy courts lack substantial business expertise; they are judges, not investment bankers.")

It is interesting to note that none of the participants in this exchange suggests that Congress should step in and stop firms from filing for bankruptcy in Delaware.[45] "The best solution," LoPucki and Kalin conclude, "would be one that distinguishes the kinds of shopping producing positive results from those producing negative results and permits only the former to continue."[46] In each of his earlier articles, LoPucki and his co-authors have argued that the proper response is for Congress to isolate the rule or practice that is interfering with successful reorganization rather than changing the venue rules.[47]

If inadequate feasibility scrutiny is the problem—but we doubt that bankruptcy judges can easily provide this kind of oversight—there is an obvious solution: appoint a disinterested expert to evaluate proposed reorganization plans. This is not a novel idea. For the forty years before the Bankruptcy Code was enacted in 1978, this is precisely the kind of approach we had. Chapter X of the old Bankruptcy Act, which governed the reorganization of publicly held firms, invited the Securities and Exchange Commission ("SEC") to assess every large scale reorganization plan before it was submitted to a vote by the parties. As I have discussed in detail elsewhere, the Chapter X scheme was widely viewed as a disaster.[48] The SEC was chronically underfunded; the parties resented its intrusion in the case; and over time, more and more publicly held firms evaded Chapter X and the SEC by filing their cases under Chapter XI, the provisions designed for smaller firms.

The failure of Chapter X of the old Bankruptcy Act does not necessarily mean that it would be a mistake to restore the SEC's status as a limited "bankruptcy czar," with the authority to pass judgment on proposed reorganization plans. The biggest problem

45. Non-Delaware bankruptcy lawyers, by contrast, have waged an active campaign to eliminate Delaware venue, as noted at the outset of this Reply. Their views are shared by many bankruptcy academics, but not by the academics engaged in the present debate.

46. LoPucki & Kalin, *supra* note 8, at 271.

47. Eisenberg & LoPucki, *supra* note 2, at 1003 ("If a solution to forum shopping does not address the underlying problem, some businesses will fail unnecessarily."); Lynn M. LoPucki & Willian C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 45-51. In their other work, Rasmussen & Thomas chime in with a very similar conclusion: "We have doubts about the wisdom of some current practices that encourage debtors to file in certain jurisdictions. However, we believe that these concerns are best addressed through changing existing substantive laws, rather than tinkering with the venue procedures." Rasmussen & Thomas, *supra* note 2, at 1393.

48. *See* DAVID A. SKEEL, JR., DEBT'S DOMINION: A POLITICAL HISTORY OF BANKRUPTCY IN AMERICA (forthcoming 2001) (detailing the rise and fall of the SEC). For further discussion of these issues, see generally David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1372-76 (1998).

with the old Chapter X scheme was its requirement that the debtor's managers be replaced by an independent trustee. The mandatory trustee requirement gave managers an enormous incentive to avoid bankruptcy at all costs, which meant that firms were often in utterly hopeless condition when they landed in Chapter X. If the SEC were brought back into the picture, without resurrecting the old mandatory trustee requirement, we could add a source of independent oversight to corporate reorganization. Alternatively, Congress could require that an independent expert—presumably an investment banker—be appointed in each case and treat the cost of the expert as an administrative expense. That is, the expert's fees could be funded by the assets of the debtor itself, just as the fees of the debtor's attorney and other professionals are.

Is independent scrutiny a good idea? Some observers think that it may be. It is striking to note in this regard that Harvey Miller—whose life as the nation's leading counsel for large corporate debtors would be complicated by outside intervention—is sympathetic to proposals for additional oversight. "[I]t appears," he wrote to UCLA law professor Ken Klee, "that a meaningful reform of the Bankruptcy Code might encompass the concept of an advisory body that would independently, and without allegiance to any group, evaluate the feasibility of a plan. The advisory reports of the SEC in Chapter X cases were very informative."[49] If what we need is a more effective feasibility test, the best way to get there is to bring in an independent expert, rather than relying on the bankruptcy judge.[50]

I should note that I have serious doubts about appointing an independent expert in every large case. An obvious problem is the risk that waiting for the expert's report would unduly prolong the case—particularly if the expert were a government agency like the SEC. Hiring an investment banker is in some respects more attractive, although bankers' tendency to reach widely divergent conclusions (usually tracking their clients' interests) in the corporate takeover context is grounds for concern. For present purposes, the important point is that if feasibility really is the problem, the best solution is to take a hard look at bankruptcy's substantive rules,

49. E-mail from Harvey R. Miller, Esq., to Kenneth Klee, Professor of Law, UCLA Law School (Oct. 19, 2000) (on file with author).

50. An alternative conclusion is that we should replace Chapter 11 with one of the alternatives that have been proposed in the past decade, but I will put that possibility to the side for present purposes.

not to give in to a new round of self-interested cries that Delaware should be eliminated as a bankruptcy venue option.

IV. THE VIRTUES OF DELAWARE

Some years ago, I heard a pundit describe a successful and famously gifted politician as "incapable of sustained error." This politician made errors of judgment from time to time, some of them quite egregious, but he invariably corrected his mistakes. It was this remarkable ability to quickly adjust when a policy misfired, rather than digging in his heels as most of us tend to do, that distinguished the politician from his peers.

In corporate law and bankruptcy, Delaware has these same enviable qualities. Delaware has sometimes seemed to stumble in its regulatory efforts, but it invariably fixes its mistakes and does so much more quickly than other states. This quality in particular, and Delaware's regulatory superiority in general, makes clear that Delaware venue should be preserved, and in fact encouraged.

In corporate law, there is a simple reason for Delaware's superiority: because it derives a large percentage of its annual revenue from franchise taxes and other revenue from the corporations that call Delaware home, Delaware has a powerful incentive to protect its reputation as the best state of incorporation for large firms.[51] Delaware achieves this with efficient regulation, expert judges and a streamlined judicial process. If the states regulated corporate bankruptcy, just as they regulate corporate law, Delaware's bankruptcy and corporate law regulation would be part of the same overall framework, and we would see all of the same benefits in both areas.[52] The fact that corporate bankruptcy has been severed from state corporate law introduces two different kinds of problems for Delaware oversight of bankruptcy law.

The first problem would apply even if firms selected Delaware as their venue choice long before they encountered financial distress.[53] The fact that bankruptcy is federal in nature attenuates

51. This insight has been most fully developed by Roberta Romano, the leading authority on Delaware's role in corporate law. *See* ROMANO, *supra* note 19, at 38 (characterizing Delaware's financial dependence on corporate charters as a "hostage" that assures the state will remain responsive to corporate needs).

52. In an earlier article, I argued that shifting corporate bankruptcy to the states is exactly what Congress should do, but I am not optimistic that lawmakers will take my cue any time soon. *See* Skeel, *supra* note 18, at 516-26.

53. This would be the case under either a rule that required firms to file for bankruptcy in their state of incorporation, as I have advocated elsewhere, or a rule that permitted firms to

some of the benefits Delaware might otherwise offer.[54] Because Congress rather than Delaware enacts and amends the substantive bankruptcy laws, Delaware's lawmakers and courts have much less flexibility in bankruptcy than in corporate law to quickly respond to changes in business conditions. Delaware also has much less control over who its bankruptcy judges are. Although the Delaware bar has input into the selection of the local bankruptcy judges, it is the Third Circuit, not Delaware, which decides who will be appointed. (This fact was underscored when the most recent bankruptcy judge was appointed; in the face of continuing controversy about Delaware's role, the Third Circuit pointedly eschewed several Delaware nominees in favor of a Philadelphia bankruptcy lawyer, Mary Walrath). Yet this thick federal overlay cannot stymie Delaware altogether. The Bankruptcy Code has enough flexibility that it gives Delaware judges leeway to make use of their superior expertise, and Delaware's corporate culture can influence both the appointment of Delaware's bankruptcy judges and their performance once they are appointed.[55]

The current venue rule introduces a second complication: the issue of managerial incentives discussed earlier. Most publicly held firms have several venue options when they file for bankruptcy, and the firm's managers and lawyers may be more concerned with finding a district whose judges will protect their interests than with the future health of the firm.[56] Other commentators view this dynamic as a serious indictment against Delaware venue. Even Ras-

select a bankruptcy venue in their certificate of incorporation, as Rasmussen and Thomas have proposed.

54. For a more complete discussion of the issues described in this paragraph, see Skeel, *supra* note 2, at 24-33.

55. In a subsection entitled "The False Issue of Federalism," LoPucki and Kalin state that "local interests have engaged in a competition for the bankruptcy reorganization business [under the federal bankruptcy laws] as lively and textured as the competition [under state corporation law] for corporate charters." LoPucki & Kalin, *supra* note 8, at 268. Although I agree that bankruptcy courts do compete for bankruptcy cases under the ostensibly uniform federal law (and, indeed, this is central to my enthusiasm for Delaware venue), it does not seem to me at all true that the competition is "as lively and textured" as state law corporate charter competition. If the states regulated corporate bankruptcy, Delaware or other states would be able to explore a wide variety of options that are presently off-limits under a mandatory federal regime. One illustration, as I have noted elsewhere, is that Delaware could experiment with one or more of the proposed alternatives to Chapter 11 if it had regulatory authority over corporate bankruptcy. Skeel, *supra* note 18, at 524. In short, although competition abounds, even under the federal bankruptcy laws, the competition is much less lively and textured than it would be in a state-regulated regime.

56. *See, e.g.*, Skeel, *supra* note 3, at 1275 (noting that, because they "can make their venue choice after the firm fails, corporate managers can shop for the most attractive courthouse at the time of bankruptcy").

mussen and Thomas, who are sympathetic to Delaware's role in corporate law, are more skeptical of Delaware's oversight of traditional Chapter 11 reorganization cases. Whereas corporate managers generally make the decision to reincorporate in Delaware at a time when they are fully subject to market pressures, and the decision requires a shareholder vote, bankruptcy's venue procedures give a firm's managers the right to choose where to file at a time when their very jobs are at stake.[57] In an endgame situation like this one, managers may ignore the future and focus only on saving their own skin. Since managers are the ones who decide where the bankruptcy case will be filed, the judges who seek to attract large bankruptcy cases may emphasize managers' interests rather than the health of the firm.[58]

As I have noted elsewhere, the best solution to this would be to require firms to file their bankruptcy case in the district of their state of incorporation.[59] Yet, even under the current venue rules, there are two reasons not to lose faith in Delaware. First, the most obvious way to entrench managers is to give them an unlimited exclusivity period. This, as noted earlier, was a frequent criticism of New York. But Delaware's cases are notably fast, which suggests that extended exclusivity cannot be the problem. No doubt this speed is precisely what managers are after in Delaware, at least in part, since managers seem more likely to keep their jobs in a speedy reorganization than in a protracted one. (This, of course, is one of the obvious attractions to managers of filing a prepackaged bankruptcy plan). But we would also expect creditors and other parties to benefit if the firm does not dawdle in bankruptcy, and it is worth repeating one more time that the plan is subject to a creditor vote.

---

57. As Rasmussen and Thomas point out, firms generally reincorporate in Delaware at a time when managers expect to remain in place and the firm will be penalized in the capital and product markets if it moves to a state with inefficiently manager-friendly laws. *See* Rasmussen & Thomas, *supra* note 2, at 1396.

58. It is important not to overstate the differences between state charter competition, on the one hand, and firms' choice of a bankruptcy venue on the other. Even in the corporate law context, Delaware lawmaking isn't perfect (it's just better than everywhere else), as is evident when we consider another endgame situation for managers: takeovers. Although firms generally reincorporate in Delaware before they face a specific takeover bid, which suggests that the race to the top assumptions about Delaware should fully apply, Delaware's record in regulating takeovers is somewhat mixed and more manager-friendly than we might wish. Delaware adopted a relatively tepid anti-takeover provision, but it did adopt one, despite the widespread view that anti-takeover laws are inefficient. Perhaps more importantly, the Delaware case law offers more protection for target managers than seems optimal. *See, e.g.*, Lucian A. Bebchuk & Allen Farrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1173-74 (1999).

59. *See, e.g.*, Skeel, *supra* note 3, at 1275.

Second, and much more important, is the synergy between Delaware's roles in corporate law and corporate bankruptcy. If the Delaware bankruptcy courts were to establish a reputation as inefficiently pro-manager, its unsavory bankruptcy reputation would have negative implications for Delaware's status in corporate law, given the close relationship between corporate law and corporate reorganization. Delaware is a small state, and it is hard to overstate the social and economic importance of its corporate culture.[60] If Delaware's bankruptcy judges focused on managers' interests at the expense of the insolvent firm, they would face enormous social pressure in Delaware to mend their ways. Most judges care deeply about their reputation, and the way to enhance one's reputation in Delaware is to demonstrate the kind of sophistication and responsiveness that we see in the Delaware state courts' handling of general corporate law issues.

This point about the synergy between corporate law and bankruptcy has crucial implications for all aspects of the debate about Delaware venue. Rasmussen and Thomas have proposed that firms pre-select a venue location by contract.[61] An obvious downside of selecting one state for incorporation purposes and another for bankruptcy is that it destroys the regulatory synergy that arises if a firm looks to the same state for both corporate law and bankruptcy. I do not think that many observers would suggest that firms should select one state for general fiduciary duties, say, and another for fiduciary duties in the takeover context. It makes more sense for a single state to provide the entire package, and the same holds true for corporate bankruptcy. This does not mean that permitting corporate debtors to select their venue by contract is a bad idea; by all means, give firms the choice. But the best choice is to use the same state for both corporate law and bankruptcy, and that is what Delaware venue offers.

---

60. *See generally* David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127 (1997) (detailing Delaware's corporate culture); David A. Skeel, Jr., *Saul and David, and Corporate Takeover Law*, *in* LITERATURE AND LEGAL PROBLEM SOLVING (Paul Heald ed., 1998) (same).

61. Rasmussen & Thomas, *supra* note 2, at 1399-1402. As I have noted elsewhere, the principal problem with this kind of approach is that there is no simple way for firms to alter their menu choice midstream. Skeel, *supra* note 2, at 39. Rasmussen and Thomas propose that changes be subject to a vote by all of the firm's creditors and shareholders, Rasmussen & Thomas, *supra* note 2, at 1403, but this would be a remarkably cumbersome process for a publicly held firm with a large number and wide variety of creditors. (The shareholder votes used in other corporate voting contexts, by contrast, are much simpler, and the process is already in place.) The decision to change bankruptcy venues would also have serious adverse signaling effects.

As should be clear by now, this synergy between Delaware's corporate culture and its bankruptcy courts is also a reason to remain optimistic even in the face of LoPucki and Kalin's data on the high refiling rate of Delaware Chapter 11 cases. This brings us back to my comment about Delaware being "incapable of sustained error." If indeed Delaware's bankruptcy judges have been too quick to confirm Chapter 11 cases, we can be quite confident that they will fix the problem. Delaware's corporate culture, and the judges' concern for their own reputations, will see to that. Rather than contemplate drastic changes to the bankruptcy venue provision, then, the most prudent course is to leave things right where they are.

CONCLUSION

Delaware is not a flawless regulator of corporate law, as its response to the takeover wave of the 1980s and thereafter has shown. Nevertheless, in corporate law, we can have more confidence in Delaware than any other state. Delaware's claim to respect is somewhat more attenuated when we get to corporate bankruptcy, because managers make their venue decision at the brink of bankruptcy rather than before, and because Congress rather than the states makes the bankruptcy laws. Yet many of the same pressures that explain Delaware's effectiveness in corporate law also spill over into the bankruptcy context.

From the moment Delaware took over from New York as corporate America's favorite location to file for bankruptcy, its preeminence has been continuously under fire. Critics have complained that Delaware is inconvenient, that it is too debtor-friendly, that its judges have too cozy a relationship with the local bar. LoPucki and Kalin's findings are the latest salvo in this assault and, in my view, are by far the most important. There is, as they suggest, something disconcerting about the large number of Delaware cases that have made their way back into bankruptcy a second time. Unlike LoPucki and Kalin, who attribute these filings in large part to their perception that Delaware's judges do not screen the feasibility of proposed reorganization plans carefully enough, I suspect that there may be other explanations. I have suggested several ways that Delaware cases may systematically differ from cases in other districts. Even if I am wrong about the significance of the data, and Delaware has confirmed too many plans that need a second look, I am confident that the problem will disappear. Delaware's corporate culture assures that, whatever mistakes its judges make, they are incapable of sustained error.