PRIVATE LAW DRAFTING, INTELLECTUAL PROPERTY, AND PUBLIC LAWS

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Public lawmakers have inadequate and misaligned incentives to engage in legal innovation. Private lawmaking is offered as a potential solution to this problem. However, private lawmaking faces a dilemma: In order to be effective, the cost-reducing standard forms produced by private lawdrafters need to be publicly enacted. However, enactment as law eliminates the intellectual property rights that are essential to properly motivate the private lawdrafters to produce such forms. As a result, private lawdrafters will have inadequate and misaligned incentives to engage in legal innovation that would provide widespread benefits. Absent some mechanism to allow the private lawdrafter a way to appropriate the gains from his investment in cost reducing legal innovation, the promise of private lawmaking may be minimal.

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Lawmaking generally has been considered the province of government agents subject to political control. At the same time, policymakers and scholars long have recognized the potential shortcomings of government-enacted laws and the lack of innovation that occurs through this process. Powerful interest groups may successfully promote laws opposed by, or block laws favored by, society in general. Also, public lawmakers have weak incentives to produce socially valuable legal innovations, in part because they share little of the public benefits of producing laws (Hadfield & Talley (HT)). But given the need for government ordering, there seems to be little alternative to incurring these political costs.

Private lawmaking has been posited as a feasible and powerful alternative to government lawmaking for some types of laws. Although the government is often in the best position to reconcile the positions of competing interest groups regarding public law, private lawmaking may be well-suited to structuring relationships among economic actors. This can include statutory business structures that are well-adapted to regulation or tax laws that necessarily are produced by government. HT show that private lawmakers, while not perfect, may have stronger and better aligned incentives to produce efficient law of this type than do public lawmakers.

Their results suggest the promise of private lawmaking as an important source of legal innovation. And legal innovation in lawmaking can increase social welfare even more than discrete enterprise innovations because a given lawmaking innovation can spur multiple private sector innovations. Systemic innovations in society's lawmaking apparatus could have a double-multiplier effect by encouraging welfare-enhancing laws (Butler & Ribstein). Yet policymakers have given little attention to lawmaking innovation as a potential source of growth.

This paper's main contribution is showing that private lawdrafters' ability to usefully supplement public lawmaking is limited by weak intellectual property rights in law. We distinguish private lawdrafters, who produce legal materials that may or may not become law, from lawmakers who are empowered to adopt their products as law. The basic conundrum that we identify is that private lawdrafters cannot simultaneously have property rights in their creations and have these creations adopted as laws (Kobayashi & Ribstein (2011b, 2012)).

The conundrum of private property rights in law requires a definition of "law." We define this term to include provisions the state is very likely to enforce because they are promulgated or approved by government (Snyder). Parties' ability to enlist the state's enforcement framework makes law a valuable mechanism for reducing the substantial transaction costs entailed in obtaining comparable results through purely private contracting with many parties who may be affected by the actor's conduct (Coase). Certainty of enforcement also helps make law an effective coordinating device (Hadfield and Weingast) and a focal point for the development of a large body of cases (Ribstein (1995)).

Intellectual property rights are available to protect privately produced standard forms. For example, parties clearly may agree to a contract they expect a court to enforce whose
language may be protected under copyright law. Authors also might profit by writing standard form contracts or general business plans that many firms can use. Because negotiating and writing a private contract can be costly, parties and firms may find it cheaper to license and adapt an existing standard form for a specific use. However, these purely private standard forms in which private lawdrafters have intellectual property rights lack the valuable characteristics of laws. Thus, the utility of using one of these standard forms is diminished by the uncertainty that the provisions contained in these standard forms will be enforced (Goetz & Scott (1985)).

One solution to this problem is to have the private forms adopted as law. Having these products adopted as “law”, however, is a two-edged sword. While government's involvement gives law its essential characteristic of certainty of enforcement, it also requires relaxing private property rights in law to give people full knowledge of the law and the ability to defend themselves in actions charging them with violating the law. Thus, it has been held that once a legislature or court makes privately produced statutes or model codes into law its author loses any intellectual property rights she might have had (Kobayashi & Ribstein (1994, 2011b, 2012), Cunningham (2005)). Legal innovators accordingly must accept the risk their property rights will be limited if they achieve their goal of creating law. Private lawdrafters therefore face a Hobson's choice between weak rights in the valuable property of law and stronger rights in the less valuable property of non-law.

As a result of these limitations on private lawdrafting, private parties' involvement in lawmaking occurs mostly as a byproduct of political rent-seeking and other activities rather than in pursuit of sales in a commercial-type market (Kobayashi & Ribstein (2012)). For example, litigants produce precedents, but only as a byproduct of dispute resolution; trade groups produce and lobby for laws that serve the group's and not society’s interests; lawyers participate in lawmaking to enhance their own reputations or those of the states in which they are licensed to practice law; and the National Conference of Commissioners on Uniform State Laws (NCCUSL) produces law as a mechanism for promoting the cartelization of state laws.

The problem with legal innovation resulting from this byproduct process is that it is likely to have less social value than what would be produced by innovators who have property rights in their innovations and can share in the full social gain the innovation produces. The byproduct approach enables innovators to share only indirectly in that gain, and then only in some of the situations in which there is a demand for legal innovation. Moreover, innovation may come at the cost of enhancing the political power of a particular interest group, such as lawyers. This may mean that byproduct private lawmaking often shares with public lawmaking many of the

1 See American Family Life Insurance Co. of Columbus v. Assurant, Inc., 2006 WL 4017651 (N.D.Ga., January 11, 2006) (holding that plaintiff's "narrative" style insurance policy may be protectable under copyright law); Nimmer on Copyright § 2.18[E] (noting that "there appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright."); Kenneth A. Adams, Copyright and the Contract Drafter, N.Y. L. J., Aug. 23, 2006, at 4.
problems of the political process. As a result, without some mechanism to give private lawdrafters better incentives, the promise of private lawmaking may be severely limited.

This article develops a model of lawmaking that highlights the difference between private lawmaking and lawdrafting, and the implications of not protecting law as intellectual property. Part I presents the basic model of lawmaking, lawdrafting, and legal innovation. This subpart assumes that provisions appear without considering parties' incentives to produce these provisions, but distinguishes between private lawmakers, whose privately produced model laws and standard forms are equivalent to law, and private lawdrafters, who produce model laws and standard forms whose enforcement as law is uncertain. Part II varies the basic model of private lawmaking (i.e., where private statutes and forms are treated as law) by explicitly introducing intellectual property rights, which help determine parties' incentives to produce legal innovations. Part III examines private lawmaking in the absence of intellectual property rights, and demonstrates how this results in weak and misaligned incentives for private lawmaking. Part IV highlights the Hobson's choice inherent in this analysis of legal innovation by private lawdrafters between creating products that have little or no market value because of uncertainty as to enforcement, and creating more valuable laws in which the creators have weak or no property rights. Part V concludes.

I. A MODEL OF LAWMAKING: MISMATCH AND UNCERTAINTY

This section presents the basic model of lawmaking, lawdrafting and legal innovation. Our model derives from the model of spatial competition presented by Hadfield & Talley. Like HT, we focus on business association contracts, but our model can be generalized to include other types of contracts or market structures. The model in this Section varies one of HT's implicit assumptions, that privately produced provisions are equivalent to provisions adopted as law, and shows how incentives for the private production of model statutes and standard forms differs from those that would apply to the private production of “law”. We vary HT's other implicit assumption, that private lawdrafters have property rights in their products, in Section III below.

To assist in visualizing the model, assume the situation that actually existed at as the middle of the twentieth century in the U.S. of only a single type of statute suited for closely held firms, specifically the Uniform Partnership Act as adopted by all states. Under this statute the parties have broad freedom to structure their relationship as they wish, except that the firm's owners must assume vicarious liability for the firm's debts. Although the parties could set up a limited partnership in which passive investors have limited liability, one who exercises the power of a general partner in such a firm necessarily takes on vicarious liability. Most states did not provide for a flexible form of business that allows managing owners of small firms to avoid vicarious liability for the firm's debts. Parties' demand for such a form, and therefore states' incentive to provide it, was limited by the fact that under U.S. tax law the members' limited
liability would deprive them of the desirable tax characteristic of "single-level" partnership taxation. We consider the circumstances in which private lawmakers and lawdrafters might fill this gap in statutory standard forms.

Following HT, we assume that the statutory standard forms will be demanded by individual firms, indexed by $j$. These firms have an ideal structure $x_j$, and are distributed uniformly, with $x \in [0,1]$. Firm $j$’s structure $x_j$ represents the firm’s optimal organizational structure, which includes members’ participation in management plus limited liability and partnership tax treatment. Private parties can, of course, attempt to contract for their desired characteristics. However, this contract would present a variety of problems related to enforcement. First, a court may not enforce the parties' contractual expectation of limited liability against a third party who neither expressly nor impliedly agreed to the liability limitation. Second, the tax consequences of the parties' contract depend on tax law rather than the parties' agreement. Third, the terms of the contract among the parties may not be clear because neither a statute nor any judicial decision specifies how courts should fill the inevitable gaps that arise because of the unpredictability of future events over a long-term relationship. For example, one party may attempt to seize benefits from the relationship that the contract neither expressly forbids nor clearly permits. Although the situation might be appropriate for application of partnership-type fiduciary duties, it may not be clear whether or how a court will apply such duties to a relationship in which the parties all have limited liability.

An alternative approach is for private lawdrafters to promulgate a standard form (say, a limited liability company or LLC) for a relationship that provides the desired characteristics of limited liability, partnership taxation, and management flexibility. The question then is precisely what difference it makes to contracting parties whether government lawmakers adopt this standard form as "law." We use this term to mean a rule that predicts how a court will act. Thus Snyder (373) cites Holmes' (1896 at 458) statement that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right." We assume statutes adopted as law by a legislature are enforced with probability $\phi^L$ and that privately produced provisions not so adopted have a probability of enforcement $\phi^{PP}$, and that $\phi^{PP} < \phi^L$. For expository simplicity and without loss of generality, we assume that $\phi^L=1$, and that $\phi^{PP} = \phi < 1$.\(^3\)

An additional question arises for firm $j$ whose optimal structure $x_j$ does not perfectly match those provided for in the statute. For example, $j$ may want to have limited liability for

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\(^2\) In contrast to HT, our model assumes for simplicity and expository clarity that firms’ ideal points are uniformly distributed, and that there is no uncertainty with respect to the actual distribution of firms’ ideal points. This difference does not alter the main HT implications cited in this Section.

\(^3\) The assumption that public statutes have a probability of enforcement equal to one is not necessary to our results. All that is needed is that the probability of enforcement for a public statute is higher than the probability of enforcement for a privately produced set of provisions not adopted as law.
some but not all of its members. This may raise questions such as whether the liability limitation is enforced for members who want it and not for members who do not, the effect of the liability rule on the parties' fiduciary duties, and the tax consequences of partial limited liability. The firm can eliminate this uncertainty by forming under a public statute, but incur mismatch costs because the statute does not give the firm its most preferred set of rights. Alternatively, the firm can enter into its contract in a way that better matches its ideal structure, but have uncertainty as to the extent to which its preferred rights will be enforced.

With this example in mind, assume the costs of organizing firm \( j \) under provisions of a public statute with characteristics \( s_i \in [0,1] \) are:

\[
(1) \quad C_j^{\text{PUBST}} = \tau(s_i - x_j)^2.
\]

The transaction cost \( \tau \) represents the costs to each firm located at \( x_j \) of operating under or contracting around default provisions (\( s_i \)) that do not perfectly fit the parties' needs. Like HT, we adopt a quadratic mismatch cost function, so these costs rise at an increasing rate as the firm's ideal point \( x_j \) moves away from provisions included in \( s_i \).

If there is no statute at \( s_i \in [0,1] \), we assume the firm can operate under an existing statute \( E \) (i.e., the UPA in our example) located outside this interval. Mismatch costs equal \( M\tau \), where \( M > 1 \). The value of a new statute to firm \( j \) is the firm's reduced costs of organizing and operating under the statute located at \( s_i \in [0,1] \). In other words, the marginal value of adopting \( s_i \) instead of \( s_E \) is given by:

\[
(2) \quad K_j^{\text{PUBST}} = \tau[M - (s_i - x_j)^2].^4
\]

If \( M > 1 \), \( K_j^{\text{PUBST}} > 0 \), so that all firms with ideal points \( x_j \in [0,1] \) will strictly prefer to organize and operate under a new (i.e., LLC) statute at \( s_i \in [0,1] \) rather than forming under an existing (i.e., UPA) statute \( E \) at \( s_E \not\in [0,1] \). The new statute accordingly is a type of innovation that increases social wealth by reducing transaction costs.

Privately produced provisions can impose not only the mismatch costs identified above, which are incurred with probability \( \phi \), but also reorganization cost \( R \) when government does not enforce the provisions the firm adopts. The firm then incurs higher costs equal to \( R\tau \), where \( R > M > 1 \). These higher costs, which occur with probability \( 1 - \phi \), can include disruption of business plans, legal fees, penalties and liabilities. We assume these costs are higher than the mismatch costs \( M \) of organizing under an existing statute at \( s_E \). A firm’s expected costs of organization and operation using privately produced provisions located at \( a_i \in [0,1] \) accordingly equals:

\[
\]

^4 HT do not explicitly derive the individual firms' demand for a statute \( K \), and assume that \( K \) is large so that the net benefits of adopting a statute at \( s_i \) are positive.
(3) \[ C_j^{PRV} = \phi \tau (a_i - x_j)^2 + (1 - \phi) R \tau. \]

The marginal value of adopting \( a_i \) instead of \( s_E \) is given by:

(4) \[ K_j^{PRV} = \tau [M - \phi (a_i - x_j)^2 - (1 - \phi) R]. \]

It follows that, unlike adding a statute at \( s_i \in [0,1] \), firms will not strictly prefer a private provision at \( a_i \in [0,1] \) to operating and organizing under the existing statute at \( s_E \) because of the risk of non-enforcement. As discussed below in subpart D, there is a critical enforcement probability below which firms will prefer statute \( s_E \) over private provision \( a_i \).

Table 1 summarizes the costs imposed on firms that organize under a statute versus under a privately produced set of provisions.

**TABLE 1 – COST OF ORGANIZATION**

<table>
<thead>
<tr>
<th>Expected Mismatch Costs</th>
<th>Expected Reorganization Costs</th>
<th>Expected Total Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Existing statute ( s_E \in [0,1] (\phi = 1) )</td>
<td>( M \tau, M &gt; 1 )</td>
<td>0</td>
</tr>
<tr>
<td>2. Non-law private provisions ( a_i \in [0,1] (\phi \leq 1) )</td>
<td>( \phi \tau (a_i - x_j)^2 )</td>
<td>( (1 - \phi) R \tau, R &gt; 1 )</td>
</tr>
<tr>
<td>3. Statute at ( s_i \in [0,1] (\phi = 1) ) (HT cost function)</td>
<td>( \tau (a_i - x_j)^2 )</td>
<td>0</td>
</tr>
</tbody>
</table>

To see the distinction between mismatch and reorganization costs, consider Firm \( j \) with ideal point \( x_j \) that can organize under provisions perfectly matched to its needs, so that mismatch costs are zero. If these provisions are enacted as law, we assume a zero probability that the firm will have to incur reorganization costs. Since \( s_i = x_j \), the firm’s total mismatch and reorganization costs then are zero when it adopts the statute. If the same firm adopts identical

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5 We recognize that a government-adopted statute may not always have a higher probability of enforcement than a privately produced provision. There may be, for example, strong reputational or other costs binding the parties to a private provision. Conversely, the parties may be uncertain about which court will apply the statute and how the court will interpret the statute as applied to particular fact situations. We leave more detailed comparisons between statutes and private law for another day. As noted above in note 3, it is enough for present purposes that the adoption of a statute increases the probability of enforcement compared to a privately produced provision that is not embodied in the statute.

6 The assumption of zero probability that the firm operating under a statute will have to incur reorganization costs (i.e., that \( \phi = 1 \)) simplifies the mathematics but is not necessary for our main results. Even if such firms face a positive probability of having to incur reorganization costs ((1 - \( \phi \) > 0) our results follow as long as this probability is lower than if the firm adopted identical provisions that have not been adopted as law.
provisions that have not been adopted as law, it will face no mismatch costs \((a_l = x_j)\) but will face positive expected reorganization costs \((1 - \phi)R\).

Against this background consider a Firm \(j\) that wants the features of a limited liability company (LLC), including limited liability, partnership taxation and flexible management, prior to the promulgation of state LLC statues. Firm \(j\)'s ideal point \(x_j\) includes features that differ from existing general partnership provisions at \(s_E\). If Firm \(j\) operates under the existing Uniform Partnership Act it will incur high mismatch costs \(M_{\tau}\) because it must forgo either limited liability or partnership taxation, but it will not face reorganization costs (Row 1 in Table 1).

If Firm \(j\) decides to adopt privately produced provisions at \(a_l\) that have the above characteristics of an LLC, the firm must bear the smaller mismatch costs of drafting around or operating under less suitable default provisions. For example, consider a firm with an ideal structure that includes several related firms each with liability limited to the debts contracted by the particular constituent firm. Such a "series" LLCs (described in Ribstein & Keatinge §4:17) may have to operate under an LLC statute that does not recognize series LLCs. Moreover, if the firm forms and operates in a jurisdiction that has not adopted an LLC statute it will also face the risk of reorganization costs if some of its ideal provisions are not enforced. For example, the firm's members may face personal liability or additional taxes and penalties because the firm was not able to use partnership taxation. These are in addition to the mismatch costs of forming and operating under \(a_l\) (Row 2 of Table 1). If the expected reorganization costs are large enough, the firm may prefer organizing under the existing statute \(E\) if no public statute is available in the 
[0,1] space. But if Firm \(j\) forms and operates in a state that has adopted an LLC statute containing provisions \(s_l\) the firm would not have to bear costs related to the uncertain enforcement of LLC terms. This firm bears only mismatch costs and not expected reorganization costs (Row 3 of Table 1).

HT assume that privately drafted provisions are equivalent to public statutes in the sense that both are law and certainly enforced \((\phi = 1)\). The total costs of private laws in HT therefore equal the quadratic mismatch costs listed in Row 3 of Table 1 and do not include reorganization costs \(R\). Thus in the HT model, privately produced provisions contained in model laws or standard forms are equivalent to law. However, this assumption is inconsistent with our assumption that only government agents can adopt "laws" in the sense of provisions that are enforced with certainty.

The potential for having to bear high reorganization costs adversely affects a firm’s demand for a private set of provisions relative to an identical set of provisions adopted as law. Figure 1 shows the demand for a public statute at \(s = \frac{1}{2}\) (where \(\phi = 1\)) and the demand for a

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7 If the firm operates in a different jurisdiction, the statute may not be enforced as law in that jurisdiction. This would be comparable to the firm's adopting a private non-law agreement. This illustrates how the choice of law rule must be factored into whether a given provision is "law."
private set of provisions at \( a = \frac{1}{2} \) when \( \phi = .5, .32, \) and \( .267. \) The Figure illustrates how uncertainty regarding enforcement and expected reorganization costs lower the demand for private provisions. Indeed, in the latter case, the demand for the statute is zero or negative over the entire range of \( x. \) Thus, uncertainty over enforcement of a private lawdrafter’s model laws or standard forms can significantly lower both the demand for and the incentive to produce such products compared to identical provisions that are adopted as law.

![Figure 1 – \( K^{PUBST} \) versus \( K^{PRV} \)](image)

**II. PRIVATE INCENTIVES WITH INTELLECTUAL PROPERTY PROTECTION**

This section analyzes private lawdrafters' incentives to produce legal materials that have the effect of laws (i.e., provisions that are enforced with probability \( \phi = 1 \)) and can be protected by intellectual property law. That is, in this section, private lawdrafters are private lawmakers. The latter assumption is relaxed in Section III. We discuss two types of intellectual property regimes. Part A discusses a regime that protects specific statutes produced by private lawmakers from copying by other lawmakers and firms, but allows different statutes to serve similar "locations," by which we mean types of firms. Part B discusses a regime of broader intellectual property rights that gives private lawmakers exclusive rights to all potential laws located in the entire \([0,1]\) space. The location of the type of business association statute we are modeling

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8 The examples in this paper assume that \( \tau = .8, M = 1.1, \) and \( R = 1. \)
might, for example, broadly include all closely held firms or more narrowly include closely held firms with centralized management and passive owners that need limit liability and flow-through taxation. The analysis in this section examines the conditions under which a regime with strong IP rights for law would induce the optimal number of private statutes and induce the efficient use of these statutes.

For purposes of comparison, it is useful at this point to consider the choice an idealized public lawmaker would make. The idealized public lawmaker maximizes social welfare by locating \( N \) statutes along the interval \([0,1]\) in order to minimize firms' mismatch costs and allowing firms to have free access to the statutes. The lawmaker can accomplish this by locating the statutes at even intervals \([1/2N, 3/2N, 5/2N, \ldots, (N-1)/2N]\). Total mismatch costs with \( N \) statutes equals:

\[
C^* = N \tau \int_0^{1/N} (x - \frac{1}{2N})^2 f(x) dx
\]

With a uniform distribution with range \([0,1]\), \( f(x) = 1 \) and the costs of mismatch equal

\[
(5') \quad C^* = N \tau \left[ \frac{1}{3} x^3 - \frac{1}{2N} x^2 + \frac{1}{4N^2} x \right]_{0}^{1/N} = \frac{\tau}{12N^2} \left[ \frac{1}{3} - \frac{1}{2} + \frac{1}{4} \right] = \frac{\tau}{12N^2}
\]

For example, a government promulgating one statute would locate it at \( s = \frac{1}{2} \) and total mismatch costs would equal \( \tau/12 \). If the government promulgates two statutes, it should locate them at \( s_1 = \frac{1}{4}, s_2 = \frac{3}{4} \), with mismatch costs of \( \tau/48 \).

The optimal number of statutes \( N^* \) increases until the marginal mismatch cost savings of an additional statute is less than the cost of drafting and promulgating the statute \( (F) \). Thus, it pays to add the \( N\th \) statute if:

\[
(6) \quad \frac{\tau}{12(N-1)^2} - \frac{\tau}{12N^2} > F
\]

or equivalently, if:

\[
(6') \quad \frac{1}{(N-1)^2} - \frac{1}{N^2} > \frac{12F}{\tau}
\]

Figure 2 illustrates the social benefits from adding a second statute. Figure 1 shows firms' demand for a single statute at \( s = 0.5 \), and the demand for a pair of statutes at \( s_1 = 0.25, s_2 = 0.75 \) when firms are distributed uniformly over the \([0,1]\) interval, and \( \tau = 0.8 \) and \( M = 1.1 \). The gross marginal benefits of adding a second statute equals area \( A + \) area \( C - \) area \( B \) in Figure 2. In the
example, this would equal the reduction in mismatch costs, and would equal \( \tau/12 - \tau/48 = \tau/16 = .05 \). Thus, two statutes located at \( \frac{1}{4} \) and \( \frac{3}{4} \) would be preferred to one statute at \( \frac{1}{2} \) if \( F < .05 \).

![Figure 2 – Gross Social Marginal Benefits of an Additional Statute in the [0,1] Space](image)

**A. Private Lawmaking with Copyright-like IP Protection**

This part discusses a regime like the one HT examine in which producers of private statutes (i.e., where \( \phi = 1 \)) get copyright-like intellectual property protection from unauthorized reproduction of their work, but not from competition by different statutes serving the same market. For example, the author might be allowed to capture benefits from producing the statute by selling or licensing it to government entities. The government/licensee can charge a franchise fee to firms that form in the jurisdiction, which can include a charge to cover the license fee for the statute (Kobayashi & Ribstein (2013)). There would be no direct charge for use of the statute by those bound by the law. This regime would enable private lawmakers to maximize profits by choosing both the statute's location \( s_i \) and the price \( p_i \) to charge for use of the statute.

HT show that where private lawmakers create two statutes and firms are distributed uniformly the authors will maximally differentiate the statutes (that is, locate them at \( s_1 = 0 \) and \( s_2 = 1 \)) and price them at \( \tau \) more than the marginal cost of selling the statute. Our model also can generate the same extreme differentiation as long as the statute author gets only copyright-like rights rather than a patent-like right that prevents competing providers from locating a statute.
near an existing location. This would resemble ideal copyright protection that protects original expression from copying, but would not protect the underlying ideas contained in the statute.

Two opposing factors in HT's model determine private lawmakers’ choice of location and the location's effect on profits. On the one hand, given the first author’s choice of location, the second author's moving toward the location of the first statute increases the number of firms that use and pay for the statute. On the other hand, this move decreases what firms are willing to pay for using the statute by decreasing the distance between the statute and its closest alternative. Moreover, as noted above, the model assumes a non-linear relationship between firms' customized drafting costs and their distance from the nearest form. This reflects the intuition that shifts in individual contract provisions, such as liability for the firm's debts, management, control and profit-sharing in a firm's governance structure, change relationships between the characteristics and therefore necessitate redrafting of these other characteristics. Because of this non-linearity, the negative effect on price dominates the positive effect on quantity. Thus, private authors have an incentive to move away from each other when choosing the location of their statute.

Extreme differentiation is not a first-best result from a social welfare standpoint. Specifically, assuming firms are uniformly distributed over the [0,1] interval, total mismatch costs with extreme differentiation are equal to:

$$C^{CR} = \tau \int_0^{1/2} (x)^2 dx + \tau \int_{1/2}^1 (x-1)^2 dx = \frac{\tau}{12}$$

Thus, the extreme differentiation regime yields mismatch costs equal to that of an optimally placed single statue at $s = \frac{1}{2}$, but at twice the drafting cost, or $2F$. And two optimally placed statutes at $s_1 = \frac{1}{4}$ and $s_2 = \frac{3}{4}$ yield lower mismatch costs $\tau/48$ for the same upfront drafting cost.

In the HT model, the imperfect extreme differentiation result, however, is superior to that produced by public lawmakers. Because of public lawmakers' weak incentives, public lawmaking offers little or no advantage over private lawmaking. Private producers' extreme differentiation is either strictly better than the undifferentiated public provision outcome if the public outcome is skewed toward 0 or 1, or equivalent to this outcome if public producers happen to locate midway between 0 and 1.

To see this precisely, consider a set of statues at $s_i$. The costs of mismatch equal

$$C^{UNIF} = \tau \int_0^1 (x - s_i)^2 f(x) dx$$
With a uniform distribution with range $[0,1]$, $f(x) = 1$ and the costs of mismatch will equal

$$(8') \quad C^{UNIF} = \tau \left[ \frac{1}{3} x^3 - s_i x^2 + s_i^2 x \right]_0^1 = \tau \left[ \frac{1}{3} - s_i + s_i^2 \right]$$

Mismatch costs are minimized when the statutes are located so the derivative of $C^{UNIF}$ with respect to $s_i$ is equal to zero

$$(9) \quad \frac{\partial C^{UNIF}}{\partial s_i} = \tau \left[ -1 + 2 s_i \right] = 0$$

which yields $s_i^* = \frac{1}{2}$, and total mismatch costs equal to $\tau/12$. Thus, if public lawmakers locate their statutes at the halfway point, total mismatch costs are equivalent to that produced by the extreme differentiation result derived by HT for private lawmakers.

HT note, however, that there is no reason for the public lawmakers to locate at the midpoint. Indeed, without a more detailed model of public lawmaking there is no reason to predict any particular location of the public statute. If public lawmakers coalesce at a point other than the midpoint of the $[0,1]$ range, total mismatch costs under the HT public lawmaker outcome will be strictly greater than that achieved by private lawmakers that locate at the extreme points. For example, suppose that the public lawmakers choose to locate their statutes at $s = \frac{1}{4}$. With a uniform distribution $[0,1]$, the total costs of mismatch will equal:

$$(10) \quad \tau \int_0^1 (x - \frac{1}{4})^2 dx = \tau \int_0^1 [x^2 - \frac{1}{2} x + \frac{1}{16}] dx$$

$$= \tau \left[ \frac{1}{3} x^3 - \frac{1}{4} x^2 + \frac{1}{16} x \right]_0^1 = \tau \left[ \frac{1}{3} - \frac{1}{4} + \frac{1}{16} \right] = \frac{\tau}{48}$$

This is greater than the total mismatch costs ($\tau/12$) under the extreme differentiation outcome of the private market with $N = 2$. Indeed, if the location of the public statute is randomly distributed over the $[0,1]$ interval, the expected total mismatch costs will equal:

$$(11) \quad \tau \int_0^1 \int_0^1 (x-s)^2 \, dx \, ds = \tau \int_0^1 \left[ \frac{1}{3} - \frac{1}{2} s + s^2 \right] ds = \frac{5\tau}{12}.$$
B. Private Lawmaking and Broad IP Protection

Owners of privately produced laws might get not only copyright-like protection from exact copies, but also stronger monopoly rights to the general space occupied by a type or category of laws. In theory, this might include patents to novel and non-obvious legal methods.\(^9\)

Consider, for example, intellectual property protection that gives the innovator property rights to the interval \([0,1]\). If the monopolist produces \(N\) statutes, it will locate the first statute at \(1/2N\) from 0 and space additional statutes evenly every \(1/N\) apart. Thus, two statutes will be located at \(1/4\), \(3/4\), and three statutes at \(1/6\), \(3/6\), \(5/6\). With equal prices, firms in the interval \(1/2N\) on each side of the statute will demand the statute for all prices below

\[
(12) \quad p^l = \tau[M - \left(\frac{1}{2N}\right)^2].
\]

This is the price that makes the firm with ideal point \(x_j\) that is \(1/(2N)\) away from a statute \(s_j\) indifferent between using this statute and incurring cost \(M\tau\) using statute \(s_E\).

To demonstrate that it is optimal for the monopolist private lawmaker to charge the limit price \(p^* = p^l\), we need to show that \(\frac{\partial \pi}{\partial p} < 0\) when evaluated at \(p^l\). If this is true, then the monopolist would not want to raise price above \(p^l\), as profits would fall, and would not gain from lowering price because this would not enable it to sell or license additional units.

To demonstrate the conditions where \(\frac{\partial \pi}{\partial p} < 0\), note that a lawmaker’s profit will equal

\[
(13) \quad \pi = 2S(p - c)\sqrt{M - \frac{p}{\tau}}
\]

where \(S\) is a variable that scales up demand, so that the aggregate demand in the interval \([0,1]\) is \(S\). The derivative of the profit function with respect to \(p\) is given by

\[
(14) \quad \frac{\partial \pi}{\partial p} = 2S\sqrt{M - \frac{p}{\tau}} - \frac{2S}{\tau^2}\sqrt{M - \frac{p}{\tau}}(p - c).
\]

At \( p = p^L \), \( 2 \sqrt{M - \frac{p^L}{\tau}} = \frac{1}{N} \), so:

\[
(15) \quad \frac{\partial \pi}{\partial p} = \frac{S}{N} - \frac{2SN}{\tau} (\tau[M - \left( \frac{1}{2N} \right)^2] - c) < 0
\]

when

\[
(16) \quad N^2 (M - \frac{c}{\tau}) > \frac{3}{4}
\]

If condition (16) is not satisfied, then the optimal price will equal

\[
(17) \quad p^* = \frac{2\tau M - c}{3} > p^L.
\]

---

**Figure 3 – The Use-Creation Tradeoff**

Thus, private law producers with broad intellectual property protection for their products may have an incentive to engage in socially optimal pricing. However, it is possible that the conditions for optimality will not always prevail. Figure 3 illustrates the tradeoffs involved when the producer has an incentive to price some users out of the market. The figure illustrates two demands for statutes located at \( \frac{1}{2} \) and \( \frac{3}{4} \), the “B” demand based on parameters \( \tau = .8 \) and \( M = 1.1 \), and the “R” demand based on parameters \( \tau = .5 \) and \( M = 1.75 \). Suppose that the cost \( c \) of distributing a copy of the statute = .75.
In the "B" case, the left hand side of condition (16) equals .65, so condition (16) is not satisfied. The optimal price $p^* = .837 > p^L = .83$, so that the marginal firms with ideal points near $x = 0$, $x = .5$ and $x = 1$ will be optimally priced out of the market and will choose to organize under the existing statute $s^E$ even if this statute is not as well matched to the firms' needs as the private statute.

In the "R" case, the left hand side of condition (16) equals 1. Condition (16) is satisfied, and $p^* = p^L = .844$. The profits foregone for marginal firms that are priced out of the market when price is raised above $p^L$ are larger than with the “B” demand and larger than the increased profits from higher prices to the firms that continue to use the statutes in the $[0,1]$ interval.

However, if $c = 0$, then condition (16) will always be satisfied, as $N \geq 1$, and $M > 1$. Thus, in our model, the market for the private statute would achieve allocative efficiency under these conditions, as the private lawmaker sets a price that results in all firms in the $[0,1]$ interval using a private statute. By continuity, condition (16) and the allocative efficiency result will hold for small $c$. For example, if costs are lower at $c = .2$, condition (16) is satisfied for both the B and R demand (the left hand side of (16) equaling 3.4 and 5.4 respectively). Thus $p^* = p^L$ in both cases, and allocative efficiency is achieved. Again, a lower cost increases the profits forgone when the marginal firms are priced out of the market.

Because the statutes contain information that can be distributed at low cost given current technology, it is likely the case that $c$ will be small and that condition (16) will hold under widely applicable conditions. Indeed, relatively low distribution costs compared to the costs of producing an idea is a ubiquitous assumption in economic analyses of the production of information and innovation.

In addition to charging a price for access to its statutes that is high enough to induce some buyers to choose to use the existing statute with higher mismatch costs, the private producer may produce a socially excessive or socially inadequate number of statutes. Assuming that Condition (16) is satisfied, the marginal benefit to the lawmaker from adding an additional statute will equal

$$\Delta \pi \over \Delta N = S^* [p^L(N-1) - p^L(N)] - F = \tau M - \frac{1}{(2(N-1))^2} \left[ \tau M - \frac{1}{(2N)^2} \right] - F$$

or equivalently

$$\frac{1}{(N-1)^2} - \frac{1}{N^2} > \frac{4F}{\tau}$$

Comparing (19) to equation (6′) shows that the lawmaker with property rights over the interval [0,1] will have socially excessive incentives to promulgate statutes. In other words, the
lawmaker will propose statutes even beyond the point where drafting costs exceed mismatch cost savings.

Figure 4 – Gross Private Marginal Benefits of Adding an Additional Statute in the [0,1] Space.

The shaded area in Figure 4 illustrates the marginal gain to the private lawmaker with property rights over the interval [0,1]. In contrast to the social gains from adding a second statute illustrated in Figure 2, the gross marginal gain to the private lawmaker is determined by the effect of an additional statute on the uniform price charged to all firms. This, in turn, depends on the value of the statute to the marginal firm, \( p^L \). Thus, the marginal gain to the private lawmaker equals the rectangular area in Figure 4 bordered above by the horizontal line at \( p^L(N=2) \) and below by the horizontal line at \( p^L(N=1) \). Because this effect is larger than the social benefit for infra-marginal firms, the private lawmaker’s private benefit from an additional statute will be greater than the social value of an additional statute.

Figures 5A and 5B compare the social and private incentives to produce statutes more generally. As shown in the figure, private production can result in the underproduction and overproduction of private statutes relative to the social optimum.
The above analysis of social welfare aspects of private law production focuses solely on drafting and mismatch costs. This excludes several potentially important factors that may determine the production of private law. First, the focus on mismatch costs leaves out of the analysis transaction costs resulting from imperfectly articulated legal rules that may result from the over-production of legal forms. This consideration may underlie the "numerus clauses" principle which limits the menu of property ownership forms from which parties can choose (Merrill & Smith). It is worth noting, however, that in the context of business association and other contractual standard forms, parties' ability to choose the applicable form and state law and therefore take into account potential confusion costs likely minimize the problem Merrill & Smith analyze. Moreover, legal innovation can reduce as well as increase the problem of
excessive forms, as where the new statute reduces the costs of choosing standard form rules. See Ribstein (2003).

Second, the above analysis does not consider factors other than mismatch costs that might determine parties' choice of form, particularly including network effects. Firms' costs of using a particular form may depend on the extent and quality of the "network" of legal materials available for interpreting and applying the form (Klausner). This network may determine both firms' mismatch costs and the degree of legal certainty (\(\phi\)) regarding a particular term.\(^{10}\) It follows that the availability of a set of statutes in a particular space may depend on the order in which these statutes are produced over time and not just on the statutes' and firms' intrinsic characteristics. Network effects may prevent entry of private forms even if these forms would reduce total mismatch and drafting costs in the absence of such effects. Network effects do not necessarily prevent the emergence of a more efficient form (Kobayashi & Ribstein (2001)). However, we cannot eliminate the possibility that this might occur. This has implications for several issues discussed below. In particular, byproduct or public laws may dominate private laws notwithstanding the latter's theoretical potential for increasing social welfare in the absence of network effects.

In addition, misaligned public or byproduct lawmakers' incentives may affect the choice between public lawmaking and the purely private lawmaking by altering the incentives of non-byproduct private lawmakers in other ways. For example, public lawmaking not only may have less efficient outcomes than private lawmaking, but may reduce the incentives of private lawmakers. More precisely, the presence of a preexisting a public statute in the [0,1] interval can significantly decrease the returns to a private lawmaker from drafting and selling another statute located in that space.

To see this, consider the following example. Figure 6 shows the demand for private statute, both in the absence of a public statute, and when there is a public statute at \(s_u = .75\). As was shown previously, a private lawmaker with enforceable and broad property rights to law will locate a single statute at .5 if there are no other statutes in the [0,1] interval. Under these ideal conditions, and assuming \(M = 1.1\) and \(\tau = .8\), the private lawmaker's gross revenue from sales of his standard form will equal \(p^k = \tau[M - (.5)^2] = .68\)

In contrast, the private lawmaker's gross revenues with a preexisting statute at .75 will equal \(.225\times.1875 = .0422\), or just 6.2% of the revenues obtained by the monopoly private lawmaker. Intuitively, the private lawmaker must now compete with a publicly provided product in the [0,1] space that is available at a zero price. Because the smaller net revenues available to

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\(^{10}\) In other words, the "law," which this paper associates with certainty, includes not only statutory provisions but also common law rules interpreting the statutes. The value of all these legal rules, in turn, depends on associated materials assisting in understanding these legal rules.
the private lawmaker are less likely to cover the cost of drafting a statute \( F \), a preexisting public statute can severely reduce the incentive to produce a private statute.

**Figure 6 – Returns of Private Lawdrafting (\( K \)) with and without an Existing Public Statute at .75.**

In addition to diminishing the returns available to the private lawmaker, the example shows that the existence of a public statute in the \([0,1]\) space will also alter the location of any private statute. With respect to the location of the private statute \( s_p \), profits for a private lawmaker increase in direct proportion to the distance between \( s_p \) and an existing public statute in the \([0,1]\) interval when the private lawmaker's cost of distributing the statute \( c \) is close to zero. Thus, a private lawmaker would prefer to locate its private statute at \( s_p = 0 \). Total mismatch costs with the public and private statute with a public statute at .75 and a private statute at 0 equal \( 1.21\tau/12 \), which is higher than the mismatch costs associated with two private statutes located at the extremes or a uniform private statute located at \( 1/2 \).

Although these complicating factors may be relevant in determining the optimal types and number of private and public laws, they complement rather than undermine our analysis. Our model suggests that mismatch costs may be significant and that total mismatch costs depend on the incentives for producing private law. This insight remains useful even if creating such incentives does not eliminate the need for additional regulation of law production.

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11 Because only a small fraction of the firms in the \([0,1]\) interval use the privately produced statute (those with preferences between 0 and .1875), firms between .1875 and .25 incur higher mismatch costs than any firm in the equilibrium with two private firms with statutes located at 0 and 1.
III. PRIVATE INCENTIVES WITHOUT INTELLECTUAL PROPERTY FOR LAW

The model of a market for privately produced law protected by intellectual property presented in Section II illustrates our main thesis regarding the importance of property rights in law. The analysis in Section II makes assumptions about law and intellectual property that we argue also are implicit in HT's model. Specifically, the HT model assumes that the private provisions produced are enforced with certainty \((\phi = 1)\) and thus equivalent to \textit{law}. Moreover, the fact that their private lawmakers can act as price setters who can appropriate the returns from their work implicitly assumes that these products can be protected by intellectual property rights. However, as noted above, this assumption does not hold under current law because copyright law does not protect privately produced statutory forms and model laws that are adopted as law, and patent law is unlikely to apply to many legal ideas (Kobayashi & Ribstein (2011, 2013)). This Section considers the implications of incorporating realistic assumptions about intellectual property rights in \textit{law} into the model.

Given weak or non-existent intellectual property protection for law, private lawmakers whose provisions are adopted as law face free riding by potential users of their work and by competing jurisdictions. Buyers therefore will have a highly elastic demand for their product such that even a slight increase in price will sharply reduce demand as the market moves to cheaper copies. Private lawmakers accordingly will be unable to set prices as HT assume. More precisely, any demand for a copy of a privately produced statute would be based solely on differences between potential users' costs of access to the statute \((\delta)\), which likely would be the same for all firms and statutes given the current technology. Under these circumstances, the demand for a set of provisions \(a_i\) would be perfectly elastic at \(p_i = \delta\).

Private lawmakers who cannot set price lack incentives to innovate by differentiating products. Recall that HT's differentiation result occurs because the positive marginal price effect of this differentiation on profits dominates the effect of reducing the number of firms adopting the statute. If private lawmakers are price-takers facing perfectly elastic demand curves, they have no incentive to try to differentiate their products in order to better fit market needs. If there are only two statutes, private lawmaking under price taking will result in undifferentiated statutes rather than differentiated statutes.

To see this point explicitly, consider the incentives of a private lawmaker (that is, a drafter of a statute at \(s_i\) where \(\phi = 1\)) who is a price-taker in the sense that it cannot set the price of its product because it lacks intellectual property rights. The absence of property rights allows customers and copycat producers to free-ride on drafting firms' investments and to sell or use the same products without having to incur drafting costs or compensate the statute's author. Given \(s_1 < s_2\) (that is, \(s_1\) is closer to 0 in the ideal point space \(x\)), the first private lawmaker's choice of
location $s_i$ will result in firms with ideal points between 0 and $x^c$ choosing to organize under $s_i$.\textsuperscript{12} The demand ($x^c$) for $s_i$ is

\begin{equation}
(20) \quad x^c = \frac{(s_i + s_2)}{2} + \frac{(p_2 - p_i)(2\tau(s_2 - s_i))}{(2\tau(s_2 - s_i))}.
\end{equation}

Private lawmaker 1's profits are

\begin{equation}
(21-1) \quad \Pi_1 = (p_1 - c)x^c - D = (p_1 - c)[\frac{(s_i + s_2)}{2} + \frac{(p_2 - p_i)(2\tau(s_2 - s_i))}{(2\tau(s_2 - s_i))}] - D
\end{equation}

where $c$ is the cost of distributing a copy of the privately produced statute and $D$ is the upfront cost of drafting the statute. The expected demand for private lawmaker 2 would equal $1 - x^c$, and his profits are:

\begin{equation}
(21-2) \quad \Pi_2 = (p_2 - c)(1 - x^c) - D = (p_2 - c)[1 - \frac{(s_i + s_2)}{2} - \frac{(p_2 - p_i)(2\tau(s_2 - s_i))}{(2\tau(s_2 - s_i))}] - D
\end{equation}

A price-taking private lawmaker will choose statute location $s_i$ that maximizes profits given price. This occurs when the statutes are optimally located at the point where the lawmakers cannot increase marginal profits by moving toward or away from their competitor's location. This condition is satisfied when the partial derivative of profits with respect to location $a_i$ equals zero. However, these first order conditions are never satisfied when $p_2 = p_1 = \delta$:

\begin{equation}
(22-1) \quad \frac{\partial \Pi_1}{\partial s_1} = (p_1 - c)[\frac{1}{2} + \frac{(p_2 - p_i)(2\tau(s_2 - s_i)^2)}{(2\tau(s_2 - s_i)^2)}] = \frac{(\delta - c)}{2} > 0.
\end{equation}

\begin{equation}
(22-2) \quad \frac{\partial \Pi_2}{\partial s_2} = (p_2 - c)[\frac{-1}{2} - \frac{(p_2 - p_i)(2\tau(s_2 - s_i)^2)}{(2\tau(s_2 - s_i)^2)}] = -\frac{(\delta - c)}{2} < 0.
\end{equation}

It is important to emphasize that if $p_2 = p_1 = \delta$, private lawmakers cannot maximize profits by choosing different locations. Under these conditions, profits for private lawmaking firm 1 are increasing in $s_i$ while profits for private lawmaking firm 2 are decreasing in $s_2$, with the result that both private lawmaking firms would locate at a single point such that $s_1 = s_2 = \frac{\tau}{2}$. In other words, if private lawmakers face a perfectly elastic demand curve and cannot set price, their incentive to differentiate will be as weak as that of HT public lawmakers. However, competition over location will lead them, in the case of $N = 2$, to locate at the center of the $[0,1]$ interval.

For private lawmakers who are efficient at distributing copies of their statutes, so that $\delta > c$, profits, even net of the costs of drafting $D$, may be positive if competition does not drive prices to costs. However, the lack of property rights allows competing providers, jurisdictions, as well as users to free-ride. Thus, the absence of enforceable property rights forces the price of $p_1$ and $p_2$ not just toward $\delta$ but also towards $c$. Under these conditions, private lawmakers accordingly will not produce any statutes because their expected revenues will not cover their drafting costs

\textsuperscript{12} More precisely, expected demand for private lawmaker 1's model equals $F(x^c)$, the distribution function of firms evaluated at $x^c$. With a uniform distribution, $F(x^c) = x^c$. 
D. This, in turn, leaves firms without suitable private forms and forces them to incur the mismatch costs $M\tau$ of forming under the existing law $s_E$.

IV. THE HOBSON’S CHOICE: LAW WITHOUT IP OR IP WITHOUT LAW

The above analysis shows that private lawdrafters are confronted with a Hobson’s choice. On the one hand, the possibility that the private model law’s terms will not be enforced raises the expected cost of using the model law and thus reduces what firms are willing to pay for the terms contained in the model law or standard form. On the other hand, court enforcement or interpretation of the privately produced terms increases the model law or standard form’s value but jeopardizes the author’s property rights in it because the contract enters the public domain.

To examine this tradeoff in more detail, consider a set of provisions that has not been adopted as law. As noted above, firms always prefer a privately or publicly produced statute (where $\phi = 1$) at $s_i \in [0,1]$ to organizing and operating under an existing statute at $s_E$ because mismatch costs are smaller and the expected reorganization costs $(1 - \phi)R\tau$ are zero. However, for privately produced provisions at $a_i$ that have not been adopted as law, the probability that these provisions will be effective as written is less than one. From Table 1, when $\phi < 1$ a firm’s expected costs of organizing will equal $\phi\tau(a_i - x_j)^2 + (1 - \phi)R\tau$. Thus, $K$ (the marginal value of adopting $a_i$ instead of $s_E$) is negative when the expected costs of reorganization exceed the expected reduction in mismatch costs. It follows that

(23) \[ \phi\tau(a_i - x_j)^2 + (1 - \phi)R\tau > M\tau \]

or equivalently

(23’) \[ (1 - \phi)R\tau > [M - \phi(a_i - x_j)^2]\tau. \]

Moreover, Firm $j$ will prefer the existing statute at $s_E$ to the private provisions at $a_i \in [0,1]$ when

(24) \[ \phi < \phi^* \equiv [R - M]/[R - (a_i - x_j)^2]. \]

Thus, the value $K$ of a privately produced set of non-law provisions becomes negative for a firm with ideal point $x_j$ when the probability of enforcement $\phi$ is below the critical value $\phi^*$. If $\phi < \phi^0 = [R - M]/R$, even the firm with an ideal point at $x_j = a_i$ will prefer to form and organize under the existing mismatched statute $s_E$. At this point, as illustrated in Figure 1 when $\phi = .267$, $K$ will then be negative for all firms with $x_i \in [0,1]$, and there will be no demand for the privately
produced set of provisions at $a_i$. Private lawdrafters therefore have no incentive to incur the costs ($D$) of producing non-law provisions even if they have enforceable property rights.

More generally, if $R >> M$, the critical probability $\phi^c$ approaches 1 such that even slight uncertainty regarding the enforcement of the provisions at $a_i$ reduces demand for these provisions. Again, even assuming enforceable property rights, the demand for a private law or statute will be less than that assumed in the model for privately produced provisions that have the characteristics of law.

To illustrate the other half of the Hobson’s choice facing private lawdrafters, suppose that the author successfully lobbies a legislature to adopt its set of provisions $a_i$ as law in order to increase $\phi$. If the private lawdrafter that successfully becomes a private lawmaker can continue to enforce its intellectual property rights, adoption as law will increase the demand for this set of provisions and improve incentives as shown in Section II. However, under current law discussed above, adoption of the privately produced set of provisions as a public statute effectively costs the private lawmaker its copyright protection. Individual firms, other jurisdictions, and other providers could adopt or sell the set of provisions contained in $a_i$ without having to pay a licensing fee. As shown in Section III, this makes the private lawmaker effectively a price-taker and drives the market price of its product to the cost of distribution $c$. Again, as shown above, the lack of property rights negates incentives to incur the costs ($D$) of producing a model statute.

In short, the rewards from private authorship of a set of provisions $a_i$ in the absence of effective property rights protection are negatively correlated with the degree to which the lawmaking results in products that have the most valuable feature of certain enforcement we attribute to law. Given these limitations on property rights in law, the inadequate and misaligned incentives from the price-taker model presented in Section III most accurately describes the incentives of a private lawdrafter who attempts to become a private lawmaker. And the diminished incentives presented in Section I most accurately describes the incentives of a private lawdrafter that does not seek to have his model law or standard form adopted as law.

Finally, it is important to emphasize that the above analysis of both private and public lawmaking assumes that lawmakers, like other creators of intellectual property, are seeking to maximize profits from the sale of their inventions. Lawmakers may, however, act as agents for interest groups who are trying to use the political process to engineer wealth transfers. This applies not only to public lawmakers, but also to most private lawmakers under the "byproduct" theory of lawmaking (Kobayashi & Ribstein (2012)). Since these incentives exist for both public lawmakers and byproduct private lawmakers, they may not affect the welfare tradeoffs between private lawmakers and public lawmakers in a predictable way without further assumptions regarding the specific nature of byproduct lawmaking.

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13 The curve in Figure 1 is based on the following parameters: $\tau = .8, M = 1.1, R = 1.5$. Thus $\phi^0 = [R - M]/R = .267$. 
V. CONCLUDING REMARKS

Legal innovation is important, but may be under-produced because of public lawmakers' weak and misaligned incentives. Private lawmaking is a potential solution to this problem. However, under current law this lawmaking faces the horns of a dilemma: it requires government enforcement and recognition, yet such enforcement and recognition necessarily reduces the property rights that are essential to motivate private lawmakers. Thus, private lawmakers who attempt to have their model laws or standard forms adopted as law will lack effective property rights and will have inadequate and misaligned incentives for innovation. Private lawdrafters who do not seek adoption of their model laws and forms as law can maintain intellectual property right protection, but face uncertainty regarding the enforcement of their products that reduces their value. Without a better approach to finding a better balance between public access and private rights, the promise of private lawmaking is unlikely to be attained.
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