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TRANSPARENCY AND BUSINESS ADVANTAGE: THE IMPACT OF INTERNATIONAL ANTI-CORRUPTION POLICIES ON THE UNITED STATES NATIONAL INTEREST

SUSAN ROSE-ACKERMAN & SINÉAD HUNT***

INTRODUCTION

What are the benefits and costs to the United States from statutes, treaties, and "soft-law" initiatives that seek to constrain bribery in international business transactions? Hard statistics are not available, but we argue that much of the debate has been overly focused on the possibility that U.S. firms will lose contracts and exports to corrupt competitors, especially ones from emerging economies such as China, Russia, or India.

Of primary importance is the United States Foreign Corrupt Practices Act (FCPA),[1] which prohibits firms from paying bribes for

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.), *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415 *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

the purpose of "obtaining or retaining" business abroad.[2] The United States has been enforcing this statute quite aggressively of late, producing a backlash from portions of the business community. The United States Chamber of Commerce (the Chamber) titles its recommendation for amending the FCPA *Restoring Balance*, implying that the law is too stringent. The Chamber is careful to support the anti-bribery aims of the statute, but its proposed amendments would significantly weaken the law.[3] In its more polemical statements, the Chamber claims that the law is obsolete and "a stumbling block for America's ability to compete in today's global economy."[4] In testimony before Congress, a lawyer representing the Chamber's position stated that "there is reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure."[5] According to the Chamber, the FCPA is a "relic of a time before globalization transformed the U.S. economy and, until updated, it will continue to hurt U.S. businesses."[6] To us, it is surprising to see the Chamber argue that aggressive enforcement is less important *because* of the globalization of business. We argue, in contrast, that enforcement has become more important as business globalizes, especially because the United States is no longer alone in penalizing overseas bribery. A treaty ratified by most major over-

2. 15 U.S.C. § 78dd-1 (2006).

3. *See* ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6–7 (Oct. 2010), *available at* http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf. For a response to this document that complements our own, see DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATIONS, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5–8 (Sept. 2011), *available at* http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916/Busting%20Bribery2011September.pdf (going through the Chamber's proposed amendments to the FCPA and offering a rebuttal to each one).

4. Press Release, U.S. Chamber Inst. for Legal Reform, U.S. Chamber Institute for Legal Reform: House Hearing is an Important Step Toward Modernizing FCPA (June 14, 2011), http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2011/533.html.

5. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 88 (2010) (written testimony of Andrew Weissmann, Partner, Jenner & Block LLP), *available at* http://judiciary.senate.gov/pdf/10-11-30 Weissmann Testimony.pdf.

6. Harold Kim, *House Hearing: An Important Step Toward Fixing the FCPA*, CHAMBERPOST (June 15, 2011), http://www.chamberpost.com/2011/06/house-hearing-an-important-step-toward-fixing-the-fcpa/.

seas investors generalizes the principles behind the FCPA to multinationals around the world.[7]

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act includes a section that requires firms in extractive industries—oil, gas, and mining—to report payments to governments where they operate.[8] It has generated similar criticisms. Firms claim that these provisions will harm U.S. firms operating in corrupt polities. For example, the American Petroleum Institute, an industry lobby group, argues that U.S.-listed companies will be placed at a competitive disadvantage if the new law causes host governments to "select business partners on future projects that do not have similar reporting requirements" or if non-reporting entities "utilize the . . . information to gain an advantage in future bidding and contract negotiations."[9]

From the point of view of the U.S. national interest, these claims are overblown. Our aim is to shift the debate over the control of corruption toward the more comprehensive benefits that may result from a strong U.S. stance against foreign bribery. If a U.S. firm loses an individual contract to a corrupt competitor, the cost to American society is not the profits that would have been earned from the corrupt deal. Rather, we defend a more sophisticated view of the loss that recognizes both that the firm can usually shift its business elsewhere and that, even if the lost contract involves a resource at a fixed location, that resource will generally enter into international trade where it can be purchased by American customers.

Furthermore, even if some business is lost, there are long-term benefits to the United States from moving toward a more honest business environment. A strong U.S. policy against international corruption can encourage other countries to follow suit, with positive effects on the efficiency and fairness of global trade and investment, and can help support government reform efforts in host

7. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 4, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Anti-Bribery Convention].

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1504, 124 Stat. 1376, 2213, 2220 (2010) [hereinafter Dodd-Frank Act] (adding section 13(q) entitled "Disclosure of Payments by Resource Extraction Issuers" to the Securities Exchange Act of 1934).

9. Letter from Kyle Isakower, Vice President of Regulatory & Econ. Policy, Am. Petroleum Inst., & Patrick T. Mulva, Chairman of the Fin. Comm., Am. Petroleum Inst., to Div. of Corp. Fin., SEC (Oct. 12, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf.

countries. Overall, we believe that the benefits to the United States and its standing in the world outweigh the net costs associated with the possibility of lost contracts.

In Part I we introduce the basic legal framework that seeks to constrain corruption in international business. There are three basic sources of legal constraints. The first source derives its authority from the FCPA[10] and its generalization, the OECD Anti-Bribery Convention.[11] The second is the United Nations Convention Against Corruption, which covers a broader range of countries and corrupt activities.[12] Finally, one section of the Dodd-Frank Act[13] requires firms in extractive industries to report payments under rules similar to those governing the Extractive Industries Transparency Initiative, a voluntary effort.[14]

In Part II we make our basic argument concerning the proper way to compute the costs for the U.S. economy, as opposed to the costs only to U.S. firms. In Part III we discuss the potential long-term benefits of vigorous enforcement and of ongoing soft-law initiatives. Finally, we conclude in Part IV with a return to the Chamber's claims.

I.
THE LEGAL AND SOFT-LAW FRAMEWORK FOR U.S. BUSINESS

The United States Foreign Corrupt Practices Act was passed in the aftermath of the Watergate scandals, which revealed widespread payments by U.S. firms operating abroad to get and retain business.[15] It was amended in 1988 to exempt "facilitating payments" from the reach of the statute[16] and again in 1998 to make U.S. law

10. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

11. Kim, s*upra* note 6. R

12. U.N. Convention Against Corruption, art. 15, Dec. 11, 2003, S. TREATY DOC. NO. 109-06, at 33–34, 2349 U.N.T.S. 41, 154–55.

13. Dodd-Frank Act § 1504, 124 Stat. at 2220.

14. For more information on the Extractive Industries Transparency Initiative, see EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org (last visited Sept. 26, 2011).

15. Linda Chatman Thomsen, Director, SEC Division of Enforcement, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008) (transcript available at http://www.sec.gov/news/speech/2008/spch032708lct.htm).

16. Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 446 (2010).

compatible with the OECD Anti-Bribery Convention.[17] The statute makes it an offense for U.S. firms to pay bribes to get business abroad, with both the corporation and its officers potentially subject to criminal liability.[18] Other provisions dealing with books and records apply only to firms listed on the stock exchanges.[19] Enforcement authority lies with both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Whereas the SEC may only pursue civil actions against issuers, that is, companies listed on U.S. stock exchanges, the DOJ may enforce criminal penalties under both the anti-bribery and accounting provisions against issuers and non-issuers.[20]

In the midst of the Watergate scandal it was difficult for businesses to oppose the proposed law. The Senate passed S. 3664 by a unanimous 86-0 vote on September 15, 1976.[21] The House of Representatives adjourned before completing work on this legislation,[22] but S. 305, identical to S. 3664, was introduced shortly after the 95th Congress convened in January 1977. The House passed accompanying bill H.R. 3815 by voice vote on September 20, 1977 with a quorum.[23] The House report noted,

> More than 400 corporations have admitted making questionable or illegal payments. . . .
>
> The payment of bribes to influence the acts or decisions of foreign officials . . . is unethical. . . . But not only is it unethical, it is bad business as well. . . . In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.[24]

Similarly, the Senate report stated, "The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered."[25] Once the law was in place, it would prove hard for business openly to oppose it because firms feared that they would suffer a public relations blow

17. *Id.* at 447–48.

18. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006).

19. 15 U.S.C. § 78m(b)(2)(A)–(B).

20. *See infra* Part II.A.

21. S. REP. NO. 95-114, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099, *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

22. *Id.*

23. H.R. REP. NO. 95-640, at 7 (1977), a*vailable at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

24. *Id.* at 4–5.

25. S. REP. NO. 95-114, at 3, *reprinted in* 1977 U.S.C.C.A.N at 4101.

from being labeled in favor of bribery. Nevertheless, some firms argued that they had lost contracts due to their compliance with the law.[26] However, the weakening of the law in 1988 to exclude facilitating payments was more a reflection of actual enforcement priorities and realities than a serious gutting of the law.[27]

Enforcement of the FCPA in the United States has had its ups and downs, but it has been relatively stringent in recent years.[28] However, few cases actually go to trial.[29] Therefore, the law has not benefitted from judicial efforts to elucidate vague aspects of the statute. Defendants prefer to settle, often to preserve their ability to bid on U.S. government contracts. Thus, settlements are announced with considerable fanfare, but the actual wrongdoing admitted by a firm and its officers may seem relatively trivial.[30] Many offenses involve only the books and records aspects of the law, which are not criminal violations.[31] Thus, the primary deterrent effect of the law may be the stigma attached to being penalized under

26. *See, e.g.*, Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 208 (1994) (citing U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 59 (1981)) (reporting the results of a 1981 General Accounting Office (GAO) survey of 250 of the top 1000 corporations in the United States, which stated that "30% of the respondents claimed that the Act had caused a decrease in business").

27. *See, e.g.*, Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 257–58 (1997) (noting that the 1988 Amendments strengthened the FCPA because "the 1988 Amendments to the FCPA have reduced or eliminated the most troublesome sources of vagueness [in the law]").

28. *See, e.g.*, Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 90–91 (2010); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495–96 (2011).

29. Mark Brzenzinski & Alex Brackett, *Foreign Bribery and Illegal Exports*, PUB. INT. REP., Spring 2011, at 14, 16 n.8.

30. For example, U.K. firm BAE Systems agreed to pay a $400 million fine to settle one charge of "conspiring to . . . make false statements." Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-209.html. *See also* Westbrook, *supra* note 28, at 530–31 ("The SEC Enforcement Division, in particular, has been described as being in a 'hyper-aggressive phase,' in which it applies existing laws in 'novel and creative ways' . . . ."). R

31. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78ff (2006). *See also* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS, 2, 5, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Sept. 27, 2011).

the statute. This may mostly deter large diversified firms that deal with the government as regulator, tax collector, and customer and also deter firms that depend upon a good reputation with private customers to sustain their business. It may be less effective against smaller or less diversified companies.

Over time, enforcement of the FCPA generated support in the U.S. business community for an international treaty to generalize the U.S. approach to other countries that are the major sources of overseas investment.[32] In the early nineties, Transparency International (TI) was founded by Peter Eigen, a retired World Bank official, and several colleagues.[33] TI has an anti-corruption mission that initially focused on limiting corruption in international business dealings. It represents a collaboration between business interests and international governance reformers that pushes for change in the practices of multinational firms and host governments. TI became an early supporter of an international treaty and, over several years, pushed for the drafting, signing, and ratification of what became the OECD Anti-Bribery Convention. A Swiss lawyer and professor, Mark Pieth, led the drafting process,[34] but the support of the U.S. government and the U.S. business community was politically crucial.[35]

The Convention tracks the FCPA, but it allows individual states to tailor their compliance to suit their own legal systems.[36] For example, not all countries permit corporations to be criminally liable, so enforcement in those cases focuses on individuals and, perhaps, on civil fines levied on firms.[37] Enforcement of the Convention relies on the initiative of signatories because its own enforcement mechanisms are weak. The OECD has a working group that meets periodically to assess progress, and it carries out country-level evalu-

32. For a list of the major sources of FDI, see *infra* note 99. **R**

33. *Advisory Council*, TRANSPARENCY INT'L, http://www.transparency.org/about_us/organisation/adv_council (last visited Sept. 28, 2011).

34. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD WORKING GROUP ON BRIBERY ANNUAL REPORT 2007, at 2 (2008).

35. *See* David Metcalfe, *The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective*, 5 INT'L NEGOTIATION 129, 134–35 (2000).

36. *See, e.g.*, OECD Anti-Bribery Convention, *supra* note 7, art. 2, at 4, 37 I.L.M. at 4–5 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."). **R**

37. *OECD Demands the Slovak Republic Establish Corporate Liability for Foreign Bribery*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Jan. 18, 2010), http://www.oecd.org/document/61/0,3746,en_21571361_44315115_44419261_1_1_1_1,00.html.

ations required by the Convention.[38] Transparency International publishes its own reviews.[39] However, the treaty has no official sanctioning mechanisms. Some have proposed an international tribunal to deal with corporations that violate the treaty,[40] but actual enforcement has no such backup.

In 2000, shortly after the OECD Anti-Bribery Convention entered into force, the United Nations General Assembly established a committee to negotiate a convention against corruption. After several negotiating sessions, the General Assembly adopted the United Nations Convention Against Corruption in 2003.[41] Again, the United States supported this international effort and was among the first countries to sign and ratify the U.N. Convention. The U.S. permanent representative to the United Nations stated, "Ten years ago, bribes were still tax deductible in some countries and no international anti-corruption treaties existed. Today's resolution is therefore a milestone achievement in the global effort to ensure transparency, fairness and justice in public affairs."[42] The U.N. Convention entered into force in the United States in 2005 after the thirtieth country ratified it,[43] and 153 countries, in addition to the European Union, are now parties to the U.N. Convention.[44]

Although the U.N. Convention Against Corruption was developed in light of previous anti-corruption instruments, including the FCPA and the OECD Anti-Bribery Convention, it is broader in scope, extending beyond bribery of foreign public officials to ad-

38. For OECD reports on the implementation of the OECD Anti-Bribery Convention, see *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/document/24/0,3746,en_2649_34859_1933144_1_1_1_1,00.html (last visited Sept. 29, 2011).

39. *TI Progress Report: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials*, TRANSPARENCY INT'L, http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention (last visited Sept. 29, 2011).

40. *See* Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L LAW 129, 160 (2010).

41. U.N. Convention Against Corruption, *supra* note 12. R

42. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 169, 184 (2004) (quoting U.N. GAOR, 58th Sess., 50th plen. mtg. at 19, U.N. Doc. A/58/PV.50 (Oct. 31, 2003)).

43. Press Release, U.N. Office on Drugs & Crime, Convention Against Corruption Ratified by 30th State, Will Enter into Force 14 December 2005, U.N. Press Release L/T/4389 (Sept. 15, 2005), *available at* http://www.un.org/News/Press/docs/2005/lt4389.doc.htm.

44. *UNCAC Signature and Ratification Status as of 1 May 2011*, U.N. OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Sept. 29, 2011).

dress other facets of corruption, including trading in influence, money laundering, and embezzlement.[45] It also covers countries that are not yet party to any other anti-corruption instrument.[46] In addition, the U.N. Convention supports the criminalization of corruption in the private sector.[47] It focuses on international cooperation, encouraging states to exchange information, and includes detailed provisions on cooperative law enforcement mechanisms like extradition.[48] However, similar to the OECD, the United Nations does not have the power to enforce compliance,[49] and the impact of the Convention is uneven across countries due to differing enforcement levels and because countries may ratify it with reservations.

In recent years several voluntary efforts have sought to increase transparency and to limit corruption, especially in the extractive industries. Two of the most significant initiatives are Publish What You Pay (PWYP),[50] a global coalition of civil society groups working to convince firms to publicize payments, and the Extractive Industries Transparency Initiative (EITI),[51] an international initiative comprising governments, firms, and civil society groups that works with governments to publish information on all types of payments connected to extractive companies' business activities. The idea is that even without strong prosecutorial efforts, information on payments, even legal ones, can help citizens and civil society groups to monitor the behavior of governments and firms.

Civil society organizations, such as PWYP, Revenue Watch, and Global Witness, lobby for transparency in the extractive industries and were key supporters of section 1504 of the Dodd-Frank Act, a provision requiring firms in extractive industries to publish what

45. *International Trade Alert: The United Nations Convention Against Corruption*, AKIN GUMP STRAUSS HAUER & FELD LLP, 5–6 (Jan. 14, 2004), http://www.akingump.com/files/Publication/eb85b0df-4b9d-49f2-bb83-0a19fa0e31a5/Presentation/PublicationAttachment/0ddf3ac5-050e-4e16-b3df-0bf9e32f5ad3/628.pdf.

46. Lucinda A. Low, Thomas K. Sprange & Milos Barutciski, *Global Anti-Corruption Standard and Enforcement: Implications for Energy Companies*, 3 J. WORLD ENERGY L. & BUS. 166, 171–72 (2010). Russia, however, has been invited by the OECD to join their Working Group and to accede to the Convention. *See OECD Invites Russia to join Anti-Bribery Convention*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (May, 25, 2011), http://www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1,00.html.

47. *International Trade Alert*, *supra* note 45, at 6. R

48. *Id.* at 5, 7.

49. *Id.* at 7.

50. For more information on PWYP, see PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org (last visited Sept. 29, 2011).

51. *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 14. R

they pay in an annual report under SEC oversight.[52] Senators Benjamin L. Cardin (D-Md.) and Richard G. Lugar (R-Ind.) introduced section 1504, also known as the Cardin-Lugar amendment.[53] In addition, section 1502 of the Dodd-Frank Act requires companies to which conflict minerals are "necessary to the functionality or production" of their products to disclose whether the minerals originated in the Democratic Republic of the Congo or a bordering country.[54] The final rules implementing these sections had not yet been issued at the time of publication, but, at the very least, they will provide information on contracting and sourcing practices in these sectors.

These initiatives in U.S. law and in international treaties and soft-law have produced a heightened interest in this aspect of corporate social responsibility and have led to the development of corporate compliance programs to signal a firm's credible commitment to integrity. For example, General Electric (GE), which received the 2010 Transparency International-USA Corporate Leadership Award for a "sustained commitment to fostering a corporate culture of integrity,"[55] disseminates a Code of Conduct among GE employees requiring compliance with policies designed to promote high standards of integrity.[56] The hope of the firm's management is that, even if an employee pays a bribe, prosecutors will view the employee as a solitary wrongdoer who is violating firm policy, not a faithful servant of superior officials who are willing to make payoffs in the name of profit. However, under the FCPA there is currently no formal "compliance defense," that is, a U.S. firm is still liable even when an employee "circumvent[s] compliance measures that [are] otherwise reasonable in identifying and preventing such violations."[57] In contrast, the recently enacted U.K. Bribery

52. *Pushing for Probity*, 52 AFR. CONFIDENTIAL 6, 7 (2011), *available at* http://www.africa-confidential.com/article/id/3884/Pushing-for-probity.

53. *The Cardin-Lugar Amendment (Dodd-Frank 1504)*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504 (last visited Oct. 3, 2011).

54. Dodd-Frank Act, Pub L. No. 111-203, § 1502(b), 124 Stat. 1376, 2214 (2010).

55. Press Release, Transparency Int'l-USA, Transparency International-USA Honors Paul Volcker and GE at Integrity Awards Dinner (Dec. 9, 2010), http://www.transparency-usa.org/news/documents/2010.12.9TI-USAPressRelease-IntegrityAwardsDinner.pdf.

56. GENERAL ELECTRIC, THE SPIRIT AND THE LETTER 3 (2005), *available at* www.ge.com/files_citizenship/pdf/TheSpirit&TheLetter.pdf.

57. WEISSMANN & SMITH, *supra* note 3, at 11; *see also* Joe Palazzolo, *An FCPA Compliance Defense? No Way, Breuer Says*, WSJ BLOGS (Apr. 1, 2011, 2:11 PM), http://blogs.wsj.com/corruption-currents/2011/04/01/an-fcpa-compliance-defense-no- R

Act of 2010 allows an "adequate procedures" defense,[58] which allows companies to prove that they "maintained 'adequate procedures' to prevent associated persons from committing bribery."[59]

Not all firms oppose U.S. laws designed to limit overseas bribery. Although business firms generally resist government attempts to regulate their behavior, in some cases firms may support regulation. For example, small firms and potential entrants may support vigorous antitrust enforcement against entrenched monopolists. Firms producing potentially dangerous products may support government standards that permit the firms to overcome consumer worries and to limit their liability. Firms may support regulations that are relatively cheap for them but that raise rivals' costs.[60] In the anti-corruption area, firm owners and managers that seek to operate honestly will benefit from efforts to constrain corrupt firms. GE and other firms with strong internal compliance systems may fall into that category. Being able to refuse a bribe demand by referring to legal constraints may help a firm's bottom line if its product is so superior that a public official cannot turn to a corrupt competitor without arousing suspicion.

Nevertheless, under other conditions, firms may believe that they are losing business to corrupt competitors. This was, after all, much of the motivation for the strong U.S. government support of the OECD Anti-Bribery Convention,[61] and it is part of the debate over the rise of firms from China and other emerging economies, which lack similar constraints.[62] Despite these concerns, a new Chi-

way-breuer-says/ (reporting that "[t]he chief of the Justice Department's Criminal Division flatly rejected the need for a compliance defense in the FCPA").

58. Bribery Act, 2010, c. 23, § 7 (Eng.).

59. F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 30 (2010).

60. *See generally* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 267 (1983).

61. *See, e.g.*, Todd Swanson, Note, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law*, 35 GA. J. INT'L & COMP. L. 397, 401 (2007) ("This situation, where U.S. firms' international competitors were not subject to the same criminal sanctions for bribery, put U.S. citizens and companies in a difficult competitive position in the ever growing global economy. This situation, along with the ill effects bribery has on states, particularly in the developing world, was to be rectified by the conventions, particularly the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions . . . .").

62. *See, e.g.*, Henry (Litong) Chen & Xiaosong Zhou, *Possible Impacts of the Dodd-Frank Act on U.S. Companies Doing Business in Asia*, BLOOMBERG L. REP. ASIA PAC. L., June 6, 2011, at 18–19, *available at* http://www.mwechinalaw.com/uploads/doc/chenzhou-doddfrank.pdf ("Some host countries, despite the exis-

nese law, which took effect in May 2011, suggests that emerging economies are also taking steps to tackle corruption. The amendment to China's criminal law prohibits bribery of foreign officials and helps to satisfy China's obligations under the U.N. Convention Against Corruption.[63]

In spite of such developments, the current difficult economic climate and the Republican control of the House of Representatives have encouraged efforts to limit the reach of anti-corruption laws. Those seeking to limit the FCPA see an opening. We turn now to arguments that can blunt the force of these arguments.

II.
THE COSTS TO THE UNITED STATES OF LIMITING CORRUPTION BY U.S. FIRMS

We argue that the claimed harm to U.S. interests from existing anti-corruption law is much exaggerated. Of course, individual contracts may have been lost because of refusals to pay bribes. Alternatively, multinationals may have developed ways to work around the law by providing extra benefits that are nominally legal, such as contributions to a charity associated with a politician's family or political allies, the use of local, well-connected suppliers, or the provision of local public goods.[64] However, assuming that workarounds

tence of strict anti-bribery and -corruption laws, may not enforce their laws evenly. Therefore, a U.S. company would be made less competitive in the host country than a local company because the local company may obtain or retain business by paying bribes to officials (as well as to other bribe recipients).").

63. George J. Terwilliger III, Alistair Graham, Darryl S. Lew, Daniel Levin & Charlie Monteith, CHINA'S NEW ANTI-CORRUPTION LAW GOES INTO EFFECT MAY 1, 2011, WHITE & CASE LLP (Apr. 19, 2011), http://www.whitecase.com/alerts-04202011/.

64. For example, a 2006 survey of 350 international companies based in Brazil, Germany, France, Hong Kong, the Netherlands, the United Kingdom, and the United States commissioned by Control Risks and Simmons & Simmons found that almost "two-thirds of respondents believed that companies in their own country either 'regularly' or 'occasionally' seek to gain a business advantage through making donations to charities favored by decision-makers." CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS LLP, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION—SURVEY 2006, at 4, 13 (2006), *available at* http://www.control-risks.com/OurThinking/CRsDocumentDownload/International%20business%20attitudes%20to%20corruption%20survey_2006.pdf. Although charitable donations are not explicitly illegal under the FCPA, donations made for the "sole purpose of gaining political advantage could lead to legal hazards." JOHN BRAY, CONTROL RISKS, FACING UP TO CORRUPTION 2007: A PRACTICAL BUSINESS GUIDE 73 (2007), *available at* http://www.control-risks.com/pdf/Facing_up_to_corruption.pdf. For example, in 2004, the Schering-Plough Corporation paid a $500,000 civil penalty to the SEC for violating the FCPA accounting provisions after it recorded payments made to a charity spe-

are not always possible and that the law does, in fact, limit payoffs, we examine the law's potential consequences. We take up two concerns raised with respect to both the FCPA/OECD Convention and the Dodd-Frank/EITI initiatives.

First, in Part A we discuss coverage. How broadly does U.S. law reach? In other words, how serious is the concern that the home countries of other investors either do not enforce their own laws or are outside the international anti-corruption framework? Aspects of both the FCPA and the Dodd-Frank Act cover all firms listed on U.S. exchanges, and many major international firms list on U.S. exchanges. We look at a few specific national markets to highlight the relatively broad coverage of U.S. anti-corruption laws.

Second, in Part B we argue that, even if some U.S. businesses lose contracts abroad because of U.S. anti-corruption initiatives, the losses to the U.S. economy are less than has sometimes been claimed. There are two distinct cases: footloose firms and government contractors (Part B.1), on the one hand, and investments tied to the location of resources (Part B.2), on the other.

A firm in a footloose manufacturing sector may lose a contract in one country and then turn to another or even invest inside the United States. A firm that loses a government contract may bid on another one elsewhere in the world. The loss to the firm is then not the value of the lost contract but only the marginal loss from operating in or selling to a somewhat less profitable and less corrupt location, taking into account the benefit of not paying a bribe. Furthermore, if a firm's management condones bribery to get business, it may create a culture of illegality inside the firm that encourages the firm's own employees and suppliers to steal from it, thus reducing the benefits of overlooking payoffs. Furthermore, the loss to the U.S. economy is considerably less than the loss to the firm so long as the firm is not 100 percent U.S.-owned or so long as some firms that lose contracts abroad invest at home instead.

In contrast, investors in the petroleum industry or in the hard rock mineral sector are limited to countries where these resources are located, and many deposits are in countries that rank highly on

cializing in historic preservation as "medical donations." *Id.*; *see also* John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 148–49 (2005) (describing the SEC complaint against Schering-Plough Corporation "for violating the books and records and internal controls provisions of the FCPA" based on incorrectly recording "charitable contributions").

corruption indices.[65] Firms may have several choices, but no potential investment site may seem particularly "honest." As resources are exhausted in relatively honest countries, firms will move elsewhere. To take an example from outside the United States, as the North Sea field moves towards depletion, Statoil, the largest Norwegian oil and gas producer, is seeking investments elsewhere in less honest countries, such as Angola.[66] In the case of the U.S., the cost to the economy, not just to U.S. firms and business owners, is not the value of the lost deal so long as the resource enters into the international market where it can be purchased by U.S. customers. The firm's U.S. shareholders may suffer a marginal loss of profit, but if prices are determined internationally, the identity of the firm that obtains the contract or concession will have little impact on U.S. citizens and firms that use the resource.

A. Coverage

In considering any costs that U.S. transparency laws may impose on U.S. firms, it is important to keep in mind that the scope of U.S. anti-corruption law is broad. For example, the jurisdiction of the FCPA extends beyond U.S. companies and citizens. The anti-bribery provisions of the FCPA prohibit, in addition to U.S. companies and citizens, "foreign companies with shares listed on a U.S. stock exchange . . . or any person while in U.S. territory from: (i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business."[67] The accounting provisions of the FCPA cover SEC issuers, i.e., "publicly-held companies with shares traded on a U.S. exchange."[68] Therefore, the DOJ and the SEC may enforce penalties against both U.S. and foreign issuers; the DOJ may also enforce civil penalties under the anti-bribery provisions with respect to non-issuers covered by the

65. For example, out of 178 countries, Russia ranks 154th, the Democratic Republic of the Congo ranks 164th, Angola ranks 168th, and Iraq ranks 175th. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2010, at 3 (2010), http://www.transparency.org/content/download/55725/890310/CPI_report_ForWeb.pdf.

66. On Transparency International's corruption index, Norway ranks 10th while Angola ranks 168th. *Id.* at 2–3. Statoil has publically announced plans in Angola. Press Release, Statoil, Statoil Identified for Pre-salt Operatorships in Angola (Jan. 26, 2011), http://www.statoil.com/en/NewsAndMedia/News/2011/Pages/24Jan_Angola.aspx.

67. Koehler, *supra* note 28, at 389–90 (paraphrasing the language of FCPA, 15 U.S.C. § 78dd-1, to clarify its meaning). R

68. *Id.* at 395.

FCPA; and the DOJ may pursue action against both U.S. and non-U.S. citizens. In fact, following the 1998 amendment to the FCPA, the DOJ may prosecute non-U.S. citizens who neither reside nor do business in the United States based solely on territorial jurisdiction.[69]

Although the jurisdiction of the FCPA is expansive, traditionally the DOJ and the SEC have taken action primarily against "U.S. publicly traded companies or U.S. companies doing business abroad."[70] However, enforcement of the FCPA has increased enormously in recent years,[71] and the DOJ and the SEC are more frequently "assert[ing] jurisdiction over a foreign company based on its status as an Issuer."[72] This occurred for the first time in 2006 when the DOJ pursued criminal actions against Statoil, the Norwegian oil company, "for improper payments to Iranian officials."[73] By 2010, such actions had become more commonplace. Ten out of the twenty-three enforcement actions resolved that year were settlements with non-U.S. companies; eight of these ten settlements ranked among the largest in the history of the FCPA.[74] To date, the largest FCPA settlement was made by the German company Siemens, which paid $800 million in 2008.[75]

The FCPA provisions are also enforced against non-U.S. citizens. Ten such actions were resolved or pending in 2010.[76] Many of these cases involve actions taken against non-U.S. agents of U.S. companies.[77] The DOJ and the SEC have also pursued actions

69. Westbrook, *supra* note 28, at 553–54. R

70. Daniel Margolis & James Wheaton, *Non-U.S. Companies May Also Be Subject to the FCPA*, 1 FIN. FRAUD L. REP. 168, 168 (2009), *available at* www.pillsburylaw.com/siteFiles/Publications/961FAE6040BDB25EB4E6C63B250A3AAE.pdf.

71. "During the first twenty-eight years that the FCPA was in force, the SEC and the DOJ typically initiated just two or three cases a year. . . . Fines, when assessed, seldom exceeded $1,000,000. . . . [Now] the SEC and DOJ are bringing ten times as many cases as in prior years. There are estimated to be a record 140 open FCPA investigations. Fines are also increasing dramatically." Westbrook, *supra* note 28, at 495–96 (internal footnotes and citations omitted). R

72. Margolis & Wheaton, *supra* note 70, at 170. R

73. Westbrook, *supra* note 28, at 551–52. R

74. *See 2010 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 3, 2011, 7:02 AM), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html.

75. *See id.*; *Japan's JGC Makes Top Ten*, THE FCPA BLOG (Apr. 7, 2011, 6:38 AM), http://www.fcpablog.com/blog/2011/4/7/japans-jgc-makes-top-ten.html.

76. *See 2010 FCPA Enforcement Index*, *supra* note 74. R

77. For example, in 2009 the DOJ took action against Ousama Naaman, a Canadian citizen, because he was considered to have been acting "'on behalf of a publicly traded U.S. chemical company and its subsidiary.'" Westbrook, *supra* note 28, at 552 (quoting Press Release, U.S. Dep't of Justice, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Pro- R

against non-U.S. individuals based on broader claims of jurisdiction. For example, in the BAE investigation, "the DOJ asserted jurisdiction based on the suspicion that the bribes had been routed through U.S. banks."[78]

Active enforcement of the FCPA is expected to continue. A generous provision rewarding whistleblowers was included in the Dodd-Frank Act,[79] with final rules issued by the SEC on May 25, 2011.[80] The final rules state that a whistleblower who provides "original information" leading to "a monetary sanction in excess of $1,000,000" will receive "10 to 30 percent of the total monetary sanctions collected in those proceedings."[81] For example, in 2010, an employee of GlaxoSmithKline received $96 million as a reward for reporting FCPA violations at one of the company's facilities in Puerto Rico.[82] It is claimed that the SEC has received at least one FCPA tip a day following the enactment of section 922.[83]

Furthermore, other American statutory provisions that deal with corruption have a broad reach. For example, section 1504 of the Dodd-Frank Act, titled "Disclosure of Payments by Resource Extraction Issuers," imposes new financial disclosure requirements on all resource extraction companies listed on a U.S. stock exchange.[84] It requires such resource extraction issuers to disclose: "(i) the type and total amount of . . . payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government."[85] This statutory provision is unprecedented in requiring such disclosure at the project-

gram (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-757.html).

78. *Id.* at 552–53.

79. Dodd-Frank Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010).

80. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,384 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249), *available at* http://www.sec.gov/rules/final2011/34-64545.pdf.

81. *Id.* at 34,328.

82. Richard Levick, *A Whole New Ballgame: Dodd-Frank's Whistleblower Provisions*, THE COMMUNICATORS BLOG (Nov. 2, 2010 1:53 PM), http://blogs.forbes.com/richardlevick/page/10/.

83. Westbrook, *supra* note 28, at 525. R

84. Dodd-Frank Act § 1504, 124 Stat. at 2220 (defining a "resource extraction issuer" as an issuer that "(i) is required to file an annual report with the SEC, and (ii) engages in the commercial development of oil, natural gas, or minerals" (internal quotation marks omitted)).

85. Dodd-Frank Act § 1504, 124 Stat. at 2221.

level, as opposed to data aggregated at the country- or continent-level.[86]

The American Petroleum Institute claims that such disclosures will render U.S. companies less competitive vis-à-vis their non-SEC-registered peers. However, to take one example, a preliminary analysis of the impact of the new financial disclosures required by section 1504 on oil companies operating in Angola suggests that these concerns are overstated, at least in that country.[87] Angola is a representative oil market because of its reputation for corruption,[88] its importance as a supplier of oil to the United States,[89] and its efforts to promote new oil exploration in which foreign oil companies are invited to participate.[90] Currently, Sonangol, the Angolan national oil company, and foreign oil companies BP (U.K.), Chevron (U.S.), Eni (Italy), ExxonMobil (U.S.), Statoil (Norway), and Total (France) dominate upstream exploration and production activities in Angola.[91] All of the foreign companies, including Statoil, are registered with the SEC and will be subject to the disclosure requirements of section 1504.[92] Sonangol is a non-issuer, but as the state oil company and sole concessionaire with a stake in all upstream

86. EITI, for example, requires "regular publication of all material oil, gas and mining payments by companies to governments," i.e., country-level disclosures. *The EITI Principles and Criteria*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org/eiti/principles (last visited Sept. 30, 2011).

87. *See* Sinéad Hunt, *Refining Black Gold: The Dodd-Frank Act and Corruption in the Oil Industry*, 16 UCLA J. INT'L L. & FOREIGN AFF. (forthcoming 2011) (manuscript at 27, 31).

88. Angola was ranked 168th out of 178 countries in Transparency International's 2010 Corruption Perception Index. TRANSPARENCY INT'L, *supra* note 65, at 3. R

89. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: ANGOLA 2 (2010), *available at* http://www.eia.gov/EMEU/cabs/Angola/pdf.pdf.

90. *See, e.g.*, Wendell Roelf, *Angola Sees Next Offshore Bid Round in 2011*, REUTERS, Sept. 3, 2010, *available at* http://af.reuters.com/article/investingNews/idAFJOE6820BP20100903.

91. *See* U.S. ENERGY INFO. ADMIN., *supra* note 89, at 3–5. R

92. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–21 (2010). Section 1504 covers specifically "a subsidiary of the resource extraction issuer." *Id.* Moreover, all of these companies perform their upstream activities in Angola through subsidiaries of which the parent company has 100% ownership. Eni SpA, Annual Report (Form 20-F), at E-9 (Apr. 7, 2011); Statoil ASA, Annual Report (Form 20-F) 89 (Mar. 25, 2011); BP p.l.c., Annual Report (Form 20-F) 220 (Mar. 2, 2011); Exxon Mobil Corp., Annual Report (Form 10-K) Ex. 21 (Feb. 25, 2011); Chevron Corp., Annual Report (Form 10-K), at E-4 to -5 (Feb. 24, 2011); CHEVRON, ANGOLA FACT SHEET 4 (2011) (noting Cabinda, Chevron's wholly owned subsidiary, operates in Angola).

activities it will not gain a greater market share due to section 1504—it is already the key actor in the Angolan oil sector.[93]

The comparative advantage that U.S. oil companies and other SEC-registrants enjoy in terms of expertise and experience in the new frontiers of oil exploration will likely mitigate any disadvantages that section 1504 imposes. Angola is not unique in this respect. As global oil reserves decrease, oil exploration will be pushed to new limits, and the same factors that mitigate the potentially disadvantageous effects of section 1504 can be expected to hold true in other oil markets. As oil exploration continues into riskier environments, technological capacity will remain a critical factor for winning bids.

The general organization of this sector, i.e., national companies dominant within their own boundaries and SEC-registered companies holding the majority of the remaining market share, appears to be prevalent in other extractive industries. In the gas sector, for example, major gas-producing countries, such as Algeria, Indonesia, and Qatar, are structured in this way.[94] In other cases, such as Russia and China, a national gas company dominates without significant international presence.[95] But there is only one prominent case in which foreign state-owned gas companies, in addition to the host country national gas company, dominate the gas sector. This is the case in Iran, but this situation is due primarily to Iran's unfavorable investment climate, which led to voluntary divestments by major international gas companies. This opened up

93. While the main oil companies operating currently in Angola, apart from Sonangol, are equally subject to the new disclosure requirements, it is feasible that they may become less competitive with respect to non-SEC registrants. In a 2011 bidding round for new licenses, however, the government selected seven companies, all SEC-registrants, to operate new deepwater blocks. *See Angola Takes Pre-salt Plunge*, PETROLEUM ECONOMIST, Mar. 2011, at 37. The more important factor in granting these new licenses appears to be the extensive experience and technological capacity of these companies that is critical for exploration in more challenging environments. *See id.*

94. For Algeria, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: ALGERIA 4–5 (2009), http://www.eia.gov/EMEU/cabs/Algeria/pdf.pdf. For Indonesia, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: INDONESIA 3–4 (2011), http://www.eia.gov/EMEU/cabs/Indonesia/pdf.pdf. For Qatar, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: QATAR 5 (2011), http://www.eia.gov/EMEU/cabs/Qatar/pdf.pdf.

95. For China, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: CHINA 12 (2011), http://www.eia.gov/EMEU/cabs/China/pdf.pdf. For Russia, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: RUSSIA 7 (2011), http://www.eia.gov/EMEU/cabs/Russia/pdf.pdf.

the market for foreign companies with large government stakes, such as Russia's Gazprom.[96]

More generally, within the extractive industries that are prone to corruption,[97] a high proportion of multinational firms list on the U.S. exchanges or have agreed voluntarily to provide most of the information required by the new U.S. statute.[98] It seems unlikely that firms will withdraw from the U.S. exchanges to avoid the reports required under the statute. Such actions are especially unlikely if withdrawals are publicized by watchdog groups and raise suspicion that the firms are engaged in corrupt dealings. Because most such firms are located in countries that have ratified the OECD Anti-Bribery Convention and/or the U.N. Convention Against Corruption, withdrawing from the U.S. stock market would be unattractive if it sends a signal to home country or host country prosecutors to look closely at the firm's international business dealings.

Additionally, United Nations Conference on Trade and Development statistics for foreign direct investment (FDI) document that the bulk of FDI flows are between countries that are party to the OECD Anti-Bribery Convention.[99] Transparency International

96. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: IRAN 8 (2011), http://www.eia.gov/EMEU/cabs/Iran/pdf.pdf.

97. According to the Transparency International Bribe Payers Index, the five most corrupt industries in the world are (1) public works contracts and construction, (2) real estate and property development, (3) oil and gas, (4) heavy manufacturing, and (5) mining. TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2008, at 11 (2008), http://www.transparency.org/content/download/39275/622457.

98. *Questions and Answers: Extractive Industry Payment Disclosure Provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, PUBLISH WHAT YOU PAY, http://www.pwypusa.org/sites/default/files/Q%20%26%20A%20on%20Disclosure%20Provision%20in%20Dodd-Frank%20WSR%20%26%20CPA.pdf (last visited Sept. 30, 2011) ("The provision covers 90% of the major internationally operating oil and gas companies."). In addition, some major oil companies like Rosneft (Russia) also file reports with the SEC voluntarily. *See* Isakower & Mulva, *supra* note 9, Attach. B. R

99. In 2008, the top ten countries in terms of inward FDI stock were: (1) United States, (2) China, (3) United Kingdom, (4) France, (5) Belgium, (6) Germany, (7) Netherlands, (8) Spain, (9) Switzerland, (10) Canada. *See* U.N. Conference on Trade & Dev., *World Investment Report Annex Table 3*, U.N. CONFERENCE ON TRADE & DEV. (July 26, 2011), http://www.unctad.org/sections/dite_dir/docs/WIR11_web%20tab%203.pdf (listing FDI inward stock, by region and economy, from 1990 to 2010). In 2008, the top ten countries in terms of outward FDI stock were: (1) United States, (2) United Kingdom, (3) Germany, (4) France, (5) China, (6) Netherlands, (7) Switzerland, (8) Japan, (9) Belgium, (10) Spain. *See* U.N. Conference on Trade & Dev., *World Investment Report 2011*, Annex tbl.4 (July 26, 2011), http://www.unctad.org/sections/dite_dir/docs/WIR11_web%20tab%204.pdf. The only country among these top ten that is not party to the OECD Conven-

monitors enforcement of the OECD Convention among member countries, and its latest report indicates that the main countries that supply FDI are already enforcing anti-corruption laws, though some less well than others.[100] Moreover, one of the main sectors with a high volume of trade between OECD and non-OECD countries, the extractive industries, is targeted directly by section 1504 of the Dodd-Frank Act.

Therefore, U.S. anti-corruption laws are unlikely to impose significantly higher costs on U.S. companies compared with their competitors because many international companies and individuals fall within the jurisdiction of the FCPA. In addition, many of the largest countries in terms of FDI are already enforcing anti-corruption laws. Concerns about U.S. companies becoming less competitive vis-à-vis multinational firms based in emerging economies are more compelling, but ultimately not wholly convincing. China, a major source of both outward and inward FDI, is not party to the OECD Convention, and many Chinese state-owned companies operating abroad are not subject to U.S. anti-corruption laws because they are non-issuers. However, as emerging economies like China begin to participate more strongly in international markets, they may seek to maintain high standards of transparency to attract foreign capital. This will help to limit corruption as these new and powerful actors enter the international marketplace. The United States is still the dominant actor in global international trade, and it can help to establish an international marketplace with strong standards against corruption. Weakening U.S. anti-corruption laws, such as by constraining the scope of the FCPA or section 1504 of the Dodd-Frank Act, may set the opposite trend in motion. China's new and unprecedented anti-corruption law will cover companies otherwise not covered by prevailing anti-corruption instruments. To help make such laws meaningful, prosecutors in emerging economies need to be able to reference prevailing norms in the international marketplace, norms that can be credible only if the United States plays a key role.

tion is China, which is a party to the U.N. Convention Against Corruption. U.N. Convention Against Corruption, *supra* note 12, 2349 U.N.T.S. at 342. R

100. Transparency International classifies Germany, Switzerland, the United Kingdom, and the United States as active enforcers; Belgium, France, Japan, the Netherlands, and Spain as moderate enforcers; and Canada as a country with little to no enforcement. Transparency Int'l, Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention 5 (2011), http://www.transparency.org/content/download/61106/978536.

B. Harm to United States Interests

Even though the coverage of U.S. anti-corruption law is broad, it will not extend to all firms or to all international contracts. Thus, U.S. firms may be correct when they claim that they suffer harm from American efforts to limit corruption in international business. However, the harm to U.S. firms has been exaggerated by the way the issue is framed, and, more importantly, U.S. policymakers need to distinguish between costs suffered by multinational firms headquartered in the United States and harms imposed on U.S. citizens and to the U.S. national interest.

1. Costs for Footloose Firms and Government Contractors

We begin with two related cases. The first is a firm (called a footloose firm) that can locate in many different jurisdictions depending upon labor conditions and transport costs, as well as the level of corruption. The second is a firm that seeks government contracts, for example, to provide infrastructure, to build and operate public utilities, or to provide defense equipment and support. The debate in the United States has focused on the claim that these types of U.S. firms may lose business if the FCPA is vigorously enforced.

Our central point in this section is that if a U.S. firm loses a contract or a business opportunity in one country, the cost to that firm is not the gross value of the contract or the profits that the firm would have earned on that contract or business deal. Rather, it is the difference in profits between those that would have been earned on the corrupt deal and those earned on the honestly obtained contracts and business deals that the firm takes on instead. Of course, firms are not limited to a fixed number of contracts or deals, but if we assume, realistically, that each contract or deal imposes costs, then managers will make judgments about which contracts are worth bidding on and which investment projects are worth pursuing. If they withdraw from countries where bribes are routine, they will shift business on the margin to more honest jurisdictions, including, perhaps, the United States itself.

Of course, U.S. firms might have invested in relatively clean countries even if paying bribes abroad were not illegal. A firm may choose to avoid corrupt jurisdictions as the result of a purely self-interested calculation. It may earn more profits in an honest country. However, one can assume that this will not always be the case. Some firms have enough bargaining power vis-à-vis host governments so that their bribe payments permit them to earn superior

profits. They may be able both to prevent competitors from investing and also to gain favorable tax and regulatory treatment. Then the FCPA can constrain a firm's choices. A firm faces a restrictive range of investment options, even if that law induces some formerly corrupt jurisdictions to shift to bribe-free deals. Because certain countries are off-limits, the firm may have a somewhat reduced level of bargaining power versus host countries that hold themselves out as honest. However, the impact is not likely to be very large. Consider both government contracts and private business deals.

For government contracts, suppose that all firms have upward sloping marginal cost curves and operate in oligopolistic markets where excess profits are routine. These are plausible assumptions that make the problem interesting while keeping the analysis fairly simple. The first assumption implies that several firms would likely divide the business in an efficient global market. If marginal costs were constant or falling, the firm with the lowest marginal costs at the point where supply equals demand could most efficiently supply the entire market. Corruption could still occur, but it would be relatively easy to detect if the firm that is the low cost supplier loses a contract.[101] The second assumption means that there are excess profits available to be divided between firms and officials, with bribes reducing the firms' profits. We assume the existence of excess profits here, but, of course, they may be created through collaboration between firms and the officials who determine procurement specifications.

Firms seek contracts in both corrupt and honest countries. To keep things simple, suppose that countries fit easily into one or the other category with no gray areas—a country is either corrupt or honest. Firms tailor their behavior to the nature of the host country. Because bribes are not a part of the firms' underlying production cost, we need to consider how they might be determined.

Suppose that all countries want to sign exactly one contract for the same type and scale of infrastructure, for example, a road of a particular type and length over similar terrain. Suppose that all firms are equally able to complete the contract to a high standard and that fixed and marginal costs are equivalent for all firms. Then, with several firms competing for a contract, a corrupt official can demand a bribe just high enough to keep at least one firm in the market. If there were only one contract on offer in the world, all

101. Of course, in practice, the market is divided between suppliers in other ways as countries demand tailor-made goods, sometimes to favor a corrupt supplier. The basic argument in the text can be extended to cover that case.

the excess profits would flow to the corrupt official in the form of a bribe. In contrast, in an honest competition between firms, excess profits are competed away, and all the excess benefits flow to the state.[102] Now suppose that there are alternative locations to seek contracts. Firms have no absolute capacity constraints, but as they add more contracts, marginal costs rise. Thus, in an honest market, the business will be spread among the firms in a way that equalizes their marginal costs.

To fix these ideas, consider an industry marginal cost curve that sums those of the individual firms. It too is obviously upward sloping overall. Suppose that there are four countries and that each state demands, at most, one contract. Then, consider the level of marginal cost that corresponds to a world where each country signs one contract. Assume that at that level of marginal cost, no country drops out if it pays the total cost of the project (including the fixed cost). How will the contracts be allocated?

Suppose there are two firms, firms 1 and 2. Then, because the firms have identical increasing marginal cost curves, two contracts will be awarded to each firm in an honest competitive market where firms compete to supply the good. Now suppose that two states have corrupt officials who demand bribes, and that firm 1 is a U.S. firm subject to the FCPA and not willing to break U.S. law. Firm 2 is from a country that is not a party to the OECD Anti-Bribery Convention, and it is willing to pay bribes. Then, if the same four contracts are on offer, firm 2 signs two contracts with the corrupt states, and firm 1 signs with the honest states. Firm 2 shares some of the rents from the contracts with the corrupt officials. This might be done by increasing the nominal contract price, a strategy that can work because firm 1 will not make a counter offer because it knows that corruption is the cost of participation. The ultimate price in the corrupt countries and the division of the rents between firm profits and bribes would depend upon whether information about honest contract terms constrains corrupt firms and officials. Firm 1 has "lost" the two contracts in the corrupt countries, but even in an honest world it would never have signed more than two contracts because its marginal costs increase as the size of its business increases. It has exactly the same number of contracts as in an honest world. The price is indeterminate but is bounded by the cost to firm 2, the corrupt firm, of supplying the needs of an honest state, given that it is already supplying the corrupt states. If the corrupt

102. For a detailed treatment and analysis of the dynamics of corruption, see SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 111–20 (1978).

firm has lost its credibility with the honest state, however, this gives the honest firm more bargaining power because dealing with firm 2 is not an option for honest country officials.

Hence, corruption in part of the market may simply rearrange who is dealing with whom. The corrupt firm may be earning more profits than the honest firm, but the honest firm has not lost any business. The extra profits for the corrupt firm, if any, are pure rents or excess profits.[103]

Now suppose that the honest firm is more efficient than the corrupt firm so that in an honest world it would obtain three of the four contracts before its marginal cost exceeds that of firm 2. In that case, corruption in half of the market would lead the efficient, honest firm to lose business. However, we should not exaggerate the loss. It has lost one contract, not two. The key variable is the ratio between the number of corrupt contracts (obtained by the corrupt firms) and the number of contracts the honest firm would obtain in an honest world. In the first example, the ratio is one, implying no loss in contracts for the honest firm. In the second example, it is 2/3, implying a loss of 1/3 of its contracts. In our simple model, the maximum number of contracts firm 1 could earn in an honest world is four, if it were very much more efficient than firm 2 and if diseconomies of scale are small. In that case, the ratio is 2/4, or 1/2. Firm 1 loses half of its contracts, but the conditions for such a result seem quite extreme. This model is very simple, but it serves to illustrate the point that the loss to an honest firm that is also efficient will not generally equal the market share of corrupt states. There will simply be some rearranging of the contractual landscape reflecting firms' relative willingness to bribe.

Bribes are a cost to the firms that pay them, but they may be profit maximizing. Bribery in part of the market may even help increase contract prices in honest states by reducing market competition. The corrupt officials want to extract as much of the contract rent as possible, but their bargaining power is limited by the existence of other states. The market will become segmented in the sense that corrupt countries have fewer firms to choose from, while honest countries can do business with anyone, so long as they can prevent corrupt firms from undermining the honesty of their officials. Under the assumptions of our simple case, honest countries

103. Presumably if the corrupt firm earned less money in corrupt countries than in honest ones, it would bid on the honest contracts as well. This would leave the corrupt countries with no contracts. If that happened, one can assume that corrupt officials would modify their demands to be sure that they are not shut out of the market.

will always sign contracts with firm 1, the honest firm, because the marginal cost to that firm of signing these contracts is below the corresponding marginal cost for firm 2 that has already locked in two corrupt contracts.

Major simplifications in the above model are the fixed number and size of contracts demanded by host countries. Suppose, instead, that each country can decide the scale of the project it wants to obtain. Assume that there are project-level economies so that each country will select only one firm to carry out its project. Bribery has an ambiguous impact on scale. On the one hand, it will generally increase the overall cost of the project as the firm incorporates the bribery cost into the price. This may lead the state to reduce the scale of the project compared to an honest world. Bribery acts like a tax that increases the per unit price.[104] On the other hand, corruption at the very top in a kleptocratic system may lead to excessive public spending as the ruler and his cronies try to maximize their bribery revenues at the expense of their own population.[105]

In the former case where project scale falls, the loss to an honest, efficient firm is less than when contract sizes are fixed. It does not obtain corrupt contracts, but these are smaller than honest contracts, and the honest firm faces less aggressive competition for honest business. In the latter case where project scale increases, the corrupt firm and a country's leaders collude to maximize their rents. The honest firm obtains the same benefits as above, but the divergence between the profits of honest and corrupt firms may be larger because project scales are larger. However, the corrupt firm's gains may be squeezed out as the country's rulers extort higher payoffs over time. Contracts may be large in scale, but they may not provide many profits. At the same time, the firm may also lose a reputation for probity and may find it hard to compete honestly in other venues. It can be caught in a trap where contractual relationships that look lucrative at first deteriorate over time. It is also, of

104. *See* Eric Friedman, Simon Johnson, Daniel Kaufmann & Pablo Zoido-Lobaton, *Dodging the Grabbing Hand: The Determinants of Unofficial Activity in 69 Countries*, 76 J. PUB. ECON. 459, 481 (2000) (using cross-country data to show that greater corruption correlates with smaller government size and lesser official economic activity).

105. There is evidence that fully kleptocratic states overspend on at least some aspects of government. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 115–16, 119 (1999); Jacqueline Coolidge & Susan Rose-Ackerman, *Kleptocracy and Reform in African Regimes: Theory and Cases*, *in* CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 1999) (providing African case studies).

course, at risk of regime change that undermines the value of lucrative corrupt relationships.[106]

A similar analysis can be carried out for investment deals where the foreign firm seeks permission to open a manufacturing or sales facility and needs government approval. Again, start with equally efficient firms, but assume that approvals are granted to any firm that fulfills certain qualifications. The state does not impose a fixed limit on entry; market pressures take care of the volume of business. Then, so long as honestly administered registration programs are not characterized by stifling red tape, firms are distributed as the market dictates. Corruption then skews firm locations so corrupt firms locate in corrupt jurisdictions, but the existence of honest jurisdictions limits the bargaining power of corrupt officials. The resulting location patterns may impose some costs on honest firms as they give up certain markets and accept longer transport routes for export goods. However, the costs to these firms are just the *marginal* profits lost from locating in a somewhat less profitable venue, not the total profits they could have earned in the corrupt location. One should only consider the difference between profits at the alternative locations.

If honest registration systems are riddled with red tape and delay that corruption can cut through, then the costs will be higher for honest firms, but they still must be measured in terms of opportunity costs, not the profits earned by the corrupt. Furthermore, entrenched corruption can itself lead to heightened red tape as corrupt officials create more and more problems in their efforts to extract bribes.[107] Once again, the investor may be stuck in a vicious spiral of bribery, extortion, and escalating bureaucratic demand that can lead to worse results than a clear stand against payoffs.[108]

Of course, in both cases the impact of corrupt systems depends upon the existence of honest alternatives. Honest firms have op-

106. For examples from Tunisia and Egypt, see Issandr El Amrani, *Probes Spread Alarm in Egypt's Businesses*, FIN. TIMES, Apr. 20, 2011, http://www.ft.com/intl/cms/s/0/ee4fa8ec-6b75-11e0-a53e-00144feab49a.html#axzz1Zj0o5uvY. *See also* Bill Waite & Martin Stone, *Regime Change in Tunisia, Egypt and Libya: A Stimulus for the Prosecutorial Authorities*, RISK ADVISORY GROUP (Feb. 24, 2011), http://www.riskadvisory.net/analysis/story/regime-change-in-tunisia-egypt-and-libya-a-stimulus-for-the-prosecutorial-a (explaining why regime change stimulates anti-corruption activity and describing the situation in Egypt and Tunisia).

107. ROSE-ACKERMAN, *supra* note 105, at 16–17, 34–35. R

108. For example, corruption may have detrimental effects on privatization. *See* ROSE-ACKERMAN, *supra* note 105, at 38. For a more detailed treatment of corruption in regulatory programs and competitive bureaucracies, see ROSE-ACKERMAN, *supra* note 102, at 137–66. R R

tions that give them bargaining power to resist corruption and to exit to an alternative location. However, outside options do not always exist. In the next section, we consider cases where exit is not possible, unless one simply exits the business entirely.

2. Extractive Industries

The extraction of petroleum and hard rock minerals is particularly subject to corruption.[109] Much development depends upon joint ventures or concession agreements with host governments or state-owned firms. Firms must sign long-term contracts to justify their investments, and revenue from these investments is a significant source of income for host countries. The main feature that distinguishes this sector from government procurement and from investments in footloose industries is the fixed and limited location of the raw materials. Investors are forced to deal with certain governments if the firms are to remain in the industry. This fact gives government officials considerable bargaining power that can be used for illicit gain. However, if U.S. firms refuse to deal with corrupt governments, the impact on the U.S. economy is likely to be small. The officials will turn to other less scrupulous firms, and corrupt kickbacks will harm the citizens of mineral-rich countries who share little in the gains. These citizens bear most of the losses. So long as the resources enter the global marketplace, corruption will have little impact on the world economy beyond a possible increase in price if kickbacks increase the costs of exploring for and developing these resources.

The serious harm imposed on citizens of resource-rich countries has led to specialized civil society efforts such as the Extractive Industries Transparency Initiative that seeks to encourage firms and states to reveal payments made in connection with contracts and concessions, and to a section of the Dodd-Frank Act that codified a version of this initiative into U.S. law. Firms that refrain from bribery or that simply agree to report payments complain that their behavior will cost them lucrative deals. Even though the coverage of these anti-corruption and transparency initiatives includes all firms listed on the U.S. exchanges, some U.S.-based firms may lose contracts to those not subject to U.S. law.

However, the harm to the interests of the United States is not the net profits of the lost deals. Like all primary products, minerals enter into international commerce and their prices depend upon

109. *See, e.g.*, TRANSPARENCY INT'L, *supra* note 97 (ranking oil and gas as the third most corrupt sector and mining as the fifth most corrupt sector). R

the operation of the global market, not the home countries of the firms that extract the minerals or drill for the oil and gas.[110] It seems unlikely that the name of the firm that signs a deal with a corrupt government will affect the global price and distribution system in any of these markets. If corruption is very widespread, it may act like a tax on the resource that raises global prices somewhat, but by less than the total bribery bill. If that happens, the bribes paid by some will benefit honest firms from the United States and elsewhere, which can sell their product at higher prices. Assuming that the world market for the resource is competitive, the world price is determined by the marginal cost of extraction at the point where supply equals demand.

In contrast, if corrupt states produce resources that are relatively cheap to extract, bribery will not affect the quantity of output. Hence, the world price will be unaffected. For example, if kickbacks are common for oil concessions in the Gulf States where production costs are very low, they will not affect the global price. The result will be higher gains for corrupt top officials compared to the owners of multinational firms.

In the case of the oil industry, of course, a group of producers, the Organization of Petroleum Exporting Countries (OPEC), does influence world prices and quantities. The existence of OPEC is an additional reason why corruption in a subset of countries is unlikely to have much effect on the price of petroleum in the United States.

Hence, if world prices are not affected, the cost of a lost contract to U.S. interests is only the marginal cost to the firm from investing elsewhere, if that is possible, or reducing operations, if not, multiplied by the share of profits that flow to U.S. investors. Very few U.S. jobs will be lost, and there may even be some job gains if the industry turns to U.S. sources or seeks synthetic or natural substitutes in the United States. The basic point is that the products of extractive industries are of no value if they are not eventually exploited, so it does not matter much to the U.S. economy overall which firm exploits the resource. If corruption is very widespread or is concentrated in states with high cost marginal producers, world prices might be higher when corrupt deals exist, but market pressures from substitutes are likely to limit that effect. Of course, the cost to the corrupt host country's citizens can be severe, and we discuss that below. Our point is simply that even if U.S. policymak-

110. *See* Angus Deaton & Ronald Miller, *International Commodity Prices, Macroeconomic Performance, and Politics in Sub-Saharan Africa*, 79 PRINCETON STUDIES IN INT'L FIN. 1 (1995), *available at* http://www.princeton.edu/~deaton/downloads/International_Commodity_Prices.pdf.

ers ignore these broader public interest concerns, the net costs to U.S. economic interests are much less than the rhetoric coming from critics of a strong U.S. policy would have us believe.[111]

III.
BENEFITS

So far, we have argued that the claimed costs to American business from limiting corruption in international business deals are often exaggerated. We now turn to consider the countervailing benefits. Three types of potential benefits are most important.

First, in some situations U.S. firms will find it profit maximizing to oppose payoffs and to monitor the behavior of their managers and sub-contractors even without outside enforcement or pressure. A firm with low costs or high quality may gain leverage with its buyers or suppliers by taking a strong stand against corruption. Then individual profit-maximization and the avoidance of corruption go together. This optimistic scenario does describe certain situations, but it is unlikely to be widespread enough to eliminate the need for action at the national and international levels to discourage payoffs in international business.

Second, corruption is costly to host countries, and these costs can harm U.S. interests broadly understood.[112] Firms pay bribes to get favored treatment on contracts, concessions, and privatization deals.[113] Managers justify their behavior as a means to create economic value and as a necessary, if unpleasant, response to the weakness and venality of governments. However, high-level corruption is very harmful in the countries where it is pervasive, especially for the

111. *See, e.g.*, WEISSMANN & SMITH, *supra* note 3, at 5–6 ("The current FCPA enforcement environment has been costly to business. . . . There is also reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure."). R

112. *See generally* ROSE-ACKERMAN, *supra* note 105, at 18–23, 35–38 (describing generally corrupt payments made to avoid regulation and lower taxes). The evidence is summarized and relevant literature cited in Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 303–10 (Bjørn Lomborg ed., 2004). For a useful aggregation of cross-country data, see Daniel Kaufman, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators, 1996-2006* (World Bank, Working Paper No. 4280, 2007). *See also* Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *Why Is Rent Seeking So Costly to Growth?*, 83 AM. ECON. REV. PAPERS & PROC. 409, 412–13 (1993) (demonstrating that corruption and other measures of poor governance harm growth and reduce income levels). Of course, there may be a vicious cycle where corruption retards growth, and low growth and income levels fuel corruption. R

113. *See generally* ROSE-ACKERMAN, *supra* note 105, at 27–38 (describing the abundant corruption opportunities associated with privatization). R

poor.[114] Corruption can introduce inefficiencies that reduce competitiveness.[115] It may limit the number of bidders, favor those with inside connections, limit the information available to participants, and introduce added bargaining costs. Corrupt officials may favor an inefficient level, composition, and time path of investment. Government produces too many of the wrong kinds of projects. It overspends even on projects that are fundamentally sound and receives too little from privatizations and the award of concessions. Buyers that obtain privatized firms through bribery often gain monopolies that undermine the efficiency benefits of private ownership.[116] If corruption distorts the business environment and retards growth, then corruption in government contracts and concessions can slow down economic growth and limit the future opportunities for investment and trade that would arise from better economic conditions.[117] It can also harm U.S. firms in other industries that might have been able to take advantage of some of those business opportunities. Thus, industries, including those based in the United States, that benefit from strong private sectors in emerging economies worldwide ought to support efforts to limit corruption that can distort and slow host country growth.

A myopic, inward-looking United States might ignore these costs of corruption, but if we take a broader, more long-term view of our role in the world and of the value of preventing unrest, limiting corruption globally can have important benefits. Anti-corruption policies will, of course, have to extend beyond efforts to deter U.S. firms from paying bribes, but a reduction in payoffs from U.S.

114. *See generally* Sanjeev Gupta, Hamid Davoodi & Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, 3 ECON. GOVERNANCE 23, 40 (2002) (arguing that high levels of corruption increase income inequality and poverty).

115. *See, e.g.*, Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 8 (2000) (analyzing corruption as a tax on investors).

116. *See generally* ROSE-ACKERMAN, *supra* note 105, at 35–38, 42–44 (explaining how privatizations in certain contexts may be corrupt transactions that ultimately defeat the efficiency rationale for privatization). R

117. *See* Toke S. Aidt, *Corruption and Sustainable Development*, *in* 2 INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 3, 37, 40 (Susan Rose-Ackerman & Tina Søreide, eds., forthcoming 2011); Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 OXFORD REV. ECON. POL'Y 271, 285–88 (2009); Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1327–28 (1997). Aidt argues that even if corruption may seem to further growth in the short run, it is likely the result of too much investment for short-run corrupt gain that is not sustainable in the long run and can harm environmental and other values.

firms is a necessary if not a sufficient condition. If the United States sets a strong example, other countries can be encouraged to follow.

Third, market actors benefit from the overall integrity of the international marketplace. Even if an individual corrupt deal is profit-making, pervasive corruption undermines the legitimacy of the international marketplace and raises the risks of doing business. Widespread unscrupulous behavior can erode public confidence in the market and seriously affect the performance of honest entrepreneurs. Hence, firms ought to support international anti-corruption efforts when the global situation is a "coordination game." Although bribe payments may be profit-maximizing in the existing business context, if corruption could be limited, all firms would benefit and none would have an incentive to defect. In contrast, the strategic situation among competitors may resemble a "prisoner's dilemma" where voluntary agreements to refrain from corruption will be unstable. Each firm has an incentive to defect. Even if one argues that firms have an obligation to act consistently with the efficient functioning of the market, they are caught in a prisoner's dilemma, and global initiatives are needed to keep firms from acting unilaterally.[118] Once again, the role of U.S.-based multinationals as leaders in international trade and investment can help set a standard for multinationals generally.

Hence, although no one has put a solid dollar number on either the costs or the benefits of the U.S. policy against corruption in international business, the net benefits, understood broadly, appear substantial. The benefits are not just gains in the efficiency and fairness of the international marketplace, but also increased pressures on corrupt states and large firms to move in a more honest direction.

CONCLUSIONS

On balance, an aggressive and clearly articulated position against international corruption is in the U.S. national interest. Critics of the current law have exaggerated the costs and underappreciated the benefits. Given the apparent scale of the problem of corruption in international business dealings and the harm caused by seeming to pull back, recent efforts to weaken the law are unwarranted.

118. This paragraph summarizes the arguments in Susan Rose-Ackerman, *"Grand" Corruption and the Ethics of Global Business*, 26 J. BANKING & FIN. 1889, 1904–07 (2002).

The U.S. Congress should resist supporting the Chamber of Commerce's entire wish list of amendments to the FCPA. Although some respond to valid concerns, most would weaken the law. At the top of the Chamber's list is allowing a company to raise a compliance defense, similar to that included in the new U.K. Bribery Act.[119] Other desired amendments include clarifying and narrowing the definition of a "foreign official," particularly with respect to state-owned companies; imposing a "willfulness" requirement for criminal liability; and limiting a company's liability for both the previous actions of an acquired company as well as for the actions taken by subsidiaries.[120] The Chamber does have a valid point when it observes that few cases are resolved by judicial opinions because the incentive to settle is so strong. This means that courts have not defined vague terms. Perhaps the DOJ and the SEC should carry out rulemakings to fix definitions more clearly. However, it does not follow from these complaints that the government's response should be to weaken the legal standards.

The Chamber argues that its suggested amendments will contribute to American economic recovery.[121] As we noted above, the Chamber's argument is based on the growing importance of international trade,[122] surely an odd reason to be *less* concerned with corruption unless one is completely indifferent to the costs imposed on people in corrupt countries and to the harm to the reputations of the United States and its multinational firms. The Chamber claims that the FCPA forces many companies to change how and where they are doing business. For example, the Chamber argues that "[t]he uncertainty about how much due diligence is sufficient, coupled with the threat of successor liability even if thorough due diligence is undertaken, have in recent years had a significant chilling effect on mergers and acquisitions,"[123] and it

119. Lisa A. Rickard, *The Ambiguous FCPA: In Need of Updates and Clarifications*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 5, 2011), http://www.instituteforlegalreform.com/component/ilr_president_corner/66/article/74.html.

120. *Id.*

121. The Chamber claims that its proposals "will help grow jobs during a time when millions of U.S. citizens are looking for one." Kim, *supra* note 6. R

122. *Id.*

123. WEISSMANN & SMITH, *supra* note 3, at 15. *See also The Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) (written testimony of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP), *available at* http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf ("[T]he FCPA, as it is currently written and enforced, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control or even their knowledge."); *Can We Sue Our Way to Prosperity?: Litigation's Effect on* R

claims that "many companies have ceased foreign operations rather than face the uncertainties of FCPA enforcement."[124] However, even if this does sometimes occur, it is not a good measure of the costs of the FCPA. Rather than being a critique of the law, this statement indicates that the FCPA is having an impact and may lead countries that wish to do business with U.S. firms to crack down on domestic corruption. Furthermore, as we have argued, even if the law does lead some U.S. firms to rearrange their business dealing, they are likely to end up almost as well off as before, and for extractive industries the impact on prices and quantities in the United States is likely to be small.[125] Some jobs that might otherwise have gone abroad may even remain in the United States where corruption is less pervasive.

Chamber criticisms of the vague language and lack of decided court cases have more merit. However, their solutions would mostly weaken the law. Particularly troubling is the Chamber's proposal to introduce a relatively narrow definition of a "foreign official,"[126] which could create a major loophole. In general, the Chamber seeks to limit a firm's liability in various ways by, for example, adding a willfulness requirement for criminal liability, a compliance defense, and limiting liability for the actions of a subsidiary.[127] All of the proposed changes would make it marginally easier to pay bribes abroad and to avoid liability under the FCPA. Given the difficulty of bringing cases under the current law, the relatively limited nature of the harm to U.S. interests broadly understood, and the need for the United States to lead in this area of global concern, acting on proposals to weaken the FCPA would be a serious mistake. If clarity is deemed valuable to limit transaction costs for

America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 40 (2011) (written testimony of John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP), *available at* http://judiciary.house.gov/hearings/pdf/Beisner05242011.pdf ("Companies going through DOJ or SEC FCPA enforcement proceedings often spend tens of millions of dollars, if not more, on attorneys and forensic accountants—on top of potentially multimillion-dollar criminal and civil fines and disgorgement—in order to determine whether their employees (often at a relatively low level) acted improperly.").

124. WEISSMANN & SMITH, *supra* note 3, at 6. R

125. *See supra* Part II (arguing that the costs to a U.S. firm from losing a contract or business opportunity is limited to the difference in profits between a corrupt deal and an honest contract. In extractive industries so long as the resource enters into the international market, the U.S. economy will not be significantly affected).

126. WEISSMANN & SMITH, *supra* note 3, at 24. R

127. *Id.* at 7. *See also* KENNEDY & DANIELSEN, *supra* note 3. R

firms, it can be achieved consistent with strong enforcement of the law through agency interpretations or amendments that clarify firm liability without weakening the law's incentive to institute internal controls and carry out comprehensive due diligence. Those who think that the law is too strongly enforced neglect the fact that FCPA cases are difficult and costly for the DOJ. Hence, many transactions and deals are never examined. Firm compliance depends on the signals sent by settlements and decided cases that keep the business community alert to the costs of violating the law. Enforcement needs to be credible and effective, not hedged about with new constraints.

WHY DO SO MANY ANTI-CORRUPTION EFFORTS FAIL?

*MICHAEL JOHNSTON**

I.
INTRODUCTION

Anti-corruption efforts are usually launched with high hopes, considerable fanfare and, at times, genuine political backing by top-level leadership. But success has been elusive at best: even where agencies are part of bona fide reform efforts, there are very few success stories to report. Improvements in specific programs and agencies tend to be short-lived, difficult to demonstrate, and hard to generalize to broader segments of government. Why is corruption so tenacious? I suggest several main difficulties, some of them inherent in the nature of corruption control and others coming in the form of avoidable strategic mistakes. Among the main issues is an overly-narrow analysis of corruption that reduces it to a law-enforcement issue and/or to one of unbalanced incentives, without considering deeper causes or variations in kind among cases. Another is a tendency to conceive of reform as a public good—"better

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government for all"—without paying close attention to collective-action problems and the range of incentives needed to overcome them. These and other difficulties weaken the credibility of and support for reform; all must be addressed in systematic ways if anti-corruption agencies are to improve their track records.

Corruption control has enjoyed broad-based support over the past generation, and has taken on increasingly sophisticated forms. The issue figures prominently, not only in discussions of economic development and democratization,[1] but also (for example) in analyses of the current upheavals in the Middle East[2] and the terror attacks at Domodedovo airport in Moscow.[3] During the summer of 2011, a broad-based anti-corruption movement energized by Anna Hazare's widely publicized hunger strike threatened, at times, to convulse Indian politics.[4] Many smart, committed, and often courageous individuals, backed by resources and official support that would have been difficult to imagine a generation ago, have energized reform and research.

Clear-cut success stories, however, have been scarce.[5] Given the difficulties in measuring corruption, any such judgment is impressionistic: most corrupt activities are clandestine and go unreported because they lack an immediate victim, while those in the know often share an interest in secrecy. Tracing trends is even more difficult. Furthermore, as I will suggest below, different societies have different kinds of corruption problems; just how much of one variety might equal or exceed another is anyone's guess. Some countries' anti-corruption agencies have had conspicuous success: Hong Kong and Singapore, both deeply corrupt in times past, are well-known examples.[6] But both are relatively small city-states in which

1. *See* BO ROTHSTEIN, THE QUALITY OF GOVERNMENT: CORRUPTION, SOCIAL TRUST AND INEQUALITY IN INTERNATIONAL PERSPECTIVE 1–57 (2011).

2. *See* Issandr El Amrani, *Why Tunis, Why Cairo?*, LONDON REV. BOOKS, Feb. 17, 2011, at 3–6, *available at* http://www.lrb.co.uk/v33/n04/issandr-elamrani/why-tunis-why-cairo; Sudarsan Raghavan, *In Tunisia, Luxurious Lifestyles of a Corrupt Government*, WASH. POST (Jan. 28, 2011, 3:09 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012901921.html.

3. Simon Saradzhyan, Op-Ed., *From Toilet to Airport*, MOSCOW TIMES (Jan. 27, 2011), *available at* http://belfercenter.ksg.harvard.edu/publication/20688/from_toilet_to_airport.html.

4. *See, e.g.*, Maseeh Rahman, *Anna Hazare Ends Hunger Strike After Indian Government Backs Down*, GUARDIAN (Aug. 28, 2011, 9:12 AM), http://www.guardian.co.uk/world/2011/aug/28/anna-hazare-ends-hunger-strike.

5. *See* Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment,* 17 J. DEMOCRACY 86–99 (2006).

6. *See* JON S. T. QUAH, CURBING CORRUPTION IN ASIAN COUNTRIES: AN IMPOSSIBLE DREAM? 199–236 (2011) (Singapore); *id.* at 237–68 (Hong Kong).

undemocratic regimes could force extensive change, and in which the economic benefits of reduced corruption could rapidly become apparent. Botswana teaches us important lessons about the value of socially rooted leadership, but its population, spread over a large area, is a quarter of Hong Kong's.[7] Japan and Belgium have made steady progress, if corruption indices based upon perception data are any indication, but both already had relatively strong national institutions in place. Korea, Indonesia, Ghana and Taiwan, for examples, are promising cases worth watching in coming years.

Still, when it comes to lasting reductions in corruption in full-scale societies where it has been endemic, the results of a generation's pursuit of better government have not been encouraging.[8] The well-known corruption problems of Russia, China, and Thailand have been the focus of widely (and frequently) proclaimed concern and control efforts, but there are few if any credible claims of sustained reductions in abuses. Corrupt practices of tightly organized rings of elites in Argentina date back to the early decades of the 19th century and continue today.[9] Hopes are high among many in the Philippines that the government of President Benigno S. "Noy Noy" Aquino can stem tides of corrupt dealing that peaked during the recent Arroyo administration, but the track record of dozens of anti-corruption projects and key institutions over many years is disappointing.[10] Equally sobering, if less apparent based on corruption indices, are the periodic scandals in established market democracies like the United Kingdom, the United States, and Germany, where the Siemens conglomerate has been the center of at-

7. *See* Anne Pitcher, Mary H. Moran & Michael Johnston, *Rethinking Patrimonialism and Neopatrimonialism in Africa,* 52 AFR. STUD. REV. 125, 144–49 (2009).

8. *See, e.g.*, Anna Persson, Bo Rothstein & Jan Teorell, *The Failure of Anti-Corruption Policies: A Theoretical Mischaracterization of the Problem* (Göteborg Univ. Quality of Gov't Inst., QoG Working Paper Series, Paper No. 19, 2010), *available at* http://www.qog.pol.gu.se/working_papers/2010_19_Persson_Rothstein_Teorell.pdf (providing an overview of such failures, with particular emphasis on Kenya and Uganda).

9. An excellent analysis of long-term trends appears in Aranzazu Guillan-Montero, As if: The Fiction of Executive Accountability and the Persistence of Corruption Networks in Weakly Institutionalized Presidential Systems. Argentina (1989-2007) 12–25 (Aug. 5, 2011) (unpublished Ph.D. dissertation, Georgetown University), *available at* ProQuest Dissertations & Theses, Doc. ID 2466588931.

10. *Cf.* Jong-Sung You, Embedded Autonomy or Crony Capitalism? Explaining Corruption in South Korea, Relative to Taiwan and the Philippines, Focusing on the Role of Land Reform and Industrial Policy 7–10, 21–27 (unpublished) (2005), *available at* http://irps.ucsd.edu/assets/003/5292.pdf. *See generally* RONNIE V. AMORADO, KAKISTOCRACY 32–37, 42–53 (2011) (discussing several case histories involving intra-governmental betrayal and corrupt dealings in the Philippines).

tention.[11] Those nations' would-be reformers, critics might well contend, need to address their own societies' problems before venturing out into the wider world with schemes for "good governance."

At the same time, a longer view shows that even deeply entrenched corruption need not be a permanent condition. Had there been governance rankings in the Seventeenth Century, England would have been near the corrupt end of the scale. In the Nineteenth Century, the United States, and the United Kingdom with its "Old Corruption"—pervasive vote-buying, intimidation, and outright electoral fraud dominated by local landholders—would have received poor ratings.[12] At times during the Eighteenth Century, Denmark and Sweden were seen as extensively corrupt.[13] Australia's first seventy years were marked by frequent scandals, and its subsequent half-century featured a long struggle between politically connected interests and emerging advocates of reform.[14] Chile, Canada, Finland, and the Netherlands have had their periods of scan-

11. As just one spectacular example, consider the extensive bribery and kickback schemes associated with the activities of British Aerospace in Saudi Arabia, in which the U.K. government obstructed inquiries rather than risk lucrative export deals. *See* R. v. Dir. of the Serious Frauds Office, [2008] UKHL 60, [2009] 1 A.C. 756 (H.L) (appeal taken from Eng.), *available at* http://www.controlbae.org.uk/jr/Lords_judgment.pdf (affirming U.K. government's decision to halt investigations into dealings between British Aerospace and the government of Saudi Arabia); *see also The BAE Files*, GUARDIAN, http://www.guardian.co.uk/world/bae (last visited Nov. 15, 2011); *OECD Says UK's Dropping of BAE-Saudi Corruption Probe Symptom of Wider Problem*, FORBES (Mar. 14, 2007, 2:14 PM), http://www.forbes.com/feeds/afx/2007/03/14/afx3516213.html; Michael Peel et al., *UK 'Unlawfully' Scrapped BAE Probe*, FINANCIAL TIMES (Apr. 10, 2008), http://us.ft.com/ftgateway/superpage.ft?news_id=fto041120080448538287. In Germany, the Siemens conglomerate has been the center of attention. Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 21, 2008), http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html.

12. *See* CORNELIUS O'LEARY, THE ELIMINATION OF CORRUPT PRACTICES IN BRITISH ELECTIONS 1868-1911, at 1–22 (1962); W.D. Rubinstein, *The End of "Old Corruption" in Britain 1780-1860*, 101 PAST & PRESENT 55 (1983).

13. *Introduction to Part I*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 4–5 (Arnold J. Heidenheimer & Michael Johnston, eds., 3d ed. 2002). On Scandinavia generally, see ROTHSTEIN, *supra* note 1, at 117–18, 126 (citing Mette Frisk Jensen, Korruption og embedsetik: dansk embedsmændskorruption i perioden 1800 til 1886 [Corruption and Official Ethics] (2008) (unpublished Ph.D. dissertation, Aalborg Univ.); Bo Rothstein, *Anti Corruption—A Big Bang Theory* 17–23 (Göteborg Univ. Quality of Gov't Inst., QoG Working Paper Series, Paper No. 3, 2007), *available at* http://www.qog.pol.gu.se/working_papers/2007_3_Rothstein.pdf.

14. Ross Curnow, *What's Past is Prologue: Administrative Corruption in Australia*, *in* THE HISTORY OF CORRUPTION IN CENTRAL GOVERNMENT 37, 39–49 (Seppo Tiihonen ed., 2003) [hereinafter HISTORY OF CORRUPTION].

dal and corruption.[15] All of those societies are generally regarded as well governed today and, for what such scores are worth, fare well on international corruption rankings.

In most such cases, progress, even when spurred by periods of relatively rapid legal innovation and changes in social expectations, grew out of fundamental conflicts over questions of power and accountability that took place over decades or more. Several of today's better-governed societies took major steps toward corruption control and more accountable government in the course of significant political contention.[16] Dedicated schemes of reform did, at times, push such processes in positive directions, but at least equally often it was various groups' efforts to defend themselves against exploitation that unleashed essential political energy and opened up space for reformers. If indeed corruption control has been an indirect consequence of contention and disagreement among interested parties, rather than solely a civic-minded quest for better government for all, and if local issues and groups have been critical to such processes, can we identify any common reasons for the indifferent record of the anti-corruption movement?

This paper offers two parallel arguments: first, that we need to view corruption control not only as an array of specific legal remedies and administrative controls, important though they are, but also as a long-term *political* process through which people defend themselves against abuses by others—or as Madison had it, through which they "*oblige* [government] to control itself."[17] The second is that the corruption problems of various societies differ in qualitative ways, in large part because divergent interests are taking advantage of contrasting opportunities and institutional weaknesses. Seen in that light, reform confronts us with a wide range of challenges

15. *See, e.g.*, SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE: 1808-2002, 191–92 (2d ed. 2004) (describing electoral bribery in Chile in the late nineteenth and early twentieth centuries); Kenneth Kernaghan, *Corruption and Public Service in Canada: Conceptual and Practical Dimensions*, *in* HISTORY OF CORRUPTION, *supra* note 14, at 83, 87; Paula Tiihonen, *Good Governance and Corporation in Finland*, *in* HISTORY OF CORRUPTION, *supra* note 14, at 99, 104–12; Frits M. van der Meer & Jos C.N. Raadschelders, *Maladministration in the Netherlands in the 19th and 20th Centuries*, *in* HISTORY OF CORRUPTION, *supra* note 14, at 179, 186–93.

16. For example, Stuart England engaged in civil war over issues of royal privilege versus parliamentary autonomy and Sweden's dominant landholding and administrative classes had to make room for a new generation of educated citizens created by rising economic modernization. On the former, see LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND (1990); for Sweden, see ROTHSTEIN, *supra* note 13, at 17–23.

17. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (emphasis added).

and with various starting points from which to attack them. Those variations are both marked and fundamental, meaning that while the anti-corruption movement has gained strength nearly everywhere it has had difficulty succeeding anywhere. To help explain the indifferent track record of those reform efforts, I will focus on two different families of problems: those inherent in the task of fighting corruption anywhere and those reflecting the contrasting forces shaping different sorts of cases.

II.
CHALLENGES INHERENT IN CHECKING CORRUPTION

A. Corruption Eludes Precise Definition

One basic, and universal, problem with controlling corruption in any society is that there is little agreement about the meaning of the term, or about what activity is or is not corrupt. The definitions debate is a hardy perennial in corruption analysis: reformers generally have proceeded on an "I-know-it-when-I-see-it" basis, reasoning that enough activity occurs that would be corrupt by *any* measure that we need not concern ourselves with parsing out details at the boundaries of the concept. In most societies it is hard to dispute that assessment. Still, a lack of settled definitions makes it more difficult to assess the seriousness of corruption and to track trends; further, in ways I will discuss below, typical conceptions of the term are based on individuals' or specific groups' behavior, and thus divert our attention from important aspects of the social and institutional setting that shape both corruption issues and prospects for reform. Understanding the political processes and conflicts that make precise definitions difficult may point to ways in which we can intensify and sustain demands for accountability and limits on official power and privileges.

B. Corruption Undermines Collective Action for Reform

Other inherent problems have to do with power, incentives, costs and benefits—in effect, with the political economy of corruption.[18] Corruption undermines the quality of government as well as its accountability to society at large. It disrupts fair and openly competitive economic and political processes, generally benefiting the "haves"—that is, the well-connected and their clients—at the ex-

18. *See generally* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 9–88 (1999); ROTHSTEIN, *supra* note 1, at 77–163.

pense of the "have-nots," whose opportunities often depend more upon fair procedures and dependable rules. It can offer sizeable material gains while draining away resources and weakening the property and political rights of society at large. It is true that at times corrupt benefits trickle downward to broader segments of the population. But the long-term costs of accepting such benefits usually outweigh their immediate value, because the benefits are often used to control clients and buy off potential opponents, not for genuine help and assistance. It is hardly surprising that people with pressing needs and few immediate alternatives will agree to accept such benefits; in the larger context, however, it is safe to say that most corruption hurts most people most of the time.

It is tempting to think that with so many losing so much to corruption, it ought to be relatively easy to mobilize most people and groups against it. But the benefits of corruption are immediate, tangible, and often concentrated in relatively few hands; its costs tend to be widespread, long-term, and often intangible, or at least difficult to quantify. Those costs are no less real for being hard to assess, but this asymmetry reduces incentives for any one citizen to challenge corrupt figures at any one time, particularly where doing so is risky. Making the imbalance all the greater is the fact that corrupt leaders may be able to buy support, compromise the courts and law enforcement, intimidate the press, and divide the opposition.

As a result, reform must overcome significant collective action problems.[19] Collective action problems are particularly likely when, as is often the case, reformers justify the need to control corruption primarily in terms of the public interest. Even if reduced corruption could bring forth an era of rational, effective government and prosperity for all, why should I take on the hard work and risks of reform, which may well involve challenging some of society's most powerful people? And why should I give up the corrupt benefits I might now receive, when I stand to benefit from successful reform even if I stay on the sidelines? Further, as Ostrom and Rothstein point out, while it might be possible and desirable to reach agreements and build institutions that could reduce the risks and costs of actively pursuing reform, the task of building those sorts of foundations for reform itself presents a second-order collective action

19. The classic treatment is MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5–65 (1965). *See also* MARK IRVING LICHBACH, THE COOPERATOR'S DILEMMA 3–29 (1996); ROTHSTEIN, *supra* note 1, at 99–105.

problem.[20] Thus, even where a strong civil society is in place diverse and targeted incentives and appeals that evolve as situations change will be needed if we are to build active political support for reform.

Reform forces not only must contend with powerful, wealthy interests who are able and all too willing to defend their advantages and gains, but they also often do so in conditions of social fragmentation, distrust, and weak social and political institutions. In post-conflict societies, longstanding social divisions, as well as memories of more recent violence, may undermine social trust and spur suspicion and resentment of even the most ordinary aspects of governance. Those difficulties will be all the more pronounced where ineffective or compromised police forces struggle to confront illicit trafficking, gang activities, organized crime, and private armies. Adding to the instability and pervasive sense of personal insecurity often found in such situations is the fact that today's developing societies are far more exposed to global forces than were most affluent market democracies during their own emergent phases. While liberalization and integration into wider markets may limit corruption in some ways,[21] it creates new risks as well.[22]

20. ROTHSTEIN, *supra* note 1, at 100; Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 AM. POL. SCI. REV. 1, 6–9 (1998); *see also* Jan Teorell, *Corruption as an Institution: Rethinking the Nature and Origins of the Grabbing Hand* 11–12 (Göteborg Univ. Quality of Gov't Inst., QoG Working Paper Series, Paper No. 5, 2007), *available at* http://www.qog.pol.gu.se/working_papers/2007_5_Teorell.pdf. Teorell notes that as institutions become more corrupt, "it becomes more profitable to be corrupt at the same time as the costs for auditing corrupt public officials increase," and that individuals in groups with corrupt reputations have little incentive to be honest themselves. *Id.* at 11–12.

21. *See, e.g.*, Juan-Jose Ganuza & Esther Hauk, *Economic Integration and Corruption*, 22 INT'L. J. INDUS. ORG. 1463, 1463–67, 1478–79 (2004) (positing that corrupt, isolated countries who have the most to gain from wider integration will constrain their corrupt practices because potential trading partners would otherwise exclude them); Daniel Triesman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 440–42 (2000) (finding empirically that the process of economic development can limit corruption).

22. *See, e.g.*, CAROLYN M. WARNER, THE BEST SYSTEM MONEY CAN BUY: CORRUPTION IN THE EUROPEAN UNION (2007). In a competitive environment, the edge that can be gained via corruption is more valuable, *id.* at 33–53, while access to other markets broadens the range of profitable corrupt activity, *id.* at 54–83. *See also* Boliang Zhu, Economic Integration and Corruption: The Case of China (Nov. 2009) (unpublished manuscript), *available at* https://ncgg.princeton.edu/IPES/2009/papers/F120_paper2.pdf (claiming that economic integration can increase the levels of corruption in countries with limited market competition and weak domestic institutions).

C. Corruption Is a Transnational Problem

Modern corruption involves diverse and unpredictable techniques, respects no boundaries, feeds upon new technologies, and evolves far more rapidly than do our efforts to contain it. Governments of affluent democracies have until recently given their domestic corporations political cover and substantial incentives to bribe officials in the developing world.[23] Banks and markets in affluent countries can profit by offering safe havens for the proceeds of corruption in less secure societies. Many cases of corruption involve transnational corporate entities and their employees, corporations that are capable of doing business almost everywhere yet difficult to hold accountable anywhere. A recent U.S. investigation of the French communications giant Alcatel, which does business in over 130 countries, found that the firm had violated the U.S. Foreign Corrupt Practices Act through its Swiss-based subsidiary Alcatel Standard.[24] The subsidiary, whose primary activity seems to have been funneling money to public officials, had engaged in systematic bribery in Central America, Taiwan, and Malaysia between 1990 and 2006.[25] At present Alcatel is also under scrutiny for the activities of another subsidiary involved in major infrastructure projects in Australia.[26] While the U.S. investigation resulted in $137 million in fines for the parent corporation, other corrupt activities—notably, individual schemes in which some company officials received a portion of the corporate bribe funds in the form of kickbacks for themselves—have gone unpunished.[27]

D. Corruption is Systemically Embedded

Another fundamental problem is the embedded nature of serious corruption. It is one thing to refer to "systematic" and "systemic" corruption, as we commonly do, but grasping the full implications of those ideas is another thing. Many reform strategies

23. Before the advent of the OECD Anti-Bribery Convention in 1999, France and Germany were among a number of countries that not only allowed corporations to pay bribes abroad, but also allowed them to treat such payments as legitimate business expenses, reducing their tax liabilities. OECD, Update on Tax Legislation on the Tax Treatment of Bribes to Foreign Public Officials in Countries Parties to the OECD Anti Bribery Convention (June 16, 2011), http://www.oecd.org/dataoecd/58/10/41353070.pdf.

24. Ian Verrender, *Bribery, Corruption: A World of Deceit*, SYDNEY MORNING HERALD (Aug. 30, 2011), http://www.smh.com.au/business/bribery-corruption-a-world-of-deceit-20110829-1jicn.html.

25. *Id.*

26. *Id.*

27. *Id.*

still reflect a view of corruption as a form of deviance—as an exception, a transgression of legitimate and widely-accepted standards, as an illness (corruption-as-cancer is a popular though generally misleading metaphor), or as something that "happens to" a society, rather than as a part and product of long-term developments. Thinking of corruption as deviance leads us to overemphasize crime-prevention approaches that rely on penalties and law enforcement as the primary mechanisms of reform. These ineffective approaches are used even where police, the courts, and the broader legal system are deeply compromised and political pressure for better performance is lacking. In affluent market democracies corrupt actions may in fact deviate from legal and social norms. Crime-prevention approaches may seem to work well in those settings, although even there the laws benefit from a variety of other sorts of support, such as public expectations of government and business, and widespread disapproval of corrupt figures. But where the law has little credibility or serves the interests of corrupt figures, where corrupt practices are rewarded or merely regarded as inevitable, and where legitimate alternatives to corrupt dealings are scarce, crime-and-punishment strategies may have little success. In those situations, adding more penalties and law-enforcement reforms may not so much increase *risks* associated with corruption—if I do *X* I stand a strong chance of being punished—but rather add to *uncertainties*: the law says I cannot do *X*, but it is not well-enforced, I've heard lots of officials use that law just to put the squeeze on small businesses, another part of the law says something quite different, penalties vary widely, and the judge is a distant relative anyway, so why should I not go ahead with my scheme? Particularly when controls are poorly conceived or lack solid official and social support, bad law and enforcement in some sectors can undermine the credibility of good law in others. Such uncertainties can even increase the temptations to pay for positive outcomes and give venal officials and other operators added leverage over citizens and honest business people: in many countries "middlemen" and touts hang around the entrances to government offices, doing all they can to persuade citizens that without their help—for a price, of course—there is no way to predict what will happen when they go through the door.[28]

Because we do not pay sufficient attention to "embeddedness"—to the ways the social, political and economic contexts shape

28. *See, e.g.*, Jyoti Khanna & Michael Johnston, *India's Middlemen: Connecting by Corrupting?*, 48 CRIME L. & SOC. CHANGE 151 (2007).

corrupt dealings—we frequently view corruption as more or less the same wherever it occurs, varying in extent but not in nature. As implausible as that idea may seem when stated explicitly, our most widely employed corruption indices persist in ranking entire societies as single data points along one common dimension. The most widely used indices of that sort are the Transparency International Corruption Perception Index (CPI)[29] and, at a higher level of methodological sophistication, the "Control of Corruption" indicators included in the World Bank's Worldwide Governance Indicators (WGI).[30] Both generate intriguing worldwide standings in the corruption and reform leagues, and both—particularly the CPI—have helped focus public attention and pressure upon regimes whose leaders had rather we looked the other way. But those rely wholly or substantially on perceptions, which are not the same thing as corruption itself.[31] Worse yet, they apply one score to all levels, regions and sectors of a country, despite the fact that corruption exploits far more specific niches and vulnerabilities. Such one-dimensional indices, and models built with them, encourage us to think of the causes and consequences of corruption as being essentially uniform across the board.

Not surprisingly, therefore, our reform prescriptions are strikingly simple from one case to the next. Lack of nuance plagues our broader visions of what reform might look like: we frequently justify proposed changes, estimate the damage done by corruption, and gauge the success of reform by comparison to an efficient, rational, corruption-free state that does not actually exist anywhere. We then judge poorer and developing societies in terms of institutions, policies, and controls that they appear to lack by comparison to our own countries, an approach that diverts our attention from the forces that actually are at work in such settings, as well as from the corruption problems visible in affluent market democracies. In the end we do not consider the likelihood that many of the values and institutions checking corruption in generally well-governed societies today might be the *outcomes* of political struggles over accounta-

29. *Corruption Perceptions Index 2010 Results*, TRANSPARENCY INT'L (Oct. 26, 2010), http://www.transparency.org/policy_research/surveys_indices/cpi/2010. For indices from previous years, see *Corruption Perceptions Index*, TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited Nov. 16, 2011).

30. *See Worldwide Governance Indicators*, WORLD BANK, http://info.worldbank.org/governance/wgi/index.asp (last visited Nov. 16, 2011).

31. In many years past, international business people have been the most frequently surveyed, though in recent indices expert opinions and more diverse survey samples have been included.

ble government, not the initial causes of effective corruption control.

E. The Most Urgent Reform Requires Extensive Institutional Change

A final general concern has to do with the sorts of societies in which reform is most urgent. Not only are political and administrative foundations for reform weak or absent in many places; the regimes and societies themselves may be fundamentally fragile. In the worst cases corrupt networks become the *de facto* framework of politics and the economy, to the extent that anyone is in charge at all. They do not so much cripple the system of governance as they *become* the system. The resulting equilibrium of high corruption, low accountability, and delayed or distorted development can be a persistent state of affairs, not an advancing disease bringing society to the brink of collapse.

Societies facing such difficulties are not just "more corrupt" than others; they confront qualitatively different abuses and injustices, and the reforms they require may have little to do with "best practices" elsewhere. Weak and ineffective institutions, divided societies emerging from conflict or authoritarian rule, and low levels of trust in government and among citizens can make reform an empty promise. This is especially concerning because most mainstream corruption-control approaches—law enforcement, civil-society based efforts seeking to mobilize public resistance, transparency initiatives, efforts to reset the incentives affecting officials' and citizens' actions—assume institutional frameworks, commitments to rule of law, and levels of trust and security that are absent in fragile societies.

One-size-fits-all reforms are thus unlikely to be widely successful. But it is no more helpful to suggest that every society's corruption problems, and therefore its reform needs, are *sui generis.* In fact, the major variations in kinds of corruption problems, I argue, fall into identifiable patterns sharing their own commonalities. Understanding such variations and their implications is a first step toward knowing what we ought to do—and where we must exercise caution. The following section lays out the essential elements of a scheme for understanding those variations, and for mounting more appropriate and effective corruption controls.

III.
CONTRASTING CORRUPTION PROBLEMS: FOUR SYNDROMES

Corruption is not just a generic problem or a statistic like GDP per capita. It reflects real actions and choices by people responding to incentives, opportunities and constraints that can vary widely. As corruption often involves the illicit pursuit, use, and exchange of wealth and power, the most important contrasts arguably are found not in terms of specific practices—do we see bribery versus nepotism, for example—but rather at the deeper level of the political and economic opportunities available in a society and the quality of the institutions that sustain, restrain, and link the political and economic arenas. On that basis, I argue that it makes sense to think of four contrasting syndromes of corruption.[32]

A. Headlines: Recognize Anyone?

Consider the following cases, which are composites of actual events. They illustrate some of the diverse characteristics of corruption cases we might see in various settings:

- A firm seeking tax changes contributes to parties and political candidates; much of the money is spent on campaigns and disclosed legally, but some is used to "sweeten" bureaucrats while another portion vanishes.

- A general skims ten percent of military procurement contracts and shares the proceeds with friendly politicos, bureaucrats, the prime minister's sister, and media owners; part of the proceeds are used over time to buy off would-be opposition leaders.

- An entrepreneur's "wholly owned" judge issues writ enabling him to seize a large firm and its assets, based on fictitious delinquent debts; the order is enforced with police and mafia help.

- Protected by a dictator, state bank officers operate an import-export business using bank resources.

The four scenarios noted above are not specific corruption cases, but neither are they wholly hypothetical. All four have clearly

32. For a more extensive exploration of these four syndromes, see MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY (2005).

corrupt aspects, and all four also venture into gray areas, at least in terms of legalities and official processes. While none of the four scenarios describes the full extent of corrupt activities within a given society, they illustrate the diversity of complications reformers face in different settings.

The first case involves routine political finance pushed to an unacceptable degree. At stake are relatively specific benefits, in the form of amendments to the tax code; the bulk of the funds go to legal uses, but the part that is funneled to bureaucrats by political intermediaries, and that which vanishes, signal corrupt dealings. We need not assume that the firm eventually succeeds in getting its preferred changes, nor would success in itself necessarily signal corruption. At issue, rather, is influence marketing: political figures putting their connections and access out for rent, private interests seeking influence over specific decisions rather than undermining regimes or whole institutions, and the ways strong administrative institutions and competitive elections increase the value of access and contributions. While we can easily imagine that the political middlemen might take the initiative in such deals, we do not see a pattern in which powerful officials plunder the private sector. Violence, organized crime, and similar abuses likewise are of little significance here.

The second scenario features collusion among diverse elites. Self-enrichment is a prime motivation, and the take can be quite large; equally important, however, is maintaining power in the face of increasing challenges, in a setting where official institutions are only moderately strong. Those institutions make official positions worth hanging onto, and the resulting political hegemony is one reason why corrupt funds can be obtained in amounts large enough to finance elite networks. But institutions in such situations are usually too weak to produce well-regulated political or economic contention; indeed, elites might have good reason to think that once lost, their political and economic dominance might never return. Elite alliances not only help shore up positions of power; they also can be the basis of monopoly positions that make corruption all the more lucrative.

Our powerful and ambitious entrepreneur in the third scenario is playing a high-stakes, high-risk game using personal clients within the judiciary and law-enforcement to augment his economic empire. He is a major player in an arena where very large stakes are on the table and several factions contend in a setting of few effective rules or institutions. The threat of violence from both police and criminal elements is integral to the deal, both in the process of

seizure and as a warning to others that they better look the other way. In a climate of pervasive risk and insecurity, few will play on such a level; those who do must reward their followers. Oligarchs thus need a continuing flow of large-scale rewards and incentives, making for more corruption, further weakening institutions, and intensifying insecurity for honest and corrupt operators alike. In such a setting, proposals to make or enforce anti-corruption laws and efforts to mobilize social opposition to the oligarchs may well amount to little.

In the fourth scenario, corrupt dealings and networks again pervade both the state and the economy and official and social institutions are very ineffective. But there is no doubt as to who is in charge and there is little to deter those top figures and their clients from engaging in corrupt schemes. Offices are little more than useful monopolies, held thanks to the patronage or mandates of top figures. Political loyalties and sources of power are personal—deriving, in this case, from a dictator, but in others from a ruling inner circle or accessible fragments of regime power. Corrupt operators enjoy a kind of impunity not found in our other three scenarios. The stakes of corruption come in many forms and there are likely few restrictions on what can be obtained by corrupt means. While most such societies are poor on aggregate, extractive industries, flows of aid and investment, and the revenue streams of the state itself can all be sufficient to make a few individuals and their minions very wealthy indeed.

B. Four Syndromes of Corruption

While it is tempting to classify corruption cases in terms of techniques—bribery, extortion, judicial corruption, violence—fundamentally, these scenarios are distinguished from one another by deeper factors. The balance between wealth and power opportunities will influence whether official clout is used for self-enrichment or wealth is deployed in pursuit of influence and power.[33] The strength of institutions—social, political, and economic as well as those of the state itself—will influence the available stakes and the rules—if any—that constrain contending interests. From those factors derive a variety of related characteristics of corruption problems, such as expectations, insecurity, the balance of power between corrupt operators and their potential opponents, and the opportunities reformers can safely put to use. Those underlying

33. *See* SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 59–71 (1968).

factors create combinations of *participation*—the ways in which people pursue, use, and exchange wealth and power—and *institutions*.

A few years ago I explored those ideas in a book that proposed ways in which various countries' corruption problems might differ in kind.[34] Using statistical indicators and case studies, the book offered the argument that four major syndromes of corruption can be observed in countries around the world:

- *Influence Markets*: in a climate of active, well-institutionalized markets and democratic politics, private wealth interests seek influence over specific processes and decisions within strong public institutions, not only bribing officials directly but channeling funds to and through political figures who put their access and connections out for rent. The United States, Japan, and Germany were discussed as case studies.[35]

- *Elite Cartels*: in a setting of only moderately strong state institutions, colluding elites—political, bureaucratic, business, military, and so forth—build high-level networks by sharing corrupt benefits, and are able to stave off rising political and economic competition. Examples presented were Italy, South Korea, and Botswana.[36]

- *Oligarchs and Clans*: a small number of contentious elites backed by personal or family followings pursue wealth and power in a climate of very weak institutions, rapidly expanding opportunities, and pervasive insecurity, using bribes and connections where they can and violence where they must. Opponents of corruption, and of dominant parties and politicians, face major risks and uncertainties. Distinctions between public and private sectors, and between personal and official loyalties and agendas, are very weak in this syndrome. Case studies included Russia, the Philippines, and Mexico.[37]

- *Official Moguls*: powerful individuals and small groups, either dominating undemocratic regimes or enjoying the protection of those who do, use state and personal power—at times, a distinction of little importance—to enrich themselves with impunity. The primary loyalties and sources of power are personal or political, rather than official in nature; anti-corruption forces, like opposition to the regime generally, are very weak. In this final group China, Kenya, and Suharto's Indonesia were examined in detail.[38]

34. JOHNSTON, *supra* note 32, at 36–185.
35. *Id.* at 60–88.
36. *Id.* at 89–111.
37. *Id.* at 120–54.
38. *Id.* at 155–85.

These four syndromes are "ideal types" highlighting important similarities and contrasts, not full or deterministic accounts of any one country's corruption problems.[39] There are generic varieties such as police corruption that occur in every society. The syndromes are not "system types": countries that differ in important ways may be found within each group, a given society can move from one to another over time, and while they are meant to highlight a society's dominant corruption problems, we might find more than one syndrome at work in various regions, economic sectors, or levels of government. They do not embody a developmental sequence; in practice, change of several sorts is possible. Nor do they amount to a rediscovery of "high" versus "low," or "bad" versus "good" or "functional," corruption by other names: contrasts among the four syndromes are qualitative rather than matters of degree, and the Influence Market corruption seen in many affluent democracies with good corruption-index scores is definitely a problem worth worrying about. Table 1 summarizes these broad patterns:

39. *See* LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 223–34 (1971). "An *ideal type* is an analytical construct that serves the investigator as a measuring rod to ascertain similarities as well as deviations in concrete cases." *Id.* at 223.

TABLE 1: FOUR SYNDROMES OF CORRUPTION[40]

Syndrome	Participation		Institutions		Examples (cases in **bold** were case studies in *Syndromes of Corruption*)
	Political Opportunities	Economic Opportunities	State/Society Capacity	Economic Institutions	
Influence Markets	**Mature democracies** Liberalized, steady competition and participation	**Mature markets** Liberalized, open; steady competition; affluent	**Extensive**	**Strong**	**United States, Japan, Germany,** Australia, France, UK, Uruguay
Elite Cartels	**Consolidating/ reforming democracies** Liberalized; growing competition and participation	**Reforming markets** Largely liberalized and open; growing competition; moderately affluent	**Moderate**	**Medium**	**Italy, South Korea, Botswana,** Argentina, Belgium, Brazil, Israel, Poland, Portugal, S. Africa, Zambia
Oligarchs and Clans	**Transitional regimes** Recent major liberalization; significant but poorly-structured competition	**New markets** Recent major liberalization; extensive inequality and poverty	**Weak**	**Weak**	**Russia, Philippines, Mexico,** Bangladesh, Bulgaria, Colombia, India, Malaysia, Niger, Senegal, Turkey
Official Moguls	**Undemocratic** Little liberalization or openness	**New markets** Recent major liberalization; extensive inequality and poverty	**Weak**	**Weak**	**China, Kenya, Indonesia,** Algeria, Chad, Haiti, Iran, Kuwait, Nigeria, Rwanda, Syria

40. This table is adapted from JOHNSTON, *supra* note 32, at 40.

There is no magic in this list of four syndromes; a different categorization might be superior.[41] The main point for our purposes is that we must move beyond ranking whole countries on one-dimensional corruption indices and get to grips with the differing opportunities and vulnerabilities that shape various societies' corruption problems. Such cases confront reformers with contrasting challenges, opportunities, and sources of resistance. A successful reform or best practice in Country *A* may be impossible in Country *B*, irrelevant in Country *C*, and downright harmful in Country *D*. While it would not be entirely fair to describe current reform strategies as uniform, neither they nor our views of what successful reforms might look like, reflect enough attention to important qualitative contrasts in corruption problems.

IV.
SORTING OUT STRATEGIES

The difficulties outlined in the previous two sections make corruption control very difficult in any but the most favorable circumstances. Compounding those problems, however, have been a variety of strategic errors—notably, an overly restrictive view of corruption as an administrative rather than political issue, underestimating the incentives needed to sustain reforms, and treating corruption as nearly the same everywhere. These errors have resulted wasted resources, lost opportunities, and overlooked lessons from experience.

One way to think about the first problem—misunderstanding the political dimensions of corruption and reform—is to return to the definitions debate, which generally zeroes in on the question of what constitutes a corrupt act. I suggest we should ask a somewhat different question: how do corruption issues arise in the first place? The change in emphasis is subtle—corruption, as we shall see, is conceptualized here not as an attribute of an action or individual but rather as a systemic dilemma arising as people pursue, use, and exchange wealth and power, and as societies contend with—and over—the never-ending problems of how to restrain excesses in those activities.[42] The clashing interests, values, and traditions that make clear-cut definitions of a corrupt act so difficult should not be seen as problems to be resolved by devising better-worded definitions. Instead, they point to political conflicts *inherent in* the rise of

41. *See generally* JOHNSTON, *supra* note 32 (discussing the evidence and arguments underlying the various syndromes of corruption).

42. *Id.* at 1–35.

corruption issues, and in the mobilization of political energy essential to successful reform.

To illustrate this approach, consider a brief thought experiment. Instead of visualizing a society into which corruption intrudes as an unwelcome influence, imagine an absolute, utterly unchallenged autocrat. No rules, competitors, or countervailing forces restrain that ruler's actions. The right to rule, in this situation, is a matter of having the biggest army and personal following, a ruthless attitude toward others, claims of divine blessing, or—via hereditary succession—taking a lucky dip into the gene pool. In this imagined situation, limits upon power and notions of accountability to the public and its interests mean nothing. People and territory exist to be dominated and exploited.

That absolute autocrat cannot be "corrupt" in any contemporary sense of the term.[43] No rules restrain his actions; no one else's wellbeing matters. There are no collective principles of loyalty or accountability, and no de facto constraints. We might judge the dictator corrupt by our own standards, which he or she is free to ignore, or as morally corrupt in the eyes of God, a definitive judgment for some but not much of a practical restraint. Likewise, conceptions of corruption built upon checks and balances, duties of office—indeed, the basic idea of a *public* office itself—the public interest, or positions of trust have no meaning.

The case of our imaginary autocrat is a deliberate oversimplification. Its value lies in highlighting the *political* processes by which limits and accountability arise, and the political processes through which they acquire legitimacy and force. Political ethics and rules and institutions limiting official powers are not natural features of the political landscape, however much they seem to be, because of their legitimacy and basis in widely-shared values in well-governed societies. Limits on official powers arise when someone other than the rulers with the political resources to protect their interests demands them, and they exist because rulers find it advantageous to abide by them. That process, not surprisingly, can be contentious:

43. There are older "classical" conceptions of corruption as a collective state of being that might enable us to call our autocrat corrupt. For example, in ancient Athens, corruption amounted to the loss of the ruling order's ability to command or inspire loyalty. J. Patrick Dobel, *The Corruption of a State*, 72 AM. POL. SCI. REV. 958, 969–70 (1978). For ways in which such older modes of thinking retain relevance today, see generally Michael Johnston, *Keeping the Answers, Changing the Questions: Corruption Definitions Revisited*, 35 POLITISCHE VIERTELJAHRESSCHRIFT SONDERHEFTE (DIMENSIONEN POLITISCHER KORRUPTION) [POLITICAL QUARTERLY SPECIAL ISSUES (DIMENSIONS OF POLITICAL CORRUPTION)] 61 (2005).

holders of great power and wealth rarely relinquish them voluntarily. To draw such limits, those "others" need a degree of space, in the form of basic security and a measure of liberty, and political resources they can call their own (wealth, a following, rhetorical gifts). Equally important, they need *a reason* to take a stand: an interest or people to protect, for example, or significant grievances and aspirations.[44]

Political contention and the clash of interests and outlooks—often seen not only as complicating our definitions, but also as a corrupting influence to be isolated from the administration and reforms—shape and reshape working meanings of "corruption" and drive the process of limiting power and insisting on accountability. In democratic societies we take it as given that public officials ought to serve interests above and beyond their own, and that taxpayers, business people, civic activists and other private parties will demand that they do so. Reform then becomes a matter of conceiving of effective institutions, rules, and systems of incentives. But even in those relatively settled systems, terms like *public*, *private*, and *abuse of power* have shifting and contentious meanings. Further complicating matters at a practical level is the fact that allegations of corruption and the moralizing language of reform can be a smokescreen for poorly-conceived or counterproductive controls, and for self-serving proposals.[45] Elsewhere—particularly where regimes lack credibility, institutions and are weak or widely distrusted, public-private boundaries are porous or meaningless, and a sense of common interest is not widely shared—new rules and demands for accountability may have little or no practical effect. Where do workable limits and boundaries originate, and what forces shape and reshape them over time?

44. For the record, I define corruption not as an attribute of an action or person, but a systemic dilemma of defining acceptable and unacceptable ways to pursue, use, and exchange wealth and power, and then as consisting of the abuse of public power or resources for private benefit, emphasizing immediately that the terms *abuse*, *public*, *private*, and even *benefit* can be politically contested, changing in their meaning, and rarely if ever delineated once and for all. Such terms, after all, refer to deeply political boundaries, distinctions, and relationships.

45. If I were sponsoring legislation to treble the salaries of academicians across this great land of ours, I would, of course, call it the Higher Education Reform Act of 2011.

V.
"DEEP DEMOCRATIZATION" AND CORRUPTION CONTROL

I suggest that the essence of sustainable corruption control is "deep democratization." That idea draws upon the same sorts of participatory and institutional dynamics that define the four syndromes discussed above. The goal is to encourage the development of free, fair, and openly competitive political and economic arenas, both sustained and restrained by a strong and legitimate framework of state, political, and social institutions, within which people can pursue their interests and protect themselves against abuses.[46] That system of order rests upon a dynamic balance among state and society, and includes both politics and the economy. Clear boundaries between public and private domains are essential, but they cannot be isolated from each other: legitimate communication between them is essential for accountability, as each domain can contribute to the vitality and restrain the excesses of the other. Competition and contention must be vigorous, open with respect to both participants and the range of possible outcomes, yet governed by legitimate rules and institutions. Although it may seem that this argument promotes American- or European-style systems as a universal ideal, affluent market democracies also fall short of these ideals in many ways. Even the most established democracies may be in need of democratic renewal to the extent that their political processes have lost credibility, citizens feel ignored by decision makers, and elections become exercises in collusion.

Democracy can hardly claim unique corruption-controlling abilities—far from it. Indeed, the "influence markets" syndrome illustrates the ways competitive elections, open institutions, incremental policy processes, strong civil liberties, and vigorous private markets—all presumably institutions most of us value greatly—can combine to create distinctive corruption hazards. At the very least, such abilities appear to depend upon a minimal level of economic development, understood not only in terms of resources and affluence but also as a process of institutional development.[47] Moreover, some societies, such as Pinochet's Chile, can claim to have reduced

46. *See generally* JOHNSTON, *supra* note 32, *passim*. "Strong institutions and balanced participation enable societies to respond to corrupt activities more effectively. They provide non-corrupt economic and political alternatives for citizens and firms and enable them to defend their interests." *Id.* at 199.

47. *See* Yan Sun & Michael Johnston, *Does Democracy Check Corruption?: Insights from China and India*, 42 COMP. POL. 1, 3–7 (2009) (analyzing the dynamic balance between economic and political factors and its effect on corruption).

corruption in strikingly undemocratic ways, while others—Botswana, for example—have done significantly better than might have been expected even though their democratic processes are still works in progress.[48] In still other settings, civil liberties sufficient to allow criticism of the regime, while falling well short of fully elaborated democracy, have effectively encouraged better government performance.[49] The driving factor here is not a veneer of formal democratic processes, but rather resources and opportunities to insist that our interests be taken into account by those who govern.[50]

Deep democratization is contentious: real interests must be at stake. But it cannot be solely a grudge match: principles and values can play a role as well. At times they provide the "vocabulary" through which challenges to established power can be justified; or, they help bond diverse resentments into a common cause. New principles too can emerge in the heat of contention, if only as useful clubs with which to belabor those on the other side. Later on such principles can be refined, and can draw broader support, not so much because they are good ideas in the abstract but *because they work* to protect and serve the interests of various groups. In many respects, the enterprise of checking corruption by seeking fairness and justice not as public goods but rather as valued rights and protections, *is* a process of deep democratization.

Years ago, Dankwart Rustow offered a fascinating argument that the factors *sustaining* democracy where it is strong, *e.g.*, literacy, affluence, multi-party politics, or a middle class, are not necessarily the same factors that created it.[51] He contended that the rise of democracy required "prolonged and inconclusive political struggle . . . . [T]he protagonists must represent well-entrenched forces . . . and the issues must have profound meaning to them."[52]

48. Pitcher et al., *supra* note 7, at 144–49.

49. Jonathan Isham, Daniel Kaufmann & Lant H. Pritchett, *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 WORLD BANK ECON. REV. 219, 226–32 (1997). "The total effect of an improvement in civil liberties is positive, even accounting for the [i]nduced [democratic] political changes." *Id.* at 232.

50. "Environments that allow civil strife or unrest to occur also allow other mechanisms for expression of popular (dis)content with government performance[.] The availability and effectiveness of those mechanisms improve government efficacy." *Id.* at 234. *Compare* Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.–Dec. 1997, at 22 (discussing the ways in which outwardly democratic systems can be deeply illiberal).

51. *See* Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, 2 COMP. POL. 337, 341–42 (1970).

52. *Id.* at 352.

In those struggles, "[d]emocracy was not the original or primary aim; it was sought as a means to some other end or it came as a fortuitous byproduct of the struggle."[53] Over time, political settlements among contending groups—even if grudgingly conceded and compromised in unsatisfying ways—could solidify into institutions made legitimate and durable because they served lasting interests.

An analogous argument can be made with respect to corruption control. Limits on power and mechanisms of accountability may be expressed in terms of enduring moral values. But they *came from somewhere*—broadly, from people and groups defending themselves from abuses by others. Independent judiciaries, conflict-of-interest rules, civil service restrictions upon patronage, and values of integrity are the culmination of political processes of reform, not their origin. Basic notions of accountability, effective institutional controls and safeguards, and the civic values through which we justify them, are as much the *outcomes* of corruption-checking political developments as their causes. Failing to appreciate that point, and expecting people to line up behind the banner of reform simply out of concern for the common good, leads to the sorts of collective-action problems sketched out earlier. So too will schemes for reform that excessively minimize political influence over processes of governing. Transparency means little if no one has a stake in "looking in." Best practices, no matter how effective they may be in one society, will accomplish little if they lack solid political foundations in the places where they are transplanted.

A. The Value of Politics and the State

Throughout the push for reform, we have misunderstood those political dynamics—not just during the past generation, but for well over a century throughout the world. Indeed, for many reformers, politics and government—the latter envisioned as an essentially technical administrative process—were opposing influences. The more recent notion of good governance has often been equally bloodless, with the state being regarded essentially as a referee in a liberalized economy. At best, the value of politics lay in civic processes of legitimation and consensus-building, and in providing useful feedback for the state's few essential functions. Occasionally, politics helped oust scoundrels once their misconduct had been revealed, but more often it was viewed as a parallel market, mirroring the economy. At worst, political processes and demands

53. *Id.* at 353.

were portrayed as a drag on governance and development because they introduced private-regarding demands into what ought to be rational, and minimal, processes of administration, creating incentives to enact costly, fraud-prone public benefits as a way of building popular support. A key critique of the State was that rent-seeking officials interfered in markets and distorted administrative processes in order to enrich themselves. While that critique was all too often right on target, its obverse—that with the government out of the economy, rationality and fairness would take the place of rent-seeking—remains unproven. More often, "rolling back" government has shifted important questions of equity and justice out of the public arena and into more private settings, where rules and enforcement are weaker and accountability is far more selectively applied.

In the deep democratization view, however, the state is not just the referee, politics is not just another kind of market, and democratic governance is not just a bundle of sound administrative processes. Instead, critical questions of power, authority, and justice are at stake. Bukovansky has argued persuasively that basic normative principles inherent in the notion of corruption have been strikingly absent from the past generation's conversations about governance, administration, and reform.[54] Reformers would do well to revisit basic ideas of republican political thought, she contends, which at the very least would remind us that political change is not an impersonal process of progress or rational modernization but rather is rooted in the agency of real people dealing with normatively complicated dilemmas.[55]

Accordingly, reform is not a matter of persuading people to be good or to put self-interest aside. Nor should we expect political parties and interest groups to put civic goals first. As Van Biezen points out, too often we treat the political parties of emerging societies as though they were public utilities established to serve democracy as a grand civic project, rather than as forces that energize it by vying on behalf of real groups and interests.[56] If corruption control is a public good, most people will leave the hard work and risks to others. We may try to overcome that dilemma by calling for more political will, but corruption often reflects an *excess* of unchecked political will.

54. *See* Mlada Bukovansky, *The Hollowness of Anti-Corruption Discourse*, 13 REV. INT'L POL. ECON. 181 (2006).

55. *Id.* at 204.

56. Ingrid Van Biezen, *Political Parties as Public Utilities*, 10 PARTY POL. 701 (2004).

Deep democratization is a long-term process that will never be finished. There are no guarantees against backsliding. It inevitably involves conflict and thus will not satisfy anyone who seeks the dawn of reason in government, much less the final triumph of good over evil.[57] Moreover, it is in an *indirect* strategy—one in which we simulate the developments that led to the emergence of political forces in once-corrupt societies that brought the problem under control. Familiar and tempting reform tactics may have to be postponed while the social and political foundations they require are under construction. Citizen participation need not focus directly upon corruption; given the risks and collective action problems involved, it may be better to organize around more immediate concerns. A diverse range of benefits and gratifications—sociability, personal interests, and symbolic rewards are just a few examples—can be as important as those of a civic and purposive nature.[58] Hiking clubs, a Tuesday Music Society, and professional or occupational associations may seem to have little to do with reform, yet can still contribute to a fund of social capital[59] and higher levels of social trust—essential resources when opportunities for reform eventually appear.

In no way do open and competitive societies inevitably converge toward "the public interest" or a lasting political equilibrium, either through a superior state of harmony or the workings of some invisible hand. Leadership remains essential. Reform will involve many dead ends and reverses and bad or self-serving ideas will abound. But most of today's better-governed societies established systems of accountability, and the rules and values that restrain abuses of wealth and power, in equally roundabout ways while contending over other things.

B. What to Do—First, Next, and Not at All?

If we should not immediately bombard corruption with any good ideas that fall to hand, how should we make our choices and what sequence should we follow?

57. *See, e.g.*, Christian von Luebke, *The Politics of Reform: Political Scandals, Elite Resistance, and Presidential Leadership in Indonesia*, 29 J. CURRENT SE. ASIAN AFF. 79, 85–89 (2010) (discussing recent conflict within Indonesia's anti-corruption agency and resistance from the elite class).

58. Michael Johnston & Sahr J. Kpundeh, *Building a Clean Machine: Anti-Corruption Coalitions and Sustainable Reform* 8–15 (World Bank Inst. Working Paper Series, Paper No. 37208, 2002), *available at* http://siteresources.worldbank.org/WBI/Resources/wbi37208.pdf.

59. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF THE AMERICAN COMMUNITY (2000).

Often we are told that corrupt societies are in a state of near-collapse, even where illicit power and spoils underwrite networks and alliances that can be very durable indeed. This sense of urgency, together with the assumption (or hope) that societies and institutions would be healthy and effective if we could just stop the corrupt behavior, encourages us to attack head-on. But deeper contrasts among syndromes of corruption and historical and situational differences among societies themselves mean that what might be a fine idea elsewhere can be irrelevant or harmful in the case at hand. Frontal assaults on corrupt behavior are tempting, but may in fact call down repression upon those who have suffered most.

The variations noted above make it quite risky to make generalizations about what to do first, later, and never. But I suggest that judiciously paced *structural strategies* must precede *political strategies*.[60] In Influence Market and Elite Cartel cases, structural developments are largely in place or have gathered significant momentum, and thus a focus on specific corruption controls may well make considerable sense. In Oligarch-and-Clan and Official Mogul cases, by contrast, those political foundations are weak or nonexistent, and rushing in with "best practices" evolved over long periods of time elsewhere may in fact make matters much worse. Knowing what *not* to do, or at least understanding why some good ideas must be deferred for a time, may be the most useful insights of all.

In Official Mogul cases the best anti-corrupt approach might be patient encouragement of basic civil liberties and the diffusion of political resources. Efforts to redefine power and authority as official and public, rather than as personal, may likewise be worthwhile; this latter strategy might revolve around education and changing expectations. Rushing to confront an Official Moguls regime by opposing corruption with anything less than overwhelming social backing, by contrast, may be very unwise: to the extent that such efforts threaten sources of wealth, repression may be an immediate response. To the extent that they actually threaten Moguls' power, the result may be voracious, hand-over-fist corruption as officials both high and low, no longer secure in their positions, steal as

60. Structural strategies include creating space for the growth of safe social and political activity, encouraging the emergence of multiple centers of power and types of political resources, and building a framework of institutions strong enough to withstand and sustain contention. Political strategies include formal checks and balances, competitive politics, mobilizing civil society, creating reform organizations, putting transparency to use, journalistic exposés, and the like.

much as they can as fast as they can take it.[61] Indeed, too much pressure applied too quickly might push an Official Moguls case over into an Oligarchs-and-Clans situation, with disastrous consequences, as arguably happened in Russia in the 1990s as aggressive economic and political liberalization were pursued in a setting of very weak institutions.[62]

Oligarch-and-Clan societies, by contrast, may have considerable or, indeed, excessive pluralism, but be too insecure and dangerous to allow most citizens to make political demands on their own behalf. There, the challenge is not diffusing power and resources, but rather institution-building. Predictable performance by law-enforcement and the courts is especially critical. Whichever syndrome we encounter, divided and post-conflict societies will present special challenges; the initial agenda might well revolve around re-establishing basic government services, on an even-handed basis, as a way of building trust and improving expectations.[63]

That point about basic services, mundane as it may seem, leads us to a final, but critical, challenge—that of measurement and assessment. How can reformers assess the scope of corruption problems? In light of the shortcomings of the existing country-level corruption indices,[64] how can they demonstrate the progress of reform—if any—to backers, citizens, and potential malefactors alike, in ways that are detailed and convincing? Measurement of corruption is the focus of a long-running debate over indices and statistical methodology.[65] None of the debaters is satisfied with existing

61. JAMES C. SCOTT, COMPARATIVE POLITICAL CORRUPTION 80–84 (1972).

62. JOHNSTON, *supra* note 32, at 120–54.

63. *See* Michael Johnston, *First, Do No Harm—Then, Build Trust: Anti-Corruption Strategies in Fragile Situations*, WORLD DEV. REP. 2011 (World Bank), Sept. 2010, at 24–33, http://wdr2011.worldbank.org/sites/default/files/pdfs/WDRBackgroundPaper-Johnston_0.pdf. For discussions on what to do—and what *not* to do—in fragile situations, see Alask Orre & Harald W. Mathisen, *Corruption in Fragile States*, FRAGILE SITUATIONS POLICY BRIEFS (Danish Inst. Int'l Studies, Oct. 2008), http://www.diis.dk/graphics/Publications/Briefs2008/PB2008_10_Corruption.pdf; Vinay Bhargava, *Practitioners Reflections: Making a Difference in High Corruption and Weak Governance Country Environments*, [2011] 1 U4 PRACTICE INSIGHT (Chr. Michelson Inst.), http://www.cmi.no/publications/file/3962-practitioners-reflections.pdf.

64. *See supra* notes 29–31 and accompanying text.

65. *See, e.g.*, CHRISTINE ARNDT & CHARLES OMAN, OECD DEV. CTR., USES AND ABUSES OF GOVERNANCE INDICATORS (2006), http://www.oecd-ilibrary.org/development/uses-and-abuses-of-governance-indicators_9789264026865-en (arguing that governance indicators based on observers' subjective perceptions lack transparency and comparability over time, suffer from selection bias, and are not well suited to help developing countries identify how to effectively improve the quality of local governance); MEASURING CORRUPTION (Charles Sampford, Arthur Shacklock, Carmel Connors & Fredrik Galtug eds., 2006) (discussing the reliability

perception-based indices, but consensus over a better approach has yet to emerge. Most suggest overly literal reliance upon such indices may not only waste scarce reform opportunities while giving reformers little guidance as to where to attack and what steps are (or are not) working, but may also stigmatize societies that take serious anti-corruption steps—and thereby put scandals, trials, and revelations of graft on page one. At the very least, many governments that have launched transparency initiatives find that even extensive efforts fail to "move the needle." A related criticism is that affluent market democracies—broadly speaking, our "influence markets" group—get a "pass" from existing indices since their legal frameworks and political systems are hospitable to wealthy interests who thus have less reason to engage in corruption.

One possible alternative is use indicators of government performance, benchmarked across comparable agencies and jurisdictions, to assess indirectly the effects of past corruption, the incentives and opportunities that sustain it, and trends in specific vulnerabilities. Those indicators can be "actionable," a clunky word meaning that they not only indicate where risks exist but also give strong signals as to what must be done. Better yet, they allow successful leaders, agency managers, and reformers to claim political credit for their efforts.[66] Such initiatives often draw strong resis-

and limitations of various measures of corruption); Marcus J. Kurtz & Andrew Schrank, *Growth and Governance: Models, Measures, and Mechanisms*, 69 J. POL. 538, 542–47 (2007) (arguing that divergent interests and cultural backgrounds of those surveyed, sampling error, and lack of direct knowledge by respondents introduce systemic errors into perception-based indices); M.A. Thomas, *What Do the Worldwide Governance Indicators Measure?*, 22 EUR. J. DEV. RES. 31 (2010) (considering the construct validity of the WGI and concluding that the indicators stand as an elaborate and unsupported hypothesis); Charles Kenny, *Measuring and Reducing the Impact of Corruption in Infrastructure* (World Bank Policy Research Working Paper No. 4099, 2006), *available at* http://ideas.repec.org/p/wbk/wbrwps/4099.html (arguing that, in the infrastructure sector, perception-based indices measure petty rather than grand corruption, a weak proxy for the true extent of corruption); Tina Søreide, *Is It Wrong to Rank? A Critical Assessment of Corruption Indices* (Chr. Michelsen Inst., Working Paper No. 1, 2006), *available at* http://www.cmi.no/publications/file/2120-is-it-wrong-to-rank.pdf (arguing, *inter alia*, that composite corruption rankings like Transparency International's CPI can blur the line between legal and illegal activities and rest on unreliable or systemically biased individual perceptions); Dilyan Donchev & Gergely Ujhelyi, What Do Corruption Indices Measure? (June 7, 2010) (unpublished manuscript), *available at* http://www.class.uh.edu/faculty/gujhelyi/corrmeasures.pdf (finding country-level corruption indices have received much attention from researchers, commentators, and policy-makers alike).

66. *See* Michael Johnston, *Components of Integrity: Data and Benchmarks for Tracking Trends in Government*, Global Forum on Public Governance (OECD, Apr. 27,

tance, and can be gamed by officials and misused by the public and critics. But particularly in the socially and politically fragile situations in which reform is the most difficult, publishing such indicators of government performance and opening them up for public discussion can be a way to demonstrate the credibility of government, build social and political trust, and link the quest for better governance to citizens' immediate needs and problems.

VI.
CONCLUSION

These arguments, taken together, set the bar quite high for reformers. But to think of reform in terms of the ability of citizens to advocate and defend their own interests and wellbeing is also to spell out a good working definition of *justice,* and to build reform on a base of lasting interests. Justice, in that view, is not just an abstract goal, a set of process standards, or a slogan. It is more than an instrumental sense that following rules *A*, *B*, and *C* will raise one's income or ward off crime. It is instead a sense of confidence that our rights, interests, outlooks, and security *matter*, and that others' do as well; that even the most powerful figures in politics and the economy must respect those values, and that they can be called to account if they do not. Justice is the linchpin between self-interest and one's obligations to fellow citizens and society. It requires, and over time can reinforce, a working level of mutual trust. It is precisely these values and linkages that corruption undermines, and that reform, if it is to be sustainable, must credibly promise to uphold.

2009), *available at* http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=GOV/PGC/GF(2009)2&doclanguage=en.

WHY DOES THE UNITED STATES REGULATE FOREIGN BRIBERY: MORALISM, SELF-INTEREST, OR ALTRUISM?

*KEVIN E. DAVIS**

INTRODUCTION

Why does the United States regulate bribery of foreign public officials? Don't U.S. authorities have more than enough corruption to tackle at home without worrying about the misdeeds of public officials in far-off lands?

There are several plausible answers to these questions. One is *moralism*, the idea that legislation such as the Foreign Corrupt Practices Act[1] (FCPA) is designed to make a moral statement, to send the message that corrupt practices are morally blameworthy no matter where they take place. A second, more cynical answer is that U.S. regulation is motivated by *self-interest*. Bribery is a relatively expensive way to obtain favors from foreign officials. Consequently, it is in the United States' economic interest to tie its firms' hands by preventing them from paying bribes for favors that they might otherwise be able to obtain by less costly and more legitimate means. Anti-corruption legislation can also serve the political interests of the United States. Prohibition of bribery can help maintain the image of the United States in foreign countries by preventing its firms

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-2, and amending §§ 78ff, 78m (2006)) [hereinafter FCPA], *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, § 5001, 102 Stat. 1415 (amending 15 U.S.C. §§ 78dd-1 to 78dd-2, 78ff, 78m (2006)) [hereinafter 1988 Amendments], *amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §1, 112 Stat. 3302 (codified at 15 U.S.C. § 78dd-3, and amending §§ 78dd-1 to 78dd-2, 78ff (2006)) [hereinafter 1998 Amendments].

from being associated with tainted foreign public officials, or at least making it possible for the U.S. government to disassociate itself from those firms by taking legal action against them. A third possibility is *altruism*, the idea that the United States should help foreign countries combat corruption as part of a broader commitment to promoting their economic and political development.

The legislative history of the FCPA suggests that moralism and self-interest played the most significant roles in shaping the original Act and its 1988 Amendments. Since then, altruism has played a more prominent role in shaping the FCPA and other initiatives aimed at foreign bribery. There is arguably some tension between self-interest and altruism as guides to enforcing the FCPA. In Part I, this essay traces the motivations for enacting the FCPA as expressed in the legislative history and examines how those motivations evolved over time as the FCPA was amended. Part II discusses the potential tension between self-interest and altruism and several ways in which that tension might be resolved.

I.
THE MOTIVATIONS BEHIND THE FCPA AND ITS AMENDMENTS

A mix of moralism and self-interest motivated the initial enactment of the FCPA. The FCPA was passed in direct response to evidence uncovered in the course of investigations sparked by the Watergate scandal. The Watergate Special Prosecutor uncovered evidence that major U.S. corporations had made illegal contributions to Richard Nixon's re-election campaign and to other political figures from secret "slush funds."[2] A subsequent Securities and Exchange Commission (SEC) investigation revealed that the illegal campaign contributions were, in some instances, also used as channels for "questionable or illegal foreign payments."[3] These findings, together with other information uncovered by a number of congressional hearings[4] and a special Presidential Task Force,[5] led to

2. The payments were detailed in S. REP. NO. 93-981, at 445–92 (1974).

3. SEC Report on Questionable and Illegal Corporate Payment and Practices, Exchange Act Release No. 642, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 3 (May 19, 1976) [hereinafter SEC Report].

4. *See Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 and S. 3418 Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 43 (1976) [hereinafter *Richardson Letter*] (letter from Elliot Richardson, Secretary of Commerce and Chairman of Task Force on Questionable Corporate Payments Abroad, to Senator William Proxmire); *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 1–3 (1975); *Multinational Corporations and United States Foreign Pol-*

the drafting of several bills and, ultimately, the Foreign Corrupt Practices Act of 1977. This background has led many scholars to characterize the FCPA as an expression of "post-Watergate morality,"[6] a self-conscious effort to restore confidence in American business and the free market system.

The House Report on the bill that eventually became the FCPA made these moralistic motivations explicit:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I]t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.[7]

The moral statement embodied in the FCPA was clearly intended for foreign as well as domestic audiences.[8] At the time, the United States was still embroiled in the Cold War and had recently lost ground to the Communists in Vietnam and Angola.[9] Taking a

icy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, 94th Cong. 385–86 (1975); *Lockheed Bribery: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 40, 57–58 (1975).

5. President Ford established the Task Force on Questionable Corporate Payments Abroad on March 31, 1976. *See* H.R. Doc. No. 94-572, at 1 (1976). The Task Force's findings were set out in the *Richardson Letter*, *supra* note 4.

6. Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 Cornell Int'l L.J. 731, 743 (2000). *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. Legal Stud. S141, S161 (2002); Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J.L. & Bus. 583, 593–96 (characterizing the FCPA as "morally based regulation"); Walter Sterling Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime*, 20 Harv. Int'l L.J. 293, 293 (1979) (characterizing the background to the FCPA as the development of a new sense of morality and claiming that "[n]o one was really concerned with overseas bribery of foreign officials until the post-Watergate revelations of questionable corporate conduct").

7. H.R. Rep. No. 95-640, at 4–5 (1977).

8. *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 Fla. L. Rev. 351, 359–60 (2010) ("[T]he [FCPA] was in fact widely understood as an instrument of foreign policy, intended to impact relations between the United States and other nations, and not merely a component of a domestic ethics crisis.").

9. Saigon fell to Communist troops from North Vietnam on April 30, 1975. George Esper, *Communists Take Over Saigon; U.S. Rescue Fleet is Picking Up Vietnamese Who Fled in Boats*, N.Y. Times (May 1, 1975), http://www.nytimes.com/learning/general/onthisday/big/0430.html#article. A leftist government backed by the So-

stand against foreign corrupt practices was a step toward reclaiming the moral high ground in the battle for the hearts and minds of wavering nations. According to the House Report:

> Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.[10]

The idea that Congress intended the FCPA to make a moral statement is consistent with the fact that the drafters rejected a proposal backed by both President Ford and the SEC to eschew criminalization in favor of simply requiring disclosure of foreign bribery.[11] It also explains why proponents of the legislation were able to override claims that a criminal prohibition would be "essentially unenforceable."[12] Whatever its merits as a means of deterrence, a disclosure requirement does not make the same kind of moral statement as criminalization. Disclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large. What disclosure does not entail is explicit denunciation by the state; under a disclosure regime, denunciation is outsourced to society as a whole. By contrast, criminal prohibition is the most potent form of denunciation known to

viet Union and Cuba took power in Angola on November 11, 1975. *Angola Due to Move Toward Marxist Rule*, N.Y. TIMES (Dec. 5, 1977), http://select.nytimes.com/gst/abstract.html?res=F5061FFE3F5E167493C7A91789D95F438785F9.

10. H.R. REP. NO. 95-640, at 5. In a similar vein, see S. REP. NO. 95-114, at 3 (1977) ("Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished."), and *Richardson Letter*, *supra* note 4, at 42 (discussing "[t]he problem of adverse effect on foreign relations").

11. *Compare* H.R. REP. NO. 95-640, at 6 ("After carefully considering all the testimony adduced, the committee concluded that [foreign bribery] should be outlawed rather than legalized through disclosure."), *with Richardson Letter*, *supra* note 4, at 61–65 (proposing a disclosure-based regime and rejecting criminalization). *See* SEC Report, *supra* note 3, at 57–66 (proposing a disclosure-based regime).

12. *Richardson Letter*, *supra* note 4, at 63 ("[T]he President has decided to oppose, as essentially unenforceable, legislation which would seek broad criminal proscription of improper payments made in foreign jurisdictions.").

law,[13] regardless of whether the prohibition is enforced. To the extent that the purpose of the legislation that became the FCPA was to make an immediate moral statement, criminalization made much more sense than a simple disclosure requirement.

Although the primary motivation behind the enactment of the FCPA may have been moralism, Congress was not completely oblivious to the FCPA's potential impact on U.S. economic interests. The House Report took the position that U.S. businesses would not be placed at a competitive disadvantage if they refused to pay bribes, citing evidence of firms that managed to compete successfully in export markets without paying bribes.[14] This view was consistent with the SEC's tentative finding (based on data provided by participants in its voluntary disclosure program) that cessation of questionable or illegal foreign payments "will not seriously affect the ability of American business to compete in world markets."[15]

There were even suggestions that the FCPA would have positive economic effects for the United States. The House Report noted evidence that "in a number of instances, 'payments have been made not to "outcompete" foreign competitors, but rather to gain an edge over other U.S. manufacturers.' "[16] In addition, the SEC made it clear that it viewed *undisclosed* questionable foreign payments as bad for business.[17] The SEC took the position that information about such payments was generally material to investors because it bore upon both the quality of the company's business and the attendant risks.[18]

Economic self-interest played a more significant role in the 1988 Amendments to the FCPA. Those Amendments were motivated by concerns about the burden the FCPA imposed on U.S. exporters and issuers of securities.[19] Tellingly, they were enacted as

13. *Id.* at 61 ("[Legislation criminalizing foreign bribery] would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct.").

14. *See* H.R. REP. NO. 95-640, at 5.

15. SEC Report, *supra* note 3, at 42–43.

16. H.R. REP. NO. 95-640, at 5 (testimony of Former SEC Chairman Hills, partially quoting Former Secretary of Commerce Richardson).

17. SEC Report, *supra* note 3, at 57–59 (describing the proposed action's primary aim as restoring integrity of corporate disclosure and accountability systems). For criticism of the SEC's approach to the problem, see *Richardson Letter*, *supra* note 4, at 53–56 (concluding that "[SEC disclosure] is, arguably, not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments").

18. SEC Report, *supra* note 3, at 18–20.

19. *See* H.R. REP. NO. 100-576, at 916 (1988) (Conf. Rep.) (citing "unnecessary concern among exporters about the scope of the Act" and "unnecessary and

part of the Omnibus Trade and Competitiveness Act of 1988.[20] The 1988 Amendments limited the scope of criminal liability for violation of the accounting standards by imposing a knowledge requirement.[21] They also created exceptions and affirmative defenses to liability for certain payments to foreign public officials: namely, reimbursements for expenses incurred in connection with promotional activities, payments that were lawful under the law of the foreign official's country, and payments for routine governmental action.[22] The 1988 Amendments also created a procedure for the Department of Justice (DOJ) to issue general guidelines and advisory opinions and directed it to provide guidance on its enforcement policy to "potential exporters and small businesses that are unable to obtain specialized counsel."[23]

Last but not least, the 1988 Amendments directed the Executive Branch to negotiate with members of the Organisation for Economic Co-operation and Development (OECD) with a view to concluding an international agreement on foreign bribery.[24] This provision was in direct response to concerns that the FCPA placed U.S. firms at a competitive disadvantage relative to firms from countries without similar legislation.[25] It had long been recognized that unilateral action by the United States would not be able to deter all foreign bribery, simply because it would be impossible for U.S. law enforcement officials to obtain evidence from, or otherwise assert jurisdiction over, all the relevant actors.[26] Accordingly, at more or less the same time that Congress began considering domestic legislation to regulate foreign bribery, the Executive Branch began to press for international agreements on criminalization of foreign

costly paperwork burdens imposed on issuers of securities by unclear and excessive accounting standards").

20. 1988 Amendments, *supra* note 1; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 19 U.S.C. § 2901, pt. 3 (2006)).

21. 1988 Amendments, *supra* note 1, § 5002 (codified as amended at 15 U.S.C. § 78m(b)).

22. *Id.* § 5003 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-2).

23. *Id.* § 5003(e)(4) (codified as amended at 15 U.S.C. §§ 78dd-1(d)–(e), 78dd-2(e)–(f)).

24. 1988 Amendments, *supra* note 1, § 5003(d) (codified as amended at 15 U.S.C. § 78dd-1).

25. *See id.* § 5003(d)(2)(A)(ii) (requiring the President to report to Congress on actions that might be taken in the event that negotiations failed to "eliminate any competitive disadvantage of United States businesses").

26. *See, e.g.*, *Richardson Letter*, *supra* note 4, at 22.

bribery.[27] The 1988 Amendments marked a renewed emphasis on these international efforts and a tactical shift away from pursuit of a global agreement toward advocacy focused in a single forum, the OECD. These efforts ultimately bore fruit in the form of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[28]

The FCPA was amended in 1998 to conform to the requirements of the OECD Convention. At one point the House Report described the Amendments as an effort to "improve the competitiveness of American business and promote foreign commerce."[29] Consistent with the hypothesis that they were motivated by self-interest, the 1998 Amendments extended the FCPA to cover acts committed by foreign nationals while in the United States and increased the penalties applicable to foreign nationals employed by or acting as agents of U.S. companies.[30] Moreover, the benefits of the advisory opinion procedure created by the 1988 Amendments were not extended to foreign actors who were not US "issuers."[31] However, the 1998 Amendments also extended the scope of the FCPA as applied to U.S. nationals in various respects. For example, it made it possible to prosecute U.S. businesses and nationals for action that took place wholly outside the United States.[32] Consequently, it is difficult to interpret these Amendments as being motivated exclusively by self-interest.

In fact, the legislative history to the 1998 Amendments marked the debut of the altruistic idea that the FCPA might serve as a tool

27. *Id.* at 56–57 (summarizing U.S. efforts to encourage regulation of questionable payments through the OECD, the General Agreement on Tariffs and Trade, and the United Nations).

28. Organization for Economic Cooperation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 37 I.L.M. 1 (1998).

29. H.R. REP. NO. 105-802, at 1 (1998).

30. *See* 1998 Amendments, *supra* note 1, § 5002 (codified as amended at 15 U.S.C. §§ 78dd-2 to 78dd-3, 78ff).

31. *Compare* 15 U.S.C. § 78dd-1(e) (providing for DOJ advisory opinions to issuers upon request), *and* § 78dd-2(f) (providing for DOJ advisory opinions to domestic concerns upon request), *with* § 78dd-3 (appearing to be silent with respect to whether the DOJ will make advisory opinions for persons and business entities other than issuers or domestic concerns). *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.4 (2009) (requiring that request for an opinion be submitted by an issuer or domestic concern).

32. *Id.*; Letter from Ann M. Harkins, Assistant Att'y Gen., Dep't of Justice, to Newt Gingrich, House Speaker (May 4, 1998), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/transltrs.pdf (transmittal letter summarizing the draft bill).

for promoting political and economic development. This idea began to circulate widely in the late 1980s and early 1990s, a period marked by growing acceptance of the view that corruption tends to inhibit democratization and economic development.[33] The U.S. Department of State deployed the altruistic and moral justifications for anti-bribery legislation to great effect in urging other countries to enact their own legislation criminalizing foreign bribery.[34] The conclusion of the OECD Convention marked the success of those strategies where previous appeals to U.S. trading partners' economic self-interest had failed.[35]

The State Department's altruistic talking points are reflected in the legislative history of the 1998 Amendments, including pronouncements from both Congress and the Executive Branch. The Senate Report that accompanied the 1998 Amendments described the enactment of the FCPA as a declaration that U.S. companies "should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices."[36] The House Report stated, "International bribery and corruption continue to be problems worldwide. They undermine the goals of fostering economic development, trade liberalization, and achieving a level playing field throughout the world for businesses."[37] In his signing statement, President Clinton declared, "The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development."[38]

The Obama administration has made it clear that anti-corruption law is a central part of its development policy. President Obama has described the promotion of broad-based economic

33. Abbott & Snidal, *supra* note 6, at S158–60. *See* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 675–76 (2004). For a survey of the scholarly literature see SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999).

34. Abbot & Snidal, *supra* note 6, at S162–65.

35. *Id.*

36. S. REP. NO. 105-277, at 1 (1998).

37. H.R. REP. NO. 105-802, at 10 (1998).

38. Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998), *available at* http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=ZeCrKK/1/2/0&WAISaction=retrieve.

growth as one of the central pillars of his Global Development Policy.[39] When the President introduced that Policy in an address to the United Nations, he explicitly characterized U.S. anti-corruption initiatives as means of promoting economic growth in the developing world: "We also know that countries are more likely to prosper when governments are accountable to their people. So we are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights."[40]

An important theme running through statements made by both the Clinton and Obama administrations is that promoting development is consistent with U.S. economic interests. In this vein, there have been several official statements that the motivation for anti-corruption initiatives is a form of enlightened self-interest. The House Report for the 1998 Amendments stated bluntly that "[t]he goal of the United States is the promotion of stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates."[41] Similarly, in the speech announcing his Global Development Policy, President Obama categorized development "not only as a moral imperative, but a strategic and economic imperative."[42]

II.
TENSIONS BETWEEN SELF-INTEREST AND ALTRUISM

At first glance, there is considerable tension between self-interest and altruism as guides to enforcement of the FCPA. An enforce-

39. *See* Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Global Development Policy (Sept. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy.

40. President Barack Obama, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york).

41. H.R. REP. NO. 105-802, at 10.

42. In this speech, the President cited this linkage as being "recognized" by his National Security Strategy. President Barack Obama, *supra* note 40. *See, e.g.*, PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 37–38 (May 2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf. Interestingly, President Obama's cover letter to the National Security Strategy characterized support for anti-corruption activities as part of an effort to "advocate for and advance the basic rights upon which our Nation was founded," and added that "[o]ur commitment to human dignity includes support for development, which is why we will fight poverty and corruption." *Id.* at ii.

ment policy guided by economic self-interest, narrowly defined, would permit U.S. firms to pay whatever it takes to foreign public officials in order to meet and defeat competition from firms that are beyond the reach of U.S. law. If anything, a purely self-interested enforcement policy would involve prosecuting only foreign firms so as to give U.S. firms a competitive advantage. Altruism, by contrast, seems to demand vigorous proactive enforcement against both domestic and foreign firms in order to overcome the limitations and indifference of local anti-corruption institutions. This tension between self-interest and altruism is arguably greater than any tension between moralism and self-interest because the purposes of making a moral statement are satisfied by even weakly enforced criminal sanctions.

There are several ways in which the potential tension between self-interested and altruistic implementation of the FCPA might be resolved. One way is to challenge the idea that enforcement of the FCPA is contrary to the economic interests of U.S. firms.[43] Another way is to challenge the claim that vigorous and proactive enforcement of the FCPA serves the interests of countries in which corrupt foreign officials are located. A final approach involves introducing respect for popular sovereignty as a value that should constrain altruistic initiatives.

The first approach to resolving the tension between altruism and self-interest is to make the argument that bribery is an inherently bad way of doing business. If only because of the difficulty of enforcing corrupt agreements, bribery is often an expensive and unreliable way of obtaining the services of foreign public officials.[44] Since corrupt transactions are beyond the scope of the law, there is no guarantee that corrupt officials will deliver what they have been paid for, and even when they do initially deliver on their promises, there is little to stop them from trying to renege. According to this argument, a legitimately awarded government contract is probably cheaper to obtain and less likely to be revoked than a corruptly procured one. Consequently, U.S. firms collectively have an interest in deterring bribery. On the other hand, this argument cannot be pushed too far. Some "services" cannot be obtained from foreign public officials without paying a bribe: authorization to construct a plant in violation of local environmental protection laws might be

43. The arguments in this paragraph are developed at greater length in Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314 (2002).

44. *Id.* at 335.

an example. Strictly speaking, it is in the United States' economic interest to permit its firms to pay for these kinds of services.

An alternative way of reconciling altruism and self-interest is to appeal to the idea of enlightened self-interest. This is what the Clinton and Obama administrations have done in emphasizing the links between the democratization and development of foreign countries, on the one hand, and U.S. economic and political interests on the other. In an age of global interdependence there may be little distinction between pursuing self-interest and promoting the development of foreign countries on the brink of becoming either trading partners or terrorist training sites.[45] The Arab Spring—especially as it has unfolded in Egypt—has given new credibility to the idea that corruption can destabilize countries in which the United States has significant strategic interests.[46]

Other approaches to the tension between altruism and self-interest challenge the idea that altruism demands vigorous enforcement of the FCPA. Although there is a broad consensus that overseas corruption is a problem, there is less of a consensus about the extent to which aggressive enforcement of the FCPA represents the best solution to that problem.[47]

One important concern is that efforts by the United States and other jurisdictions to punish payment of bribes to foreign public officials may discourage multinational firms from doing business in countries where corruption is endemic, thereby threatening the

45. President Obama's National Security Strategy states:

> Development is a strategic, economic, and moral imperative. We are focusing on assisting developing countries and their people to manage security threats, reap the benefits of global economic expansion, and set in place accountable and democratic institutions that serve basic human needs. Through an aggressive and affirmative development agenda and commensurate resources, we can strengthen the regional partners we need to help us stop conflicts and counter global criminal networks; build a stable, inclusive global economy with new sources of prosperity; advance democracy and human rights; and ultimately position ourselves to better address key global challenges by growing the ranks of prosperous, capable and democratic states that can be our partners in the decades ahead.

NATIONAL SECURITY STRATEGY, *supra* note 42, at 15.

46. *See, e.g.*, Stuart Levey, *Fighting Corruption After the Arab Spring: Harnessing Countries' Desire to Improve their Reputations for Integrity*, FOREIGN AFFAIRS, June 16, 2011, http://www.foreignaffairs.com/articles/67895/stuart-levey/fighting-corruption-after-the-arab-spring ("From Tunisia to Yemen, the corruption of Middle Eastern regimes has played a significant role in motivating the Arab Spring.").

47. This and the following paragraphs draw heavily on Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, *in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 283, 283–306 (Julio Faúndez & Celine Tan eds., 2010).

prospects for development of those countries.[48] OECD survey data and anecdotal evidence suggest that multinational firms are well aware of the FCPA and are making meaningful efforts to comply with it and similar legislation in other countries.[49] Likewise, statistical analyses of cross-border trade and investment flows suggest that enactment of the FCPA and similar legislation in OECD countries has reduced imports and foreign direct investment into countries that are perceived to have high levels of corruption.[50] Small firms, or firms from jurisdictions that do not have legislation equivalent to the FCPA, may make up for reduced business from U.S. multinationals. Nonetheless, there are solid grounds for believing that aggressive enforcement of the FCPA will reduce trade and investment flows to countries with high levels of corruption.

Is it a good thing for U.S. law to discourage firms from doing business with highly corrupt countries? Such a regime creates a collective incentive for inhabitants of countries prone to corruption to control corruption in the hopes of attracting foreign firms. In the optimistic scenario, local actors will be willing and able to respond to that incentive but there is no guarantee that such optimism is warranted. Meanwhile, the lost trade and investment might reduce opportunities for economic growth and poverty reduction.

A second concern about using the FCPA to combat corruption in foreign countries can be labeled "institutional displacement."[51] The concern here is that reliance on U.S. institutions as substitutes for local anti-corruption institutions will, over time, inhibit the development of the local institutions.[52] In other words, U.S. institutions may displace local ones. As a theoretical matter this concern arises even in situations in which U.S. institutions are clearly more effective in combating corruption than local institutions. Even then, the net impact of relying on U.S. institutions might be negative if their operation tends to inhibit the long-term development of

48. Spalding, *supra* note 8, at 351 ("In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond the deterrence of bribery, and ultimately deters investment.").

49. *See* OECD, MID-TERM STUDY OF PHASE 2 REPORTS: APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 128 (2006), *available at* http://www.oecd.org/document/13/0,3343,en_2649_34859_39884109_1_1_1_1,00.html.

50. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad,* 39 J. INT'L BUS. STUD. 634, 645 (2008); Anna D'Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade*, 97 J. DEV. ECON. 73, 73 (2011).

51. Davis, *supra* note 47, at 294–96.

52. *Id.*

local institutions. For example, if American forensic accountants can be relied on to investigate cases of transnational bribery involving public officials from Country X, there will be little benefit to Country X in building up local forensic accounting capacity. Why is this a problem? The fear is that if the institutions in Country X had not been displaced by the American ones, they would have improved over time to the point where they performed better than the U.S. ones.

There are at least two theoretical reasons to take the possibility of displacing local institutions seriously. The first relies on Hirschman's well-known analysis of the trade-offs sometimes entailed in permitting the clients of an organization to "exit" its sphere of influence as opposed to relying on their "voice" to motivate organizational change.[53] Suppose that victims of corruption could rely on the FBI, the DOJ, and U.S. courts to investigate, prosecute, and adjudicate complaints of bribery and to levy criminal or civil sanctions. In that case, why would those victims invest any effort in complaining about or pressing for the improvement of local anticorruption institutions? This may not be a problem if the U.S. institutions are perfect substitutes for local institutions. But suppose that the U.S. institutions only serve the needs of a subset of the local population, perhaps only people—such as foreign investors—who are victimized by transnational bribery as opposed to purely localized corruption. Suppose that the local prosecutors and courts would serve both constituencies. Suppose further that the voices of victims of local corruption are too weak to prompt change and the guardians of local institutions are indifferent to the prospect of losing jurisdiction over cases involving transnational bribery. In these circumstances it is quite plausible that permitting U.S. institutions to respond to corruption will retard the development of local institutions.

A second reason for suggesting that displacement by U.S. institutions can inhibit the development of local institutions relies on the idea of learning-by-doing.[54] The premise of the learning-by-doing argument is that local institutions improve by gaining experience, rather than as a result of pressure from vocal constituents. The intuition is that professionals such as judges, lawyers, police officers, and accountants—as well as the organizations to which they belong—may need to cut their teeth on at least a few cases before they can be expected to perform at the same levels as more

53. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

54. Davis, *supra* note 47, at 295–96.

experienced foreign institutions. On this view, lack of expertise or integrity on the part of local legal institutions may be consequences, rather than causes, of their disuse. To the extent that victims of corruption can rely on foreign lawyers, prosecutors, courts, and police forces to respond to their claims, local institutions will face diminished opportunities to acquire the requisite experience. This is sub-optimal whenever the long-term benefits of enhancing the quality of local institutions would outweigh the costs borne by victims who are poorly served while local institutions are in the process of acquiring expertise. Again, the conclusion is that limiting the role that U.S. institutions play in combating corruption may, over time, better serve the interests of local actors.

Of course, it is always possible that local institutions will respond to the threat of competition ("exit" in Hirschman's terminology) by improving their performance. Another possibility is that the performance gap between local and U.S. institutions will be so great that neither the effects of "voice" nor learning-by-doing can close the gap.

A third possibility is that U.S. institutions serve as complements to local institutions, not substitutes. In other words, the greater the extent to which U.S. institutions are involved in combating political corruption, the greater the benefits a country will derive from local institutions' anti-corruption efforts. In this case, the involvement of U.S. institutions will lead to more rather than less activity for local institutions. In this scenario the flip sides of the arguments set out above suggest that voice and learning-by-doing will tend to improve the quality of local institutions. For example, the fact that U.S. institutions are willing to investigate financial flows passing through the U.S. financial system and to assist in recovering misappropriated funds will tend to increase the benefits to local actors of initiating proceedings against corrupt actors and, by extension, of building local institutions capable of initiating such proceedings. The competence of these local institutions may very well increase as they attract the critical attention of local constituencies and accumulate experience.

A final way to reconcile the tension between self-interest and altruism in enforcement of the FCPA is to refer to a third value: respect for the sovereignty of foreign countries.[55] The drafters of

55. Steven R. Salbu has repeatedly criticized the enactment of the FCPA on account of concerns about interfering with the sovereignty of foreign countries. *See* Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 251–55 (1999); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419,

the FCPA implicitly rejected the idea that its mere enactment would be offensive to countries in which recipients of prohibited payments were based.[56] But respect for sovereignty also provides a basis for arguing about how the FCPA ought to be enforced. Specifically, taking concerns about sovereignty into account suggests that enforcement priorities should be shaped by actors based in the jurisdiction most affected by corrupt activity. These actors typically will not be U.S. prosecutors. Consequently, while respect for sovereignty will not necessarily weigh against enforcement of the FCPA, it will often weigh in favor of reactive, rather than proactive enforcement.

CONCLUSION

The U.S. government has always expressed a mix of reasons for regulating the practices covered by the FCPA, but the mix has changed over time. The idea of using the FCPA to promote foreign countries' economic development has become more prominent in recent official statements than it was when the legislation was initially drafted. This idea is potentially in tension with another idea reflected in the FCPA's legislative history: namely, that the FCPA should serve to promote the economic interests of the United States. The ways in which that tension is resolved will have significant implications for the future of the FCPA.

437–47 (1999); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 282–85 (1997).

56. *See Foreign Payments Disclosure: Hearings on H.R. 15481, S. 3664, H.R. 13870 and H.R. 13953 Before the Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 89 (1976). Hon. Gerald L. Parsky, Assistant Secretary of the Treasury for International Affairs, stated:

Any attempt to apply a U.S. criminal statute to acts consummated abroad would involve an extraterritorial application of U.S. law. While there are no absolute legal prohibitions on such extraterritorial application, attempts by the United States to apply our anti-trust and export control laws in a similar way have created substantial problems in the past. The application of our laws abroad often conflicts with foreign laws or practices and is looked upon as an unwarranted intrusion into the sovereignty of other states. . . . It can be expected that similar reactions would be forthcoming in the present instance. *Id.*

PERILOUS PROXIES: ISSUES OF SCALE FOR CONSUMER REPRESENTATION IN AGENCY PROCEEDINGS

*DARRYL G. STEIN**

One oft-ignored but frequently employed method for improving agency accountability is the use of "proxy advocates," government agencies or lawyers charged with giving voice to underrepresented interests in agency proceedings. Though the bulk of these proxy advocates are used in state agencies to aid ratepayers in regulatory proceedings, several were created to police federal agency action in the 1970s. Those federal proxy advocates were short-lived, but the idea has persisted in national politics, both in legislative and non-governmental calls for administrative reform. These advocates remain in use by the states.

This Note asks what conditions contribute to a proxy advocate's effective consumer advocacy by examining the historical and institutional context of proxy advocates at the state and federal level. It concludes that proxy advocates can most successfully represent consumer interests at the state level when they are independent from political influence and at the federal level when they can be held accountable to consumers rather than the general polity. Finally, this Note addresses ways in which these findings can be used to improve proxy advocates' representation of consumer interests at the federal level.

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INTRODUCTION

The financial turmoil of 2008 led Congress to create the Consumer Financial Protection Bureau (CFPB), an agency many hoped would improve the regulation of financial markets.[1] The CFPB was supposed to represent the interests of consumers to administrative agencies thought to be overly solicitous of the financial institutions they were intended to rein in.[2] Advocates of reform were dismayed, however, to find that the presumptive leader of the Bureau—noted consumer advocate and scholar Elizabeth Warren—would not be confirmed by a fractured legislature. The coverage of Warren's non-appointment focused on the procedural features in the Senate that have widely prevented vacancies from being filled, such as the filibuster and anonymous holds.[3] Other commentators pointed to financial institutions' opposition to Warren.[4] Not only does this latter explanation intuitively make sense, there is historical precedent

1. *See* Ben Protess, *New Consumer Bureau Reaches Out to Wall Street*, N.Y. TIMES DEALBOOK BLOG (Nov. 26, 2010, 7:00 AM), http://dealbook.nytimes.com/2010/11/26/new-consumer-bureau-reaches-out-to-wall-street.

2. "Finally, regulators were not truly independent of the influence of the financial institutions they regulated." *Community and Consumer Advocates' Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Comm. on Fin. Serv.*, 110th Cong. 2 (2009) (testimony of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/mierzwinski_7.16.09.pdf. This was, of course, not the only reason for the creation of the CFPB. *See Creating the Consumer Protection Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Sept. 19, 2011).

3. Testimony of Edmund Mierzwinski, *supra* note 2.

4. *See, e.g.*, Simon Johnson, *Who's Afraid of Elizabeth Warren?*, N.Y. TIMES ECONOMIX BLOG (Mar. 17, 2011, 5:00 AM), http://economix.blogs.nytimes.com/2011/03/17/whos-afraid-of-elizabeth-warren. At the time of publication, Warren had withdrawn from consideration and Richard Cordray had been nominated to the office and subsequently installed as a recess appointment. Nikki Sutton, *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, THE WHITE HOUSE BLOG (July 18, 2011, 3:55 PM), http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau; Dan Pfeiffer, *America's Consumer Watchdog*, THE WHITE

for such practice. Congressional failure to protect consumers is not merely a product of recent Senate practice but a recurring problem whenever the federal government tries to protect consumers in the administrative state.[5] In fact, this is not even the first time that a watchdog agency has found itself without a leader due to industry opposition. The CFPB is not itself a new idea; there is a long history of such "proxy advocates" in American government.

The idea of a proxy advocate is simple: The government creates one agency to influence the decisions of another agency. If the government thinks Alex may not be making proper decisions because he lacks adequate information (or is beholden to private interests), it can assign a proxy advocate, Peter, to keep an eye on Alex. Peter will ensure that Alex has all the relevant information and can monitor Alex to make sure that he gives that information the attention it deserves.

Proxy advocates provide such oversight to agencies. The agency might ignore consumer interests, whether because the consumers cannot communicate their interests to the agency or because the agency staff favors the interests of the regulated industry. The proxy advocate acts on behalf of the consumers, representing them before the agency.[6] For example, when an agency conducts ratemaking proceedings, consumers may not be able to participate in order to represent their interests, but the proxy advocate can appear in their stead to ensure that the consumers' point of view is heard and is supported by evidence entered into the record. All proxy advocates are entitled to file into the record of the agency before which they are tasked with representing consumers.[7] That is to say, a proxy advocate created to represent residential consumers before a Public Utility Commission (PUC) would have the power to file into the commission's record. Generally, proxy advocates are created to represent a constituency that is diffuse or otherwise incapable of adequate unaided representation. Although proxy advocates can take many forms, they are always created by the

HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog.

5. This history is discussed *infra* Part II.D.

6. While these offices go by a variety of names, this Note refers to all of them as "proxy advocates." Some such offices are led by individual officials and others directed by multi-member commissions, which this Note will refer to as bureaucratic entities ("it") rather than appointees ("she"). *See also infra* Parts II.C and II.D.

7. Given the difficulty of concisely and consistently citing to each state's proxy advocate practices, all citations are given in the Appendix.

government[8] and instructed to advocate for a constituency. Proxy advocates that represent consumers of regulated utilities appear on behalf of electric, gas, telecom, rail, or airline consumers to ensure that their collective interests are represented before the relevant regulatory agency. To accomplish this, the proxy advocate is empowered to appear before another governmental agency to represent the constituency's interests.[9] The proxy advocate does not actually make policy decisions but rather makes recommendations or presents information to another agency that makes a decision.[10]

Although there are many entities in government that protect public interests, proxy advocates are distinct from each of them. First, the proxy advocate picks sides in a contested policy area, rather than giving due consideration to all sides of a dispute, which separates proxy advocates from inspectors general, who usually do not advocate for policy but rather monitor fraud or malfeasance. Advocating for a particular interest group also distinguishes the proxy advocate from the agency before which it appears, since that agency will regulate in the general interest. Additionally, in contrast to prosecutors, the proxy advocate does not enforce laws.[11]

Though facially similar to ombudsmen, proxy advocates play a very different role.[12] Ombudsmen are intended to facilitate interac-

8. There are, in some cases, nongovernmental organizations that represent the consumer interest. While they may function similarly to proxy advocates, the fact that they are privately operated makes them qualitatively different. *See* WILLIAM T. GORMLEY, JR., THE POLITICS OF PUBLIC UTILITY REGULATION 49 (1983).

9. *Id.* at 49 ("The idea seems to be that you set a bureaucrat to catch a bureaucrat.").

10. *Id.*

11. Admittedly, enforcement has policy implications. However, an enforcement action occurs within the sphere of pre-established policy. Proxy advocates, by contrast, act to change that policy.

12. One may be forgiven for mistaking a proxy advocate for an ombudsman: members of Congress have made the same mistake. *See Authorization and Oversight Hearing on the United States Railway Association and the Office of Rail Public Counsel: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 1 (1977) (statement of Sen. Russell B. Long, Chairman, Surface Transp. Subcomm.) ("An independent and effective public counsel can be an excellent ombudsman for the various rail users . . . ."). The Office of Rail Public Counsel addressed the question of its role as an ombudsman directly:

> Because of anticipated budgetary constraints I do not visualize the Office functioning as an ombudsman in the sense of processing large numbers of individual claims or disputes involving rail services. However, there are likely to be some instances where individual complaints bring to light broader problems which affect the public at large and with which the Office should deal.

tions between the public and the bureaucracy.[13] The ombudsman is not supposed to influence the bureaucrat's policy choices, as the proxy advocate should.[14] The proxy advocate's power to challenge an administrative decision in the regulatory proceeding itself, or on appeal, further distinguishes the roles. Moreover, proxy advocates generally represent a defined class or group of consumers, rather than individuals.[15]

While the function of proxy advocates is generally accepted, it is less clear where they should be located within government in order to be effective. The recent debates over the Consumer Financial Protection Bureau brought the controversy over the bureaucratic location of such proxy advocates to the forefront of contemporary public discussion. Agency independence was central

Nominations—October-December: Hearings Before the S. Comm. on Commerce, Sci., and Transp., 95th Cong. 104–05 (1977) (statement of Howard A. Heffron, nominee for the position of Director of the Office of Rail Public Counsel).

13. *See* Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975). The three defining elements of an ombudsman are (1) its nonpartisan and independent role as a supervisor of the executive branch, (2) its role handling specific complaints against the administration, and (3) its power to investigate, criticize, publicize, but not overturn, administrative action. *Id.* at 847.

14. GORMLEY, *supra* note 8, at 50, 214. **R**

15. Although Colorado is the only state that explicitly prohibits involvement of the proxy advocate in consumer complaints, COLO. REV. STAT. § 40-6.5-106(d)(2) (LexisNexis 2011) ("[T]he consumer counsel shall not be a party to any individual complaint between a utility and an individual."), most proxy advocates aim to protect a class of consumers rather than individual consumers. *See infra* Part II.C. Some proxy advocates represent individual consumers more directly. This may ask them to serve as a clearinghouse for complaints. GA. CODE ANN. § 46-10-4(b) (2004) ("[A]ppear in the same representative capacity in similar administrative proceedings affecting the consumers of this state . . . ."); KAN. STAT. ANN. § 66-1223(d) (2002) ("[R]epresent residential and commercial ratepayers who file formal utility complaints with the state corporation commission."); OHIO REV. CODE ANN. § 4911.02(B)(2)(b) (West 2010) ("[T]ake appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission."); PA. CONS. STAT. ANN. § 309-4(c) (West 1990) ("[A]uthorized to represent an interest of consumers which is presented to him for his consideration upon petition in writing by a substantial number of persons . . . ."); TEX. UTIL. CODE ANN. § 13.003(a)(7) (West 1997) ("[M]ay represent an individual residential or small commercial consumer with respect to the consumer's disputed complaint concerning utility services that is unresolved before the commission . . . ."); WIS. STAT. ANN. § 196.26(1m) (West 2010) ("[M]ay investigate [filed] complaint . . . as it considers necessary."). *See also* Richard L. Goodman, *The Role of Consumer Advocacy Before the Public Utilities Commission of Ohio*, 8 CAP. U. L. REV. 213, 231–32 (1978) (noting that the outcome of a consumer counsel's backbilling case involving seven consumers would be generally applicable).

to these debates.[16] A topic familiar to administrative law scholars, agency independence recently grabbed the attention of the public, becoming the subject of heated newspaper editorials.[17] The central issue was where to locate an agency charged with protecting consumer interests in the administrative state in order to most effectively protect consumers.[18] Many consumer advocates assumed greater independence to be an unmitigated good, presuming that placing a consumer advocate under the influence of the bank-friendly Federal Reserve would hinder its mission. However, the evidence does not support this conclusion. In fact, independence appears to make federal proxy advocates less successful as representatives of consumer interests.

Proxy advocates can be a powerful tool for consumer protection, but their success is determined by their design.[19] This Note argues that the institutional design of proxy advocates determines how effectively consumers are represented. Proxy advocates must be independent enough to escape the pressure of regulated industry but not so aloof as to disconnect them from the consumers they represent. Specifically, independence hinders the performance of federal proxy advocates, although it makes state proxy advocates more effective. Federal proxy advocates must rely on institutional features that keep bureaucrats connected to their constituency.

Part I examines proxy advocates in the context of their historic development. Part I.A discusses the evolution of state proxy advocates in public utility regulation. Part I.B recounts the history of the three most salient federal proxy advocates. Part II focuses on how proxy advocates are designed. It begins, in Part II.A, with an ac-

16. *See supra* notes 3–4 and accompanying text.

17. *See, e.g.*, Editorial, *Pick Your Side*, N.Y. TIMES, Mar. 13, 2010, at A18, *available at* http://www.nytimes.com/2010/03/13/opinion/13sat1.html; Editorial, *A Fair Shake for Local Thrifts*, THE PLAIN DEALER, May 6, 2010, at A9, *available at* 2010 WLNR 9469281; Victoria McGrane, *Groups Push Independent CFPA*, POLITICO (Mar. 3, 2010, 5:23 AM), http://www.politico.com/news/stories/0310/33786.html.

18. Editorial, *Battle Over Reform*, N.Y. TIMES, June 13, 2010, at WK9, *available at* http://www.nytimes.com/2010/06/13/opinion/13sun2.html ("Banks and other lenders are also fighting to ensure that a new consumer financial protection regulator is neither powerful nor independent. There must be no exceptions for auto dealers and payday lenders, no pre-emptive or veto power for federal officials over the consumer regulator's decisions.").

19. *See generally* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter *Structure and Process*]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) [hereinafter *Administrative Procedures*].

count of the context in which proxy advocates operate. Part II.B explains why proxy advocates are necessary and theorizes how they may alter the landscape of agency decisionmaking. Parts II.C and II.D discuss the structure of state and federal proxy advocates in light of the earlier discussions. With this understanding in mind, Part III looks at how well proxy advocates have performed to ask whether effective consumer representation through proxy advocates at the federal level is possible. Since all proxy advocates may intervene in rate setting proceedings, and many do so, Part III.A looks at the success of state and federal proxy advocates in this practice and concludes that federal proxy advocates are even less successful than state proxy advocates. Part III.B asks whether independence improves proxy advocate performance at the federal level, as it appears to on the state level, concluding that other factors better explain improved federal proxy advocate performance. Part IV makes some preliminary proposals for how proxy advocates can more effectively represent consumer interests. It suggests that courts should pay greater attention to conflicts between proxy advocates and agencies and that the federal government can play an effective role in assisting state proxy advocates.

I.
PROXY ADVOCATES IN HISTORICAL CONTEXT

Proxy advocates have a long history in American government. This history is helpful in understanding how proxy advocates function, as well as understanding their place in administrative law. Since proxy advocates developed differently in federal and state governments, and because the goal of this paper is to compare proxy advocates across these levels of government, their histories are presented separately.[20] This section will provide the historical background necessary to understand why proxy advocates have taken on the institutional features described in Part II.

20. State proxy advocates have received considerably more academic attention than federal proxy advocates. There are several reasons for this, including the interest in comparisons of utility regulation across states and the relatively low profile of federal proxy advocates in administrative law generally, and even within interest group representation more specifically. As a result, the discussions of federal proxy advocates are drawn more from primary documents than the discussion of state proxy advocates, which is drawn from the comparatively voluminous secondary literature.

A. State Proxy Advocates

Proxy advocates emerged in connection with public utility regulation, which began with railroads and has spread to analogous fields.[21] Proxy advocates in state utility regulation, for example, appear before the public utility commission (PUC), which is charged with regulating rates.[22] Like railroads, electric utilities provide essential services for which operators can extract exploitative rents from consumers.[23] Moreover, natural monopolies in railroad and electric utility markets meant no competition between service providers to keep prices low.[24] These early proxy advocates were created

21. *See* GREG PALAST ET AL., DEMOCRACY AND REGULATION 107–08 (2003) (explaining that utility regulation began with state railroad oversight and, later, electricity).

22. *See* GORMLEY, *supra* note 8, at 49–50 (noting proxy advocates that appear before Public Utility Commissions). The PUC, which may also be called the Public Service Commission (PSC), may take almost as many different forms as a proxy advocate. It may regulate electricity, railroads, water, and telecommunications operators. The commissioners may be appointed by the governor with senate confirmation, or they may be elected to a term of years. Indeed, most academic literature regarding democratic utility regulation has focused on the commission and the impact of electing, rather than appointing, commissioners. *See* Guy L. F. Holburn & Pablo T. Spiller, *Interest Group Representation in Administrative Institutions: The Impact of Consumer Advocates and Elected Commissioners on Regulatory Policy in the United States* 2–3 (Univ. of Cal. Energy Inst. Working Paper Series, Paper No. EPE-002, 2002), *available at* http://www.ucei.berkeley.edu/pwrpubs/epe002.html [hereinafter Holburn & Spiller] (noting that elected commissioners tilt rate structures to the advantage of residential consumers); *see also* Timothy Besley & Stephen Coate, *Elected Versus Appointed Regulators: Theory and Evidence* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 7579, 2000), *available at* http://www.nber.org/papers/w7579 (observing that regulatory issues are bundled with other policy preferences held by appointing politicians, but are discrete in elections for regulatory commissioners). *But see* Kenneth W. Costello, *Electing Regulators: The Case of Public Utility Commissioners*, 2 YALE J. ON REG. 83, 84 (1984) (suggesting that evidence indicates that elected PUCs will not lead to lower prices).

23. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 550–53 (1968) (outlining—and critiquing—the traditional arguments in favor of regulating natural monopolies).

24. After a firm makes capital investment in reliance on existing rail shipping or electricity generation options, the market is an inadequate check on the rail or electric company. Since the start up costs required to enter the rail or electricity market are incredibly high—and much higher than the marginal costs to the monopoly holder of adding capacity for additional users in the region served by the monopoly holder—it is difficult for a competitor to become established. Due to the low marginal cost for existing rail and electricity providers to expand service to accommodate increased capacity, railroads and electric utilities both came to be seen as natural monopolies, where it made economic sense for only one firm to serve a geographic constituency.

by the states to curb the perceived abuses of state public utility commissions.[25]

The public utility commissions were themselves created to reign in utilities. With competition unable to protect utility consumers, state governments turned to regulation to guard against abuses by both railroads and electric utilities. The first utility regulator, the Massachusetts Board of Railroad Commissioners, was created in 1869 and used its investigative powers to encourage transparency.[26] As the concern of states shifted to electric utilities rather than railroads,[27] rate regulation by utility commissions was advocated by investor-owned utilities as a way to quell Populist anger and accompanying demands to municipalize power generation.[28] Wisconsin was the first state to set rates by administrative process in 1907, followed by almost all states in the union by 1921.[29]

Public utility commissions were, and are, charged with serving the general welfare.[30] The goals of the state regulators included "guaranteed returns on capital invested to prevent confiscation of

25. Since this section is illustrative rather than exhaustive, this Note focuses its attention on several state proxy advocates that have been the subject of secondary literature.

26. PALAST, *supra* note 21, at 108. R

27. This change in focus was a product of both economic forces, the rising significance of electric utilities, and a changing regulatory landscape following the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. The Interstate Commerce Act permitted the federal government to regulate railroads, a power previously reserved to the states. *See* John J. Esch, *The Interstate Commerce Commission and Congress—Its Influence on Legislation*, 5 GEO. WASH. L. REV. 462, 462–63 (1937); *see also* Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 531 (noting field preemption by the Interstate Commerce Commission regarding rail safety regulation).

28. PALAST, *supra* note 21, at 111–12. R

29. *Id.* at 113. The only holdout, Delaware, followed suit in 1978. *About Agency*, DEL. DEP'T OF STATE, DIV. OF THE PUB. ADVOCATE, http://publicadvocate.delaware.gov/HTML/aboutagency.shtml (last updated Apr. 19, 2011). This use of scientific principles and disinterested experts to make decisions would become the hallmark approach of the New Deal era. *See* William M. Barvick, *Public Advocacy Before the Missouri Public Service Commission*, 46 UMKC L. REV. 181, 182 (1978) (discussing the Missouri Public Service Commission as a shift away from adversarial rate-setting methods).

30. Barvick, *supra* note 29, at 183 ("Strictly speaking, the Commission does not protect the public interest; it determines the public interest."); *see also Fiscal Year 1980 Authorizations of Appropriations for the U.S. Railway Association and Office of Rail Public Counsel: Hearing on S. 447 and S. 448 Before the Subcomm. on Surface Transp. of the S. Comm on Commerce, Science, and Transp.*, 96th Cong. 19 (1979) (discussion between Mr. Madigan and Mr. Heffron) [hereinafter *FY1980 USRA and OPC Appropriations*]. Heffron was asked whether he thought the ICC protected the public interest, and if so, why the ORPC was needed. R

property," which was to be determined by transparent information gathering and informal negotiations guided by a "just and reasonable" standard.[31] No particular constituency was privileged by this approach. Rather, the commission had to balance the interests of all constituencies. The task of protecting and representing the interests of vulnerable parties rested with the parties themselves.

Realizing that some constituencies had difficulty representing themselves, the first proxy advocates were created in the early 1920s. Concern over the growing power of utility companies led Maryland to create the first independent consumer proxy agency.[32] The Maryland statute is remarkable in its similarity to the statutes that persist today.[33] The states that followed Maryland varied in how they designed their proxy advocates. For example, in 1923, Missouri empowered the general counsel of the Public Service Commission to defend consumer interests.[34] Between the 1920s and 1970s, only two other states created proxy advocates to protect consumers.[35]

The 1970s saw a renewed consumer interest in utility issues,[36] however, and a correspondingly broadened use of proxy advocates. Interest representation became a vital component of administrative proceedings in the 1970s,[37] and as interest group participation increased, scholars became concerned that bureaucratic deci-

31. PALAST, *supra* note 21, at 113. R

32. J. Jonathan Schraub, *The Office of Public Counsel: Institutionalizing Public Interest Representation in State Government*, 64 GEO. L.J. 895, 917 (1976) (citing Act of Apr. 9, 1924, ch. 534, §§ 1–2, 1924 Md. Laws 1301, 1301).

33. Act of Apr. 9, 1924, ch. 534, § 2, 1924 Md. Laws 1301, 1305–06 ("Whenever application, protest or other form of complaint is made to the Commission of or concerning any act or omission . . . subject to the jurisdiction of the Commission, . . . it shall be the duty of said People's Counsel . . . to participate in the preparation or reforming of the pleadings . . . and to appear before the Commission . . . in the interest of the public . . . and the services of the experts employed by said Commission as well as the records and other facilities of the Commission shall be availed of by said People's Counsel in the performance of these public duties . . . .").

34. Barvick, *supra* note 29, at 184–85 (1978) (citing MO. REV. STAT. § 386.080 (1969)). R

35. In addition to Missouri and Maryland, a handful of other states created proxy advocates before the 1970s: Indiana in 1941, Rhode Island in 1966. Goodman, *supra* note 16, at 214 n.3.

36. There are several reasons why consumer salience of utility issues increased in the 1970s. *See, e.g.*, Goodman, *supra* note 16, at 214–15 (noting that consumer concern arose from price increases due to oil embargoes and perceived "congressional indifference").

37. *See* Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1760–61 (1975) (observing that interest representation improves outcomes, justice, and confidence in administrative decisionmaking).

sionmakers would place special interests above the general welfare.[38] Indeed, Congress found that these suspicions were well founded[39] and looked for ways to ensure that agencies regulated in the public interest.[40] Congress identified so-called "proxy advocates" as an effective tool for ensuring the representation of consumer interests.[41] Several reasons have been cited for the emergence of proxy advocates, including discontent with government, rising gas prices, and federal funding of state proxy advocates.[42] State legislatures recognized that residential consumers were not only the largest and most diffuse class of ratepayers but also the least able to absorb the rising costs of services. Unlike industrial ratepayers, residential consumers cannot pass rate increases on to customers.[43] Moreover, as one state noted, they were "historically under-represented before utility regulatory agencies."[44] By 1978, twenty states had independent agencies that operated as

38. For a summary of early theories of bureaucratic decisionmaking, see Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 130 (2006). For a discussion of agency capture theory, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–7 (1971) (describing agency behavior in relation to industry in terms of supply of regulatory rents). For a discussion of "iron triangles," see J. Leiper Freeman, *The Bureaucracy in Pressure Politics*, 319 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1958, at 10 (describing bureaucrats as pressure groups). *But see* Thomas L. Gais et al., *Interest Groups, Iron Triangles, and Representative Institutions in American National Government*, 14 BRIT. J. POL. SCI. 161, 163 (1984) (questioning the continued existence of iron triangles in American politics).

39. S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION, VOLUME III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 2 (Comm. Print 1977) [hereinafter PUBLIC PARTICIPATION STUDY] ("There is substantial evidence that this imbalance of representation does, in fact, exist to the detriment of the regulatory process.").

40. The recommendations, expounded upon at length in the full report, include easing the requirements for standing and intervention, as well as an independent consumer protection agency, advisory committees, and direct compensation of intervenors. *Id.* at XI–XIV.

41. *Id.* at XII (recommending creation of consumer advocate offices within federal agencies and provision of grants to assist states in doing the same).

42. Goodman, *supra* note 15, at 214–16; *see also* Guy L. F. Holburn & Richard G. Vanden Bergh, *Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States*, 126 PUB. CHOICE 45, 66–68 (2006) (arguing that proxy advocates are created by center-left coalitions to lock-in policy gains).

43. Goodman, *supra* note 15, at 218.

44. *Id.* (citing the reasons given by the 111th Ohio General Assembly for creating the Office of Consumers' Counsel).

proxy advocates, and another twelve charged their Attorneys General with representing consumer interests.[45]

Today, proxy advocates are part of the regulatory landscape in forty-five of the fifty states.[46] Mississippi has considered legislation to create a proxy advocate, although it has yet to pass both legislative chambers.[47] While a few states created general consumer advocacy departments in lieu of proxy advocates, some, like New Jersey's, have since been abolished.[48]

B. Federal Proxy Advocates

Although state proxy advocates have received the bulk of attention from legal scholars and economists, federal proxy advocates are older. Since federal proxy advocates were so short-lived, they are less frequently discussed and less easily researched. Congressional testimony, statutes, regulations, and agency documents reveal a rich and varied history of federal proxy advocates, spanning from the now-defunct Interstate Commerce Commission to the contemporary Consumer Financial Protection Bureau. Two particular fields in which proxy advocates left a noticeable impact were

45. *Id.* at 214 nn.3 & 4. Between 1924 (Maryland) and 1974 (Florida), only two states created proxy advocates: Washington, D.C. in 1926, Indiana in 1941, and Rhode Island in 1966. *Id.* at 213 n.3; *see also* Potomac Elec. Power v. District of Columbia, 651 F. Supp. 907, 908 (D.D.C. 1986) (noting that the District of Columbia proxy advocate was created in 1926, abolished in 1952, and reestablished in 1975).

46. The five that do not are Idaho, Louisiana, Mississippi, North Dakota, and South Dakota.

47. Press Release, Office of the Attorney General of Miss., Public Utilities Bill Passes House (Feb. 13, 2009), *available at* http://www.ago.state.ms.us/index.php/press/releases/public_utilities_bill_passes_house1 (discussing passage of HB1087); *Report of All Measures*, MISS. STATE LEGISLATURE, http://billstatus.ls.state.ms.us/2009/pdf/all_measures/allmsrs.xml (last visited Nov. 6, 2011); *see also* Adam Lynch, *AARP: Consumer Advocate Needed for PSC*, JACKSON FREE PRESS, July 21, 2010, http://www.jacksonfreepress.com/index.php/site/comments/aarp_consumer_advocate_needed_for_psc.

48. N.J. STAT. ANN. § 52:27E-50 (West 2010) (repealed 2010). One topic that this Note does not directly explore is the conditions that lead to the continued existence of proxy advocates. On the surface, the continued existence of proxy advocates in the states implies that they are doing something right or at least not incurring significant political opposition. By contrast, the fact that the few federal proxy advocates have only persisted for a few brief years before disappearing implies the opposite. However, isolating the myriad factors that contribute to the creation or abolition of a bureaucratic agency is beyond the scope of this Note.

railroad and airline regulation.[49] This section will flesh out the history of proxy advocates in these areas: how they were created and how they were terminated.[50]

As early as 1903, the Interstate Commerce Commission contracted with attorneys to serve as public counsel on behalf of consumer interests.[51] This was the first use of a proxy advocate. However, as these were individual attorneys, hired on a contract basis, rather than repeat players, they were distinct from the proxy advocates that would come later. It is also unclear whether they had the technical expertise, or the ability to contract for expert assistance, that is so important to other proxy advocates.

During the 1960s and 1970s, Congress proposed numerous proxy advocates for a variety of circumstances. While most failed to pass, some proxy advocates were successfully created.[52] Most ambitiously, proxy advocates have been proposed with broad mandates to speak for consumers writ large before the whole federal bureaucracy.[53] However, each such proposal failed in Congress.[54] The only

49. Helpfully, both railroad and interstate airlines at this time were governed by so-called "rate-and-entry" regulation, much like the public utilities discussed at the state level.

50. The few scholars that have addressed federal proxy advocates have focused on the OPC. *See, e.g.*, Bruce Blatchly, *Railroad Reorganization Under the Regional Rail Reorganization Act of 1973: An Overview*, 40 ALB. L. REV. 812 (1976); Theodore S. Bloch & Robert Jay Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 WM. & MARY L. REV. 215 (1974); Nathan I. Finkelstein & Collister Johnson, Jr., *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 ADMIN. L. REV. 167, 169 (1977).

51. *Rail Competition and Service*: *Hearing on H.R. 2125 Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. 579 (2007) (testimony of Charles D. Nottingham, Chairman, Surface Transportation Board) (noting that Louis Brandeis was contracted as public counsel in 1914). For a further discussion of the debate regarding Brandeis's service, see *Brandeis's Part in Rate Hearing*, N.Y. TIMES, Nov. 27, 1913 (discussing whether Brandeis would represent shippers, minority stockholders, or both); *Brandeis Attacks Rayburn Stock Bill*, N.Y. TIMES, June 20, 1914.

52. Insofar as this Note seeks to focus on the effects of proxy advocates after they have already been created, an assessment of the factors that lead to their creation is beyond its limited scope. In examining the conditions under which states have created proxy advocates, Holburn and Vanden Bergh have found that elected political actors are more likely to create proxy advocates when they are "less certain about remaining in office at the next election." Holburn & Vanden Bergh, *supra* note 42, at 66–67. R

53. Though this proposal came in numerous forms, the idea was generally the same in each incarnation—an agency that could represent the interests of consumers before other agencies. A summary of prior proposals was included in the Senate report accompanying The Consumer Protection Act of 1977. *See* S. REP. NO. 95-169, at 5–6 (1977). The first of these proposals was put forward by Sen. Estes

proxy advocates enacted were given limited purview and were sometimes created by regulation rather than statute. Even these, however, were neither long-lived[55] nor viable.[56] There have been recommendations to establish proxy advocates within a variety of administrative agencies, including the Consumer Products Safety Commission,[57] the Federal Communications Commission,[58] and, most recently, the Federal Energy Regulatory Commission.[59] The

Kefauver in 1961 to create a Department of Consumers. S. 1688, 87th Cong. (1961). Proposals were introduced to establish similar offices at the Cabinet level, S. 860, 91st Cong. (1969); in the Executive Office of the President, S. 3097, 91st Cong. § 2 (1969); as an independent agency, S. 3165, 91st Cong. § 2 (1969); and in the Department of Justice, S. 3240, 91st Cong. (1969).

54. None of these attempts were successful: though one bill passed the Senate in the 91st Congress, it never made it to a floor vote in the House. *See* S. REP. NO. 95-169, at 6 (1977). In the 92nd Congress, it passed the House but not the Senate. *Id.* at 7 (noting that S. 3970 failed a cloture vote thrice). The last push was in the 95th Congress, which failed in early 1978. *See* BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS 127–34 (1987) (describing the turns in the press and among consumerists, such as Michael Pertschuk, that led to the bill's demise).

55. The difficulty of passing consumer protection legislation is observed in the legislative history of the CFPB, supra notes 1–4, and can be inferred from the theories of regulation discussed in subsequent sections. *See infra* Part II.A (describing barriers to consumer representation); *see also* Holburn & Vanden Bergh, *supra* note 42. Arthur Bonfield lists a variety of extinct proxy advocates of which little record now exists. Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 538 (1969) (including the National Bituminous Coal Commission and the Department of Agriculture). At one point, the Postal Rate Commission required that a hearing opportunity be granted to an officer of the Commission who would represent consumer interests. Terrence Roche Murphy & Joel E. Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 ADMIN. L. REV. 391, 405 (1976).

56. As Arthur Bonfield noted, "[a]lmost all of the consumer's counsel offices organized as separate entities within the federal establishment have atrophied and disappeared." Bonfield, *supra* note 55, at 538.

57. One proposal would have placed a proxy advocate in the Consumer Product Safety Commission. NAT'L COMM'N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 115 (1970) (recommending the appointment of a consumer product safety advocate to represent the interests of consumers before the Commission). This proposal was removed from the final legislation, under the assumption that a general "consumer protection agency" would be created. Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Products Safety Act*, 20 UCLA L. REV. 899, 902 n.20 (1973). As discussed above, this never came to fruition.

58. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 72 n.1.

59. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 194 (creating an Office of Consumer Advocacy); *see also* Darren Samuelsohn & Ben Geman, *14 Hours Later, House Democrats Hold the Line on Climate Bill*, CLIMATEWIRE, May 20, 2009, *available at* http://www.nytimes.com/cwire/2009/05/20/20climatewire-14-hours-later-house-democrats-hold-the-line-12208.html.

attention that proxy advocates received in the federal government during the 1960s and 1970s corresponded to the interest at the state level.[60]

This Note discusses three federal proxy advocates which are not only among the most widely discussed in the literature, but also whose variations demonstrate that increased independence often does not facilitate a proxy advocate's success. One federal proxy advocate was created in the Civil Aeronautics Board's (CAB) Office of the Consumer Advocate (OCA) to represent consumers before the Board.[61] The Office of Consumer Affairs, as OCA was originally known, began as a consumer complaint section of the CAB Bureau of Enforcement before it was granted limited independence within the CAB under the authority of the Managing Director.[62] In 1974, regulations gave it powers of appearance before the board,[63] but its role as a facilitator of consumer complaints kept it well-grounded in the concerns of its constituency.[64] Though the OCA achieved a modicum of independence, such as the ability to file directly into the docket of a pending matter rather than requiring the approval of the CAB, the Board retained significant power over the OCA through its control over budget and personnel.[65] The CAB was phased out with the deregulation of the airline industry, thus eliminating the OCA as well.[66]

60. *See supra* notes 39–48 and accompanying text.

61. Part II.D provides a more extensive description of federal proxy advocate structure. In particular, see *infra* notes 233 & 234 and accompanying text.

62. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74.

63. Initially it was constituted as the Office of Consumer Affairs and entrusted with handling complaints and distributing consumer guides. *Id.* It was then renamed the Office of the Consumer Advocate, 39 Fed. Reg. 39867 (Nov. 12, 1974), and given status as a party before the board, 14 C.F.R. §§ 302.9, 302.11 (1978).

64. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 78–79 (noting that the primary complaints and OCA activities between 1974 and 1975 focused on baggage damage and overbooking).

65. *Id.* at 80. This was the main objection of the Aviation Consumer Action Project, the primary consumer group that appeared before the CAB, to the OCA. *Id.* at 81.

66. The elimination of the CAB necessarily abolished the OCA, a subsidiary office. Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744 (1978). Certain of the OCA's powers persist in the Department of Transportation's Office of the General Counsel, in the Office of Aviation Enforcement and Proceedings (OAEP). 49 C.F.R. § 1.22(d) (2009); *see also Aviation Enforcement & Proceedings (C-70)*, DEP'T OF TRANSP. OFFICE OF THE GEN. COUNSEL, http://www.dot.gov/ost/ogc/org/aviation (last visited Oct. 9, 2011) (responsibilities include "handling of informal consumer complaints" and "enforcement of consumer protection regulations").

Two other significant proxy advocates were created to participate in rail proceedings. The Office of Public Counsel (OPC) was a proxy advocate created within the Interstate Commerce Commission.[67] After the OPC closed, Congress created the Office of Rail Public Counsel (ORPC). This was the first federal proxy advocate created to be independent of the agency before which it appeared.[68] Both offices represented consumer interests before the Interstate Commerce Commission.[69]

The Regional Rail Reorganization (3-R) Act of 1973 created the OPC. This legislation reorganized several bankrupt northeastern railroads into Conrail.[70] Although traditional bankruptcy procedures had been adequate to handle prior railroad insolvencies,

67. *See* Finkelstein & Johnson, *supra* note 50, at 168–69; *see also* Interstate Commerce Commission Evaluation of the Secretary of Transportation's Rail Services Report, 39 Fed. Reg. 17147, 17149 (May 13, 1974) (stating that the RSPO contributed to this ICC report and that the OPC, whose function was "to provide legal representation and assistance to the public throughout the restructuring process set in motion by the [3-R] Act," held public hearings to solicit views and comments). *See generally* Regional Rail Reorganization (3-R) Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (establishing the statutory scheme in which the OPC would operate).

68. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52. The author has been unable to identify any prior, independent proxy advocates.

69. The role and purpose of the Interstate Commerce Commission in relation to the railroads has been a topic of extensive historical debate. Gabriel Kolko first challenged the "prevalent history of the federal regulation of railroads . . . [as] 'a counterpoise to the power of private business' and 'the complaint of the unorganized against the consequences of organization.'" GABRIEL KOLKO, RAILROADS AND REGULATION 1877–1916 2 (1965) (quoting RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 214, 231 (1955)); *see also* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 22–23, 26–32 (1983) (describing the role of the ICC as a codification of the common law of common carriers that balanced competing interests of consumers and railroads and noting that the ICC also reconciled the needs of railroads with competing interests of other modes of freight transportation).

70. The debate over the cause of the railroad bankruptcies was among the disputes in which the proxy advocate was embroiled. While railroads, such as Penn Central, claimed that the losses were due to the operation of light-density lines, this may only have accounted for a small portion of the losses. For a discussion of the circumstances surrounding the legislation, resulting nationalization, and reprivatization, see RICHARD SAUNDERS, THE RAILROAD MERGERS AND THE COMING OF CONRAIL 313 (1978) (noting that only 17% of total losses were due to light-density lines under the railroad's own accounting, and only 7% of the losses according to the Interstate Commerce Commission); Blatchly, *supra* note 53, 823–24 (discussing the process); James S. Ang & Carol Marie Boyer, *Finance and Politics: Special Interest Group Influence During the Nationalization and Privatization of Conrail* (European Fin. Mgmt. Ass'n 2000), *available at* http://ssrn.com/abstract=251413.

they were ill suited for the wave of bankruptcies in the Northeast in the early 1970s. The continued operation of the railroad eroded the bankruptcy estate, thus preventing the payment of creditors,[71] but the strong public need for railroad transportation required them to continue operation.[72] By passing the 3-R Act, Congress created four entities to facilitate the reorganization. The United States Railway Association (USRA) was the principal planning and funding agency. It was authorized to make loans and issue obligations on behalf of the Department of Transportation.[73] Congress also authorized the creation of Conrail, the corporation that would operate the railroad, and it created a three judge judicial panel with jurisdiction over all proceedings related to the plan.[74]

The fourth entity, the Rail Services Planning Office (RSPO), was created within the Interstate Commerce Commission. Its director was appointed by the ICC. The RSPO did not have planning or funding authority; rather, its purpose was to serve as a counterweight to the USRA in the planning process by soliciting public comment in response to the reorganization and planning efforts of the Department of Transportation[75] and the USRA.[76] One of its major duties was to prepare the Evaluation of the USRA's Preliminary System Plan.[77] In order to do so, the RSPO created a proxy advocate, the Office of Public Counsel.[78] The OPC was given both a permanent[79] and outreach staff, which represented affected geographic areas.[80] The outreach program was essential: the Conrail reorganization threatened to deprive towns of their access to the

71. *See* SAUNDERS, *supra* note 70, at 304 (describing *New Haven Inclusion Cases*, 399 U.S. 392 (1970), and the continued erosion of the bankruptcy estate of the Penn Central line by continued operation of the railroad, as mandated by regulators).

72. *Id.* at 303–07 (comparing the options of liquidation and nationalization).

73. Blatchly, *supra* note 53, at 823; *see also* Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 202(a)(2), 87 Stat. 985, 990 (1974).

74. Blatchly, *supra* note 50, at 823–24; *see also* 3-R Act § 209.

75. 3-R Act § 205(d)(1).

76. 3-R Act § 207(a)(2).

77. *See* RAIL SERVICES PLANNING OFFICE, EVALUATION OF THE U.S. RAILWAY ASSOCIATION'S PRELIMINARY SYSTEM PLAN 1 (1975) (noting that one of the Office's "two major responsibilities" is to analyze the Report of the Secretary of Transportation and the Preliminary System Plan).

78. It was thus a regulatory, rather than a statutory, creation. *See* Finkelstein & Johnson, *supra* note 50, at 170–71.

79. The permanent staff consisted of seven lawyers and four supporting personnel. Bloch & Stein, *supra* note 50, at 226 n.47.

80. *Id.* at 225–26.

national rail network, and thus their livelihood, but the towns were unable to participate in a Washington-based agency proceeding.

Congress created the Office of Rail Public Counsel following the successful completion of the OPC's duties. In 1976, the RSPO gave its final comments on the USRA plan, thus fulfilling its statutory mission, but Congress was impressed by its performance and sought to make the public counsel a permanent feature of the bureaucracy. A letter from Senator Vance Hartke referred to the OPC as an "unqualified success."[81] Thus, Congress decided to continue and ostensibly improve the office by transforming it into the Office of Rail Public Counsel.[82]

The Office of Rail Public Counsel was intended to continue representing consumer interests in railroad regulation, but it met significant opposition to undertaking its mission. The creation of the office, one study noted, was "a paper change, as the actual implementation of the legislation was frustrated by President Ford and the Commission itself."[83] The much-vaunted independence of the ORPC required the President to appoint a director[84] and the

81. Finkelstein & Johnson, *supra* note 50, at 186 n.71. Similarly glowing comments were included in the appropriations request by the ICC for the ORPC for 1978. *See Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978, Part 3: Hearings on H.R. 7557 Before a Subcomm. of the S. Comm. on Appropriations*, 95th Cong. 578 (1977) (Verbatim comments of legislators, businesses, public interest groups, and citizens are included in the subsequent pages.).

82. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51. Prior to the creation of this office, the ICC sought to preserve the OPC and expanded its mandate. *See Interim Regulatory Reform Act of 1977: Hearing on S. 263 Before the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 127–128 (1977) [hereinafter *Interim Authority Decision*] (reprinting an ICC press release, issued October 31, 1975, regarding the expanded OPC).

83. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 85.

84. 4-R Act § 304. Indeed, presidential appointment was required for the leader of the new office. *Interim Authority Decision*, *supra* note 82, at 126 (concluding that the ICC could not appoint an interim leader for the ORPC). Despite impressions given in testimony by Interstate Commerce Commission officials, the ICC may have sought the DOJ opinion not in the hopes of being granted the power to make the interim appointment, but of being forbidden it. *Compare Authorization and Oversight Hearing on the United States Railway Association and the Office of Rail Public Counsel of the Interstate Commerce Commission: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 18 (1977) (statement of George M. Stafford, Chairman, Interstate Commerce Commission) ("As it became evident that the appointment was not soon forthcoming, the Commission, partially through its own initiative and partially through the urging and support of this committee, sought alternative methods to effect the intent of the legislation until such time that a director was appointed."), *with* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 86 ("Interpreting the legislation to mean that

new office to seek its own budget line.[85] These requirements freed the office from direct control by other agencies, but they also forced the fledgling office to convince the Executive to nominate a Director, and to convince Congress to confirm that selection and provide the office with adequate funding. These obstacles would delay the agency's progress until 1978.[86]

Although the ORPC appeared to be a model proxy advocate on paper,[87] members of Congress criticized the ORPC from its inception and eventually dissolved the office.[88] At first, the ORPC was criticized for its very existence: Legislators balked at the inefficiency of having a separate office that seemingly duplicated the role of the ICC.[89] Later, the office's failures gave critics ample ammunition. The Senate's report on the failures in coal price regulation by the ICC,[90] then a central part of the politically and economically volatile energy crisis, laid part of the blame on the ORPC for its failures in representing the public.[91] The central criticism was that the representation of the public interest required active solicitation of pub-

the Office of Rail Public Counsel could not be set up until the President appointed a director, the ICC sought an opinion from the Justice Department.").

85. 4-R Act § 304.

86. *See Nominations—October-December*, *supra* note 12, at 103.

87. The director of the ORPC testified to fulfilling its purpose of organizing to overcome collective action problems, noting that his office asked the question: "How about rail users . . . ? Are rate bureaus in their interest because the railroads and the shippers happen to like that type of arrangement?" *Rail Public Counsel Authorization for Fiscal Year 1980: Hearing on H.R. 2420 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 96th Cong. 15 (1979) [hereinafter *FY1980 ORPC House Authorization*] (statement of Howard A. Heffron, Director, Office of Rail Public Counsel).

88. Since it was intended as a check on a bureaucratic function—a redundancy—, it was frequently identified as wasteful in Congressional hearings. The ICC also had a Bureau of Investigation and Enforcement that furthered the appearance of redundancy. Moreover, the ORPC's inability to secure broader support for funding and leadership is unsurprising, given that similar agencies had been proposed for decades but had never been authorized by Congress. *See* Letter from Elmer B. Staats, Comptroller General of the United States, to Sen. John Melcher (Mar. 22, 1979) (on file with author) (observing that the Senate's creation of the ORPC limited its jurisdiction to intervention in proceedings related to the ICC); *see also* S. Rep. No. 96-97, at 3–4 (1979) (noting that the Office of Special Counsel could easily assume the ORPC's role).

89. *See, e.g.*, *FY1980 ORPC House Authorization*, *supra* note 90, at 13–15 (statement of Rep. Gary A. Lee, Member, H. Subcomm. on Transp. and Commerce).

90. H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., RAILROAD COAL RATES AND PUBLIC PARTICIPATION: OVERSIGHT OF ICC DECISIONMAKING (Comm. Print 1980) [hereinafter COAL RATE REPORT].

91. *Id.* at 6, 8–9, 107–12.

lic opinion,[92] but the ORPC solicited the opinions of the Edison Electric Institute and the National Coal Association, rather than those of the consumers.[93]

In 1980, ORPC funding was reduced from $1,850,000 to $1,200,000 with an eye toward phasing it out.[94] It was formally eliminated in 1995, along with the rest of the Interstate Commerce Commission,[95] though funding had not been authorized since FY1980.[96] It might be argued that the ORPC failed because it was not given enough time, but it appears that its failure was structurally predetermined. It was forced to fight for its own budget and leadership, but it definitionally lacked an organized interest that could pressure either Congress or the Executive.

II.
PROXY ADVOCATES IN INSTITUTIONAL CONTEXT

Proxy advocates have been created to help consumers who are frequently underrepresented in agency proceedings. As shown by state and federal proxy advocates, these offices frequently help con-

92. *Id.* at 6, 8, 107–110.

93. *Id.* at 110 (both the Edison Electric Institute and the National Coal Association are trade associations whose interests are aligned with utilities rather than consumers).

94. *See* Amtrak Reorganization Act of 1979, Pub L. No. 96-73, § 301, 93 Stat. 537, 557; S. REP. 96-67, at 3 (1979). After the ORPC was eliminated, there was a division within the ICC that was somewhat similar to a proxy advocate: the Bureau of Investigation and Enforcement. This was eventually renamed the Bureau of Hearing Counsel. 49 Fed. Reg. 18,848 (May 3, 1984). The Bureau of Investigation and Enforcement performed some functions similar to a proxy advocate, such as filing comments into the docket of Interstate Commerce Commission proceedings. *See, e.g.*, Carolina Freight Carriers Corp. v. Interstate Commerce Comm'n, 627 F.2d 563, 564–65 (D.C. Cir 1980) ("The Bureau of Investigation and Enforcement also participated in the hearings."); Cont'l Grain Co. v. Interstate Commerce Comm'n, 603 F.2d 939, 941 (D.C. Cir. 1979) ("The Commission . . . ordered [the BIE] to further investigate specific instances of possible violations of the Elkins Act." (internal quotation marks omitted)). However, the BIE was part of the agency, rather than an independent watchdog, and was often directed to undertake activities on behalf of the Commission. *See, e.g.*, Rocky Mountain Motor Tariff Bureau, Inc. v. Interstate Commerce Comm'n, 590 F.2d 865, 866 (10th Cir. 1979) ("The ICC directed the Bureau of Investigation and Enforcement to participate."). Indeed, the record reveals that the BIE's relation to the ICC could lead to the Bureau's recommendations being flatly rejected, and then the Bureau subsequently requested to investigate the alternative course of action chosen by the Commission, given the control of the BIE by the ICC. *See Cont'l Grain Co.*, 603 F.2d at 941–43.

95. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

96. *See* Amtrak Reorganization Act of 1979 § 301; S. REP. 96-67, at 3.

sumers disadvantaged by regulated utilities, such as electricity or rail. This section addresses why consumers need to be protected and how proxy advocates serve that function. It begins in Part II.A at the highest level of generality by describing how consumers function in the administrative process and the difficulties they face.[97] Next, Part II.B demonstrates how proxy advocates can help consumers. Finally, Parts II.C and II.D narrow the scope of the inquiry and move from theory to practice. Specifically, these sections address how proxy advocates at the state and federal level help consumers. They survey the powers that are given to proxy advocates and the ways in which proxy advocates are kept accountable. The paper continues in Part III to compare these specific approaches with regard to proxy advocate effectiveness.

A. Consumers in the Administrative Process

Whether a proxy advocate can represent consumers begs a more fundamental question: why are these consumers unable to represent themselves? For an interest group to represent its views in a political forum, the group must overcome three hurdles. The interest must (1) organize, (2) participate in the proceeding, and (3) be credibly heard by the decisionmaker. Compared to private firms, however, diffuse consumer interests are less able to organize, less able to participate in technical agency proceedings, and less likely to be heard by agency decisionmakers. This section addresses these three hurdles and presents a theoretical framework in which to understand why consumers struggle to represent their own interests in administrative proceedings. It concludes by contrasting the relative abilities of consumer groups and private firms to influence policy.

Administrative procedures determine administrative outcomes.[98] When Congress delegates decisionmaking to agencies, it relies on a body of laws to constrain agency discretion in accordance with the dictates of the particular substantive delegation.[99] Although the amount of policy space given to the agency can be hugely broad,[100] legislatures rely on administrative law to constrain

97. Part II.A.

98. *See generally Structure and Process*, *supra* note 19; *Administrative Procedures*, *supra* note 19.

99. For a more complete discussion of how legislation begets regulation within the structure of these constraints, see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–22 (2008).

100. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in

agency decisions by way of previous legislative directives and judicial decisions. Agencies are further constrained by process requirements, such as the Administrative Procedures Act.[101] Such statutes hold agencies to judicially reviewable standards in how they conduct their proceedings.[102] Other restrictions on agencies, such as conducting cost-benefit analyses,[103] impose substantive requirements on agency decisions.

In particular, administrative procedures assure "fair representation for all affected interests" in agency proceedings.[104] This assurance not only facilitates transparency but also implicitly recognizes the "assumption that there is no ascertainable, transcendent 'public interest,' but only the distinct interests of various individuals and groups in society."[105] Since agencies must make a decision from amongst those competing interests,[106] it follows that certain constituencies may not be protected if they are unrepresented in the proceedings.[107]

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only two statutes, one of which provided literally no guidance for the exercise of discretion . . . .").

101. 5 U.S.C. §§ 500–584 (2006). There are similar statutes that govern state administrative agencies. *See generally* Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986) (describing the relationship of the federal APA to the development of the Model State Administrative Procedure Act).

102. *See* 5 U.S.C. §§ 701–706 (2006) (explaining the process of judicial review of agency action).

103. Exec. Order No. 12,291, 3 C.F.R. 127, 129 (1981); Exec. Order No. 12,866, 3 C.F.R. 638, 645 (1993); Exec. Order No. 13,422, 3 C.F.R. 191, 192 (2007).

104. Stewart, *supra* note 37, at 1712; *see also* Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 723–30 (1972) (discussing approaches to decisionmaking "in the public interest").

105. Stewart, *supra* note 37, at 1712.

106. Agencies are frequently given a statutory mandate to regulate in the "public interest." *Administrative Procedures*, *supra* note 19, at 272 ("[L]egislation typically delegates to agencies vague mandates accompanied by broad grants of authority to the agency to define the 'public interest.'"). This may be more accurately spoken of as serving the general welfare. Barvick, *supra* note 29, at 183 ("The Commission has followed this public good-general welfare view of the public interest since its inception.").

107. *See FY1980 ORPC House Authorization*, *supra* note 87, at 19 (dialogue of Rep. Edward R. Madigan, Member, H. Subcomm. on Transp. and Commerce, and Howard A. Heffron, Director, Office of Rail Public Counsel) ("Mr. Madigan: Do you agree that the function of the Interstate Commerce Commission is to protect the public interest in matters relating to transportation decisions? . . . Mr. Heffron: . . . I think it is necessary that another public body participate in those proceedings out front and produce whatever evidence, whatever arguments are relevant to the matter before the Commission so that it does not have only the views of those interests that are well financed that follow these proceedings very carefully with specialist assistance."). R

Interest group involvement should improve policy through the adversarial clash of opposing interests, but this requires that all relevant interests participate on fair footing.[108] Not all groups participate equally, however. Private firms and trade groups have a sizable financial stake in the outcome, and they have the resources to research proposed rules, file comments, and keep a close eye on administrative agencies that may affect their financial interests.[109] Most consumers possess only a fractional stake in the outcome, and they lack the capital know-how to identify and organize in response to relevant agency proceedings.[110] Since substantial procedural obstacles to participation have been lowered to encourage appearance by interest groups and outside parties,[111] the failure of citizens to vindicate demands in agency proceedings now generally arises from the practical (as opposed to legal) obstacles to participation, such

108. *See* Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 241 (1976) (citing Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78, 1684 (1975)). This approach seems to presume that the adversarial clash of interests will yield a result that (all at once) most satisfies preferences, maximizes social welfare, and is in accord with the legislative delegation. It is possible, or indeed likely, however, that the result that yields the most satisfaction amongst involved parties, however, either imposes externalities or contradicts legislative intent. This question is bracketed for now and addressed further when examining the scope of the proxy advocate's mandate. *See infra* Part II.

109. *See* Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 257 (1998) ("[B]usiness groups—whether they are corporations or trade associations—utilize much more sophisticated monitoring techniques than the smaller advocacy groups do.").

110. These principles apply to consumer involvement in elections as well as agency decisionmaking. An interest group could try to change the agency's mind or change the agency by electing a new principal, but they must overcome the same barriers to participation. Consumers, however, may more easily affect agency proceedings since they require fewer resources than electoral contests.

111. Where the doctrinal barriers to citizen involvement in agency proceedings were once a significant obstacle to citizen participation, they are now an historical footnote. *See* United Church of Christ v. FCC, 359 F.2d 994, 1003–04 (D.C. Cir. 1966) (granting standing to consumers as a means of ensuring that the public voice is heard in regulatory proceedings); United States v. Pub. Utils. Comm'n, 151 F.2d 609, 613–14 (D.C. Cir. 1945) (granting standing to the United States to challenge the Public Utility Commission's actions in its customer capacity); *see also* Leflar & Rogol, *supra* note 108, at 245 ("A series of judicial decisions, legislative acts, and administrative rulings over the past decade has opened up the regulatory agencies to 'private attorneys general' . . . ."). *See generally* Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972) ("Most efforts on behalf of public intervention to date have been focused on establishing a 'right' to intervene. This battle has largely been won . . . .").

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as the inability to form an interest group, participate in a proceeding, or convince a decisionmaker.

The first, and perhaps most significant, barrier to participation in agency proceedings is organization. Diffuse interests seeking public goods often face a significant collective action problem with respect to interest group formation. As explained by Mancur Olson, a collective action problem arises when an individual understands that she will share in the benefit of a non-excludable good whether she participates in the group effort or not.[112] If success requires the participation of multiple members of the group, and the other members of the group fail to participate, then no one will obtain the benefit, including the individual, regardless of whether she chose to participate.[113] Thus, it is only rational for her *not* to participate in the collective action. Such is the case with an individual considering whether to petition an agency for a desired policy.[114] While the benefits to the individual may be significant, they will not likely surpass the high initial costs of assembling a cohort of people willing to share the costs of establishing an organization to appear before the agency. Rather, "the marginal cost and benefit must be equal not only for the group as a whole, but also for each of its members."[115] All of this is to say that if she cannot have the support of a group behind her in lobbying for a policy, she will not succeed, and thus she will not try without a guarantee that she will have support.

Yet diffuse interest groups are more successful than this (admittedly pessimistic) account would suggest. At the individual level, there are reasons for political involvement that cannot be explained purely by economic self-interest. People may participate for ideological, moral, and solidaristic reasons.[116] They may also be

112. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 10–22 (1971); *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 560–71 (2001).

113. Olson draws the analogy from a defection from monopoly pricing:

> The individual member of the typical large organization is in a position analogous to that of the firm in a perfectly competitive market, or the taxpayer in the state: his own efforts will not have a noticeable effect on the situation of his organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.

OLSON, *supra* note 112, at 16. R

114. *See* Revesz, *supra* note 112, at 561–62. R

115. *Id.* at 562.

116. *See* CROLEY, *supra* note 99, at 43 ("Although [interest group] members may have overlapping interests, they also have individualized interests."). R

subject to "bounded self-interest," whereby people "care, or act as if they care, about others, even strangers, in some circumstances."[117] Members of small groups may be more willing to contribute to collective goods, even when the costs exceed their direct benefits, since they are more likely to act out of concern for others in their group.[118] Additionally, consumers may form representative groups that can organize electoral campaigns and mobilize public attention, although they must overcome the obstacles to forming a group from a diffuse interest at the outset.[119] These tools are more important in influencing the elected government officials,[120] however, since bureaucrats may be insulated from direct electoral accountability, as by civil service rules.[121]

117. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV 1471, 1479 (1998); *see also id.* at 1541 n.208 ("A standard argument for law under the conventional economic approach is that self-interested people will create collective irrationality; if people are boundedly self-interested, however, this problem may tend to disappear.").

118. For a contrary view, see CROLEY, *supra* note 99, at 42. Croley notes the argument that collective action is more likely in small groups but argues that "[c]onceptually, there is no necessary connection between group size and the influence the marginal member's contribution has on the probability that the good will be produced." *Id.* R

119. These may broadly grouped as the transaction costs of mobilization. For example, consumers of electricity may face transaction costs in organizing to drive down prices, thereby preventing full competition. *See* Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL L. 435, 448 (2002). In starkest terms, the savings are dispersed over so many people that each consumer would only gain pennies in savings but would have to expend more than that (in resources or opportunity cost) to realize that gain. For a discussion of whether transaction costs are reduced in subnational jurisdictions for environmental lobbying, see Revesz, *supra* note 112, at 560; Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 285–86 (1997). R

120. One should keep in mind that participation is neither universal nor equal. Rather, participation varies, demographically speaking, in terms of who participates and how much they do so. Citizen groups, for example, may not be as effective as corporations at tracking agency behavior. *See* Golden, *supra* note 109, at 258 & tbl.5 (showing that citizens groups are more likely to rely on informal networks to track agency action). While technology might have changed the nature of agency monitoring, there is still reason to believe that corporations are ahead of citizen groups with regard to agency monitoring, based on this evidence. *See* SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 174–77 (1995) (noting that participation is not evenly distributed across all groups, and that some interests rely on proxies). R

121. RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 8 (1994) ("In structuring the bureaucracy, the president and the Congress had an incentive to insulate senior-level officials from political manipulation in the administration of policy. Achieving this goal

Additionally, diffuse interest groups have been slow to organize before administrative proceedings.[122] One legislature-commissioned report in 1977 showed the minimal representation of diffuse public interests, as opposed to the robust representation of private (business) interests.[123] In recent years, however, studies have reflected increasing interest group participation in agency proceedings.[124]

Even if diffuse consumers can organize, they must also overcome a second obstacle: the difficulty and cost of participating in agency proceedings. Citizen groups often lack adequate notice of upcoming proceedings.[125] As a result, a great many decisions and proceedings are conducted without any participation by public interest groups, and some agencies have received "literally no attention at all" from public interest groups.[126] Businesses, conversely, are notified by trade groups, which they organize and join due to their significant vested financial interest.[127] Even if a diffuse group

required shielding them from arbitrary dismissals and limiting the role of political favoritism in promotion and advancement.").

122. For a general discussion of appearance of public interest groups, firms, and individuals before administrative agencies, see CROLEY, *supra* note 99, at 123–25. R

123. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 16 ("[W]e found that in agency after agency, participation by the regulated industry predominates—often overwhelmingly."). When agencies try to stimulate citizen participation, the individuals active in such programs tend to have been previously active in agency affairs, include a large component of representatives from other government agencies, and represent a small portion of the public affected by the program, skewing toward the well-educated and affluent. Walter A. Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC'Y 355, 372 (1976).

124. *See* Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 360–62 (2005); Golden, *supra* note 109, at 255; Yackee & Yackee, *supra* note 38. R

125. *See* Golden, *supra* note 109, at 257–59; Leflar & Rogol, *supra* note 108, at 245–46. Private citizens often lack the time and resources to monitor the day-to-day happenings of agencies. *Id.* However, the Internet has made this process considerably easier and more accessible. R

126. *See* Peter H. Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132, 137 (1977) (indicating the high threshold costs of participation). In a review of meetings held by OIRA to review pending rules, fifty-six percent were attended solely by so-called "narrow-interests" while ten per cent were attended only by "broad-based" interests. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 871 (2003) (noting that twenty eight percent of meetings had representatives from both narrow- and broad-based interests).

127. *See* Golden, *supra* note 109, at 263. R

is aware of a proceeding, it may lack expertise and thus not be able to participate adequately.[128]

Participation in proceedings is costly and complex and may require a high threshold of spending beneath which involvement is either impossible or meaningless.[129] These costs are generally incurred due to legal fees, technical assistance, and clerical costs imposed by the agencies.[130] Whether the cost is $30,000-40,000 to participate in FDA proceedings[131] or $100,000 to contest a utility rate increase request,[132] the cost of fighting against an agency decision may outstrip the group's annual budget[133] or cost more to fight than it would benefit the consumers.[134] If participation costs are particularly high, public interest groups would understandably choose other, cheaper battles to fight, perhaps hoping to capitalize on those victories in fundraising revenue that could be used in later agency proceedings. Additionally, if the costs exceed benefits, involvement would require marginal contributions from group members in excess of the marginal benefit, rendering participation

128. *See* GORMLEY, *supra* note 8, at 164. The generalization that citizen groups lack expertise does not always hold true. In some cases, they possess considerable and invaluable expertise. *See, e.g.*, Schuck, *supra* note 126, at 134 (describing a public interest law firm, usually supported by a foundation, a university, or by fees from public interest groups that furnishes formal legal representation to unorganized as well as organized interests); *About NRDC: Who We Are*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/about/who_we_are.asp (last visited Oct. 9, 2011) (describing the NRDC's "staff of more than 300 lawyers, scientists, and policy experts"). Additionally, for a discussion of the costs of expert witnesses, see Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 540 (1972). Not all proceedings are complex, however. In utility regulation, such citizen groups, termed "grassroots advocates" by William Gormley, proved themselves effective in low complexity issues, such as the establishment of lifeline rates. *See* GORMLEY, *supra* note 8, at 165. R

129. For example, participation in a "simple" rulemaking at the CAB (filing an answer to a petition for reconsideration) cost six percent of an interest group's total annual budget. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 19. Notably, this was for clerical costs alone. Today, where it is easy to find and file into rulemaking dockets on the Internet, these figures may be lower. However, where technical expertise or computational power is required to formulate comments, as is the case for ratemaking, the costs are still significant.

130. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 17–18.

131. Schuck, *supra* note 126, at 137 (in 1972 dollars). R

132. Leflar & Rogol, *supra* note 108, at 246. R

133. Schuck, *supra* note 126, at 137. R

134. That consumers would elect not to participate in such a proceeding may be described as the neopluralist view of agency behavior, wherein a group will spend up to an amount equal to the value that its members place on a desired political good. *See* CROLEY, *supra* note 99, at 53 (citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence,* 98 Q.J. ECON. 371 (1983)). R

economically irrational, as discussed above.[135] Since the public interest group may be opposed by a firm spending considerably more money, the cost of successful participation may be much higher than merely the cost of appearing.[136]

As the idea of threshold spending illustrates, the benefits from interest group participation may not have a strictly linear relationship to cost. Consider the costs and benefits to a group of consumers from participating in a hypothetical agency proceeding. If participation were a threshold good, like paying $100 in fees merely to file into the docket, spending any amount less than that will provide no benefits.[137] If the relationship between the costs of representation before the agency and benefits from the agency were linear, a consumer group might save $200 dollars for its members for every $100 it spends before the agency. This would be true for the first $100 ($200 of savings) as well for the next $1,000 ($2,000 of savings). However, there may be increasing marginal gains to participation, meaning that the consumer group saves more money for each additional dollar spent beyond a certain point. For example, after spending $1,000, every additional $100 spent may save the consumers $300. This is quite plausible for consumer representation before an agency: Spending more allows one to present technical evidence and investigate the technical evidence of opponents. Additionally, the consumer group could then become a frequent participant in the proceedings, and thus be taken more credibly as a repeat player.[138] Now, if the consumer group spent $1,500, it

135. *See* Revesz, *supra* note 112, at 560–71 (describing Olson's analysis of collective action problems). R

136. It is difficult to precisely describe the resource disparity between private firms and public interest groups in a given administrative proceeding, but it most certainly exists. In Civil Aeronautics Board (CAB) proceedings in 1976, the eleven trunk airlines spent $2,851,000 on outside counsel. The one public interest group active before that agency, the Aviation Consumer Action Group, had a total budget of $40,000, of which half was spent on CAB proceedings. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 18–19.

137. Schuck, *supra* note 126. In some cases, the marginal gains from further participation are zero, insofar as the benefits to participation are of a threshold nature, where the group benefits just by appearing before the agency with no greater benefit for spending more. R

138. Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1078–80 (2001). That is to say, an interest group that has more people and more funding, or that participates in more agency decisions with more technical expertise, and does so over a longer period of time, may achieve disproportionately better results than an interest group with fewer resources. Agencies may be more responsive to parties who consistently appear before them or who are more likely to litigate adverse decisions.

would save $3,500.[139] At some point, however, there are likely to be decreasing marginal gains to participation. After spending $1,000,000 on this hypothetical agency, the next dollar spent would not provide the same savings as the first, if only because the agency can only provide so many benefits to the consumers.

One solution to the cost of funding participation has been to reimburse certain parties involved in agency proceedings.[140] These so-called "intervenor funding" provisions can help citizen groups contest agency proceedings where budget shortfalls would otherwise prevent participation. However, many of these statutes only allow reimbursement after the action, rather than upfront payment of costs, meaning the problems presented by high upfront costs are unresolved.[141] Fee reimbursement provisions are still in force,[142] but some have been repealed.[143]

Even if an interest group organizes and participates, it is of no matter unless its voice is heard credibly by the adjudicator. Ensuring credible hearing by the agency is the third difficulty faced by interest groups. Under the traditional model of bureaucratic behavior, this responsiveness to interest groups was inherently malign,[144] but it is a necessity in the interest group representation model of

139. $2,000 in savings for the first $1,000 invested, and $1,500 for the next $500.

140. *See* 1 MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 5.05[3] (1992).

141. *See generally* Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision- Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643 (2002) (arguing that intervenor funding—rather than award of costs—will best improve the quality of environmental proceedings).

142. Statutes which still contain attorney fee provisions include the Veterans Employment Opportunities Act of 1998, 5 U.S.C. § 3330c(b) (2006); the Consumer Products Safety Act, 15 U.S.C. § 2056(c) (2006); the Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (2006); the Federal Power Act with respect to the Federal Energy Regulatory Commission, 16 U.S.C. § 825q-1(b)(2) (2006); the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a) (2006); the State Department Basic Authorities Act of 1956, 22 U.S.C. § 2692 (2006); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2006). Michigan's proxy advocate also functions, in part, by this approach: an oversight board funds actions by private parties and the Attorney General.

143. For example, the Federal Trade Commission's attorney fee provision section, 15 U.S.C. § 57a(h) (1980), the most widely discussed in the literature from the late 1970s and in use since 1975, was repealed in 1994. *See* Act of Aug. 26, 1994, Pub. L. No. 103-312, § 3, 108 Stat. 1691 (1994).

144. *See* Stewart, *supra* note 37, at 1684 ("The sense of uneasiness aroused by this resurgence of discretion is heightened by perceived biases in the results of the agency balancing process . . . .").

administrative behavior.[145] However, such representation can only remain benign so long as it occurs in a fair proceeding.[146]

Beyond the three hurdles any interest group must overcome to be heard by an agency, different kinds of interest groups may influence agencies differently. However, scholars have yet to provide a clear picture of how different types of interest groups influence agencies.[147] Despite increasing congressional delegations of authority to administrative agencies,[148] academics have continued to focus on the influence of interest groups on the legislative process rather than on the administrative process.[149] The few studies of interest group influence in agencies are divided. One study conducted mail and telephone surveys of different interest groups.[150] This survey, however, relied on the groups to self-report their level of "influence" on a one-to-five scale.[151] Another study measured thirty final and proposed rules against 17,000 public comments; it concluded that business interests have a disproportionate impact on agency decisions.[152] However, a previous study that used a similar compari-

145. *See id.* at 1684–85.

146. Without interrogating the question of "what is fair" down to first principles, it should be sufficient to say that a "fair" process affords the process due to the participants. This process should provide some combination of adequate notice, confrontation of witnesses and presentation of evidence, the ability to retain counsel, an impartial decisionmaker, a decision resting on the rules and evidence presented at the proceeding, and a statement of reason for the decision. Mathews v. Eldridge, 424 U.S. 319, 325 n.4 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 266–71 (1970)).

147. One recent and notable exception to this is a recent paper by three administrative law scholars. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011) (tracing interest groups' engagement and influence through the lifecycle of EPA rulemakings).

148. At the same time that Congress has yielded discretion to agencies, presidents have tried to exercise more control over the administrative state. *See, e.g.*, Croley, *supra* note 126, at 821–24. R

149. Golden, *supra* note 109, at 246 ("Yet despite all of the attention paid to R interest group influence in Congress, little attention has been paid to this facet of agency rulemaking. Most scholarly attention has focused on either the technical facets of rule making, such as the use of cost-benefit analysis, or on interest groups in the congressional context.").

150. Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC'Y 325, 331–32 (1997) (describing the four types of groups as trade associations, citizen groups, corporations, and unions).

151. *Id.* at 333. For a critique of the methodology of this study, see Golden, *supra* note 109, at 248 (critiquing scholarship's focus on Washington listed groups R and noting the groups' incentive to overreport their influence in self-reported surveys).

152. Yackee & Yackee, *supra* note 38, at 128–29.

son of final and proposed rules found the comments of business groups did not have a disproportionate impact;[153] rather, influence was contingent on the "the degree of conflict among commenters, the sides in the conflict, and the paucity of repeat players."[154]

Not only do different interest groups have different influences on policy makers, different policy makers are subject to different influences. Although diffuse and concentrated interest groups compete for regulatory rents before both the legislature and administrative agencies, they influence legislators and administrators differently. Agencies make decisions subject to a variety of constraints and motivations. The agency is overseen by and administers laws passed by legislators, who are in turn constrained by the electorate and subject to their own internal motivations.[155] The agency itself is accountable to the executive, which has its own interests and goals, and the agency further is constrained by administrative processes, the accountability of agency employees, and the internal motivations of agency employees. An interested public may decrease the "slack" given to bureaucrats and legislators, thus decreasing the influence of the government official's personal goals.[156] As such, the agency relies on authority delegated and discretion granted to it by the executive, the legislature, and the public.[157] Since the legislature, the executive, the agency, and the public influence the policy outcomes, regulated firms and consumers compete to win attention and support for the policies they support.

The nature of the policymaker is not the only variable that determines the effectiveness of consumer groups. Rather, many factors affect consumer success: the decisionmaker, the mechanism of

153. *See* Golden, *supra* note 109, at 262 (surveying ten rules from EPA, HUD, and NHTSA in the Clinton administration and finding no significant business influence). For a survey of the methodology of the Yackee & Yackee and Golden studies, see Yackee & Yackee, *supra* note 38, at 129 (critiquing the coding and sample size of the Golden study). R

154. Golden, *supra* note 109, at 261. R

155. *See also* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 176–78 (1990) (discussing the "slack" between the general polity and the regulator, which provides the regulator with policy discretion as well as with "ideological consumption" in the form of policies that are favored by the regulator but not necessarily in the public interest).

156. *Id.* at 186.

157. The scope of public involvement depends directly on the structure of the agency. If the PUC Commissioners are elected, public responsiveness is much more important than if they are appointed by the executive, whose broader policy portfolio can be used to assuage public opinion with other, higher profile policies while appointing a hostile commissioner.

influence, and the policy area. Legislators and bureaucrats operate in very different contexts, and thus they may be differently affected by interest group influence. Laws may restrict agency decisionmaking, such as by limiting ex parte contacts with interest groups.[158] Legislators might have no such restrictions. The personal and professional objectives of legislators may also be different from those of career bureaucrats. Administrators and legislators may also be more or less vulnerable to capture.[159]

Legislators and bureaucrats may have slack, or situations in which the agent is less closely supervised by its principal and thus capable of exercising discretion, but the factors that contribute to such slack differ between legislators and bureaucrats.[160] Bureaucrats frequently work on highly technical matters that are more difficult for the polity to understand or learn about, let alone organize opposition to. Legislators, by contrast, are subject to frequent criticism by electoral opponents and the press. Even when bureaucrats see their slack reduced, it is for different reasons: they may be restricted by new laws or judicial decisions. Although these may be a product of pressure on a legislator, the pressure put upon the bureaucrat is significantly attenuated. Legislators and bureaucrats thus vary both in where they have slack and in the way that slack-reducing factors affect them.

The decisionmaker also dictates what methods of influence may be used. Here, consumer groups and private interests may have very different strengths. For example, consumer groups can bring attention to issues, provide public credibility, and muster grass roots organizational strength. These are all significant powers, but they may not influence bureaucrats as effectively as they would democratically accountable legislators. Conversely, concentrated interests can more easily make promises of post-government employment, which can persuade agency decisionmakers as well as legislators.

The method of influence may be dictated by other factors as well, but not all methods of influence are equally effective.[161] For example, it might be more difficult to capture public attention regarding a highly technical issue, and legislators may be more easily

158. 5 U.S.C. §§ 557(d)(1), 551(14) (2006).

159. Levine & Forrence, *supra* note 155, at 185–91 (outlining various factors that influence the amount of "slack").

160. *Id.*

161. *See* JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS 93–102 (1999); JACK L. WALKER, MOBILIZING INTEREST GROUPS IN AMERICA 104–14 (1991).

influenced where there is a lack of public scrutiny. Some choices may be predetermined by the administrative process. For example, if a ratemaking proceeding is already before the PUC, the parties would likely appear before the PUC rather than before the governor.[162] If, however, there are broader issues of policy at stake, or the interest group wants to alter the selection of the commissioners, the stakeholders may lobby the commission's principal—the executive, if the commissioners are appointed, or the electorate, if they are elected.

These factors set the stage for competition between interest groups, but there are sometimes wholly external influences on agency decisions. For example, the governor may make appointments as a form of political patronage, and voters may make decisions for public utility commissioners on such low information as to make them practically arbitrary. There is no simple explanation of why certain policies pass and others founder, of why some interest groups are successful and others are not, but these factors help explain why interest groups behave the way they do.

Attempts to increase participation, such that agencies more accurately reflect public interests, must also guard against opening opportunities for regulated industries to exercise undue influence. The history of the Consumer Product Safety Act provides several instructive lessons. The petition process under § 10, which was revoked by statute several years after its initial passage, shows one possible downside to public involvement.[163] Though Congress did not intend the petition process to set the regulatory agenda of the Consumer Product Safety Commission (CPSC), the CPSC felt it had limited discretion to deny petitions and underestimated the effort it would take to handle the petition docket.[164] Indeed, not only was the standard setting process itself arduous, but the CSPC would conduct hearings on all petitions, even when petitioners supplied little support for the proposed standard or when the proposal was

162. Ex parte communications between the governor and the PUC are frowned upon by administrative procedure acts. *Cf. supra* note 160. It is also more likely difficult to convince a governor to focus resources and attention on a highly specialized issue, as compared to convincing an agency that is already required to make a decision. Of course, if one of the groups can offer the Governor electoral resources, they may move up on his priority list.

163. *See* Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 47–49 (1982) (explaining that the Commission initially adopted a reactive posture to consumer petitions).

164. *Id.*

meritless on its face.[165] As with most agencies that permit a similar mechanism, the petition process began to be used by industry as a means of pursuing exemptions.[166]

These obstacles explain why consumers face such an uphill battle for representation. Even when consumers can organize, they must fund participation in costly agency proceedings, and still, there is no guarantee that they will be heard by the agency decisionmaker.

B. Understanding the Role of the Proxy Advocate

Given the advantages that private firms have over diffuse consumers in influencing agency proceedings, it is understandable that policymakers might turn to solutions like proxy advocates to ensure consumer voice. This section provides the reader with a brief summary of how a proxy advocate can mitigate these disadvantages.

Interest groups and institutional design are heavily interrelated. Agencies are influenced by interest groups, and interest group decisions are in turn influenced by agency design. Proxy advocates change the environment in which the agency operates. Likewise, proxy advocates may be subject to similar interest group influence as agencies: they rely on public support; are subject to internal administrative constraints; and are subject to some sort of oversight. The most significant difference between proxy advocates and agencies is that proxy advocates are intended to be faithful advocates for consumer interests and, as such, should be designed to prevent other interests (such as utility or industry) from commandeering them. Once a proxy advocate is created, moreover, its existence influences the operation of the original agency. The agency is presented with another "interest group," in the sense that another agency is now a party regularly appearing before it, and the interest groups are operating in a different structural environment.

Begin with a simplified and idealized version of proxy advocate behavior. The commission, which had been making decisions with little or no consumer input, is now presented with a consistently present and technically capable voice speaking for consumers. Whereas the agency would have previously heard only the voice of

165. *Id.* at 49–52 (discussing the petition for a pool slide standard, which was supported by industry members with a financial stake in a mandatory product standard and which embroiled the CPSC in a proceeding to the detriment "of the Commission and consumers").

166. *Id.* at 54; *see also* Scalia & Goodman, *supra* note 57, at 951–52 (noting that the proposed consumer advocate would have been a necessary counterweight to the petition process to ensure that such actions are taken to benefit consumers). R

the regulated companies, the proxy advocate presents a competing voice. Since agencies are required to base their decisions on the evidence presented,[167] this new input can be very significant. The agency may still side with the regulated company, but it must provide a basis in the record for disagreeing with the consumer perspective. If the agency fails to provide such reasons, the proxy advocate can prevail on appeal since the evidence is in the record.[168] The proxy advocate, in this vision, presents a voice for consumers by creating an agency that is, by definition, captured by consumers.

Consider the decisions of residential and commercial ratepayers before and after such a proxy advocate is created. Prior to the creation of the proxy advocate, consumers overburdened by utility bills may have directly lobbied the PUC, lobbied its principal, or simply not have lobbied at all. After the proxy advocate is created, those consumers might redirect their activities to lobby the proxy advocate, and other consumers who may not have participated at all may be mobilized to act. There are several reasons why consumers would lobby the proxy advocate. First, proxy advocates might reach out to consumers to solicit their views.[169] Second, proxy advocate statutes may empower the office to serve as a clearinghouse for consumer complaints.[170] Additionally, proxy advocates reduce the cost

167. ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 223–24, 363–64 (1989) (outlining the rationales behind the requirement that an agency state its findings and reasons).

168. *Id.* at 569–77 (discussing review of agency decisions of fact, particularly in state court).

169. This may be a statutory mandate, as in Texas, or it may just be that websites and consumer information direct consumers to the proxy advocate. TEX. UTIL. CODE ANN. § 13.064 (West 1997). If a utility commission has a consumer department, it may not direct consumers to an attorney general or independent agency. *Compare State and Local Consumer Agencies in Arizona*, USA.GOV, http://www.usa.gov/directory/stateconsumer/arizona.shtml (last visited Oct. 10, 2011) (designating the Arizona Office of the Attorney General as a state consumer protection office), *with Consumer Services*, ARIZ. CORP. COMM'N, http://www.azcc.gov/divisions/utilities/consumerservices.asp (last visited Oct. 10, 2011) (noting only the PUC's consumer services). *See also Consumer Information*, PA. PUB. UTIL. COMM'N, http://www.puc.state.pa.us/general/consumereducation.aspx (last visited Oct. 10, 2011) (outlining the sources of information available to consumers). Searches for "complain about utility rates Colorado" on Google.com returns that state's Office of Consumer Counsel as the first result.

170. *See, e.g.*, HAW. REV. STAT. § 269-55 (2007); KY. REV. STAT. ANN. § 367.150 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 35-A, § 1702(4) (2010); N.Y. EXEC. LAW § 94-a(3)(1) (McKinney 2011); OR. REV. STAT. § 774.160 (2009); N.C. GEN. STAT. ANN. § 62-15(d)(7) (West 2000 & Supp. 2011).

of intervening before the PUC.[171] Lastly, if the PUC is seen as hostile, consumers—and even consumer groups—may try to work with the agency more hospitable to their interests. If a consumer believes that her electricity rates are too high, the costs of simply complaining, by phone or letter, to the proxy advocate and to the PUC will be equal. However, complaining to the proxy advocate might mobilize its technical expertise on behalf of the consumer's cause. Each of these factors brings consumers and the proxy advocate into direct contact. The proxy advocate then appears before the PUC, relaying these opinions.[172] Although a proxy advocate cannot bind the determination of the agency,[173] it can introduce evidence into the record that the commission must evaluate in accordance with administrative procedures.[174] The PUC could have easily disregarded a consumer's conclusory complaint, but it requires more effort to deny claims supported by technical expertise.

If proxy advocates are created to overcome consumers' inability to organize, the picture presented thus far shows that consumers may have new and different problems to overcome. First, they may have to compete with organized consumers also represented by the proxy advocate, such as commercial ratepayers. The connection between a proxy advocate and its underrepresented constituents may weaken if there are more organized interests to whom it is also accountable. Second, consumers may have to compete to influence the proxy advocate's principal to ensure that a responsive advocate is even appointed to lead the office. If they fail at this, and they are thus connected to a proxy advocate controlled by a captured principal, their efforts are entirely wasted. Monitoring the proxy advocate and expressing their concerns to it will not change anything, since the advocate will represent the organized interest.[175] In such a case, consumers would be better off monitoring the agency directly.

171. Holburn & Vanden Bergh, *supra* note 42, at 47 ("[B]y granting automatic intervenor status to advocates, and by providing financial resources, state advocacy legislation substantially improved the level of consumer representation in administrative processes."). R

172. Since the proxy advocate may also be empowered to suggest legislative reforms and make recommendations to the executive, it may also be suggested that the proxy advocate appears before the principal in those states where PUC commissioners are appointed by the governor and confirmed by the legislature.

173. *See infra* Part IV.

174. The rate regulation process is subject to due process protections. Among these is a requirement to give reasons in response to comments. *See, e.g.*, United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238–246 (1973) (discussing rate regulation in due process terms).

175. If an entity is responsive to public pressure, it follows that the interest group that is best able to exert that pressure will accrue the greatest benefit from

Many of these problems emerge when proxy advocates have broader constituencies, such as all consumers (including commercial ratepayers), rather than just residential ones. However, if a proxy advocate must be convinced to adopt the views of the underrepresented constituency, it must still rely on mobilization. Residential consumers are thus back where they started, although now they are trying to police the proxy advocate rather than the PUC. As these consumers focus on the proxy advocate, utilities meanwhile continue to pressure the PUC and its principal directly.[176] This scenario risks misallocating consumer resources, since they will be trying to influence one agency that is in turn trying to influence another.

This potential misallocation of resources can be easily remedied, however. The constituencies of proxy advocates can be narrowly drawn to only include the groups most in need of representation. Residential consumers are in the greatest need of such aid; they are the most diffuse and see the smallest gain per member from organizing for public goods. A narrowly drawn constituency also ensures that diffuse interests are not forced to compete with organized interests. Where the proxy advocate can identify and represent the consumer interest, such as by acting as a clearinghouse for complaints[177] or by conducting consumer outreach,[178] it can reduce the chances of being commandeered by organized interests.

Just as proxy advocates may be captured by organized consumer interests, they may be accountable to a principal who is in turn beholden to a particular interest group.[179] A proxy advocate is

that entity. Since consumers are less able to organize and exert influence, it likewise follows that organized interests will be better represented.

176. Generally, proxy advocates do not represent industrial consumers. Rather, their mandate is written to include residential ratepayers, and sometimes commercial ratepayers. *See infra* Part II.C.

177. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 40-461, 40-464(C) (2011); HAW. REV. STAT. § 269-55 (2007); IND. CODE ANN. § 8-1-1.1-8.1 (West 2010). See also the discussion of the Office of the Consumer Advocate, *infra* notes 254–60.

178. *See* TEX. UTIL. CODE ANN. § 13.064 (West 1997). Also relevant is the discussion of the Office of Public Counsel, *supra* Part I.B.

179. Although a proxy advocate can help consumer interests be heard in the agency's proceedings, it is unable to represent consumers before the agency's principal, or help consumers organize to influence the agency or its principal directly. The interests who oppose consumers, however, appear directly before the agency and influence its principal. At best, a proxy advocate can commission studies and suggest legislation, but it cannot harness the same electoral resources that utilities can provide. While consumers as a diffuse group have such potential to marshal voters, this returns consumers to square one: they need to organize to provide

accountable to a principal in the same way that any agency is: Someone, frequently the Governor, has the power to appoint the proxy advocate and may have the power to either hinder their efforts, by threats of removal or reducing funding, or help, such as by supporting them against political attacks or allocating them more resources and power. That is to say, if a proxy advocate is accountable to a Governor who relies on utility companies for electoral support, the proxy advocate may be undermined from above. Utility companies can influence selection of proxy advocates just as they can influence selection of utility commissioners.[180]

Ensuring that the proxy advocate cannot be captured through the principal is considerably more difficult than adjusting the constituency. The proxy advocate must be held accountable in a way that precludes undue involvement by concentrated interests. Some oversight mechanisms ameliorate the problem of lack of accountability, such as requiring certain qualifications of proxy advocates. As will be seen in Part III, one likely solution, independence, might cause as many problems as it solves.

Although consumers may attempt to influence all relevant parties—the proxy advocate, the PUC, and their respective principals—this is unlikely for several reasons. First, consumers have limited financial and political resources to expend on monitoring and lobbying. Second, as discussed, when competing for beneficial policies from the PUC, consumers will be competing against utilities and industrial consumers. While they will not always lose this battle, it may dissuade them from pursuing this course of action, especially when there is an active proxy advocate.

Proxy advocates promise to improve consumer representation, but they introduce a host of new problems. Although these may be resolved by appointing "good" proxy advocates who zealously protect the consumer interest, structural assurances of effective advocacy are preferable. But what does a properly designed proxy advocate look like? Parts II.C and II.D survey the different designs used by state and federal proxy advocates, respectively.

Both state and federal proxy advocates employ a variety of designs. They are not only given different powers but also monitored and controlled in a variety of ways. This variation provides us a number of points of comparison. Most significantly, the differences

such electoral benefits, just as they would have had to organize to fulfill the role of the proxy advocate.

180. Imposing statutory qualifications for proxy advocates may reduce the likelihood that utilities can encourage appointment of insidious proxy advocates. *See infra* Part II.C.

in accountability allow comparisons among state proxy advocates and between those state proxy advocates and their federal counterparts. By comparing how these state and federal proxy advocates perform, Part III will demonstrate how an effective proxy advocate can be designed.

C. Design of State Proxy Advocates

Comparing state and federal proxy advocates requires a baseline understanding of how these entities function. This section introduces state proxy advocates by describing their powers and the oversight mechanisms used to control them. The Appendix contains citations to the statutes that govern each state's proxy advocate.[181]

The most basic of a proxy advocate's powers is the right of appearance before the state utility regulatory commission. The right of appearance is the basis of the proxy advocate's function and has been affirmed by state courts.[182] While states vary in their wording, most grant the proxy advocate power to initiate and intervene in administrative proceedings, as well as to appeal such rulings before appropriate courts.[183] These powers of appearance are particularly important, since resolution of an issue by a proxy advocate can bind private litigants by res judicata.[184]

In addition to the right of appearance, proxy advocates are also given powers and privileges that make them more effective in

181. *See infra* Appendix. For the purposes of this discussion, Washington, D.C.'s Office of People's Counsel is counted as a state proxy advocate.

182. For a discussion of the right to appeal, see State *ex rel.* Mo. Power & Light Co. v. Riley, 546 S.W.2d 792 (Mo. Ct. App. 1977) (concluding that the Public Counsel of Missouri had authority to appeal Public Service Commission's decision). However, the proxy advocate may not have always had such powers. *See* State *ex rel.* McKittrick v. Mo. Pub. Serv. Comm'n, 175 S.W.2d 857, 862, 865 (Mo. 1943) (en banc) (holding that the Attorney General lacked a right to intervene on behalf of consumer interests, or to apply for a rehearing, writ of review, and appeal, because that right was reserved to the General Counsel).

183. All proxy advocates can appear before the state regulatory commission, and many more can appear before other relevant state and federal agencies. *See* MD. CODE ANN., PUB. UTIL. § 2-205(b) (LexisNexis 2010) (noting that the proxy advocate may appear before "any federal or State unit"); MINN. STAT. ANN. § 8.33(6) (West 2005) (providing for intervention in federal proceedings). *Contra* MO. REV. STAT. § 386.710(2) (2000) (referring only to appearance before the Commission).

184. *See* Brandon v. Ark. W. Gas Co., 61 S.W.3d 193, 201–03 (Ark. Ct. App. 2001) (holding that private litigants had a full and fair opportunity to litigate the issue of refunds when the Attorney General, acting as a proxy advocate, entered into a settlement that did not allow for refunds).

such proceedings. Some states require that the PUCs provide information directly to the proxy advocate upon its receipt by the PUC.[185] Statutes may also give the proxy advocate the right to inspect PUC records[186] and the power to issue subpoenas.[187] Some states give proxy advocates additional powers, beyond appearance before the Commission, either to complement those efforts[188] or to fulfill other consumer-minded goals.[189]

While states grant fairly uniform powers to proxy advocates, they differ widely in the oversight mechanisms they use to regulate proxy advocates. States generally use two types of controls: ex ante restrictions on proxy advocate priorities and discretion, and ex post mechanisms that ensure political accountability.

One means of controlling a proxy advocate is by setting clear priorities for the office upon its creation, as by defining the proxy advocate's constituency.[190] Such priorities clearly define the diffuse interests that the proxy advocate should aid.[191] By contrast, where a constituency is not defined, proxy advocates are given free reign in how to allocate their resources. Of the forty-five states with proxy advocates, twenty-seven are tasked with defending the public interest generally. While only five states require the proxy advocate to defend residential consumers,[192] twelve states have proxy advocates represent residential, small business, and agricultural interests.[193] A further two states define the proxy advocate's mission as represent-

185. *See, e.g.*, ME. REV. STAT. ANN. tit. 35-A, § 1708 (2010).

186. *See, e.g.*, DEL. CODE. ANN. tit. 29, § 8716(d)(5) (2003 & Supp. 2010).

187. *See, e.g.*, CAL. PUB. UTIL. CODE § 309.5(e) (West 2004) ("The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission . . . .").

188. *See* OHIO REV. CODE ANN. § 4911.02(B)(2)(d) (West 2010) (permitting "long range studies concerning various topics relevant to the rates charged to residential consumers").

189. *See* N.H. REV. STAT. ANN. § 363:28(V) (LexisNexis 2008) (directing the proxy advocate to publicize programs that help low income telephone customers).

190. A proxy advocate's rights of appearance may also be limited by its substantive grant of authority. *See, e.g.*, GA. CODE ANN. § 46-10-4 (2004) (jurisdiction extends to defend the customers of any utility doing business in the state); ME. REV. STAT. ANN. tit. 35-A, § 1702(5) (same); OHIO REV. CODE ANN. § 4911.14 (West 2010) (jurisdiction limited to parties lying wholly within the state or, when the party lies partly within the state, to the part doing business within the state).

191. These are generally interests who are unable to appear on their own behalf.

192. One example is Maryland. *See* MD. CODE. ANN., PUB. UTIL. § 2-204 (Lexis 2010) (residential and noncommercial).

193. One of the states is California. *See* CAL. PUB. UTIL. CODE § 309.5(a) (West 2004) ("[T]he division shall primarily consider the interests of residential and small commercial customers.").

ing non-high volume consumers[194] or those that have inadequate representation.[195]

States may also place qualifications on staff to guard against undue influence. The most common of these is the requirement that the person have an expertise in the field.[196] Even if a political ally or stealth deregulator is sought by the appointer, these restrictions ensure a bare minimum of qualification. Certain employment covenants are also used, especially as a means of insulating regulators from the influence of regulated entities. These may include restrictions on holding stock in regulated companies,[197] post-termination employment in regulated industries,[198] holding any other job concurrently with the role as proxy advocate,[199] or broad "conflict of interest" provisions.[200] These directives are generally balanced against the need to find knowledgeable and experienced persons to fill the roles.[201] Restrictions may also be imposed against partisan or political activity. These are most common when the proxy advocate operates as a corporation,[202] but they also appear in other forms.[203] There are also restrictions and requirements placed on the proxy advocates, such as those on ex parte contacts,[204] as

194. NEB. REV. STAT. § 66-1830(1) (2009).

195. MO. REV. STAT. § 386.710(3) (2000).

196. *See, e.g.*, FLA. STAT. ANN. § 350.061(1) (West 1999) (requiring the proxy advocate to be an attorney); GA. CODE ANN. § 46-10-3 (2004) ("The director shall be a practicing attorney qualified by knowledge and experience to practice in public utility proceedings.").

197. NEB. REV. STAT. § 66-1830(3).

198. CONN. GEN. STAT. ANN. § 16-2(c) (West 2007).

199. OHIO REV. CODE ANN. § 4911.04 (West 2010). An interesting contrast is the Nebraska public advocate, whose contact information lists a private law firm that practices in Public Sector Services, including utility rate negotiations and litigation. *Member Directory*, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, http://www.nasuca.org/archive/about/membdir.php (last visited Oct. 11, 2011) (listing Roger Cox of Harding & Shultz as the Nebraska Public Advocate); *see also Public Sector Services*, HARDING & SHULTZ, http://www.hslegalfirm.com (follow "Areas of Practice" hyperlink; then follow "Public Sector Services" hyperlink) (last visited Oct. 11, 2011) (listing "[u]tility rate negotiations and litigation" as one of the firm's services).

200. TEX. UTIL. CODE ANN. § 13.042 (West 1997) (prohibiting service as proxy advocate if the person is, or is a spouse of, an employee, paid consultant, or officer of utility trade association; or if the person is a registered lobbyist under Texas statute).

201. NEV. REV. STAT. § 228.320(1)(a) (2009).

202. 220 ILL. COMP. STAT. ANN. 10/16 (West 2007).

203. FLA. STAT. ANN. § 350.061(3) (West 1999).

204. *See, e.g.*, WYO. STAT. ANN. § 37-2-402(a)(i) (2011).

well as required reports to other government offices.[205] These features ensure the separation and accountability of the office.

States may also restrict the discretion of proxy advocates to guide their performance. Nevada mandates certain proxy advocate interventions,[206] while California mandates that the proxy advocate meet with the utility before taking action.[207] Texas requires the proxy advocate to create a plan to solicit public input through hearings.[208] Other states mandate that the proxy advocate's agenda be set by a third party, such as an oversight board.[209]

Such restrictions on proxy advocates hint at the ex post mechanisms that states use to ensure accountability. Whereas priorities guide the office from the beginning, ex post restrictions provide that the decisions of the proxy advocate will be evaluated and, thus, that a proxy advocate not fulfilling its duties will suffer the consequences.

The most significant form of ex post control is political accountability. Depending on where a proxy advocate is placed in the bureaucracy, it is subject to different pressures and accountable to different actors. Fifteen proxy advocates function through states' attorneys general.[210] In ten states, the proxy advocate is a division of the agency that regulates utilities.[211] Eighteen states have placed their proxy advocates elsewhere in the state's executive branch,[212]

205. The government may be able to request reports, FLA. STAT. ANN. § 350.0611(4) (West 1999), or the proxy advocate may be required to make an annual report, CAL. PUB. UTIL. CODE § 309.5(b) (West 2004).

206. NEV. REV. STAT. 228.360(a) (in all disposal of generation assets proceedings).

207. CAL. PUB. UTIL. CODE § 309.5(h).

208. TEX. UTIL. CODE ANN. § 13.064 (West 1997).

209. *See* Appendix.

210. There are five states where the Attorney General's duties include those of a proxy advocate. There are an additional nine states that have a specific position in the Attorney General's office dedicated to representing consumer interests. In all but one of these states, that position is appointed by the Attorney General. In the other, Kentucky, it is appointed by the Governor. The Attorney General may also be relevant in other states. For example, there may be proxy advocate elsewhere in the executive branch, but who uses the Attorney General as counsel. The Attorney General's role is frequently codified in statute, but not all states create a separate department within Attorney General's office. Rather, states like Alaska assign the Attorney General the task of representing the public interest, but have not statutorily authorized a division of the Department of Law for that purpose.

211. The location of each state's proxy advocate is noted in the Appendix.

212. Nine states place the proxy advocate as a subsidiary in another department. COLO. REV. STAT. § 40-6.5-102 (LexisNexis 2011) (Dep't of Regulatory Agencies); DEL. CODE ANN. tit. 29, § 8716(a) (2003 & Supp. 2010) (Dep't of State); GA. CODE ANN. § 46-10-3 (2004) (Office of Consumer Affairs); HAW. REV. STAT. §§ 269-

either in another department, such as consumer affairs or state, or as a freestanding agency. In three states, the proxy advocate is a government-chartered, nonprofit corporation, known as a Citizens Utility Board. In two, the proxy advocates are under the legislature. In at least one case, a proxy advocate initially created within an agency was severed to form an independent office.[213]

These variations speak to the varying degrees of independence that proxy advocates are granted. While independence in discussions of administrative agencies generally refers to independence from the President,[214] an independent proxy advocate in this discussion is autonomous from the utility commission before which it appears. The least independent proxy advocate is placed in the Commission, and it is thus subject to control by the same agency before which it appears as a party. To give the proxy advocate more independence, it can be placed elsewhere in the executive branch and held accountable to the Governor or another executive branch official. Within these political contexts, proxy advocates are further controlled by the administrative law of the state.[215] Such law may

51, 269-52 (2007) (Dep't of Commerce and Consumer Affairs); MO. REV. STAT. § 386.700 to 386.710 (2000) (Dep't of Economic Development); N.J. STAT. ANN. § 52:27EE-46 (West 2010) (Dep't of Treasury); N.Y. EXEC. LAW § 94-a (McKinney 2011) (Dep't of State); S.C. CODE ANN. § 37-6-103 (2000) (Comm'n on Consumer Affairs); UTAH CODE ANN. § 54-10a-201 (LexisNexis 2010) (Dep't of Commerce). A further eight states appear to have created free standing agencies. ARIZ. REV. STAT. ANN. § 40-461 to 40-464 (2011); IND. CODE ANN. § 8-1-1.1-1 to 8-1-1.1-9.1 (West 2010); KAN. STAT. ANN. § 66-1222(a) (2002); MD. CODE. ANN., PUB. UTIL. § 2-201 to 2-206 (Lexis 2010); MONT. CODE ANN. § 69-2-204 (2009); OHIO REV. CODE ANN. §§ 4911.01 to 4911.20 (West 2010); TEX. UTIL. CODE ANN. §§ 13.001 to 13.064 (West 1997).

213. In Missouri, consumer interests had been represented by the General Counsel of the Public Service Commission, which also acted as counsel to the Commission. Barvick, *supra* note 32, at 184–85. The legislature, recognizing the conflicts of interest created by this arrangement, moved those duties into a new Office of the Public Counsel. *Id.* at 195–96; *see also* Schraub, *supra* note 32, at 918–19 (noting that the Office of Public Counsel was located within the Department of Consumer Affairs and was appointed by the Department's Director). Today, there are eleven staff members, including three attorneys. *Who We Are*, MO. OFFICE OF THE PUB. COUNSEL, http://www.mo-opc.org/Home/OPC/Who%20We%20Are.html (last visited Oct. 11, 2011). For the current statute, see MO. REV. STAT. § 386.710 (2000). R

214. *See, e.g.*, Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 ("[T]he term may be defined in many ways, but for me an independent agency is one whose members may not be removed by the President except for cause, rather than simply because the President no longer wishes them to serve . . . .").

215. *See, e.g.*, NEV. REV. STAT. § 228.330(1) (2009) (noting that personnel decisions are made according to the same procedures as in the Attorney General's

establish the ways in which the proxy advocate is held accountable or specify the way it must undertake its duties, such as requiring it to request comments in anticipation of proceedings held by the regulator.[216] Additionally, procedural protections of state administrative procedure may apply in theory, although such requirements may be under-enforced.[217]

Appointment and removal power are strong indicators of the degree of agency independence and scope of accountability. In seventeen states, the governor appoints the proxy advocate, and in another seven, a lower-level executive branch official does so.[218] Some of these states, like Ohio, have a more attenuated appointment process.[219] In four states, the public utility commission appoints the proxy advocate. The other six states that have a proxy advocate housed in the public utility commission have their leader appointed by the governor. The three states that have Citizens Utility Boards rely on citizen members to elect leadership. The legislature may also be involved; in two states they appoint the proxy advocate directly, and in other states they confirm appointees. Conditions for removal vary as well. Thirteen states have fixed terms for officials, although they vary between two and six years. Six states note that

Office). *But see* CAL. PUB. UTIL. CODE § 309.5(h) (West 2004) (describing the "meet and confer process").

216. In one instance, the Missouri Public Counsel encouraged the utility commission to conduct hearings on rate increases. The Public Counsel requested that the anticipated rate increases be sent to consumers along with monthly bills, together with the address of the Public Counsel. *See* Barvick, *supra* note 32, at 207.

217. The California Public Utility Commission has voluntarily separated its proxy advocate, the Division of Ratepayer Advocates, from the PUC. *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1178–79 & n.379 (1992). The Water Resources Control Board has a smaller staff, and thus an attorney who is an adversary in one case may be an advisor in the next. *Id.* Interactions between PUC and DRA staff may be more porous than indicated. There is no record of any suit being brought to enforce separation of function requirements. There would likely be procedural hurdles to bringing any such action. Insomuch as agency actions in the federal APA scheme may only be challenged when final and when there is standing, it is not certain that either condition would be met by a failure of a proxy advocate.

218. To give a few examples: Colorado (Executive Director of the Dep't of Regulatory Agencies); Georgia (Director of Consumer Affairs); Hawaii (Director of Commerce and Consumer Affairs); Kansas (an executive board is appointed by the Governor, who in turn appoints the Counsel); Missouri (Director of Dep't of Economic Development); New Jersey (Public Advocate); Ohio (Consumers' Counsel Governing Board); South Carolina (Director of Consumer Affairs). The oversight mechanisms are cited in the Appendix.

219. Among the states that use this attenuated approach are Colorado, Kansas, and Ohio.

proxy advocates serve at the pleasure of the person who appointed them.[220]

Another significant factor in proxy advocate oversight is how the proxy advocate is funded. In rare cases, the statute sets a dollar amount of funding.[221] More frequently, the proxy advocate either receives a budget appropriation from the legislature[222] or is permitted to raise money by levying fees on utilities.[223] When the proxy advocate must fight for its budget from either the legislature or the Commission, it is subject to its control. This is of particular concern with respect to the Commission: An increased budget for the proxy advocate means more work for the Commission in the form of responding to the proxy advocate's comments, which creates a clear institutional incentive for underfunding. The size of the budget, in turn, appears related to funding scheme. The largest budgets appear to come from fee levies.[224] Proxy advocates with a separate budget line have greater variability between states.[225] While the costs of electricity ratemaking hearings may vary from state to state, Ohio illustrates the magnitude of the sums involved. Ohio utilities spent $4.9 million in 1976 to win $665 million in rate increases

220. ARIZ. REV. STAT. ANN. § 40-462(B) (2011); CAL. PUB. UTIL. CODE § 309.5(b) (West 2004); DEL. CODE. ANN. tit. 29, § 8716(a) (2003 & Supp. 2010); KAN. STAT. ANN. §66-1222(e) (2002); OHIO REV. CODE ANN. § 4911.02(A) (West 2010). *But see* VT. STAT. ANN. tit. 30, § 1 (2008) (setting up a scheme whereby the commissioner serves at the pleasure of the government and the director of public advocacy is in turn appointed by the commissioner).

221. ALA. CODE § 37-1-18 (LexisNexis 1992).

222. COLO. REV. STAT. § 40-6.5-107 (LexisNexis 2011).

223. NEV. REV. STAT. § 704.033 (2009).

224. Four states with fees have budgets over $2,000,000. CONN. GEN. STAT. ANN. § 16-49 (West 2007); MASS. GEN. LAWS ANN. ch. 12, § 11E, ch. 14, § 3 (West 2010); OHIO REV. CODE ANN. § 4911.18; 71 PA. CONS. STAT. ANN. § 309-4.1 (West 1990). Two more have budgets over $1,000,000. ALASKA STAT § 42.05.254 (2010); TEX. UTIL. CODE. ANN. § 13.041(b) (West 1997). The budgets were reported in surveys answered by each of the offices. *See Member Surveys*, National Association of Utility Consumer Advocates, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, http://www.nasuca.org/archive/about/membdir.php (follow "More Information" hyperlink under each state's listing, where available) (last visited Oct. 11, 2011).

225. For example, Indiana has some staff set by statute and other staff that it can request through appropriations. In addition to its budget of over $2,000,000, it has forty-seven professional staff, five support staff, and $751,000 budget for consultants. *See* IND. CODE ANN. § 8-1-1.1-6.1 (West 2010). Tennessee's proxy advocate, housed in the office of the Attorney General, must make separate appropriations requests, but has a budget between one and two million dollars and eleven professional staff members. TENN. CODE ANN. 65-4-118(a) (2004). In Colorado, the appropriations request comes out of the Public Utilities Commission's budget. § 40-6.5-107. For details on each office's staff and budget, see *Member Surveys*, *supra* note 224.

before the PUCO.[226] At the time, the consumer counsel had an annual budget of approximately $2.25 million.[227] Today, proxy advocate budgets vary between under $500,000 to over $2,000,000.[228]

These ex ante and ex post means of oversight are essential to understanding how proxy advocates choose to use their powers. For example, even if an attorney general acting as a proxy advocate has a general mandate and may intervene whenever she deems it advisable, she does not act without limitation. Rather, she is subject to the same political constraints that regulate the behavior of any attorney general.[229] Similarly, the executive and the legislature may have powers over the proxy advocate, such as appointment or removal and funding, respectively. If the proxy advocate serves for a term of years, the executive has less influence. If the legislature must confirm the nominee, this increases its influence. Creating a self-funding mechanism can reduce legislative power. The institutional design of the proxy advocate determines the degree and nature of influence that will be exercised over the proxy advocate, and it can predetermine its efficacy, as will be demonstrated in Part III.

D. Design of Federal Proxy Advocates

Like state proxy advocates, federal proxy advocates vary in what powers they are given and how they are controlled. The most significant difference between federal and state proxy advocates lies in the feedback mechanisms that connect a possibly nation-wide constituency to the federal proxy advocate.

The powers of federal proxy advocates are similar to those of state proxy advocates. Both the Civil Aeronautic Board's Office of Consumer Advocate and the Interstate Commerce Commission's Office of Rail Public Counsel had the power to appear as a party in agency proceedings, for example. The OCA had powers of appear-

226. Goodman, *supra* note 15, at 225.

227. The proxy advocate had a two-year budget of $4.5 million. *Id.* at 220. The size of the consumer counsel was driven downward, according to Goodman, by the so-called "taxpayer revolt" of the time. This motivated a consciousness of the cost efficacy of the counsel office.

228. *Compare Oregon Member Survey*, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, http://www.nasuca.org/archive/OR%20Member%20Survey%20(6).pdf (last visited Oct. 11, 2011) (indicating a budget of less than $500,000), *with Florida Member Survey*, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, http://www.nasuca.org/archive/FL%20NASUCA%20Member%20Survey.pdf (last visited Oct. 11, 2011) (indicating a budget of over $2,000,000).

229. *See* Scott M. Matheson, Jr., *Constitutional Status and the Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 12 (1993) (situating the attorney general as a representative of the "public interest").

ance before the Board equivalent to those of any other party.[230] The OCA "petitioned for rulemakings, submitted comments on pending rulemaking proceedings, commented on reports presented by other components of the Board, supported the petitions of external parties, and filed various letters and comments on proposed and pending matters."[231] The ORPC was granted similar powers by its authorizing statute.[232] Unlike the OCA, however, it was granted the power to seek judicial review.[233] While it was thought that the office would be active in such litigation,[234] the ORPC participated in few judicial proceedings.[235] The Office of Public Counsel had a similar, albeit limited power, insofar as its duties were limited to filing comments for the RSPO report.[236]

In addition to the formal power of appearance, federal proxy advocates also appear to play a more advisory role. The OPC had the narrowly defined power to draft the response reports.[237] The

230. 14 C.F.R. §§ 302.9, 302.11 (1978). Ratemaking proceedings within the CAB were primarily conducted by the Bureau of Economics. When a carrier filed for a rate change, the Bureau of Economics would review the proposal and send a recommendation to the Board, which must make a decision within thirty days. *Appendix to Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, Vol. I, 94th Cong. 36 (1976) [hereinafter *CAB Hearings*]. The OCA may also share its views in this process. *Id.* at 130–31 (discussing a 4% fare increase effective November 1974 in which OCA circulated a memo describing its views). The Board was not required to give the OCA's views any particular weight. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74. Since the ratemaking procedures were grounded in figures and methodologies established by a five-year study, the OCA found it difficult to sway the Board. *CAB Hearings* at 64 n.9 (citing OCA's memo in a dissent from the Board's decision); *see also* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 77.

231. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76. It did not have the power to seek judicial review of Board decisions. *Id.* at 74.

232. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52.

233. *Id.*

234. *See* Atchison, Topeka & Santa Fe Ry. v. Interstate Commerce Comm'n, 580 F.2d 623, 640 n.33 (D.C. Cir. 1978) ("Had a rail public counsel existed at the start of this dispute, he would have voiced another perspective.").

235. The ORPC was involved in two judicial proceedings. One was decided. Nat'l R.R. Passenger Corp. v. Interstate Commerce Comm'n, 610 F.2d 865 (D.C. Cir. 1979). Another was on the Supreme Court's docket, but the Court declined to hear the case. Interstate Commerce Comm'n v. Chicago & N. W. Transp. Co., 582 F.2d 1043 (7th Cir. 1978), *cert. denied* 439 U.S. 1039 (1978). For a discussion of ORPC action, see *FY1980 ORPC House Authorization*, *supra* note 87, at 273–75 (appendix providing cumulative list of cases in which ORPC appeared).

236. 4-R Act § 304.

237. Bloch & Stein, *supra* note 50, at 227–29.

OCA had a duty to advise the Board on all consumer related matters.[238] Its portfolio in this regard included overbooking and baggage handling issues. The OCA was given this power before it was granted right of appearance, and it was merely advisory. For example, the OCA submitted a white paper on baggage handling issues to the Board, but no action was taken until the Senate took up the issue.[239] As such, the OCA chose to use its formal powers instead, once it had acquired them, such that their position would be less likely to be "summarily dismissed."[240]

Like state proxy advocates, federal proxy advocates vary in their oversight. Just as is the case for state proxy advocates, the two most salient features of federal proxy advocate control are independence and accountability to constituencies. Whereas state proxy advocates, with one notable exception,[241] do not emphasize contact between the proxy advocate and its constituents, the matter appears to be a significant concern for federal proxy advocates and, as will be seen in Part III, a significant factor in proxy advocate success.

As with state proxy advocates, a central aspect of accountability is independence. The varying levels of independence of federal proxy advocate are similar to the considerable variation seen among state proxy advocates. Both the OCA and the OPC were structurally part of the agencies before whom they appeared, a situation similar to the state proxy advocates located within public utility commissions. The OCA was referred to as an "organizationally distinct consumer advocacy unit," although it was an office of limited autonomy under the supervision of the managing director of the CAB.[242] Since the office lacked a statutory basis, it relied on the grace of CAB for funding.[243] By contrast, the ORPC was designated as independent in its authorizing statute.[244] This independence was affirmed by the DOJ.[245] Its budgetary independence was set out as well,[246] along with its initial appropriation.[247]

238. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 75.

239. *Id.*

240. *Id.* at 75–76.

241. TEX. UTIL. CODE ANN. § 13.064 (West 1997).

242. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74.

243. *Id.* at 74, 79–82.

244. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52. ("There shall be established . . . a new independent office affiliated with the Commission to be known as the Office of Rail Public Counsel.").

245. *Interim Authority Decision*, *supra* note 82, at 125–26. R

246. 4-R Act § 304.

247. *Id.*

Appointment and removal are also important to federal proxy advocates. Since the OCA and OPC were regulatory rather than statutory creations, however, any constraints on personnel policy, such as appointment and removal, were never set out in statute.[248] By contrast, ORPC's independence was carefully dictated by statute. The Director of the Office was to be appointed for a four-year term,[249] with presidential appointment and the advice and consent of the Senate.[250]

One feature of accountability particularly relevant to federal proxy advocates is connection to and communication with their constituencies. All federal proxy advocates were structured to permit feedback between advocates and constituents, although some proxy advocates did this more effectively than others. The OCA was initially created to serve as a conduit for information between consumers and the CAB by acting as a clearinghouse for complaints.[251] In this role, it successfully focused attention on the problems of air passengers.[252] This continued through its life as a proxy advocate, when it was the conduit for consumer complaints regarding the airlines.[253] Upon the receipt of complaints, it would refer the complaints to the airlines, refer the matter to the Bureau of Enforcement,[254] send memoranda to Board staff alerting them to problems, or appear as a party to a proceeding itself.[255] It also published monthly reports summarizing complaints[256] and disseminated other informational material.[257]

The OPC succeeded at establishing a conduit between itself and its constituency as well. In fact, as with the OCA, such commu-

248. The OCA's personnel are "controlled through the regular channels of the CAB organization." PUBLIC PARTICIPATION STUDY, *supra* note 39, at 80. OCA had expertise that outside advocacy groups lacked. *Id.* at 83. OPC's control over personnel was indirectly provided for in the statute that authorized the RSPO. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 205(c), 87 Stat. 985, 993 (1974)

249. 4-R Act § 304.

250. *Id.*

251. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 75.

252. 39 Fed. Reg. 39867 (Nov. 12, 1974).

253. *CAB Hearings*, *supra* note 230, at 484 (noting that letters received by OCA revealed that passengers were not concerned about limitations on carriers baggage liability). R

254. *Id.* at 485 (noting that they did so with overbooking complaints).

255. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74–86.

256. *CAB Hearings*, *supra* note 230, at 546 (noting that it was a party to the Board's investigation of live animal transportation). R

257. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76.

nication was its very purpose.[258] As discussed above, the OPC was created to aid the RSPO in commenting on the reorganization plans for the bankrupt northeastern railroads. To accomplish this goal, the OPC had permanent (Washington-based) and outreach staff. The permanent staff monitored the federal agencies and courts, passing that information onto the outreach attorneys, who were a conduit for information between Washington and affected constituencies. The outreach attorney, who was generally a private lawyer based in Washington and under contract, would relay information to the public at regional hearings and then take the opinions voiced at those hearings back to Washington. They also assisted local rail users in forming "branch line committees" to represent local interests before the federal agencies. When the ORPC was created, legislators intended for it to continue the outreach activities of the OPC.[259] However, it failed to actively solicit public opinion,[260] in part due to a lack of funding.

The experience of the ORPC shows that weak feedback mechanisms allow proxy advocates to drift from their consumer focus. Absent statutory mandates, these federal proxy advocates have struggled to identify their constituencies and to prioritize conflicts therein. In the absence of clear guidance to protect consumers, there is a greater risk that organized interests will sway the proxy advocate at the expense of diffuse consumers. The squeaky wheel gets the grease: small businesses, which can organize and communicate with the proxy advocate more easily, will become the focus of agency concerns, rather than residential consumers who may not object or object as persistently.

While the OCA complaint mechanism would ensure that the office maintained some connection to the interests of consumers, the Advocate also gave consideration to the interests of airlines. The OCA staff had no predetermined method for deciding how to prioritize conflicts between different groups of consumers.[261] By contrast, the OPC's clear and narrow statutory mission ensured that it focused on the priorities of rail consumers. Given the narrow scope of the OPC's mission, its constituency was clearly defined. The ORPC, which had a broader mandate, was unable to define its constituency. By statute, the Office was supposed to represent com-

258. The following discussion of the OPC's outreach advocacy functions is compiled from primary and secondary sources. *See supra* note 50.

259. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52.

260. COAL RATE REPORT, *supra* note 90, at 6, 8, 107–10. R

261. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 82.

munities and users of rail service who "might not otherwise be adequately represented before the Commission in the course of such proceedings."[262] In its first year in operation, the ORPC testified before Congress that it interpreted this broad statutory mandate as establishing three priorities:[263] (1) continuing the OPC program of conducting outreach programs to solicit customer opinions on light rail policy, (2) participating in ICC regulatory proceedings to better develop the record, and (3) bringing attention to issues of rail safety raised by the transportation of hazardous materials.[264] The ORPC also noted that it sought to avoid duplication of state efforts.[265] When the Office began participating in energy proceedings related to transportation pursuant to the Powerplant and Industrial Fuel Use Act,[266] it became clear that the Office was not following these priorities. Rather than soliciting the opinions of unrepresented consumer interests, it sought out the opinions of well-represented interests such as the Edison Electric Institute and the National Coal Association.[267]

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262. 4-R Act § 304.

263. In FY1979, Howard Heffron testified that priority setting was a "continuing process." *Department of Transportation and Related Agencies Appropriations for Fiscal Year 1979: Hearings on H.R. 12933 Before a Subcomm. of the S. Comm. on Appropriations, pt. 4*, 95th Cong. 209–10 (1978). However, by FY1980 he was able to provide more specificity. *FY1980 USRA and OPC Appropriations*, *supra* note 30, at 19 ("In determining which proceedings to enter we consider, among other things, (1) whether the issues involved are of major importance (either intrinsically or as precedent) to communities, rail users, and the public generally; and (2) whether the interests which are potentially affected are able to represent themselves adequately in the proceeding."); *FY1980 ORPC House Authorization*, *supra* note 87, at 3–7 (outlining ORPC's top three priorities). R R

264. *FY1980 ORPC House Authorization*, *supra* note 87, at 3–7. A complete list of the ORPC's activities is listed as an appendix to the testimony. *Id.* at 12–13. R

265. *Id.* at 18. Notably, the ORPC would seek involvement in regional rail proceedings that affect multiple states. This rationale for federal involvement—to control interstate spillover effects—is among the most theoretically sound. *See generally* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (discussing the state spillover provisions of the Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006), while arguing that the Act has been unsuccessful at forcing internalization of state externalities).

266. *FY1980 ORPC House Authorization*, *supra* note 87, at 7. *See also* Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 804, 92 Stat. 3289, 3348 (repealed 1987) (giving ORPC the authority to "present the views of users, as well as the views of the general public and affected communities, and, where appropriate, providers of rail services in proceedings of Federal agencies concerning (1) the impact of energy proposals and actions on rail transportation, and (2) whether transportation policies are consistent with National energy policies"). The results of this intervention are discussed at notes 90–92, 282–284 and accompanying text. R R

267. COAL RATE REPORT, *supra* note 93, at 110.

Given the role that proxy advocates aspire to play in administrative proceedings, as discussed in Parts II.A and II.B, as well as the way in which state and federal proxy advocates fill that role, as discussed in Parts II.C and II.D, the question remains whether the reality has fulfilled the promise of theory. As will be demonstrated in Part III, proxy advocates can indeed succeed, but this success hinges on the way in which they are designed.

III.
PROXY ADVOCATES AS REPRESENTATIVES

Proxy advocates help consumers overcome obstacles that limit the involvement of diffuse interests. Part II set out a theoretical model for understanding the problem, the solution, and the state and federal implementation. Now, in Part III, this Note asks whether these proxy advocates have succeeded. By examining differences among federal and state proxy advocates in terms of their success and their structure, this section concludes that state proxy advocates are generally more successful than federal proxy advocates, but that federal proxy advocates are effective when they are designed to maintain contact with their constituents.

What does it mean for a proxy advocate to be successful? A proxy advocate is successful when the regulatory agency it monitors makes decisions favorable to its constituency. Although there are a wide variety of favorable decisions a proxy advocates may seek, this section looks specifically at rate-setting proceedings to compare the performance of federal and state proxy advocates.[268] Rate-setting proceedings provide proxy advocates a clear opportunity to help their constituents by saving them money otherwise paid to regulated utilities.[269] Not only do almost all proxy advocates participate in rate setting, but also these proceedings allow qualitative and

268. Throughout this section, comparisons are made between the performance of proxy advocates in the regulation of electric utilities, telephone rates, railroads, and airlines. The regulation of each of these is a distinct administrative process subject to its own procedures, but this should not preclude comparisons so long as the analysis accounts for those differences.

269. Rate setting proceedings are not the only way for proxy advocates to help constituents. For example, a proxy advocate may also secure other policies from the PUC that benefit residential consumers such as lifeline rates, prevention of wintertime shutoff, or green energy. They could also participate in the hearings that determine the mechanism and procedures for rate setting. *See, e.g.*, *supra* note 230. R

quantitative comparisons to be made between the presence, absence, or variations of the proxy advocates.[270]

Part III.A looks at the effect of state and federal proxy advocates on these rate proceedings. It concludes that proxy advocates are more successful in rate proceedings at the state level. Part III.B asks how the institutional design of proxy advocates relates to its performance in rate setting. This section concludes that state proxy advocates flourish when granted independence, but federal proxy advocates suffer from independence. Heterogeneity and size appear to have the biggest impact on the success of proxy advocates. Mechanisms that keep proxy advocates accountable to their constituents, however, may ensure effective representation.

A. Rate Setting as an Indicator of Proxy Advocate Success

This section discusses when proxy advocates have adequately represented diffuse consumers. By examining the effect of proxy advocates in ratemaking proceedings, this section provides a baseline against which to compare proxy advocates. As will be shown, the level of government—federal or state—appears to be among the most significant determinants of success for proxy advocates.

State proxy advocates have been successful at contesting rate increases requested by utilities.[271] While there are no similar studies at the federal level, the historical record, as developed later in this section, indicates that federal proxy advocates were ineffective in ratemaking proceedings, failed to secure funding, and were unresponsive to their constituencies.

270. Additionally, statistical techniques can be used to control for confounding variables, since proxy advocate performance can be compared across states and over time. *See* GORMLEY, *supra* note 8, at 161–62 (describing the statistical methods used in computing the behavioral affects); Holburn & Spiller, *supra* note 22, at 8–10 (describing the methodology for comparing the expected allowed return on equity (ROE) to actual ROE to control for political, demographic, and institutional variables; factors independent of management, such as state GDP and fuel prices; and regulatory climate and economic factors). As can be observed from the preceding, rates are frequently used as a metric by scholars in this field.

271. Economists have examined the behavior of state proxy advocates and shown that they have been successful at contesting rate increases requested by utilities. *See infra* note 273. However, state proxy advocates may be less successful at ensuring that these savings go to residents, as opposed to other ratepayers. Although current research does not distinguish between general and residential-only proxy advocates, forthcoming research from Holburn & Spiller may indicate that residential-only proxy advocates "are indeed associated with rate structures that dramatically favor residential consumers." Holburn & Vanden Bergh, *supra* note 42, at 63.

State proxy advocates have been successful at reducing the influence of utility companies over state public utility commissions. However, as discussed below, they may be less successful at ensuring that these savings go to residents, as opposed to other ratepayers. Utility rates are determined by public utility commissions, which set allowed return on equity (ROE). The ROE determines what rates the utilities can charge consumers. Utilities try to increase the ROE and are often successful. As has been repeatedly shown, the ROE drops when a proxy advocate represents consumer interests before the commission.[272] When a proxy advocate wins a reduction in ROE, utility consumers in the proxy advocate's jurisdiction save money by paying the lower rates. Since all state proxy advocates define their constituencies to include utility consumers, even if some narrow the constituency further to include only residential or other types of consumers,[273] the reduced ROE is evidence that the proxy advocate is accomplishing its statutory mandate.

However, savings alone do not necessarily indicate the proxy advocate's success; it is possible that the savings won by the proxy advocate are being allocated to some consumers at the expense of others. Such disparate allocation of savings may indicate that the proxy advocate is representing a heterogeneous constituency and allocating benefits to the better-organized interest within that constituency. This appears to be the case for state proxy advocates: While there is a decrease in ROE when a proxy advocate is present, residential consumers end up paying more while commercial consumers get all of the savings.[274] If it is the case that state proxy advocates who represent general consumers allocate savings to commercial consumers ahead of residential consumers, it does not

272. The earliest study on proxy advocates included an evaluation on ROE in electricity proceedings. GORMLEY, *supra* note 8, at 162–63 (discussing the effect of proxy advocacy on utility companies' rate hike requests, which factor into ROE). Similar conclusions were reached studying ROE figures in electricity proceedings in the 1980s. *See generally* Holburn & Spiller, *supra* note 22. A similar finding was made using telephone rates. *See* Robert N. Mayer et al., *Consumer Representation and Local Telephone Rates*, 23 J. CONSUMER AFF. 267, 281 (1989). Most recently, a proxy advocate was found to create pro-consumer outcomes in negotiated settlements, which are an alternative to the traditional adjudicatory ratemaking process. *See* Stephen Littlechild, *Stipulated Settlements, the Consumer Advocate and Utility Regulation in Florida*, 35 J. REG. ECON. 96, 107 (2008) (concluding that the participation of the Office of Public Counsel resulted in faster and greater stipulated rate reductions).

273. *See* Appendix.

274. Holburn & Spiller, *supra* note 22, at 22 (finding that residential rates increased 2.0% to 2.3% due to the presence of consumer advocates).

necessarily follow that the proxy advocate is failing.[275] However, representing an interest that is capable of organizing at the expense of one that cannot negates the purpose of a proxy advocate.[276]

Federal proxy advocates have been significantly less successful in rate-setting proceedings than their state counterparts.[277] With OCA and ORPC, for example, involvement in ratemaking proceedings occurred rarely for both and was a priority for neither. The OCA participated in nine fare tariffs and succeeded in only two.[278] The staff of the OCA, consisting of three attorneys, four economic researchers, and fifteen support staff, with a budget of $220,000 in 1976,[279] was almost certainly unable to match the airlines' multi-

275. It may still, however, mean that the proxy advocate is making a poor decision. Since commercial and industrial ratepayers can pass utility costs onto consumers, and are more capable of representation in such proceedings without the help of proxy advocates, a skew to residential consumers may be the right policy choice. However, equitable distribution may be mandated by statute. DEL. CODE ANN. tit. 29, § 8716 (2003 & Supp. 2010) ("To advocate the lowest reasonable rates for consumers . . . consistent with an equitable distribution of rates among all classes of consumers."). Or indeed one may be instructed to work for lower rates generally but to prefer certain interests. *E.g.*, CAL. PUB. UTIL. § 309.5(a) (West 2004) (prefer residential and small business consumers in revenue allocation and rate design); *Welcome to the Consumer Advocate Division*, PUB. SERV. COMM'N OF W. VA., http://www.cad.state.wv.us (last visited Oct. 25, 2011) ("The Consumer Advocate Division advocates primarily on behalf of residential consumers . . . ."). The political problem raised by choosing between constituencies was the reason why Gormley suggested that proxy advocates would elect to stay out of ratemakings. GORMLEY, *supra* note 8, at 170.

276. There is not yet any published data on whether the misallocation of proxy advocate representation remains a problem in jurisdictions that limit proxy advocate constituencies to only residential consumers. However, there is some empirical evidence suggesting that residential-only proxy advocates indeed skew their advocacy in favor of residential consumers. *See supra* note 274.

277. Since the OPC was not involved in any such proceedings, this investigation is necessarily limited to the ORPC and the OCA. As discussed *supra* Part I.B, the OPC was only involved in the insolvency of the northeastern railroads and the reorganization thereof into Conrail. Due to obscurity and sample size, federal proxy advocates are less amenable to the econometric analysis to which their state-level counterparts have been subject. Using Congressional documents, however, an assessment can be made of the effect of federal proxy advocates on ratemaking proceedings.

278. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76. Additionally, "[f]ive of the nine fare tariff proceedings involved applications for fare increases and the OCA prevailed in only one of those five." *Id.* These tariffs were set through a procedure "similar to that used in classical utility regulation," but relying on airline industry averages and a set formula. *Id.* at 77.

279. *Id.* at 74.

million dollar spending.[280] By comparison, proxy advocates in state utility regulation might more easily keep pace with industry spending; state proxy advocates are frequently funded in excess of one million dollars per year.[281]

The ORPC was also relatively absent from ratemaking proceedings, and failed when it did appear.[282] When the ORPC did appear in a rate proceeding, it was influenced by the private interests that it was created to contest.[283] In this sense, the ORPC failed its mission. Despite its statutory duty to represent those interests which would otherwise not be represented, it both represented otherwise capable interests (trade associations) and was unable to represent diffuse interests.[284]

Since participation in ratemaking proceedings is one of the most direct ways for a proxy advocate to help its constituency, and state proxy advocates show that success in ratemaking proceedings is possible, federal proxy advocates' absence from such proceedings cannot be explained as a simple choice to engage in other forms of intervention. However, one may argue that participation in ratemaking proceedings is simply an inaccurate gauge of performance. That is to say, federal proxy advocates may be just as "successful" as state proxy advocates but succeed in areas other than ratemaking proceedings. This is a reasonable argument, and in some cases, federal proxy advocates were unable to appear in ratemaking proceedings.[285] However, even where able to appear, federal proxy advocates have both failed to participate and done poorly when they have participated. The OCA, for example, was able to participate in ratemaking proceedings but dealt more frequently with complaints related to luggage handling. While this representation undoubtedly helped consumers, it is not clear that the public benefitted more from fewer lost bags than it would have

280. The combined spending of the airlines on CAB proceedings exceeded three million dollars in 1976. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 18.

281. *See* Goodman, *supra* note 16, at 225. For a further discussion of state funding of proxy advocates, see *infra* Part II.C.

282. *See* COAL RATE REPORT, *supra* note 90, at 147 (illustrating that the cost in constant dollars for rail transport of coal has increased). The reviewed documents, such as *FY1980 USRA and OPC Appropriations*, *supra* note 30, at 17–18, reflect participation in ratemaking proceedings, but they do not indicate any victories. By comparison, the same documents note success in safety. *Id.* at 21 (noting success in requiring speed indicators in locomotives hauling hazardous materials). R

283. *See supra* notes 90–92 and accompanying text. R

284. PUBLIC PARTICIPATION STUDY, *supra* note 39 (showing that regulated industries dominated agency proceedings).

285. The OPC, for example, was not able to participate in ratemaking proceedings while representing of rail consumers in underrepresented localities.

from lower fares (which, after all, allows more people the opportunity to lose their luggage). Moreover, history shows that proxy advocates could have won significant price decreases for consumers, particularly in regulated interstate markets.[286] Where federal proxy advocates were able to participate in ratemaking proceedings, they should have done so, since the benefits won from such activity would surely have inured to the consumers.

B. Independence as an Explanation for Proxy Advocate Performance

This section looks at the effect of proxy advocate independence on performance. The ratemaking analysis from Part III.A demonstrates a divergence between state proxy advocates, which perform more effectively with independence, and federal proxy advocates, for whom independence is a mixed blessing. It concludes that bureaucratic independence may prevent successful federal proxy advocacy, but that providing conduits for communication between constituents and proxy advocates can improve representation.

Before addressing the divergent effect of independence on federal and state proxy advocates, one particular explanation for the variation between federal and state proxy advocates should be addressed. Federal proxy advocates have been funded at lower levels than state proxy advocates, which may explain their failure. However, this is not always true and causality may run the other way. In fact, state proxy advocate funding varies widely. Alabama's proxy advocate has a statutory budget of $250,000 whereas other states fund their proxy advocates in excess of two million dollars.[287] Moreover, underfunding federal proxy advocates appears linked to the same factors that hindered their development and continued existence. That is to say, if federal proxy advocates failed due to underfunding, it is likely that the proxy advocate was underfunded as a way to eliminate it. For example, the ORPC was defunded when

286. While the drop in airline prices after deregulation may have other causes as well, deregulation appears to have benefitted the airline markets significantly. *See* Stephen Breyer, *Airline Deregulation, Revisited*, BUSINESSWEEK.COM (Jan. 20, 2011, 5:00PM), http://www.businessweek.com/bwdaily/dnflash/content/jan2011/db20110120_138711.htm (noting the unforeseen "spectacular growth" of the airline industry after deregulation).

287. *See Member Surveys*, *supra* note 224 (Some of the states whose budgets exceed two million dollars, according to the surveys on this site, include Florida, Indiana, Iowa, Massachusetts, and Pennsylvania.). For Alabama's statutory budget, see ALA. CODE § 37-1-18 (LexisNexis 1992). Regardless of funding, all of these proxy advocates have continued to exist, and there is no indication that funding is correlated to performance.

Congress decided that it was redundant.[288] Furthermore, consumers have more difficulty organizing to protect proxy advocates at the federal level. Just as consumers were unable to push the nomination and confirmation of a director, they were unable to convince Congress to continue funding the office. This is intuitively understandable—a proxy advocate is created *because* consumers are incapable of such action. States, however, may not suffer the same fate. Because states are smaller and likely more homogenous than the mass of federal consumers, a state's consumers may be more able to organize and less likely to argue internally to the detriment of broader goals.

Independence is an important starting point for analyzing proxy advocates.[289] If the proxy advocate is located within the PUC, and is subject to the hiring and firing power of the commissioners,[290] appropriated for by the PUC's budget requests,[291] housed in the same building,[292] part of the same bureaucratic culture, and serving in the same institutional structure as the agency adjudicating the proceeding before which it serves as an advocate, the proxy may be a less zealous advocate for fear of offending the parent agency. These concerns are common in administrative law, where boundaries are frequently drawn between advocates and adjudicators. Of course, these fears might be out of proportion to reality. The Model State Administrative Procedure Act bars ex parte communications and the sharing of officials, both of which minimize these risks.[293] While these resource benefits may influence the proxy advocate,[294] they also reduce its costs of operation. If the proxy advocate cannot free ride on the agency's appropriations for technical experts, attorneys, and support staff, it will have to fight

288. *See supra* note 92 and accompanying text.

289. The specifics of state and federal proxy advocate independence are discussed *supra* Parts II.C and II.D.

290. *See, e.g.*, NEB. REV. STAT. § 66-1830(2) (2009).

291. DEL. CODE. ANN. tit. 29, § 8716(d)(4) (2003 & Supp. 2010). The funds are appropriated from the Delaware Public Utility Regulatory Revolving Fund, which is provided for in DEL. CODE ANN. tit. 26, § 116.

292. *See* IOWA CODE ANN. § 475A.3 (West 2009) (placing the office of the consumer advocate "at the same location as the utilities division of the department of commerce," even though the two are separate divisions).

293. BONFIELD & ASIMOW, *supra* note 167, at 792–93. But it is known to happen. *See supra* note 220. R

294. State *ex rel.* Utils. Comm'n v. Seaboard Coast Line R.R., 303 S.E.2d 549, 555 (N.C. Ct. App. 1983) (finding that the commission acted within its authority when it allowed the proxy advocate to appear when such appearance was challenged as "beyond [the advocate's] statutory authority" by a regulated company).

for those appropriations itself, or reallocate its general budget to overhead rather than interventions.

At the state level, the most successful proxy advocates are those that are most independent. The most comprehensive study on the effect of independence on state proxy advocate performance examined telephone rates. It found that the most consumer-friendly outcomes were produced by independent counsels, followed by the state's Attorney General and divisions within the PUC.[295] Independent counsels operate subject to the least control, since they have both the technical expertise and are least subject to outside control. The study found no statistically significant difference between the effects of Attorneys General and divisions in the PUC. Both were less effective than independent counsels, but the study cites different reasons for their difficulties. The PUC divisions are subject to significant internal oversight, whereas the Attorney General may lack expertise and likely has dual loyalties to defend the PUC as well as to act as a proxy advocate. However, Attorneys General today frequently have technical consultants, thus providing the needed expertise.[296] Additionally, the Attorney General is likely to be more zealous that the PUC when the office contains a division dedicated to representation, and when political pressure encourages the Attorney General to use it.[297] Given that today's Attorney General proxy advocates have technical staff and more political accountability, it appears that they may be more effective consumer advocates than at the time this study took place.

Independent federal proxy advocates do not produce the same pro-consumer outcomes as their state counterparts. The one independent proxy counsel advocate had significant implementation problems, which were reminiscent of the considerable legislative obstacles faced by prior proposals to create independent consumer protection agencies.[298] Placement within the agency, however, creates other, perhaps equally insidious, issues. Proxy counsels housed within agencies, however, appear limited by control from above.[299]

295. Mayer et al., *supra* note 272. R

296. *See* Appendix.

297. Even when there are separate divisions in the PUC, they are not always respected. *See supra* note 220.

298. *See supra* notes 55–63 and accompanying text.

299. The dilemma was summarized thusly: "Ironically, despite the fact that the 1976 legislation theoretically established an office of substantial independence and power [in the Office of Rail Public Counsel], the lack of implementation of that office has seriously compromised its independence and left it less effective than the in-house advocacy office in the Civil Aeronautics Board." PUBLIC PARTICIPATION STUDY, *supra* note 39, at 86.

The only independent federal proxy advocate, the Office of Rail Public Counsel,[300] had a brief, tumultuous existence before it was eliminated.[301] A significant obstacle for the ORPC was the appointment process for its leadership. The statute provided for presidential appointment of the director of the ORPC, but it took quite a while for Howard Heffron to be nominated and confirmed to lead the office.[302] Apart from the lack of leadership, budgeting also posed problems for the nascent office. Its initial funding precluded it from using outreach attorneys or hiring technical consultants, crippling the office.[303]

Not only did the ORPC struggle to survive, it failed at its task while it was operating. As the *Railroad Coal Rates* report found, the office's energies were misdirected. Rather than identifying and representing the views of the public, the ORPC advocated its own views.[304] When the ORPC did represent the views of "the public," it listened to the views of such concentrated, private interests as the National Coal Association and public utility companies.[305] It is undoubtedly easier for a hobbled proxy advocate, lacking in resources and outreach attorneys, to hear the views of organized interests who have a financial stake in agency proceedings, but this ease contra-

300. As discussed *supra* Part I.B, the ORPC was the only federal proxy advocate whose leadership, budgetary authority, and agenda setting power existed independently of the agency before which it appeared.

301. For a discussion of the history of the ORPC, and its defunding, see *supra* notes 84-99 and accompanying text.

302. *See Nominations—October-December*, *supra* note 12, at 103; *Amending the Interstate Commerce Act to Authorize Appropriations for the Office of Rail Public Counsel for Fiscal Year 1979: Hearing Before Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 2 (1978) (statement of Howard Heffron) ("I have been in office slightly more than 3 months as I come here today."); *see also Authorizations for the Unites States Railway Association: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 2 (1977) (statement of Sen. John A. Durkin, Member, S. Comm. on Commerce, Sci., and Transp.) (expressing dismay at the failure to appoint a director for one full year, despite the statute's command to appoint a director within sixty days). The Interstate Commerce Commission sought authorization to nominate an interim director, but permission to do so was denied. *Interim Authority Decision*, *supra* note 82, at 125–26. R

303. *See supra* note 262. In requesting authorization in 1980, the ORPC noted that it used outreach attorneys in an Amtrak route reorganization. *FY1980 USRA and OPC Appropriations*, *supra* note 30, at 16. This appears to be the only use of outreach attorneys by the ORPC, and it seems restricted to only this matter. By contrast, it notes that the requested budget would permit outreach "if the occasion arises." *Id.* at 18. It further downplayed the prospects of future outreach attorneys. *Id.* at 22–23.

304. *See* COAL RATE REPORT, *supra* note 90, at 108. R

305. *Id.* at 110.

dicts both the specific statutory authorization for ORPC involvement in energy proceedings[306] and for the office.[307] Proxy advocates do little good when they aid organized and represented interests, especially at the expense of diffuse consumer interests.

Despite the cautionary tale of the ORPC, the alternative of placing a proxy advocate within the agency is not significantly more appealing. The dangers of internal proxy advocates can be seen in the aviation context. Leaving the proxy advocate under the authority of the agency created the self-defeating dysfunction of an internal advocacy office adopting the views of its parent agency.[308] For example, rather than declaring his responsibility to be "to consumers," the director of the OCA, the putative guardian of the consumer cause, testified that he works to balance those interests with those of air carriers and regulators.[309] Although agencies should look to balance the interest of consumers and regulated industries, a proxy advocate should be a zealous voice for its constituents. After all, they are advocates. Since it is easier to operate within a parent agency, however, the OCA never sought the independence that might have solved its capture.[310] The experience of the OCA was

306. Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 804, 92 Stat. 3289, 3348 (repealed 1987) ("shall present the views of users, as well as the views of the general public and affected communities"); *see also* COAL RATE REPORT, *supra* note 90, at 109–10. Indeed, ORPC was forced to spread itself even thinner when it was given responsibility for energy proceedings, likely exacerbating the problem. **R**

307. *See* Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52 (instructing the Director to solicit the views of underrepresented parties).

308. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 81 (quoting interviews with a representative of the Aviation Consumer Action Project in which the representative asserted that a lack of independence would lead to cooperation).

309. *Oversight of Civil Aeronautics Board Practices and Procedures, Vol. 2: Hearings Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. 1124 (1975) (statement of Jack Yohe, Director, Office of the Consumer Advocate, Civil Aeronautics Board). While this quotation has been read to reflect an honest assessment of his opinions, it may have been a politically motivated statement to create the appearance of impartiality and thus avoid opposition to the OCA by the industry. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 83.

310. The Office of Consumer Advocate disavowed a desire to gain greater independence from the Civil Aeronautics Board for fear of becoming embroiled in the same budgetary fights that hindered the ORPC. PUBLIC PARTICIPATION STUDY, *supra* note 42, at 81 ("[The director of OCA] stated that while there might be some benefits in a separate appropriations line, he did not want to get involved in direct dealings with the appropriations committees and deferred to the Board Chairman in that regard.").

not all negative. The Office did have some successes, albeit not in rate setting proceedings.

Nonetheless, a comparison of two in-agency proxy advocates shows the risks of proxy advocates that lack independence. While the OCA was placed in the agency, it was somewhat insulated from its influence.[311] A more extreme example of agency influence, the ICC's Bureau of Investigation and Enforcement, shows how divisions of agencies are ill suited to robust representation of consumer interests. Having identified a failure in the ORPC's representation of consumer interests in coal ratemaking proceedings, legislators turned to a bureau within the ICC charged with developing the agency record on behalf of the public interest. Looking at two cases, however, an oversight report found that the Commission restricted "the scope, access, and timeliness of [Bureau] access" to discovery in one proceeding[312] and denied the Bureau permission to develop the record in the other.[313]

Although both complete independence and dependence lead to ineffective proxy advocacy, there is one alternative institutional design that may function well at the federal level. The Office of Public Counsel, the ORPC's predecessor agency, used outreach attorneys as a feedback mechanism between central decisionmakers in Washington and areas affected by the Conrail reorganization, and vice-versa.[314] The results of this office were overwhelmingly positive.[315] While the ORPC intended to continue the use of such outreach attorneys, both as a means of staying abreast of public opinion and as a check against agency drift, they did not do so. While one study suggested that this was itself a product of agency drift,[316] it appears more likely that the decision to end the outreach attorney program was a financial one forced by insufficient funding.[317]

The comparative success of the OPC and ORPC suggests that federal proxy advocate failure may be due to the heterogenaeity and size of the constituency. The OPC had a very limited mission, whereas the ORPC had a broad mandate. Moreover, since the OPC was only operating in specific towns in a specific region, its re-

311. *See supra* Part II.D.

312. COAL RATE REPORT, *supra* note 90, at 113. **R**

313. *Id.* at 114.

314. *See supra* Part II.D.

315. *See supra* Part I.B.

316. *See* COAL RATE REPORT, *supra* note 90, at 107–10. **R**

317. *See supra* Part I.B.

sources were more focused than those of the ORPC, which had to protect the whole country.

The experience of the OPC suggests that these obstacles may be overcome by institutional design. First, when the scope of the office is constrained to a limited mission, as it was by the OPC, drift is less likely.[318] Second, an office that uses outreach attorneys is more likely to maintain a connection to the constituents, as the OPC did and the ORPC did not.

That state proxy advocates have been successful without the outreach suggested here indicates that heterogeneity and size may be the salient difference between federal and state proxy advocates. Given the differences observed between federal and state proxy advocates, similarly structured proxy advocates create significantly different results when placed in federal or state government. Most significantly, whereas independent state proxy advocates are more successful, an independent federal proxy advocate is less successful.

This point is further emphasized by the experience of a dependent but accountable federal proxy advocate, the OPC. Rather than doing a poor job, as would non-independent state proxy advocates, it is the most successful of the federal proxy advocates. This is because it had a clearly defined mission and remained close to the views of its narrowly defined constituency as a result of the outreach program it used. The OPC is thus the exception that proves the rule: while it forsakes the freedom that makes state proxy advocates effective, it gains stability from its bureaucratic location and effectiveness from its narrow focus and clear communications.

The classes of interests represented by the state proxy advocates might be more homogenous, for example, due to the circumscribed constituency. Indications that residential-only state proxy advocates are more effective than general proxy advocates only bolster this point. The smaller geographic scope of state proxy advocates makes it easier for them to maintain communication between the advocate and the constituency than it is for federal proxy advocates. The costs of communicating, both for constituents to reach the advocate and for the advocate to understand its constituents, may be low enough in states to obviate the need for outreach attorneys. Even if federal proxy advocates can maintain such communication, however, heterogeneity may still hinder their performance. Since federal proxy advocates need to represent interests from a variety of states, but maintain enough support to sustain their exis-

318. This may also be demonstrated if residential-only state proxy advocates are more effective than general proxy advocates. *Supra* Part III.A.

tence, they may need to balance consumer interests in a way that distorts their representation of consumer preferences.

However, even if a federal proxy advocate represents a narrow and homogenous constituency, independence may still significantly hinder its performance by forcing it to engage in battles that it is ill-equipped to fight. The hallmark independence of the ORPC—requirements of a presidentially appointed director and a separately appropriated budget—crippled that office. It was unable to convince the legislature and the executive of its importance, and narrowing its constituency or using outreach attorneys would not have helped it avoid its eventual elimination. However, given that states have had successful proxy advocates with requirements of independent funding[319] and appointment, it is possible that reducing heterogeneity and the impact of size may help an independent federal proxy advocate survive. Thus, it appears that independence does not help a federal proxy advocate, but other changes to its structure might.

State proxy advocates are more successful than federal proxy advocates, but federal proxy advocates do not respond as well to greater independence, the change that most helps their state counterparts. The ready explanation for this difference is heterogeneity and size. While this is analytically apparent, this Note cannot definitively say which is the explanation. Hopefully, further empirical research can explain the clear differential demonstrated here. Nonetheless, the comparisons provide sufficient data to ask how federal proxy advocates can be improved.

IV.
IMPROVING PROXY ADVOCATE REPRESENTATION

Part III sought to understand what makes federal and state proxy advocates effective. It concluded that independence improves state proxy advocate performance but can undermine federal proxy advocates. At the federal level, proxy advocates require a connection to their constituency to stay focused and effectively fulfill their duties. Given this understanding, this section asks how these lessons can be applied to improve consumer representation. Part IV.A suggests that the positions of proxy advocates should be

319. The ICC was unable to obligate funds appropriated to the ORPC. *See Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978: Hearing on H.R. 7557 Before the Subcomm. on Transp. Appropriations of the H. Comm. on Appropriations*, 95th Cong. 522 (1977) (statement of John P. Kratzke, Acting Managing Director, Interstate Commerce Commission).

more seriously considered by reviewing courts. Part IV.B more modestly suggests that, given the difficulties of federal proxy advocates, the federal government can best aid consumer representation by funding state proxy advocates.

A. Proxy Advocates and Deference

Given the significant role courts play in administrative decisionmaking,[320] the legal system must properly account for proxy advocates, especially in cases where they contest agency decisions. By default, courts evaluate agency decisions with deference.[321] As shown below, this has not changed when a proxy advocate is present, but perhaps it should. If a proxy advocate has the potential to misdirect public pressure such that consumers engage the proxy advocate instead of the agency,[322] it is important that this influence is not misplaced. However, it appears as though it may be. Rather than trying to influence the agency, whose decision will be reviewed under a deferential standard of review, consumers raise grievances before the proxy advocate, who in turn may raise them before the agency. A proxy advocate's work culminates in either a decision by the agency, who accounts for the proxy advocate's views as one perspective among many, or a court challenge, where the court defers to the agency's position over the proxy advocate's.[323]

Two conclusions follow from analyzing this process. First, consumers' focus on proxy advocates gains the benefit of technical expertise at the risk of an unfaithful representative. If consumers approach the commission directly, their views must be taken into account by the commission, whose decision will be given deference. But their views will lack sophistication, and the agency would likely dispatch them easily as a result. If consumers approach the commission through the proxy advocate, their argument will be more robust, and thus taken more credibly by the commission, but they must also trust the proxy advocate to express their views faithfully. Second, the agency decisionmaking process is qualitatively different when a proxy advocate is involved. There is a second politically ac-

320. *See* CROLEY, *supra* note 99, at 72–76. R

321. *See, e.g.*, Nextel W. Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 156 (Ind. Ct. App. 2005) (reviewing a determination of the public interest by the Commission under a substantial evidence standard); Wash. Att'y Gen. v. Wash. Utils. & Transp. Comm'n, 116 P.3d 1064, 1068 (Wash. Ct. App. 2005) (reviewing the decision of the Commission under an "arbitrary and capricious" standard).

322. *See supra* Part II.B.

323. *See Wash. Att'y Gen.*, 116 P.3d at 1068 (noting the Commission's "wide discretion" and ultimately affirming the Commission's action).

countable, statutorily authorized office involved in the process who may reach a conclusion contrary to the agency's.[324] Both reasons indicate that courts should be cautious in granting agency deference in the presence of proxy advocates.

Though deference is justified on a variety of grounds, each also argues for granting deference to proxy advocates. If deference is owed to agencies due to their political accountability, the proxy advocate may be as or more politically accountable than the public utility commission.[325] Deference may also be justified on the basis of expertise, but, again, proxy advocates are no less technically competent than the PUCs that they challenge.[326] Not only are proxy advocates repeat players in a technical field, but they generally have a budget for hiring consultants as well. Furthermore, deference may reduce costs of governance by creating a background presumption against which the legislature can operate.[327] However, courts have not used this approach to analyze decisions in the presence of a proxy advocate. The proxy advocate presents a situation where deference to agency decisions may not be appropriate under the traditional approaches, but courts continue to defer. The proxy advocate is not charged with promulgating overlapping rules or making binding policy determinations,[328] but it is created by the legislature and endowed with expertise to represent interests before a separate body.

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324. On the issue of deference in the case of competing interpretations, see Gonzalez v. Oregon, 546 U.S. 243 (2006) (holding that federal law did not authorize the Attorney General to prohibit physician-assisted suicide as authorized by Oregon law).

325. If, for example, public utility commissioners are appointed by the governor for ten-year terms without legislative confirmation, whereas the proxy advocate is appointed every two years with confirmation, the proxy advocate has a more grounded claim to being a responsive voice of the populace.

326. Courts will defer to agencies that frequently deal with complicated technical issues since they are more adept at assessing these issues than judges who lack a scientific background and a familiarity with the issues bred by day-to-day exposure. As a result, a better decision will be made by the specialist. *See, e.g.*, Reuel E. Schiller, *The Era of Deference: Courts Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L REV. 399, 441 (2007) (noting the continued role of expertise in American administrative law).

327. Since the legislature knows that courts will give agencies wide discretion upon review, they can choose to narrow that by limiting the scope of delegation.

328. This question of deference when agencies have competing rulemaking authority remains complicated. *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 206–07 (citing Gonzalez v. Oregon, 546 U.S. 243 (2006) (finding that deference was not owed to the Attorney General given the expertise of the Secretary of Health and Human Services and the presumption against preemption)).

A reviewing court is thus left with the following conundrum: The legislature has sought to delegate its decisionmaking responsibilities to an independent agency and to reduce enforcement costs by granting the agency deference in litigation; however, a subsequent legislative coalition is skeptical enough of the agency to implement an additional control mechanism—a proxy advocate—that polices that agency.[329] Courts have resolved this problem by ignoring the subsequent legislative coalition. While this approach conserves judicial resources, it does not satisfy the other justifications for deference. The proxy advocate is a similarly expert body, and its presence creates a background presumption against which legislatures govern. Indeed, resolving a dispute between two experts does not stretch the judicial role too far afield, as it would to require a judge to develop a technical recommendation de novo.

Take, for example, a case where a proxy advocate brings to a court's attention an issue which might not otherwise have been reviewed. Such a case provides a clear example of the proxy advocate fulfilling its function. For example, in South Carolina, the reviewing court set aside a conclusion that trade association dues could be included in rate calculations following an objection that was noted and appealed by a proxy advocate.[330] Though the court reviewed the dispute under a deferential standard, the case suggests that a proxy advocate's opposition can serve as a red flag to reviewing courts. Even without judicial review, the proxy advocate's views must still be taken into account by the agency itself. Even if the agency sides with the utility at the end of the ratemaking proceeding, it must still acknowledge the arguments of the proxy advocate if its decision is to withstand even the most deferential judicial review.

Although the proxy advocate plays a necessary role in flagging issues for reviewing courts, this does not dictate what standard the courts should use to evaluate the proxy advocate's views. The strongest approach would grant deference to the proxy advocate when it contests agency decisions in litigation. The weakest version would continue the status quo, whereby commissions are given significant deference and proxy advocates merely ensure that agencies meet minimal standards of due process. A middle ground would

329. *See* Holburn & Vanden Bergh, *supra* note 42, at 61 ("[L]ess electorally confident governments have a greater incentive to lock-in favored policies by designing institutional structures that are difficult for future political generations to dismantle."). R

330. Hamm v. S.C. Pub. Serv. Comm'n, 422 S.E.2d 110, 114 (S.C. 1992).

diminish deference to the agency decisions in litigation when the consumer's advocate is on the opposing side.

The strong version would be a poor idea for several reasons. First, it would effectively replace commission decision making with proxy advocate decisionmaking. Even if the proxy advocate were only given deference when they opposed the commission, the commission would likely be required to acquiesce to any demands placed upon them by the proxy advocate.[331] While some consumer advocates would argue that this is preferable, most proxy advocates are neither equipped for such burdensome decision making, nor do their statutory mandates reach to provide for the "general welfare" as should be required from utility proceedings. That is to say, the Commission must balance interests, and the proxy advocate must zealously represent only one.[332] As a result, they would impose significant costs on the groups that are not within their statutory constituency, such as industrial consumers. Moreover, assuming such a responsibility as to make binding determinations would require courts to read proxy advocate statutory authority beyond the plain meaning of the authorizing statutes.

The middle ground, however, might improve judicial decisionmaking. When a proxy advocate contests an agency decision, it can indicate to courts the presence of a public choice problem meriting judicial intervention. Proxy advocates and commissions may reach different conclusions for a variety of reasons, but the disagreement will necessarily be between two politically accountable, technically expert offices that are subject to different political currents. The commission, in general, will be subject to greater influence by utilities and industrial companies, while the proxy advocate will be subject to other (perhaps no less insidious) political influences, such as commercial utility customers or political demagoguery. Second, after the public choice problem is highlighted by the disagreement between the proxy advocate and the commission, the court's inter-

331. Though not every action by a public utility commission is litigated by the proxy advocate at present, granting deference to proxy advocate decisions would alter both parties' strategic choices. Today, the likelihood of losing due to judicial deference reduces the proclivity of proxy advocates to bring suits. Rather, they (sensibly) pursue other strategies with a great likelihood of success. When the greatest likelihood of success comes from litigation, that would supplant other strategies, and the PUC would act based on an expectation that any litigation would result in a court deferring to the proxy advocate's position.

332. Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 208 (1st Cir. 1998) (emphasizing "[New Hampshire's] legislative directive requiring [the Office of Consumer Advocate] to devote its representational zeal entirely to the cause of the consumer").

vention is aided by technical expertise on both sides. A court reviewing such a disagreement with diminished deference is arguably acting well within the scope of legislative intent. The enacting coalition that created the proxy advocate did so after the agency had been well established, and thus did so to guard against future utility rate hikes by anti-consumer commissions.[333]

Of course, there are both legal and policy objections to this approach. Most significantly, enacting coalitions were presumably aware that agency decisions were given deference. If they had intended to weaken such deference, they could have done so. Additionally, when courts have given agencies deference over proxy advocate objections, they have not sought to change the standard of review. This is not to suggest, however, that legislatures should not begin to demand such a change or that legislators keep abreast of developments in judicial review of utility ratemaking.

On a policy level, moreover, it is not clear that a court *should* trust the proxy advocate, let alone above the PUC. As the Indiana Court of Appeals noted, these are two different parties who guard the public interest in utility proceedings with a proxy advocate.[334] As such, the court held that opposition by the proxy advocate did not constitute conclusive proof that the PUC's decision was opposed to the public interest, nor did it require the PUC to meet a higher standard of proof.[335] As required by administrative procedure, the PUC must always account for the positions presented them, including those of the proxy advocate in the initial decisionmaking. However, they are granted considerable latitude in how they respond to such comments.

More importantly, given the varying success of proxy advocates at the federal and state level, it is not clear that all proxy advocates should be treated as unquestioned harbingers of good. If there is a disagreement, the PUC may well be right. Even were this true, however, proxy advocates should not be ignored. The voices of the proxy advocate's constituents—diffuse as they are—should still be heard. So long as the proxy advocate exists, therefore, courts should account for their interaction with the citizenry in their review.

The diminished deference standard would permit such an analysis. If the proxy advocate litigates a PUC rate setting, the court can look at whether the proxy advocate's processes were representa-

333. *See* Holburn & Vanden Bergh, *supra* note 42, at 61. R

334. Nextel W. Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 155–57 (Ind. Ct. App. 2005).

335. *Id.* at 156.

tive of their constituency. Among state proxy advocates, the judge can look at indicia of independence and whether the proxy advocate is responsive to consumer needs. At the federal level, the judge may look at how the proxy advocate remains accountable to its constituents.

There is precedent for this diminished deference approach, both in theory and in practice. When an agency's action implicates a threatened or endangered species, the Endangered Species Act (ESA) requires that the acting agency consult with the agency that administers the ESA.[336] This requires that an agency, which may be predisposed toward its statutory mission, formally take into account the views of an agency that is dedicated to considering the ESA. The proposal here has a similar effect: an agency is forced to look outside of itself to ensure that the effects on consumers are properly considered. Professor Catherine Sharkey's agency reference model suggests that an administrative agency can be vested with the power to make initial, albeit reviewable, determinations in crowded policy spaces.[337] Though her argument focuses on agency determinations of preemption, the principle applies to proxy advocates. The agency determination "should be the beginning—not the end"—of the analysis.[338]

If the proxy advocate is an unfaithful agent, however, this raises further problems for how courts review their decisions. At least one court has found that a proxy advocate's litigation of an issue precludes a private litigant's cause of action.[339] The same indicia of representation can be used to determine whether the proxy advocate has provided adequate representation.[340] This section, however, presupposes the power of the proxy advocate to participate in a litigation. In some cases, the courts have denied inter-

336. *See* 16 U.S.C. § 1536(a) (2006); *see also* Thomas v. Peterson, 753 F.2d 754, 763–64 (9th Cir. 1985) (the Forest Service's failure to consult the Fish and Wildlife Service and to prepare a biological assessment, where an endangered species may have been present in the area of its proposed action, was not a *de minimis* violation of the ESA); RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 945–50 (2008).

337. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 G.W. L. REV. 449, 477 (2008).

338. *Id.* at 479.

339. Brandon v. Ark. W. Gas Co., 61 S.W.3d 193, 203 (Ark. Ct. App. 2001) (holding that action by the Arkansas Attorney General precluded later action by ratepayers).

340. *Cf.* Hansberry v. Lee, 311 U.S. 32, 44 (1940) ("Because of the dual and potentially conflicting interests of those who are putative parties to the agreement . . . , it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more . . . can some be permitted to stand in judgment for all.").

venor status to proxy advocates on the theory that their interests are sufficiently represented by the agency.[341]

B. The Federal Role for Proxy Advocates

In examining federal and state proxy advocates separately above, this paper has thus far ignored their overlap. Proxy advocates of one jurisdiction can, and often do, operate in another. Though many state proxy advocates can and do represent their constituencies in federal agency and judicial proceedings,[342] federal proxy advocates have not been given similar powers. These state proxy advocates are well established in state government,[343] and function well as independent agencies.[344]

State proxy advocates thus appear capable of representing consumer interests, even at the federal level, under two conditions. The first requirement is that they are legally empowered to do so. The second is that the proxy advocate or advocates must adequately represent the national constituency. If one state's consumers have divergent interests from those of another, both states' proxy advocates must be involved to present their views. If a federal agency approves a pipeline that benefits one state by passing through the wilderness of another, both states should be represented. A federal proxy advocate, by contrast, would be forced to balance the competing interests of each state's consumers and may thus avoid representing consumers in the issue altogether.

341. *See, e.g.*, Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 208–09 (1st Cir. 1998) (finding that the proxy advocate's role of advocating the consumer interest differed from the PUC role of balancing consumer and utility interests, but concluding that this case presented no divergence in their views); *In re* Pub. Serv. Co. of N.H., 88 B.R. 546, 556–57 (Bankr. D.N.H. 1988) (finding that the interests of all consumers are represented by the state through the Attorney General and thus granting only limited intervenor status to the proxy advocate).

342. The only two states that seem to restrict the appearance of their respective proxy advocates to appearance before state utility commissions are Vermont and Arizona. VT. STAT. ANN. tit 30, § 2(b) (2008) (providing that in cases requiring hearing before the board, the director shall represent the interests of the people of the state); *see also* ARIZ. REV. STAT. ANN. § 40-462 (2011) (specifying that the residential utility consumer office represents consumer interests "before the corporation commission"). More commonly, the grant of power is broad and extends to all state and federal administrative and judicial proceedings. *See* MINN. STAT. ANN. § 8.33(6) (West 2005) (granting the Attorney General authority to intervene in "federal proceedings"); N.Y. EXEC. LAW § 94-a(3)(8) (McKinney 2011) (before "federal, state and local administrative and regulatory agencies").

343. *See* Part I.B.

344. *See* Part III.B.

Federal proxy advocates may be necessary in several situations, even if state proxy advocates can appear federally. For example, if the increased burden on proxy advocates—that of participation in numerous federal proceedings—overburdens the state proxy advocates. A state proxy advocate who neglects local utility rate settings to monitor natural gas sales may save local consumers less money, although the overall savings to consumers nationwide may be greater. However, federal proxy advocates may lack accountability. Reliance on state proxy advocates may also create yet another collective action problem. Since certain agency and judicial interventions will be public goods, such as monitoring the natural gas market, state proxy advocates will free ride on the efforts of their counterparts.

Another case which would justify a federal proxy advocate is a diffuse interest systemically underrepresented by state proxy advocates, whose voice merits inclusion in agency proceedings. Grouping consumers by state does not always properly sort interests. For instance, a number of states may have a minority class of consumers who would be disadvantaged by a more permissive hydroelectric licensing process, such as commercial fishers or residents in affected areas. However, it is unlikely that any state proxy advocate would represent these interests since the majority preference, for cheaper energy, would direct its activities. Although a federal proxy advocate may not always advocate more strongly for such minority interests, it provides such a class of consumers with a federal entity who may be more sensitive to their concerns.

Despite these exceptions, state proxy advocates are more effective consumer representatives than federal proxy advocates. The federal government should recognize the problems with federal proxy advocates and thus encourage the development of state proxy advocates. This has been attempted once before.[345] Given proxy advocates' need for resources and their variable funding structures, federal money could do a great deal in furthering consumer interests.[346]

345. *See* H.R. REP. NO. 95-1750, at 19–20 (1978) (Conf. Rep.) (appropriating $10,000,000 for state offices of consumer representation in FY1979 and FY1980 through the Public Utility Regulatory Policies Act, H.R. 4018, 95th Cong. (1978)); *see also* Goodman, *supra* note 15, at 215 (citing H.R. 4018 as a reason for the increase in the use of state proxy advocates). For a broader discussion of this approach to federalism, see PAUL E. PETERSON ET AL., WHEN FEDERALISM WORKS (1986).

346. As John Chubb has pointed out, however, distributing federal funds through state and local governments introduces an additional interest group to the analysis—those very governments, who can redirect the funds to their benefit

V.
CONCLUSION

Experience shows that proxy advocates help improve consumer representation in agency proceedings, but optimism must be tempered by history. If such mechanisms are to be used to govern the discretion of federal agencies, these proxy advocates must be designed to ensure communication with the constituencies they represent. The expansion of the administrative state shows no signs of slowing down, and the federal government is right to ensure that business interests do not commandeer these proceedings to the detriment of consumers.

Congress must make sure that dedicated bureaucratic voices for consumers speak on behalf of the consumer. Where it does, courts should take heed. Where it does not, however, Congress would be wise to find other ways of protecting consumers.

APPENDIX

State proxy advocates exist in a variety of forms. Generally, statute creates an office or mandates that attorneys general represent consumer interests. In such cases, the relevant considerations are fairly consistent. Who appoints the proxy advocate? Where is the proxy advocate located in the state government? Does the proxy advocate serve for a term of years? What constituency does the proxy advocate represent? Is there an additional layer of oversight? These questions are addressed in Table 1.

or the benefit of their political allies. *See* John E. Chubb, *Excessive Regulation: The Case of Federal Aid to Education*, 100 POL. SCI. Q. 287, 304–05 (1985).

	Statutory Section	Loc.	Appt.	Conf.	Term	Mand.	Oversight
AL	ALA. CODE § 37-1-16 to -18 (LexisNexis 1992)	AG	AG			General	
AK	ALASKA STAT. § 42.04.070 (2010)	AG				General	PUC
AZ	ARIZ. REV. STAT. ANN. § 40-461 to -464 (2011)	Exec	Gov	Y		Residential	
AR	ARK. CODE. ANN. § 23-4-301 to -308 (2002 & Supp. 2009)	AG	AG			General	
CA	CAL. PUB. UTIL. CODE § 309.5 (West 2004)	PUC	Gov	Y		General*	
CO	COLO. REV. STAT. § 40-6.5-101 to -10 (LexisNexis 2011)	Exec	Exec			Res/Ag/SmBiz	Bd.
CT	CONN. GEN. STAT. ANN. § 16-2a (West 2007)	PUC	Gov	Y	5	General	
DC	D.C. CODE § 34-803 (LexisNexis 2001 & Supp. 2010)	PUC	Gov	Y	3	General	
DE	DEL. CODE. ANN. tit. 29, § 8716 (2003 & Supp. 2010)	Exec	Gov	Y		General	
FL	FLA. STAT. ANN. § 350.061 (West 1999)	Leg	Leg	Y		General	
GA	GA. CODE ANN. § 46-10-1 (2004)	Exec	Exec			Res/SmBiz	
HI	HAW. REV. STAT. § 269-51 (2007)	Exec	Gov	Y		General	
IL	220 ILL. COMP. STAT. ANN. 10/16 (West 2007)	Corp	Board			Res/(SmBiz)	
IN	IND. CODE ANN. § 8-1-1.1-1 (West 2010)	Exec	Gov		4	General	Council
IA	IOWA CODE ANN. § 475A.1 (West 2009)	AG	AG		4	General	Council
KS	KAN. STAT. ANN. § 66-122 (2002)		Gov		4	Res/SmBiz	CURB
KY	KY. REV. STAT. ANN. § 37.130 (LexisNexis 2008)	AG	Gov		3	General	Council
ME	ME. REV. STAT. ANN tit. 35-A § 1701 (2010)	Exec	Gov	Y	4	Res/SmBz/LowInc	
MD	MD. CODE ANN., PUB. UTIL. § 2-201 (LexisNexis 2010)	Exec	AG	Y	5	Res/NonComm	
MA	MASS. GEN LAWS ANN. ch. 12, § 11E (West 2010)	AG	AG			General	
MI	MICH. COMP. LAWS ANN. § 460.6l (West 2011)	Exec	Gov			Res	Bd.
MN	MINN. STAT. ANN. § 8.22 (West 2005)	AG	AG			Res/SmBiz	
MO	MO. REV. STAT. § 386.700 (2000)	Exec	Exec			General/(Inad.)	

MT	MONT. CODE ANN. § 5-16-101 (2009)	Leg	Leg			General	
NE	NEB. REV. STAT. § 66-1830 (2009)	PUC	PUC		4	Not High Volume	
NV	NEV. REV. STAT. § 228.300 (2009)	AG	AG		4	General	
NH	N.H. REV. STAT. ANN. § 363:28 (LexisNexis 2008)	PUC	Gov		4	Res	Bd.
NJ	N.J. STAT. ANN. 52:27EE-46 (West 2010)	Exec	Gov			Inad.	
NM	N.M. STAT. ANN. § 8-5-2 (LexisNexis 2004)	AG				Res/SmBiz	
NY	N.Y. EXEC. LAW § 94-a(3)(8) (McKinney 2011)	Exec	Gov(FN)	Y		General	Bd.
NC	N.C. Gen. Stat. Ann. § 62-15 (West 2000 & Supp. 2011)	PUC	PUC			General	
OH	OHIO REV. CODE ANN. § 4911.01 (West 2010)	Exec	AG(Bd.)			Res	Bd.
OR	OR. REV. STAT. § 774 (2009)	Corp	Board			General	
PA	PA. CONS. STAT. ANN. § 309-1 (West 1990)	AG	AG			General	
RI	R.I. GEN. LAWS § 39-1-17 (2006)					General	
SC	S.C. CODE ANN. § 37-6-512 (2000)	Exec	Exec			General	
TN	TENN. CODE ANN. § 65-4-118 (2004)	AG				General	
TX	TEX. UTIL. CODE ANN. § 13.001 (West 1997)	Ind	Gov	Y	2	Res/SmBiz	
UT	UTAH CODE ANN. § 54-10-201 (LexisNexis 2010)	Exec	Gov	Y	6	Res/SmBiz	Cmte
VT	VT. STAT. ANN. tit. 30, § 1 (2008)	PUC	PUC			General	
VA	VA. CODE ANN. § 2.2-517 (2008)	AG				General	
WA	WASH. REV. CODE ANN. § 80.01.100 (West 2011)	AG				General	
WV	W. VA. CODE ANN. § 24-1-1(f) (LexisNexis 2004 & Supp. 2010)	PUC	PUC			General	
WI	WIS. STAT. ANN. § 199.01 (West 2010)	Corp	Board			Res/Ag	
WY	WYO. STAT. ANN. § 37-2-401 (2011)	PUC	Gov			General	

THE QUASI-CLASS ACTION MODEL FOR LIMITING ATTORNEYS' FEES IN MULTIDISTRICT LITIGATION

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INTRODUCTION

In 2008, Judge Donovan W. Frank noted a disturbing trend in a large multidistrict consolidation he was overseeing: "[T]he Court . . . received numerous communications from [plaintiffs] stating that their attorneys have never contacted them or that their attorneys are making the [plaintiffs] complete, by themselves, all of the settlement documents."[1] With multidistrict consolidations—in which a single judge oversees the pretrial activities of a collection of similar lawsuits—growing more common,[2] it is increasingly important that all facets of the justice system, including attorneys, work together to guide these suits to just and efficient resolutions. Attorneys' fees, however, complicate this objective. Because cases are consolidated to avoid duplicative work, and because individual attorneys receive their contracted-for fees regardless of whether they or someone else does that work, attorneys have the incentive to leave as much work as possible to others.[3] In other words, attorneys' fees in multidistrict litigation create a free-rider problem. Courts should be able to combat that problem by limiting attorneys' fees and thus adjusting attorneys' incentives. In class actions, courts have explicit authority to do just this,[4] but in multidistrict consolidations, they do not. This Note addresses an emerging solution to this lack of authority: the quasi-class action model for limiting attorneys' fees in multidistrict litigation.

The class action once promised to provide the means to resolve instances of mass harm, but in recent years courts have increasingly soured on class actions in the mass-harm context. Multidistrict litigation (MDL) has taken up some of the resulting slack.[5] The powers of federal courts over class actions are deline-

1. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

2. *See infra* notes 35–37 and accompanying text.

3. *See infra* text accompanying notes 276–77.

4. FED. R. CIV. P. 23(h).

5. "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (2006). For instance, several thousand people who allege injuries resulting from the use of a drug might file suit in their own home districts, but the Judicial Panel for Multidistrict Litigation might, primarily for efficiency reasons, consolidate these cases before one court. *See infra* note 22 and accompanying text. For a full explanation of the history and procedure of multidistrict consolidations, see *infra* Part I.B. A multidistrict consolidation is not a strict substitute for a class action. *See infra* note 35. For instance, such a consolidation may in fact *include* one or more class actions. Rather, a multidistrict consolidation is a procedural mechanism that, in the mass

ated in Federal Rule of Civil Procedure 23 (Rule 23), but courts' powers over multidistrict consolidations are less clear cut. This lack of rule-based clarity has forced courts to innovate new ways of managing multidistrict consolidations. They have looked to alternative sources of authority for this control and have developed a number of tools to guarantee that multidistrict consolidations are both efficient and just. Given the increasing prominence of MDL practice and the fact that a single multidistrict consolidation can involve tens of thousands of individual claimants, a major corporate defendant, and billions of dollars in claims,[6] these efforts to define judicial power affect not only the legal system itself, but also a great number of individuals.

The quasi-class action model is just such an effort. Because a multidistrict consolidation is made up of originally separate actions, individual plaintiffs and their attorneys in such consolidations decide on their own contingent-fee arrangements, arrangements under which, in all likelihood, different attorneys will be paid different amounts. Labeling large multidistrict consolidations "quasi-class actions," some courts have capped, ex post, the amount that plaintiffs' attorneys can receive under ex ante contingent-fee agreements.[7] This authority is not explicitly founded on any rule or statute, but it is similar to the power that courts possess under Rule 23 when hearing class actions.[8] Some have criticized the quasi-class action model,[9] but the authority to limit attorneys' fees furthers the

harm context, can be used to resolve instances of mass harm in which a class action is, for one reason or another, unavailable.

6. For instance, the *Vioxx* MDL involved some 50,000 claims against Merck and a settlement fund of $4.85 billion. *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 608, 612 (E.D. La. 2008).

7. McMillan v. City of New York, Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *5 (E.D.N.Y. Sept. 17, 2008); *Vioxx*, 574 F. Supp. 2d at 612; *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *1 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488 (E.D.N.Y. 2006). By capping the attorneys' fees at a certain percentage, a court can in essence capture funds that would have otherwise gone to attorneys for no other reason than that they had more advantageous retainer agreements than other attorneys. It can then ensure that these funds go, for instance, to attorneys who have performed work that benefits all plaintiffs or to the plaintiffs themselves. *See infra* Part III.A.2.

8. FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . . .").

9. *E.g.*, Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107, 111 (2010). Professors Silver and Miller criticize a number of judicial management

underlying aims of the MDL mechanism: justice and efficiency. In the context of courts' attempts to define their powers over multidistrict consolidations, the quasi-class action model fills a gap in the authority courts need to deal with the realities of modern litigation.

This Note focuses on the cases that have expressly adopted the quasi-class action model. It offers a limited, functional definition of that model based on the manner in which courts have employed it. Though the term "quasi-class action" implies that a court hearing a multidistrict consolidation has broad powers—perhaps powers similar to all of those granted by Rule 23—the reality of the term's use to date has been far more modest.[10] Courts that have employed it have done so for a very specific purpose: to justify limiting the percentage of clients' recoveries that plaintiffs' attorneys can be paid under contingent-fee contracts.[11] Some commentators have suggested a broader definition of "quasi-class action" that encompasses more aspects of judicial management of multidistrict consolidations.[12] In characterizing the term more narrowly, this Note takes its lead instead from the way courts themselves have actually used the term: as a justification for limiting attorneys' fees.[13]

techniques that they define as part of the quasi-class action method: "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts." *Id.* at 110. By employing these techniques, Professors Silver and Miller argue, "judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well." *Id.* at 111. This Note focuses specifically on fee caps, and it addresses the benefits and drawbacks of such fee caps at length. *See infra* Part III.

10. This gap between the potentially broad meaning of "quasi-class action" and its limited application in practice has led one commentator to criticize the term and the willingness of courts to base their authority over multidistrict consolidations on Rule 23. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. (forthcoming 2012) (manuscript at 58–59), *available at* http://ssrn.com/abstract=1909967 ("[C]ourts . . . need not risk the confusion that the quasi-class action theory connotes.").

11. *See infra* Part I.C. It is for this reason that this Note defines the quasi-class action model as authorizing fee caps only.

12. Silver & Miller, *supra* note 9, at 110 (defining "quasi-class action" as consisting of "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts"). R

13. McMillan v. City of New York, Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *5 (E.D.N.Y. Sept. 17, 2008); *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 618 (E.D. La. 2008); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *20 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *Zyprexa*, 424 F. Supp. 2d at 496–97.

The quasi-class action has garnered little scholarly attention.[14] This Note offers the first in-depth examination of the history and context of the quasi-class action and argues that the authority over fees that courts claim under the model furthers the principal aims of multidistrict consolidation and is thus a valuable judicial tool. Part I analyzes 28 U.S.C. § 1407 (MDL Statute or Statute) and the current state of class actions in the mass-harm context before examining the history of the quasi-class action model. Part II puts that model in context by considering other powers courts have adapted and innovated in order to manage multidistrict consolidations: Federal Rule of Civil Procedure 16 (Rule 16); plausibility pleading with respect to motions to dismiss under Federal Rule of Civil Procedure 12 (Rule 12); evidentiary gatekeeping under *Daubert v. Merrell Dow Pharmaceuticals*;[15] bellwether trials;[16] and the ability to provide "common-benefit fees," additional compensation to attorneys who have worked for the common benefit of all plaintiffs. Notably missing from these powers is the authority to limit attorneys' fees—authority that courts expressly possess when they oversee class actions.[17] Part III analyzes the benefits and drawbacks of the quasi-class action model and concludes that it is a valuable—if as yet imperfect—part of modern aggregate-litigation practice.

I.
MULTIDISTRICT CONSOLIDATION AND THE POWERS OF THE TRANSFEREE COURT

The quasi-class action model developed as a means to help judges manage multidistrict consolidations. This Part explores that development. Section A describes the procedures outlined by the MDL Statute. Section B discusses the importance of the MDL mechanism in light of the decline of the class action in the mass-harm context. Section C examines the history of the term "quasi-class action" and explores the development of the quasi-class action model.

14. The primary scholarly treatment of the subject is Silver & Miller, *supra* note 9. R

15. 509 U.S. 579, 597 (1993).

16. A bellwether trial is a single case that is selected from the pool of cases in a multidistrict consolidation and is then tried front-to-back before the remainder of the cases in the consolidation are tried or settled. *See infra* Part I.C.4.

17. FED. R. CIV. P. 23(h).

A. The MDL Statute

Congress enacted the MDL Statute in 1968[18] as a response to the systemic difficulties of resolving some 1800 separate actions alleging conspiracy among electrical equipment managers.[19] The Statute provides that pending federal "civil actions involving one or more common questions of fact . . . may be transferred to any district for coordinated or consolidated pretrial proceedings."[20] The Judicial Panel on Multidistrict Litigation (MDL Panel) administers these consolidations.[21] The Panel may transfer related actions to a single "transferee court" for consolidated pretrial proceedings if the Panel determines "that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[22] The Panel must remand each transferred action to its court of origin (its "transferor court") "at or before the conclusion of . . . pretrial proceedings."[23]

The MDL Statute, then, mandates that three prerequisites be in place before actions can be consolidated and transferred: (1) the actions must share at least one common question of fact; (2) consolidation must be for the convenience of parties and witnesses; and (3) consolidation must further the just and efficient conduct of the transferred actions. In practice, the Panel does not accord equal importance to each requirement. The first is treated loosely: any of "a wide spectrum of issues" may qualify as an issue of fact.[24] Moreover, the Panel tends to take a broad view of what constitutes a question of fact, to the extent that questions of law[25] or mixed ques-

18. For a more thoroughgoing history of the MDL Statute, see for example Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 314 (2009); Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47 (2007).

19. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2226 (2008).

20. 28 U.S.C. § 1407(a) (2006).

21. *Id.* The MDL Panel consists of seven circuit and district judges, no two from the same circuit. § 1407(d). The Chief Justice of the United States appoints Panel members "from time to time," and any Panel action requires the agreement of four members. *Id.*

22. *Id.* § 1407(a).

23. *Id.*

24. 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3863, at 381 (3d ed. 1998) (citing cases).

25. Ostolaza & Hartmann, *supra* note 18, at 52–53 (noting transfer of cases based on "important or dispositive questions of law, as well as factually similar cases involving the assertion of different legal theories") (footnotes omitted); WRIGHT, MILLER & COOPER, *supra* note 24, § 3863, at 388–94; *see, e.g.*, *In re* Pfizer, Inc., Secs., R R

tions of law and fact[26] may meet the requirement. The Panel generally considers the second requirement to be comparatively insignificant—inconvenience to individual parties or witnesses may be outweighed by overall efficiencies associated with consolidation and transfer.[27] The third requirement, however, is critical.[28] In fact, "this . . . requirement really subsumes the other two."[29] The Panel takes into account a wide variety of factors in determining whether transfer would promote "the just and efficient conduct" of an action. For instance, cases have been transferred "to avoid duplication of discovery activities, to prevent the entry of inconsistent pretrial rulings, and to conserve the human and financial resources of the parties, their counsel, and the judiciary."[30]

The Panel's consolidation decision greatly affects parties to the suits in question, particularly since consolidation offers the chance to settle the actions simultaneously. The Manual for Complex Litigation notes this "unique opportunity" for settlement and is straightforward about a judge's role in it: "Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases."[31] Some are skeptical that such settlement is in the

Derivative, & "ERISA" Litig., 374 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005) (finding transfer appropriate for claims arising under federal securities law and ERISA); *In re* MP3 Power Razor Sys. Mktg. & Sales Practices Litig., 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) (noting transfer appropriate when some actions involved interpretation of different states' laws).

26. WRIGHT, MILLER & COOPER, *supra* note 24, § 3863, at 395–96 ("This liberal interpretation of Section 1407 seems sound since the policy behind the statute is to promote judicial efficiency, and permitting consolidation under any circumstance in which there are common questions, whether legal, factual, or mixed, furthers that goal."). R

27. *Id.* § 3863, at 412–13 ("[I]f the other tests required by Section 1407 are met, the Panel appears to take the position that logistical inconveniences can be overcome by efficient management of the coordinated actions.").

28. *Id.* § 3863, at 413 ("The third and, in the minds of many courts, the most important prerequisite to obtaining a transfer and consolidation for pretrial purposes under Section 1407 is a showing that the just and efficient conduct of the actions will be served thereby.") (citing cases).

29. *Id.* § 3863, at 415.

30. *Id.* § 3863, at 417. The Panel, of course, considers many more issues than these when choosing a district and a judge to oversee the consolidated pretrial proceedings. For an analysis of the various factors cited by the Panel, see Richards, *supra* note 18, at 330–40.

31. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132, at 223 (2004).

best interests of all parties,[32] but, for good or ill, the vast majority of actions consolidated under the MDL Statute are terminated by the transferee court, either through settlement or a dispositive motion.[33]

The MDL Panel, in sum, may consolidate a large number and a wide variety of cases before a single transferee court, primarily to serve the interests of justice and efficiency. Many of these cases settle, and it is this opportunity for coordinated mass settlement that makes the MDL process particularly significant. And nowhere is the process more important than in the mass-harm context, in which the viability of class actions is deteriorating.[34]

B. Multidistrict Consolidation and the Decline of the Mass-Harm Class Action

Multidistrict consolidation is increasingly important as a method of resolving disputes arising from incidents of mass harm.[35]

32. *See, e.g.*, Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) ("Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense.").

33. As of September 30, 2010, transferee courts had terminated a total of 266,264 actions. In contrast, the MDL Panel had remanded only 11,986 actions to their respective transferor courts. Thus, of the cases either terminated or remanded, over 95% were terminated. U.S. JUDICIAL PANEL ON MULTI-DISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2010, at 4 (2010), *available at* http://www.jpml.uscourts.gov/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2010.pdf.

34. *E.g.*, AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporter's notes, at 25 (2010) ("As a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries. This development reflects many factors, including concerns about the quality of the representation received by members of settlement classes, difficulties presented by choice-of-law problems, and the need for individual evidence of exposure, injury, and damages.").

35. *See* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 794, 798 (2010). This may be true in some contexts other than mass harms as well. *See* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2279 (2008) ("There thus seems to be considerable justification for believing that multidistrict litigation could serve to take up whatever slack results from the impediments class actions now encounter in resolving dispersed litigation."); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008) ("The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement."). Of course, multidistrict consolidations are not direct substitutes for class actions, as the actions are different in many respects. *See, e.g.*, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L.

Empirical research indicates both that that courts have been less likely to certify mass-harm classes in recent years[36] and that mass-harm consolidations under the MDL Statute are increasingly common.[37] Accepting the latter observation on its face, this Section explores the mass-harm class action's decline.

A number of decisions and rule changes in recent years have made the class action a less viable tool for resolving mass-harm claims. First, two Supreme Court decisions have curbed the class action's usefulness in this context.[38] In *Amchem Products, Inc. v. Windsor*, the Court held that a "sprawling" settlement class containing both present and future claimants seeking damages from asbestos companies had been improperly certified as an opt-out class under Rule 23(b)(3).[39] The present claimants manifested a wide variety of symptoms of several asbestos-related diseases, and the fu-

REV. 1769, 1773–84 (2005); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991).

36. Willging & Lee, *supra* note 35, at 787. R

37. *Id.* at 794 ("[T]he [MDL Panel] has become much more likely to order consolidation of products-liability proceedings—almost three times as likely to consolidate—at the same time as the number of products-liability proceedings has increased.").

38. Though it is beyond the scope of this Note, recent Court decisions may affect other types of class actions as well. For instance, the Court's recent decision to deny certification of a class of employees claiming sex discrimination in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), may limit the availability of class actions in the employment context. The extent of any such limitation remains to be seen. With respect to securities class actions, however, the Court sided with plaintiffs in *Erica P. John Fund, Inc. v. Halliburton*, holding that a private securities-fraud plaintiff need not prove loss causation to obtain class certification. 131 S. Ct. 2179, 2185–86 (2011).

39. 521 U.S. 591, 622 (1997). Rule 23 allows a court to certify three types of classes, provided that the proposed class meets the prerequisites of numerosity, commonality, typicality, and representativeness. FED. R. CIV. P. 23(a). Rule 23(b)(1) describes classes in which prosecution of separate actions would risk inconsistent adjudications or incompatible standards, or would affect the interests of nonparties. FED. R. CIV. P. 23(b)(1). Rule 23(b)(2) allows class actions when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Rule 23(b)(3) describes the third of these, providing that a class is viable if it meets certain prerequisites set forth in Rule 23(a) and:

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the

ture claimants manifested no such symptoms at the time the class was certified.[40] According to the Court, the class did not satisfy Rule 23(b)(3)'s predominance requirement,[41] which mandates that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members."[42] Moreover, the interests of the present and future claimants diverged, such that the class did not satisfy Rule 23's adequate-representation requirement. The present claimants were primarily interested in large immediate payments; the future claimants sought a fund sufficient to compensate those who would manifest symptoms in the future.[43] The predominance and adequacy requirements imposed by *Amchem* thus made the resolution of large, complex cases more difficult by virtually eliminating Rule 23(b)(3) as a vehicle for such resolution.

The Court's decision in *Ortiz v. Fibreboard Corp.*[44] continued in this vein. The *Ortiz* parties had attempted to use a mandatory class under Rule 23(b)(1)(B) to resolve a large number of asbestos cases.[45] The Court decertified the class, holding that certification under this section is confined to cases involving a limited fund, and that a limited fund must have "a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution."[46] Moreover, such a fund must be limited "independently of the agreement of the parties to the action"[47]: consensus of all parties that a fund is limited, in other words, does not make it so.

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desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3).

40. *Amchem*, 521 U.S. at 624.

41. *Id.*

42. FED. R. CIV. P. 23(b)(3).

43. *Amchem*, 521 U.S. at 625–26.

44. 527 U.S. 815 (1999).

45. *Id.* at 825–28. The subsection at issue here provides that class certification is appropriate if the prerequisites of Rule 23(a) are met and the prosecution of separate actions by class members would create the risk of "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B).

46. *Ortiz*, 527 U.S. at 838–41. The Court applied this requirement even though "the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept" because it was concerned about the possibility of abuse under a more lenient rule. *Id.* at 842.

47. *Id.* at 864.

The *Ortiz* plaintiffs had not shown that the defendant asbestos companies constituted such a fund.[48] Like *Amchem*, *Ortiz* curtailed the utility of the class action in the mass-harm context. In this case, the Court determined that mass-harm claims cannot be resolved using a Rule 23(b)(1)(B) class. In the words of one commentator and practitioner, in these cases "the Supreme Court transformed [Rule] 23(b)(3)'s 'superiority' requirement into a mandate of perfection, and reformalized the 'limited fund' doctrine beyond practical utility."[49]

Beyond *Amchem* and *Ortiz*, a number of lower court decisions have made class certification more challenging and thus mass-harm class actions less viable. For instance, a number of courts of appeals have denied certification to putative nationwide classes in which the plaintiffs allege state-law claims, citing the impossibility of reconciling the laws of the several states.[50] In another example, the Seventh Circuit expressed concern in *In re Rhone-Poulenc Rorer, Inc.* that a class action might "hurl [an] industry into bankruptcy," a possibility that "need not be tolerated" since the individual plaintiffs could bring each case in the putative class action on its own.[51] Moreover, the mere possibility of a large verdict for the plaintiffs, the court reasoned, would coerce the defendants to settle, resulting in what the court called "blackmail settlements."[52] Some courts and commentators disagree with the Seventh Circuit's dim view of the mass-harm class action and the court's decision to deny certification based on factors like threats to an entire industry[53] and settlement

48. *Id.* at 848.

49. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005).

50. *E.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of [Rules] 23(a) [and] (b)(3)."); Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.").

51. 51 F.3d 1293, 1300 (7th Cir. 1995).

52. *Id.* at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

53. *See, e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1274 (11th Cir. 2004) ("It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous.").

pressure;[54] however, the reasoning behind *Rhone-Poulenc* holds sway in many areas of the country.[55]

Finally, as Thomas Willging and Emery Lee have observed, alterations to several federal rules and guidelines have made class certification, particularly of mass torts, less likely.[56] First, the addition of Rule 23(f) to the Federal Rules of Civil Procedure in 1998 authorized for the first time interlocutory appeal of class-certification decisions.[57] The subsection's drafters apparently found *Rhone-Poulenc* convincing: According to the advisory committee, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[58] Based on data from district and appellate decisions, Rule 23(f) has indeed reduced the number of classes ultimately certified.[59] Second, the 2003 revisions to Rule 23(c)(1) changed the time at which a certification decision had to be made from "as soon as practicable" to "an early practicable time"[60] and also eliminated the possibility of conditional certification.[61] In Willging and Lee's analysis, "[r]ead together, these provisions raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision."[62] Finally, the

54. *See, e.g.*, Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 722 (9th Cir. 2010) ("[T]he fairness of the pressure, i.e., the sociological merits of the small claims class action[,] is not a question for us to decide." (quoting Blackie v. Barrack, 524 F.2d 891, 899 (9th Cir. 1975)) (second alteration in original)); *Klay*, 382 F.3d at 1275 ("Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit."); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429–30 (2003) (concluding that settlement pressure in class actions does not resemble blackmail and that the argument that coercive settlement pressure in class actions exists is unpersuasive).

55. *See, e.g.*, Newton v. Merrill Lynch, 259 F.3d 154, 167–68 (3d Cir. 2001) (citing, inter alia, *Rhone-Poulenc*, 51 F.3d 1293); Andrews v. AT&T, 95 F.3d 1014, 1025 (11th Cir. 1996), *abrogated in part by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008) (same); *Castano*, 84 F.3d at 748–50 (same).

56. Willging & Lee, *supra* note 35, at 783–87. **R**

57. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.").

58. *Id.* advisory committee's note.

59. Willging & Lee, *supra* note 35, at 785. **R**

60. FED. R. CIV. P. 23(c)(1)(A) advisory committee's note.

61. FED. R. CIV. P. 23(c)(1)(C) advisory committee's note.

62. Willging & Lee, *supra* note 35, at 785. **R**

fourth and current edition of the Manual for Complex Litigation[63] sets out more stringent requirements for class certification of mass torts than previous editions did.[64] Where the third edition notes that "courts have increasingly utilized class actions to avoid duplicative litigation in mass tort cases,"[65] the fourth observes that "[f]ederal courts have ordinarily disfavored—but not ruled out entirely—using class actions in dispersed tort cases."[66] Though nonbinding, these newer recommendations for trial judges suggest that the federal judiciary is, on the whole, less inclined than it once was to certify mass-tort classes.

In short, due to a combination of judicial precedent, rule changes, and modifications to recommendations for judges, the class action is waning as a viable means for resolving instances of mass harm. Multidistrict litigation, rising in popularity where the class action has fallen,[67] offers a possible alternative mechanism to bring closure to these disputes.

Multidistrict litigation is not a perfect solution, however. One major problem is that the MDL Statute, unlike Rule 23,[68] provides no authority for a court to control attorneys' fees. Though clients and their attorneys nearly always have divergent interests when it comes to fees,[69] aggregate litigation presents problems that one-to-one litigation does not. First, given the nature of aggregation, a contingent-fee agreement that is fair in one-to-one litigation may be unfair in aggregate litigation: when claims are aggregated and attorneys represent many clients, the amount an attorney receives as a

63. The Manual for Complex Litigation is a set of recommendations for trial judges that is not "authoritative legal or administrative policy." *Introduction* to MANUAL FOR COMPLEX LITIGATION (FOURTH), at 1 (2004).

64. Willging & Lee, *supra* note 35, at 785–87. R

65. MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.262 (1995) (citation omitted). The caveat the Manual refers to is located in the advisory committee's note to Rule 23: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." FED. R. CIV. P. 23 advisory committee's note.

66. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.7 (2004) (citation and internal quotation marks omitted).

67. Willging & Lee, *supra* note 35, at 794. R

68. FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . . .").

69. *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006) (noting that "plaintiffs' counsel have a built-in conflict of interest" regarding their fees).

percentage of his clients' recoveries may have more to do with the number of clients the attorney represents than with the amount or quality of that attorney's work.[70] A private contingent-fee arrangement under which an attorney's fees amount to, say, forty percent might be reasonable in one-to-one litigation, but it might also lead to an unjustifiably large fee award in a case in which plaintiffs stand to recover over a billion dollars.[71] Second, such contingent-fee arrangements are inefficient, resulting in a suboptimal allocation of resources. As discussed at greater length below, a consolidated action presents a free-rider problem.[72] If only a small percentage of the attorneys in a consolidation perform the vast bulk of the work in the case but every attorney receives his agreed-upon fee in full, every attorney's incentive is to let other attorneys do the work. In such a case, the attorneys who do little or no work are taking their clients' money without providing their clients, or the legal system, with any real benefit. Rule 23(h) provides a solution to this problem in class actions: "In an action certified as a class action, the court may award *reasonable* attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . . ."[73] No rule or statute, however, provides a transferee court with similar powers. It was to address just this deficiency that the quasi-class action arose.[74]

70. *See In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 736 (3d Cir. 2001) (observing that, with respect to class actions, "[i]n many instances the increase [in attorneys' fees] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel") (quoting *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 339 (3d Cir. 1998)) (first alteration in original); *see also Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256 (1986) ("The negotiated fee, and the procedure for arriving at it, should be left to the court's discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases.").

71. *See Prudential*, 148 F.3d at 340 ("While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion.").

72. *See infra* Part III.A.1.

73. FED. R. CIV. P. 23(h) (emphasis added).

74. Prior to the quasi-class action model, some courts had innovated other, less drastic ways to deal with the problem of fees. *See infra* Part II.E.

C. The Development of the Quasi-Class Action Model

This Part examines the development of the quasi-class action as a means of controlling attorneys' fees. Multidistrict consolidations are stepping in where mass-harm class actions are no longer viable, but courts hearing class actions have at least one vital statutory power that transferee courts lack: the authority to cap plaintiffs' attorneys' fees.[75] Class action courts have recognized the value of this power and have employed Rule 23(h) to reduce contingency fee amounts.[76] Before the quasi-class action model, however, no transferee court had done so.

The quasi-class action is inextricably linked with Judge Jack Weinstein of the United States District Court for the Eastern District of New York. The term "quasi-class action" appears in few cases before a 2006 order from Judge Weinstein in *In re Zyprexa Products Liability Litigation*.[77] Most pre-*Zyprexa* courts used the term in one of two ways. First, several courts used it to refer to what is also known as a "collective action" under § 216(b) of the Fair Labor Standards Act (FLSA).[78] Second, some courts used the term to refer loosely to various actions and procedures that exhibited some characteristics of a class action.[79] In his 2006 *Zyprexa* order, Judge Weinstein dubbed the multidistrict consolidation before him a "quasi-class action" and asserted that a court possesses expanded authority in such a case.[80] He used that authority to cap attorneys' fees.[81]

This Section outlines the pre-*Zyprexa* history of the term and analyzes the way Judge Weinstein and others have used it more re-

75. FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . . .").

76. *See*, *e.g.*, *In re* Rio Hair Naturalizer Prods. Liab. Litig., No. MDL 1055, 1996 WL 780512, at *20–21 (E.D. Mich. Dec. 20, 1996) ("[I]ndividual attorneys in this case may collect from their clients no more than 5% of their individual clients' recoveries as contingency fees."); *In re* Joint E. & S. Dists. Asbestos Litig., 878 F. Supp. 473, 561–62 (E. & S.D.N.Y. 1995), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); *In re* Beverly Hills Fire Litig., 639 F. Supp. 915, 924–25 (E.D. Ky. 1986) (limiting plaintiff class members' attorneys' fees to 6.3% of individual clients' recoveries).

77. 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006) (applying the term "quasi-class action" to the Zyprexa MDL throughout the order).

78. 29 U.S.C. §§ 201–219 (2006); *see, e.g.*, Douglas v. GE Energy Reuter Stokes, No. 1:07CV077, 2007 WL 1341779, at *2 (N.D. Ohio Apr. 30, 2007) ("Actions filed pursuant to § 216(b) are properly termed 'collective actions' or 'class actions.'"). For further discussion of the FLSA, see *infra* Part II.A.

79. *See infra* notes 97–100 and accompanying text.

80. *Zyprexa*, 424 F. Supp. 2d at 496–97.

81. *Id.*

cently. Subsection 1 traces the term's meanings before Judge Weinstein began to use it. Subsection 2 discusses the ways in which Judge Weinstein employed it before he applied it to *Zyprexa*. Subsection 3 addresses *Zyprexa* itself, and Subsection 4 turns to the term's use in subsequent cases.

1. Usage Prior to Judge Weinstein

Before *Zyprexa*, a quasi-class action was either a collective action under the FLSA or an action that resembled a class action in some ways but not others. This Section addresses both meanings. With respect to the first, a collective action is described in § 216(b) of the FLSA. The procedure so specified is, by the standards of American law, unusual. Generally, the FLSA requires an employer, inter alia, to pay its employees no less than a specified minimum wage[82] and to pay qualifying employees at least one-and-one-half times their regular rate for time they work in excess of forty hours during a workweek.[83] The Act also prohibits an employer from discharging or discriminating against an employee who institutes a proceeding under the FLSA, testifies at such a proceeding, or "has served or is about to serve on an industry committee."[84]

If an employer violates any of these provisions, § 216(b) allows employees to aggregate their claims in a particular way: one or more employees may maintain an action "for and in behalf of himself or themselves and other employees similarly situated."[85] Furthermore, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing."[86] The procedures specified in § 216(b) also govern collective actions for age discrimination by non-federal employees under the Age Discrimination in Employment Act (ADEA)[87] and equal-pay actions by all employees under the Equal Pay Act.[88]

82. *See* 29 U.S.C. § 206.

83. § 207(a)(2).

84. § 215(a)(3).

85. § 216(b).

86. *Id.*

87. 29 U.S.C. § 626(b) (2006) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title . . ."). Section 216(b) is not applicable to government employees, however. *See* § 633.

88. 29 U.S.C. § 206(d) (2006). The Equal Pay Act amended the FLSA, providing a cause of action based on wage disparity. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

Courts have construed actions under § 216(b) to be quite unlike class actions under Rule 23. The Fifth Circuit explained this distinction:

> There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [§ 216(b)]. In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit. Under [§ 216(b)], on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent.[89]

Section 216(b) differs from Rule 23 in another important respect. Under § 216(b), claimants must be "similarly situated" to one another, but the Act does not define this phrase. In contrast, Rule 23 lists four prerequisites for class certification: numerosity, commonality, typicality, and adequate representation.[90] In interpreting the "similarly situated" requirement of § 216(b), courts have not required that plaintiffs be "identical."[91] Further, most have held that meeting the Rule 23 prerequisites is unnecessary in a collective action under § 216(b).[92]

The first time the phrase "quasi-class action" appears in a decision by a federal court, in 1946, it refers to a § 216(b) collective

89. LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 288 (5th Cir. 1975) (footnote and citations omitted).

90. FED. R. CIV. P. 23(a).

91. *E.g.*, Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1217 (11th Cir. 2001); *id.* at 1219 ("Plaintiffs in this case all held the same job title, and they all alleged similar, though not identical, discriminatory treatment."); Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996) (holding that plaintiffs need not show their positions are identical).

92. This is true regardless of whether claims are brought under the FLSA, the Equal Pay Act, or the ADEA. *See, e.g.*, *Grayson*, 79 F.3d at 1106 (finding that ADEA suits under § 216(b) are not subject to Rule 23 requirements); Lynch v. United Servs. Auto. Ass'n, 491 F. Supp. 2d 357, 369 (S.D.N.Y. 2007) ("[Rule 23] is not relevant to an FLSA collective action."); Ebbert v. Nassau County, No. 05-CV-5445(FB)(AKT), 2007 WL 2295581, at *2 (E.D.N.Y. Aug. 9, 2007) (finding Equal Pay Act claims not subject to Rule 23). *Contra* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 265 (D. Colo. 1990) ("[N]amed representative plaintiffs in an ADEA class action must satisfy all of the requirements of rule 23, *insofar as those requirements are consistent with* [§216(b)].").

action.[93] The court was explaining the nature of representative suits under the FLSA, then but eight years old. This usage of the term, however, did not prove popular. The next time a court referred to a § 216(b) action as a quasi-class action was more than three decades later, in the context of an ADEA suit.[94] In all, a handful of courts have used the term to refer to an action under either the FLSA[95] or the ADEA.[96] Perhaps because of the similarity of the term "quasi-class action" to "class action" and the fundamental differences between actions under § 216(b) and those under Rule 23, courts have rarely used "quasi-class action" in this context.

Federal courts have also used "quasi-class action" more loosely to refer to actions that resemble class actions under Rule 23 in some ways but not in others. The Sixth Circuit, for instance, used the phrase to refer to a decision by the National Labor Relations Board to grant relief to thirteen individuals, even though the Board considered evidence relating to only one of them.[97] In the context of a suit under 42 U.S.C. § 1983, the Eighth Circuit employed the term in affirming a district court's refusal to allow the plaintiffs in a case to amend their complaint to include more plaintiffs.[98] The district court had previously refused to certify a class in the case, and it found that "the naming of additional plaintiffs would essentially amount to the grant of permission for plaintiffs to go forward in a quasi-class action[,] which the Court has determined not to be appropriate."[99] In another example, a bankruptcy court used the term to call attention to the similarities between a class action and objec-

93. Swettman v. Remington Rand, 65 F. Supp. 940, 944 (S.D. Ill. 1946) ("The next part concerns itself with the right of joinder of plaintiffs and the authorization for a representative suit or quasi class action.").

94. Montalto v. Morgan Guar. Trust Co., 83 F.R.D. 150, 152 (S.D.N.Y. 1979) ("To the extent that the plaintiff may hereafter secure filed written consents of eligible plaintiffs pursuant to the provisions of 29 U.S.C. § 216(b) a class or quasi-class action may come into being *de facto* and the assistance of the court will be unnecessary.").

95. *E.g.*, Aguilar v. Sunland Beef Co., No. 95-15028, 1996 WL 218188, at *1 (9th Cir. Apr. 29, 1996); Highland v. Wal-Mart Stores, Inc., No. CIV04-0711 JC/KBM, 2005 WL 3415855, at *1 n.1 (D.N.M. Sept. 15, 2005).

96. *E.g.*, Hallas v. W. Elec. Co., No. C-2-79-519, 1981 WL 205, at *2 (S.D. Ohio Apr. 23, 1981) (citing *Montalto*, 83 F.R.D. at 152).

97. NLRB v. Indus. Towel & Unif. Servs., 473 F.2d 1258, 1261 (6th Cir. 1973) ("We . . . disapprove of the quasiclass-action aspect of this case.").

98. Sweat v. City of Fort Smith, 265 F.3d 692, 698 (8th Cir. 2001).

99. *Id.*

tions to the granting of a debtor's discharge under 11 U.S.C. § 727(a).[100]

Originally, then, the term "quasi-class action" could describe any action that bore some similarity to a class action. Courts most commonly used the term, though, to refer to collective actions under § 216(b) of the FLSA.

2. Judge Weinstein's Usage Prior to *Zyprexa*

Judge Weinstein's use of the term "quasi-class action" to refer to the *Zyprexa* multidistrict consolidation gave the term new vitality. He first employed the phrase, though, in a different context: a 1994 law review article in which he concluded that, since aggregate mass tort actions in many ways resemble class actions, "mass consolidations are in effect quasi-class actions."[101] He contended that "obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations."[102] Given the complexity of such mass consolidations, he reasoned, a judge must sometimes intervene "by force of necessity" to "take control and help guide the litigation."[103] Judge Weinstein's assertion that non-class "consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements"[104] foreshadows his handling of *Zyprexa* more than a decade later.[105]

After his law review article and before *Zyprexa*, Judge Weinstein began using the phrase "quasi-class action" in his written opinions. He first did so in 1997 in *United States v. Cheung*,[106] a consolidation

100. *In re* Joseph, 121 B.R. 679, 682 (Bankr. N.D.N.Y. 1990) ("In addition to the general body of creditors as beneficiaries of a quasi-class action pursuant to [11 U.S.C.] § 727(a), the moral basis of the bankruptcy statute is also affirmed when a dishonest debtor is denied discharge.").

101. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481 (1994).

102. *Id.*

103. *Id.* at 550.

104. *Id.* at 529. Notably, Judge Weinstein asserts that a court hearing a quasi-class action should be able to review both fees *and* settlements. In practice, however, courts that have expressly used the quasi-class action model to justify their actions have done so solely in the context of fees.

105. Of the mass consolidation at issue in *Zyprexa*, Judge Weinstein ruled that "[w]hile the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court." *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

106. 952 F. Supp. 148 (E.D.N.Y. 1997).

of civil litigation and a criminal action against a single defendant, Hollman Cheung.[107] Both cases settled simultaneously in an agreement under which Cheung paid a total of nearly $1.5 million in restitution and fees.[108] In the civil portion of the case, ninety-four plaintiffs had filed complaints against Cheung under the Racketeer Influenced and Corrupt Organizations Act.[109] Although joinder of plaintiffs was pursuant to Federal Rule of Civil Procedure 19 rather than Rule 23, Judge Weinstein called the civil part of the case "in effect a civil quasi-class action."[110] Judge Weinstein handled the case like a class action in at least two respects. First, he "held extensive post-settlement, post-plea hearings akin to those required in approving a Rule 23 class action settlement."[111] Second, he "approved the civil action fee of the attorney for plaintiffs, treating it as if it had been earned in a class action."[112] This latter action, particularly, foreshadows both Judge Weinstein's treatment of *Zyprexa* and other judges' approaches to quasi-class actions.

Four years later, in 2001, Judge Weinstein decided a summary judgment motion in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*[113] In this case, the plaintiff health insurers contended that misrepresentation and deceptive conduct by the defendant tobacco companies adversely affected the health of the plaintiffs' subscribers, resulting in increased costs for the plaintiffs.[114] The tobacco companies moved for summary judgment, and the court denied the motion.[115] As an argument in favor of summary judgment, the companies asserted that New York law barred the plaintiffs from seeking punitive damages and that the amount of the plaintiffs' recoveries should thus be limited to the amount they actually paid on their insurance policies.[116] Judge Weinstein disagreed, pointing to the broader social value of punitive damages and stating that "[p]unitive damages serve the purpose of providing compensation to society where—as here—many individual claims cannot as a practical matter be brought."[117] He went on to note

107. *Id.* at 148–49.

108. Cheung's payment consisted of $1.25 million in restitution to his victims and $200,000 to the civil plaintiffs' counsel. *Id.* at 149, 152.

109. *Id.* at 149.

110. *Id.* at 148.

111. *Id.* at 149; *see* FED. R. CIV. P. 19, 23(e)(2).

112. *Cheung*, 952 F. Supp. at 149.

113. 133 F. Supp. 2d 162, 179 (E.D.N.Y. 2001).

114. *Id.* at 164–65.

115. *Id.* at 165.

116. *Id.* at 176.

117. *Id.* at 176–77.

that the "[d]efendants [had] not raised the point that, in a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full cost of damages a defendant caused."[118] This case illustrates two salient points with respect to the development of the quasi-class action. First, and most obviously, it reveals that Judge Weinstein continued to think about non-class aggregations as quasi-class actions. Second, and more importantly, it demonstrates his willingness to inquire into ways in which the distribution of funds in complex trials potentially affects not only parties, but also society as a whole, and whether that distribution is just.

Judge Weinstein's use of the term "quasi-class action" in *Cheung* and *Blue Cross* represents an intermediate step in the term's development. In some ways, these cases resonate with Judge Weinstein's use of the term in his 1994 law review article. At the same time, though, the opinions do not fully articulate definitions of the term or offer explicit rationales as to why a court can exercise certain powers in a quasi-class action. These developments would be forthcoming.

3. *Zyprexa*

The quasi-class action came into its own in *Zyprexa*, five years after *Blue Cross*. In April 2004, the MDL Panel consolidated six actions against Eli Lilly and Company, all of which concerned the safety of the schizophrenia drug Zyprexa, and transferred them to Judge Weinstein for pretrial proceedings.[119] In November 2005, Judge Weinstein approved a partial settlement agreement between the defendant and about 8000 individual plaintiffs.[120] Of greater concern for this Note, however, is the court's subsequent order in March 2006 on the issue of attorney compensation. Here Judge Weinstein issued an order setting out a scheme for the payment of the plaintiffs' attorneys' legal fees under which, in relevant part, fees for claims worth a lump sum of $5000 were capped at twenty percent, fees for all other claims were capped at thirty-five percent, and special masters were authorized to adjust fees for the latter group of claims up or down within a specified range.[121]

118. *Id.* at 178.

119. *In re* Zyprexa Prods. Liab. Litig., 314 F. Supp. 2d 1380 (J.P.M.L. 2004).

120. *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-01596 (JBW), 2005 WL 3117302, at *1 (E.D.N.Y. Nov. 22, 2005); *see In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006).

121. *Zyprexa*, 424 F. Supp. 2d at 496–97. Judge Weinstein had, prior to *Zyprexa*, used his powers under Rule 23(h) to cap attorneys' fees in a similar way in

The essential element of this order is the court's asserted power to override the contracts between plaintiffs' attorneys and their clients and cap the attorneys' fees at a certain percentage. As laid out further below, previous courts overseeing settlements of multidistrict consolidations had exercised authority over fees, often in order to ensure that the plaintiffs' attorneys who really did the work in the case were compensated accordingly.[122] In *Zyprexa*, however, Judge Weinstein went further. He did not, for instance, tax each plaintiff at the same rate in order to find funds to transfer to the common-benefit attorneys, as previous courts had done.[123] Instead, he effectively altered the contracts of those attorneys whose contracts provided that they were to be paid more than he found appropriate.[124]

The first sentence of the order leaves no doubt as to its conclusion: "[b]y this order the court exercises its power to control legal fees in a coordinated litigation of many individual related cases—in effect, a quasi-class action."[125] Judge Weinstein based his authority on two sources: class action law and a court's authority to exercise ethical supervision over attorneys, particularly with respect to contingent fees.[126] First, with respect to class action law, Judge Weinstein pointed to Rule 23, which specifically allows a court to require reasonable fees in a class action.[127] He then identified four similarities between a class action and *Zyprexa*: (1) "the large number of plaintiffs subject to the same settlement matrix approved by the court"; (2) use of special masters for discovery and settlement; (3) the court's order for a large escrow fund; and (4) "other interventions by the court."[128] Later courts and commentators have picked

class actions. *E.g.*, *In re* Joint E. & S. Dists. Asbestos Litig., 878 F. Supp. 473, 561-62 (E. & S.D.N.Y. 1995) (reducing amount of attorneys' fees under contingency contracts from 33.3% to 25%), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996).

122. *See infra* Part II.E.

123. *E.g.*, *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., No.1203, 1999 WL 124414, at *2 (E.D. Pa. Feb. 10, 1999) (ordering defendant to pay 9% of each plaintiff's award into separate account).

124. *Zyprexa*, 424 F. Supp. 2d at 496–97.

125. *Id.* at 490.

126. *Id.* at 490–92.

127. *Id.*; FED. R. CIV. P. 23(h) ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by agreement of the parties . . . ."); *see also* FED. R. CIV. P. 23(g)(1)(C) (allowing court to "order potential class counsel to . . . propose terms for attorney's fees and nontaxable costs").

128. *Zyprexa*, 424 F. Supp. 2d at 491. Judge Weinstein also noted that the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006),

up on these four factors, which have become central to the identification of quasi-class actions.[129] According to Judge Weinstein, the factors "reflect a degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses."[130] This analysis underscores the importance of the role of the court in the settlement of the cases. Implicit in Judge Weinstein's reasoning is the idea that, once parties take advantage of the powers of a court to resolve their dispute, the parties—and their attorneys—are subject to that court's general equitable powers. Whether the court's intervention is through a class action or a multidistrict consolidation, the fundamental point is that the court has indeed intervened. Given that intervention, the court's power to ensure a fair outcome to the parties should not be limited by the particular form—class action, multidistrict consolidation, or any other procedural mechanism[131]—of the intervention.

Second, Judge Weinstein based his authority on a court's "well-established authority to exercise ethical supervision of the bar in both individual and mass actions."[132] In the course of his discussion of a court's general ethical supervision of the bar, Judge Weinstein

treats class actions and "mass actions" similarly for purposes of removal. *Zyprexa*, 424 F. Supp. 2d at 491; 28 U.S.C. § 1332(d)(11)(A). Under CAFA, a mass action is, generally speaking, "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" that also meets certain amount-in-controversy requirements. 28 U.S.C. § 1332(d)(11)(B).

129. *E.g.*, *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008) (quoting the four *Zyprexa* factors and comparing the *Vioxx* litigation to the *Zyprexa* litigation by noting the large number of plaintiffs subject to the same settlement matrix, the use of special masters, and the large escrow fund in both cases).

130. *Zyprexa*, 424 F. Supp. 2d at 491. Other courts have ruled that the district judge in a class action is a fiduciary of the class in the settlement phase of the action. *E.g.*, *In re* Rite Aid Corp. Sec. Litig., 396 F.3d 294, 307 (3d Cir. 2005) ("At the fee determination stage, the district judge must protect the class's interest by acting as a fiduciary for the class."); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

131. As noted above, for instance, Judge Weinstein called *Blue Cross* a quasi-class action, even though the case had been consolidated under Rule 19, not the MDL Statute. *See supra* notes 113–18 and accompanying text.

132. *Zyprexa*, 424 F. Supp. 2d at 492 ("[I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court." (citing *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530 (1824))).

emphasized two primary points. First, a court may exercise such control in assuring that attorneys' fees are not excessive, whether or not a party has challenged such fees.[133] Second, mass litigations are "highly beneficial to the public when adequately controlled,"[134] and overcompensation of attorneys threatens to undermine such consolidations by reflecting poorly on the court and undermining public confidence in and support for these types of actions.[135] This point resonates with Judge Weinstein's earlier consideration of the broader social consequences of the litigation in *Blue Cross*.[136] The order further points out that the court was the only entity able to control fees effectively for three reasons: (1) many of the plaintiffs were mentally and physically ill, lacking the power and knowledge necessary to negotiate their fees effectively; (2) the plaintiffs' attorneys had conflicting interests; and (3) the defendant was indifferent as to how the settlement fund was to be apportioned.[137] The last point is particularly significant, as it means that a court cannot rely on the normal adversarial clash of interests to set a proper fee schedule in cases like this. Judge Weinstein thus impliedly argued that, since the usual methods of fee determination are not efficient means of setting proper rates, judicial fee determination is justified.

In this brief order, Judge Weinstein established the template other courts would look to when invoking the quasi-class action model. Basing his authority on class action law and a court's equitable powers, he filled a gap in the authority of transferee courts and acted in accordance with his sense of justice and efficiency, thus furthering the two primary rationales underlying the MDL Statute itself.

133. *Zyprexa*, 424 F. Supp. 2d at 492–93. The opinion cites primarily to two cases for this proposition: *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982), and *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970).

134. *Zyprexa*, 424 F. Supp. 2d at 494.

135. *Id.* at 493–94. Additionally, the order surveys a variety of state laws for the proposition that a federal court is obliged "to guard against excessive fees." *Id.* at 494.

136. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 133 F. Supp. 2d 162, 176–77 (E.D.N.Y. 2001).

137. *Zyprexa*, 424 F. Supp. 2d at 491–92. With respect to the last point, the court is arguing that a defendant who has to pay a lump sum as part of a settlement does not care how that sum is apportioned among the plaintiffs and the plaintiffs' attorneys. Such a defendant has no interest in who gets the money, or in the fact that different agreements between plaintiffs and their attorneys specify different contingent fee arrangements, some higher than others.

4. Post-*Zyprexa* Usage

Since *Zyprexa*, two other federal district courts have adopted both *Zyprexa*'s terminology and its reasoning, and Judge Weinstein has himself used the term in another case. In 2008, the United States District Court for the District of Minnesota looked to the quasi-class action model in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* in 2008.[138] The MDL Panel consolidated the actions in this case and assigned them to Judge Donovan W. Frank.[139] The plaintiffs in the actions contended that they had been injured by certain defective implantable defibrillator devices and pacemakers produced by the defendants.[140] The parties worked out a settlement agreement that included a provision allowing the court to determine the amount of any "common benefit payment" to plaintiffs' attorneys who performed work benefitting the plaintiffs as a whole.[141] Attorneys working for the plaintiffs' steering committee submitted a request under this provision for payment from the settlement fund.[142] The court ultimately granted the common-benefit attorneys' request in part and denied it in part, setting aside funds for common costs and common-benefit attorneys' fees.[143] The court capped attorneys' contingent fees at 20% of their clients' recoveries but allowed parties to petition special masters to increase that percentage to "a maximum of either 33.33%, the percentage previously agreed to in the individual case[']s contingent fee arrangement between the attorney and the client, or the limit imposed by state law, whichever of the three is [least]."[144]

Judge Frank explicitly referred to the case as a quasi-class action,[145] and his justifications for awarding attorneys' fees were similar to Judge Weinstein's in *Zyprexa*. First, the court noted its express authority to require reasonable fees in a class action under Rule 23

138. MDL No. 05-1708, 2008 WL 682174 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008). In this order, the court expressly referred to the case as a quasi-class action on three occasions. *Id.* at *6, *10, *12.

139. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 398 F. Supp. 2d 1371 (J.P.M.L. 2005).

140. *Guidant*, 2008 WL 682174, at *1. The three defendants in the case were Guidant Corporation, Guidant Sales Corporation, and Cardiac Pacemakers, Inc. *Id.*

141. *Id.* at *1, *4.

142. *Id.* at *4.

143. *Id.* at *20.

144. *Id.*

145. *Id.* at *6, *10, *12.

and stated that *Guidant* had, like *Zyprexa*, the hallmarks of a quasi-class action.[146] The court further observed that it alone was able to effectively exercise ethical control over fees.[147] Judge Frank agreed with Judge Weinstein that a court has the inherent authority to supervise members of the bar.[148] He asserted the right to review the fairness of contingent-fee contracts and also noted the importance of ensuring that the public does not view mass litigations as abusive.[149] In sum, the *Guidant* court grounded its actions in the same authority the *Zyprexa* court did, with reference to, first, class action rules and, second, its equitable power to supervise attorneys generally and contingent fees specifically. The *Guidant* court, however, had an additional source of authority that the *Zyprexa* court did not: the contractual arrangement in the settlement agreement under which the parties agreed that the court had authority over common-benefit fees.[150]

The court, notably, altered course several months later. After reviewing a report and recommendation from the case's special masters, seventeen objections to that report, and sixty-seven petitions from plaintiffs' attorneys,[151] the court determined that the plaintiffs' attorneys had in the end performed more work than the court had initially anticipated.[152] Given the costs involved in such unforeseen difficulties as complex settlement-related paperwork, lengthy delays, and a complicated protocol for dealing with deceased plaintiffs, the court concluded that "what was a fair cap in March . . . [was] no longer fair [in August]."[153] Under a revised fee formula, the court capped *total* fees (contingency fees plus common-benefit fees) at the least of: "(1) the percentage contracted for in [the] contingency/retainer agreement; (2) 37.18%; or (3) the state-imposed limit."[154] The court noted that the "unique facts and contours" and the "changed circumstances" in the case were alone

146. *Id.* at *17.

147. *Id.* at *18.

148. *Id.*

149. *Id.*

150. As discussed *infra*, Part II.E, some courts had, even without such contractual arrangements, exercised authority over common-benefit fees, which compensate attorneys for work those attorneys have done that benefits the plaintiffs as a whole, rather than just those attorneys' clients.

151. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 3896006, at *1 (D. Minn. Aug. 21, 2008).

152. *Id.* at *6.

153. *Id.* The court in fact referred to "a fair cap in March 2007," *id.*, but the cap that this order revised was put into place in March 2008. *Id.* at *1.

154. *Id.* at *8.

responsible for the alteration, and that under the revised formula, "the maximum amount of contingency fees that any firm will be allowed to collect is approximately 28%."[155] Judge Frank's revision of the fee framework demonstrates a significant point: Given the changing equities of a particular multidistrict consolidation, a fee cap may not be set in stone. A court's ability to amend its orders based on changed circumstances, however, does not undermine its authority to set fees at what it considers to be a just level.

The third decision to employ the terminology of and reasoning of *Zyprexa* was *In re Vioxx Products Liability Litigation*.[156] In this case, the MDL Panel transferred "thousands of individual suits and numerous class actions" against defendant Merck to Judge Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana.[157] The plaintiffs were users of Vioxx, a drug designed to relieve pain and inflammation. They asserted various products liability, tort, fraud, and warranty claims in connection with injuries allegedly resulting from their use of Vioxx, contending that the drug increased its users' risks of heart attacks and ischemic strokes.[158] In an order dealing with fees for the plaintiffs' attorneys, the court capped all contingent fee arrangements at 32%, plus reasonable costs, reserving for later consideration determination of an appropriate fee for common-benefit work.[159]

In explaining its authority to issue orders related to attorneys' fees, the court, like the *Guidant* court, referenced *Zyprexa*.[160] Judge Fallon noted his authority under Rule 23 to require reasonable fees in class actions.[161] He also referred to the matter under consideration as a quasi-class action, noting that three of the four factors set forth by Judge Weinstein in *Zyprexa* were met in *Vioxx* as well: Both cases involved a large number of plaintiffs subject to the same settlement matrix, both courts used special masters during the proceedings and for the administration of the settlement, and both settlement funds were large and were held in escrow.[162]

155. *Id.* at *10.

156. 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008).

157. *Id.* at 608; *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

158. *Vioxx*, 574 F. Supp. 2d at 608.

159. *Id.* at 618. In a later order, the court granted in part a motion for the award of common benefit funds. *In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 3d. 640, 650–51 (E.D. La. 2010).

160. *E.g.*, *Vioxx*, 574 F. Supp. 2d at 611–12.

161. *Id.* at 611.

162. *Id.* at 612.

The *Vioxx* court also noted its authority to exercise ethical supervision over attorneys.[163] Relying on both *Guidant* and *Zyprexa*, the court pointed out that settlement agreements "will likely become more common" and asserted a "growing need to protect the public's trust in the judicial process."[164] Moreover, it noted that many *Vioxx* plaintiffs were in poor health and that, on account of this fact, the court had a heightened duty to ensure that the plaintiffs' attorneys' fees were both fair and reasonable.[165] Finally, the *Vioxx* court, like the *Guidant* court but unlike the *Zyprexa* court, had a further source of authority in a settlement agreement in which the parties agreed that the court would "oversee various aspects of the administration of settlement proceedings, including . . . allocating of a percentage of the settlement proceeds to a Common Benefit Fund."[166]

Judge Weinstein has also cited *Zyprexa* in other litigation. In *McMillan v. City of New York*, plaintiff James McMillan was awarded damages in a case arising out of the 2003 crash of a Staten Island Ferry.[167] Many other claimants had previously brought litigation related to this accident, and, by the time of *McMillan*, "[t]he issue of liability had already been decided under the leadership of other counsel."[168] McMillan's attorney sought a fee in the amount of one-third of McMillan's recovery, but the court limited the attorney's fee to 20%.[169] Judge Weinstein concluded that, since the liability issue had already been resolved and the attorney thus faced little risk in this action, "this was a quasi aggregate or quasi class action," and the court had greater-than-usual power to control fees.[170]

Judge Weinstein, like Judge Frank before him,[171] later reconsidered this order, at least provisionally. After the plaintiff confirmed that "he freely agreed to [the one-third contingency fee] and . . . wishe[d] to pay in full," Judge Weinstein relented—conditionally.[172] He ordered 20% of the plaintiff's award to be paid to

163. *Id.*

164. *Id.* at 613.

165. *Id.*

166. *Id.* at 609.

167. Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573, at *1 (E.D.N.Y. Sept. 17, 2008).

168. *McMillan*, 2008 WL 4287573, at *5.

169. *Id.*

170. *Id.*

171. *See supra* notes 151–55 and accompanying text.

172. McMillan v. City of New York, Nos. 08-CV-2887, 03-CV-6049, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010), *modifying* Nos. CV-08-2887, CV-03-6049, 2010 WL 1459218 (Mar. 4, 2010).

the plaintiff's attorney immediately, and he ordered an additional 13% to be held in escrow for the attorney, pending the resolution of litigation over fees for common-benefit work provided by other attorneys in the litigation.[173] Reinforcing his view of the case, Judge Weinstein noted that "[t]he benefits of that aspect of this quasi-class action litigation allegedly accrued to hundreds of injured claimants, including the client."[174]

Judge Weinstein's view of a court's role in determining attorneys' fees in non-class aggregate litigation has thus gained some traction over the past several years. Courts adopting his reasoning ground their authority over fees in class action law as set forth in Rule 23 and in a court's equitable power over members of the bar in general and contingency fees in particular. Courts also tend to point to matters of societal welfare and public perception which, while they may not be sufficient of themselves to authorize the courts' actions, further justify the way courts treat and distribute settlement funds. Despite such justifications, the quasi-class action model is not explicitly based on any rule; rather, it is an innovation developed to meet a particular need. The history of the multidistrict consolidation, however, is full of just such innovations.

II.
THE MDL TOOLKIT: TRANSFEREE COURTS' POWERS OVER MULTIDISTRICT CONSOLIDATIONS

Consolidations under the MDL Statute provide opportunities to resolve aggregate litigation without the various roadblocks that now impede class action practice. However, the powers of courts over such consolidations are somewhat uncertain. In the class action context, Rule 23 lays out the ground rules, taking into account the particular challenges of aggregate litigation. For instance, the court in a class action certifies or refuses to certify the class,[175] selects the class counsel,[176] and approves the class counsel's fees,[177] all pursuant to Rule 23. Such procedures have no direct corollaries in multidistrict litigation. Instead, transferee courts must look to a collection of various judicial tools largely designed for one-to-one litigation to ensure, in the phrasing of the MDL Statute itself, "the just and efficient conduct of [consolidated] actions."[178] This Sec-

173. *Id.*
174. *Id.*
175. FED. R. CIV. P. 23(a)–(b).
176. FED. R. CIV. P. 23(g).
177. FED. R. CIV. P. 23(h).
178. 28 U.S.C. § 1407(a) (2006).

tion addresses these tools and analyzes the ways in which they have been adapted to the particular challenges of MDL practice. Section A describes the authority of courts to hold pretrial conferences under Rule 16. Section B explores the effects of plausibility pleading on motions to dismiss in MDL practice. Section C concerns the role of *Daubert* hearings in shaping consolidated actions. Section D deals with the authority of transferee courts to hear bellwether trials. Finally, Section E discusses some of the ways courts allocated attorneys' fees before the development of the quasi-class action model.

A. Pretrial Conferences under Rule 16

As originally promulgated in 1938, Rule 16 allowed judges to hold pretrial conferences.[179] Judges were authorized to direct attorneys to attend such conferences, which could be convened to consider matters including issue simplification, amendment of pleadings, limitation of the number of expert witnesses, and "[s]uch other matters as may aid in the disposition of the action."[180] Missing from this version of Rule 16, however, was any mention of settlement conferences. Indeed, in 1944 the Judicial Conference of the United States approved a recommendation relating to pretrial procedure declaring in part "that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge."[181]

The text of Rule 16 remained unchanged until 1983, when it was revised heavily to expand judges' pretrial powers and responsibilities.[182] The revised rule contemplated more conferences, including a required early scheduling conference[183] and a final pretrial conference.[184] The new rule gave judges power over both attorneys and unrepresented parties,[185] and it allowed judges to sanction parties for such offenses as failing to follow the court's or-

179. FED. R. CIV. P. 16, 308 U.S. 684 (1938) [hereinafter 1938 Rule]. For a history of the evolution of Rule 16, see Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347, 349–353 (2002).

180. 1938 Rule, *supra* note 179, at 684.

181. Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1953); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000) (noting that, as originally contemplated, pretrial conferences were "a prelude to trial").

182. FED. R. CIV. P. 16, 97 F.R.D. 165, 168–71 (1983) [hereinafter 1983 Rule].

183. *Id.* at 168–69.

184. *Id.* at 170.

185. *Id.* at 168.

ders and failing to attend pretrial conferences.[186] With respect to settlement, a court could now hold a conference to, among other things, "facilitat[e] the settlement of the case."[187] Further, the 1983 rule provided that conference participants could "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[188] Rule 16 was amended again in 1993,[189] and, though the changes were relatively minor, they did "contemplate[ ] a more active role for judges."[190] For instance, judges could now "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."[191] Further cosmetic amendments in 2006 and 2007 did not affect the rule's substance.[192]

Rule 16 does not mention transferee courts, and the MDL Statute does not mention Rule 16. Although they have explicit authority to do so under neither rule nor statute, transferee courts have exercised power under Rule 16. One such court took a broad view of its authority under the 1983 version of the rule, holding that "the transferee court in a consolidated multidistrict case has jurisdiction to order a corporation properly before it to designate individuals with certain authority to attend certain conferences."[193] Citing the efficiency rationales behind both Rule 16 and the MDL Statute, the court concluded that "the limits of the authority conferred by Rule 16 are determined as much by the circumstances of the particular case as by the language of the Rule."[194] Rule 16, under this reading, thus provides a transferee court with the authority to compel parties to attend settlement conferences.

Courts have, furthermore, buttressed this authority with the power to sanction—including by dismissal—parties who disobey court orders. The Ninth Circuit upheld a transferee court's dismissal of the complaints of several plaintiffs who disobeyed the transferee court's case-management orders issued pursuant to Rule

186. *Id.* at 171.

187. *Id.* at 168.

188. *Id.* at 169–70.

189. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 427–31 (1993) [hereinafter 1993 Rule].

190. Parness & Walker, *supra* note 179, at 351. R

191. 1993 Rule, *supra* note 189, at 430–31.

192. *See* FED. R. CIV. P. 16 advisory committee's note.

193. *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1433, 1436 (D. Colo. 1988), *rev'd on other grounds*, Johnson v. Continental Airlines Corp., 964 F.2d 1059 (10th Cir. 1992).

194. *Id.* at 1437.

16.[195] A court's power to dismiss a complaint in a multidistrict consolidation is the same as it is in a non-MDL case, the Ninth Circuit reasoned, and "the court's discretion is necessarily informed, and broadened, by the number of actions, their complexity, and its charge in the multidistrict context to promote the just and efficient conduct of actions that are coordinated or consolidated for pretrial purposes."[196] Transferee courts have thus assumed a great deal of power over the parties before them, power that ranges from the scheduling of settlement conferences, to the management of cases, to the dismissal of complaints for parties' noncompliance with court orders.

B. Plausibility Pleading under Twombly *and* Iqbal

A transferee court, like any district court, may dismiss a complaint under Rule 12.[197] This power is particularly notable given the emergence of "plausibility pleading" under *Bell Atlantic Corp. v. Twombly*[198] and *Ashcroft v. Iqbal*.[199] Decided in 2007 and 2009, respectively, *Twombly* and *Iqbal* allow federal trial courts to dismiss complaints that the courts find implausible. This power presumably extends to all federal district courts, including those hearing multidistrict consolidations, though some debate surrounds the manner in which Rule 12 applies to multidistrict consolidations.

As scholars have elsewhere written extensively on the effects of *Twombly* and *Iqbal* on pleading standards,[200] this Note will only sketch that history. Before *Twombly*, district courts relied on *Conley v. Gibson*, a 1957 case holding that "a complaint should not be dis-

195. *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1222 (9th Cir. 2006) (upholding most of transferee court's dismissals and reversing others). The court noted that Rule 16(f) permits a court to sanction parties who do not comply with Rule 16, and that Rules 37(b)(2)(C) and 41(b) allow dismissal, respectively, "for failure to comply with discovery plans and orders," and "for failure of the plaintiff to prosecute or to comply with any order of court." *Id.* at 1227.

196. *Id.* at 1252.

197. *Cf.* FED. R. CIV. P. 12.

198. 550 U.S. 544 (2007).

199. 556 U.S. 662 (2009).

200. *E.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2007 (2010); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890–98 (2009); Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 9–21 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434–39 (2008).

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[201] *Conley*'s "no set of facts" language became the standard used to decide motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(6) and 12(c).[202] The Supreme Court expressly retired this language in *Twombly*,[203] in its place articulating a "plausibility standard"[204] under which a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level."[205] In *Iqbal*, the Court clarified that *Twombly*'s plausibility pleading standard applies to all civil actions.[206]

There is some question as to just how a transferee court should approach a motion to dismiss under Rule 12—and thus plausibility pleading—in the MDL context.[207] Specifically, can a court dismiss a master complaint? Master complaints, consolidated statements of the plaintiffs' claims, "are often used in complex litigation, although they are not specifically mentioned in either the Federal Rules of Civil Procedure or in any federal statute."[208] Some courts hesitate to dismiss master complaints. For instance, the transferee court in a consolidation involving the contraceptive NuvaRing determined that a Rule 12(b)(6) motion to dismiss was inappropriate in the context of the master complaint, since the master complaint was "simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation."[209] Another trans-

201. 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

202. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 (3d ed. 2004) ("[T]his general rule is supported by a wealth of judicial authority; complete citation to the case law is neither feasible nor useful.").

203. *Twombly*, 550 U.S. at 563.

204. *Id.* at 560.

205. *Id.* at 555.

206. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1953 (2009) (citing FED. R. CIV. P. 1) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions' . . . .")

207. Effron, *supra* note 200, at 2059–60. R

208. *In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 141 (E.D. La. 2002). The purpose of a master complaint is "to promote judicial economy." *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 489 F. Supp. 2d 932, 936 (D. Minn. 2007).

209. *In re* NuvaRing Prods. Liab. Litig., No. 4:08MD1964 RWS, 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009); *accord In re* Trasylol Prods. Liab. Litig., No. 08-MD-1928, 2009 WL 577726 (S.D. Fla. Mar. 5, 2009). *But see* James M. Beck et al., *The Nuvaring Cycle, Revisited*, DRUG AND DEVICE LAW (May 17, 2011 12:56 AM), http://druganddevicelaw.blogspot.com/2010/01/nuvaring-cycle-revisited.html (calling motion to dismiss NuvaRing master complaint "perfectly proper").

feree court denied a similar motion to dismiss on its merits, but the court noted the uncertainty surrounding the proper treatment of a master complaint facing such a motion.[210]

Despite some judges' hesitance to apply it to master complaints, the *Twombly/Iqbal* standard still applies to individual complaints in a multidistrict consolidation. In the *NuvaRing* MDL, the defendants followed the court's rejection of their motion to dismiss the master complaint with a series of motions to dismiss, each aimed at a different individual complaint, of which there were over 200.[211] The trial judge, who clearly found this strategy distasteful,[212] noted that ruling on all of the motions was not in the interest of "judicial economy [or] litigant efficiency," both of which the MDL procedure seeks to promote.[213] Though this court denied the individual motions, nothing would have prevented a different court from granting them. Indeed, the Third Circuit has held that transferee courts do have the authority to dismiss individual claims and complaints under Rule 12(b)(6).[214] The court pointed out, first, that transferee courts have in fact terminated consolidated cases, and, second, that language in the Federal Rules of Civil Procedure[215] and the Manual for Complex Litigation supports such termination.[216] Though a master complaint may be invulnerable to a motion to dismiss, nothing in the MDL Statute or elsewhere pre-

210. *In re* Digitek Prods. Liab. Litig., MDL No. 2:08-md-01968, 2009 WL 2433468, at *8 (S.D. W. Va. Aug. 3, 2009) ("[I]t is uncertain how a master complaint should be treated when it is challenged via Rule 12(b)(6).").

211. *In re* NuvaRing Prods. Liab. Litig., No. 4:08MD1964 RWS, 2009 WL 4825170, at *2 (E.D. Mo. Dec. 11, 2009).

212. *Id.* ("Instead of devoting its energy to promoting the efficient coordination of discovery, [the movant] has decided, through motion practice, to request that I review all 223 (and counting) individual complaints and rule on whether each claim in each complaint comports with federal and state pleading requirements.").

213. *Id.* (citing *In re* Phenylpropanolamine Prods. Liab. Litig., No. MDL 1407, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004)). The *NuvaRing* court noted that ruling on the motions would require additional briefing and inquiries into the laws of several states, including choice-of-law rules. *NuvaRing*, 2009 WL 4825170, at *2.

214. *In re* Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig., 7 F.3d 357, 367 (3d Cir. 1993).

215. *Id.* at 368 ("Actions terminated in the transferee district court by valid judgment, including . . . judgment of dismissal . . . , shall not be remanded . . . and shall be dismissed by the transferee district court." (quoting FED. R. CIV. P. 14(a))).

216. *Id.* ("The transferee judge has the power to terminate actions by rulings on motions under [Rule] 12." (quoting MANUAL FOR COMPLEX LITIGATION (SECOND) § 331.122 (1985))). The current version of the Manual is similarly explicit: "the judge may terminate actions by ruling on motions to dismiss, for summary

vents a transferee court, to which matters have been referred for pretrial proceedings, from ruling on a series of pretrial dispositive motions seeking to dismiss each individual complaint.

Rule 12, in light of *Twombly* and *Iqbal*, confers a great deal of power on transferee courts. The ability to dismiss an entire multidistrict consolidation's worth of complaints—either by dismissing a master complaint or individual complaints en masse—means a transferee court can dispose of a massive number of actions at a stroke. The plausibility pleading standard thus enhances a transferee court's powers by allowing it to dismiss a complaint in which the plaintiff's claims have not been "nudged . . . across the line from conceivable to plausible."[217] The wealth of judicial and academic commentary on plausibility pleading suggests that this area of law is far from settled, but it seems clear that a trial court—and by extension a transferee court—has more authority now than it did even a few years ago to dismiss a complaint.

C. Evidentiary Gatekeeping under Daubert

Federal district judges, in addition to exercising the powers described above, serve as evidentiary "gatekeepers." This authority in effect authorizes a court to determine the fate of a case that turns on expert testimony: if vital evidence is ruled inadmissible, the case is all but dead. In *Daubert v. Merrell Dow Pharmaceuticals*,[218] the Supreme Court held that a trial judge must determine whether proffered expert scientific testimony is indeed "scientific knowledge," and whether it "will assist the trier of fact to understand or determine a fact in issue."[219] In other words, expert scientific evidence must be "not only relevant, but reliable."[220] The Court later extended this gatekeeping obligation to all expert testimony, scientific or otherwise.[221] The Federal Rules of Evidence were subsequently amended to reflect these rulings.[222]

judgment, or pursuant to settlement, and may enter consent decrees." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

217. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

218. 509 U.S. 579 (1993).

219. *Id.* at 592.

220. *Id.* at 589.

221. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

222. FED. R. EVID. 702 (allowing expert testimony "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."); *see also id.* advisory committee's note (explaining that Rule 702, as revised in 2000, "provides that all types of expert

A federal trial court may make a *Daubert* determination before a trial begins, for instance, on a motion *in limine*.[223] Since the MDL Statute gives a transferee court power over pretrial proceedings,[224] it follows that such a court has the authority to make *Daubert* determinations. And transferee courts have indeed made such rulings, even when the rulings threatened to present subsequent problems at trial. In *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, the transferee court ruled on a *Daubert* motion challenging experts whose testimony took the form of trial deposition videos.[225] The transferee court recognized several difficulties in ruling on such testimony considerably in advance of trial, such as the possibility of a remand court's needing to redact or modify the testimony and the possibility that a remand court might be forced to reconsider the admissibility of the evidence based on intervening events.[226] Nonetheless citing gains in judicial economy, the court granted the *Daubert* motion in part, thus excluding some evidence.[227]

In some cases, a *Daubert* ruling may be dispositive for all intents and purposes. *In re Silica Products Liability Litigation* was a multidistrict consolidation in which over 10,000 plaintiffs, mostly in Mississippi, alleged injuries caused by exposure to silica, asserting claims against over 250 corporate defendants.[228] Inhalation of silica dust can lead to silicosis, an incurable and potentially fatal condition.[229] The transferee court was skeptical of the plaintiffs' evidence, given that silicosis is extremely rare and that an occurrence of 10,000 cases would constitute "perhaps the worst industrial disaster in recorded world history."[230] Noting that the massive number of diagnoses "def[ied] all medical knowledge and logic," the court suggested that impending Mississippi "tort reform" and a downturn in the number of new asbestos lawsuits—factors leading to a precipitous decline in work for plaintiffs' attorneys and litigation screen-

testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful").

223. *See* FED. R. EVID. 702 advisory committee's note (approving of challenges based on *Daubert* in, inter alia, *in limine* hearings).

224. 28 U.S.C. § 1407 (2006).

225. No. MDL 1203, 2001 WL 454586 (E.D. Pa. Feb. 1, 2001).

226. *Id.* at *1–2.

227. *Id.* at *1.

228. 398 F. Supp. 2d 563, 573 (S.D. Tex. 2005).

229. *Id.*

230. *Silica*, 398 F. Supp. 2d at 572.

ing companies[231]—explained the lawsuits.[232] The court heard evidence with respect to all of the diagnosing physicians,[233] finding their diagnoses "fatally unreliable."[234]

Ultimately, the court determined that it did not have subject-matter jurisdiction over the vast majority of the cases before it and remanded those cases to state courts, thus rendering its opinion largely advisory.[235] With respect to the sole case over which the court did have subject-matter jurisdiction, the court excluded the evidence of the diagnosing physicians, "as well as their accompanying diagnoses," noting that further inquiry would be required to determine "whether (and, if so, under what conditions) the [p]laintiffs' claims [could] proceed."[236] Had the court found that it had subject-matter jurisdiction with respect to the other cases before it, exclusion of the plaintiffs' doctors—as would have been likely, given the court's view of the case—would have sounded the death knell for the lawsuits. With no evidence of diagnoses, the plaintiffs would have found further litigation virtually impossible. Furthermore, even though it remanded most of the cases and did not rule on the motion, the transferee court included in its opinion all the evidence from the *Daubert* hearings, sparing the remand courts from holding similar hearings of their own.[237] This evidence included the court's conclusion that the silicosis claims were "largely the result of misdiagnosis."[238] Thus, even though it did not rule on the motion, the transferee court's view of the case affected the viability of the plaintiffs' actions. Indeed, about six months after

231. These companies assist plaintiffs' firms in diagnosing particular diseases in individuals, helping to determine which individuals may in turn become plaintiffs. *Silica*, 398 F. Supp. 2d at 597–98.

232. *Id.* at 620.

233. *Id.* at 581–637.

234. *Id.* at 675. The court applied the "fatally unreliable" description specifically to diagnoses used by one plaintiffs' firm, but the label fits the court's overall view of the diagnosing physicians' work. The physicians often "diagnosed" hundreds, or even thousands, of plaintiffs, and some physicians were unaware of the fact that forms they signed purported to be diagnoses. *See id.* at 581–637; *see also* Mark A. Behrens & Corey Schaecher, *Rand Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the "Phantom" Silica Epidemic That May Deter Litigation Screening Abuse*, 73 ALB. L. REV. 521, 526–28 (2010).

235. *Silica*, 398 F. Supp. 2d at 679.

236. *Id.* at 680.

237. *Id.* at 633.

238. *Id.* at 632.

remand, more than half of the lawsuits had been dismissed, most of them voluntarily by the plaintiffs' firms that filed them.[239]

In sum, the power to rule on a *Daubert* motion gives a transferee court the evidentiary gatekeeping authority of a trial court. Even though a transferee court does not have the power under the MDL Statute to try a case, it may nonetheless admit and exclude evidence. This authority in turn affects trials on remand as well as settlement negotiations, the latter of which is perhaps more important given the tendency of multidistrict consolidations to settle. A party whose experts have been excluded by the transferee court will be at a disadvantage at trial and, correspondingly, in settlement negotiations.[240] The transferee court's power over evidence provides another example of a transferee court's ability to influence the outcomes of cases consolidated before it and to drive those cases toward resolution.

D. Bellwether Trials

Another important innovation in the MDL context is a transferee court's ability to hear bellwether cases. Unlike the procedures discussed thus far, bellwether trials were created to deal with the problems of aggregate litigation. "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock."[241] Bellwether cases, in a similar vein, are representatives selected from the "flock" of cases consolidated in front of the transferee court and tried front-to-back.[242] A particular case is selected as a bellwether "because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases."[243] Some courts have made, or have tried to make, bellwether trials binding on parties other than those in the bellwether trials themselves;[244] others, par-

239. Behrens & Schaecher, *supra* note 234, at 529.

240. After the *Silica* ruling discussed above, *see infra* text accompanying notes 228–39, for instance, the plaintiffs had virtually no negotiating leverage at all.

241. *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

242. For a thorough discussion of bellwether cases, see Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

243. Fallon, Grabill & Wynne, *supra* note 242, at 2325. R

244. *See, e.g.*, *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on. Nov. 15, 1987, 720 F. Supp. 1505, 1510 (D. Colo. 1989), *rev'd on other grounds*, Johnson v. Continental Airlines Corp., 964 F.2d 1059 (10th Cir. 1992) ("[C]ases consolidated for resolution through the exemplar trial, by order of the court or confession of the parties, are bound by the result of the exemplar trial."); Hilao v.

ticularly courts of appeals, are skeptical that such preclusive effects are legitimate.[245] Nevertheless, bellwether trials can still assist the transferee court and the parties: "the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries."[246] This use of bellwether trials as information-gathering devices is uncontroversial.[247]

Under the MDL Statute, cases are consolidated before the transferee court for pretrial purposes only.[248] In order to try bellwether cases for the first few decades after the MDL Statute was in force, transferee courts would assign the bellwether cases to themselves under 28 U.S.C. § 1404(a).[249] Section 1404(a), unlike the MDL Statute, allows a court to retain the transferred case for trial.[250] The Supreme Court put a stop to this practice of "self-assignments" in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[251] The Court held that the MDL Statute "obligates the [MDL] Panel to remand any pending case to its originating court when, at the

Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996) (affirming district court's binding of all claimants in Rule 23(b)(3) class action to results of a series of determinations of a statistical sample of the claims). For an example of an attempt to bind parties in other MDL actions to the outcome of bellwether trials that was reversed on appeal, see Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998).

245. *See, e.g.*, *Chevron*, 109 F.3d at 1021 (Jones, J., concurring) ("I also have serious doubts . . . that a bellwether trial of representative cases is permissible to extrapolate findings relevant to and somehow preclusive upon a larger group of cases."). Other courts have found that such preclusive effects are illegitimate unless the parties agree to them. *E.g.*, *In re* TMI Litig., 193 F.3d 613, 725 (3d Cir. 1999) ("[A]bsent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff."). These courts, in other words, are uncomfortable with the idea that a party that has not had its day in court could be bound by the results of a bellwether trial.

246. Fallon, Grabill & Wynne, *supra* note 242, at 2325. **R**

247. *See, e.g.*, *Chevron*, 109 F.3d at 1019 ("The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar.").

248. 28 U.S.C. § 1407(a) (2006).

249. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 32–33 (1998).

250. 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

251. 523 U.S. 26 (1998).

latest, [all] pretrial proceedings have run their course."[252] Despite this setback, however, transferee courts and parties to MDL proceedings, continuing to see the benefits of bellwether trials, have used "[c]reative thinking" to continue the practice of trying bellwether cases.[253] For instance, a transferee court can, without violating the holding of *Lexecon*, hear any case in a multidistrict consolidation that was (1) originally filed in the transferee district; (2) dismissed from its original district and re-filed in the transferee district; (3) remanded to the original court and then transferred *back* to the transferee court by the transferor court under § 1404(a);[254] or (4) "filed directly into the MDL."[255] Moreover, the transferee judge may remand a case to the original, transferor court, and then herself seek an intercircuit[256] or intracircuit[257] assignment to that transferor court, in effect following the case to the court in which it was originally filed and presiding over it there.[258]

The primary import of a transferee court's ability to hear bellwether cases is that through such cases the court "can precipitate and inform settlement negotiations."[259] The ability to accurately determine the values of individual cases is an important part of the settlement of multidistrict consolidations, and, given that most of the cases transferred under the MDL Statute are settled,[260] this ability is vital to the judicial efficiency that multidistrict litigation is meant to promote.

E. Authority over Attorney's Fees Prior to the Quasi-Class Action Model

With the exception of the ability to hear bellwether cases, the procedures discussed in this Section—pretrial conferences, motions to dismiss, and *Daubert* hearings—are adapted from a court's

252. *Id.* at 34.

253. Fallon, Grabill & Wynne, *supra* note 242, at 2354 n.107. R

254. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

255. Fallon, Grabill & Wynne, *supra* note 242, at 2355–56. In such a case, the R transferee court is technically the forum court, whether or not the plaintiffs reside in the transferee court's judicial district. *Id.*

256. *See* 28 U.S.C. § 292(b) (2006) ("The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.").

257. *See* § 292(d) ("The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.").

258. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

259. Fallon, Grabill & Wynne, *supra* note 242, at 2338. R

260. *See supra* note 33 and accompanying text.

authority in traditional, one-to-one litigation. Such procedures serve judges well in multidistrict consolidations, but they do not address certain problems inherent in aggregate litigation, such as the problem of fees.[261] The quasi-class action evolved to help solve this problem, but the *Zyprexa* court was not the first to realize that the power to control fees is important.

Despite their lack of express authority to address attorneys' fees, some transferee courts have simply done so.[262] For instance, in the *Diet Drugs* settlement, the transferee court ordered the defendant to pay 9% of each plaintiff's award into a separate account.[263] The court used this account to provide common-benefit fees to attorneys for work those attorneys did that benefitted the plaintiffs as a whole.[264] One possible justification for these sorts of court actions is the common fund doctrine,[265] but some commentators have asserted that this doctrine does not apply in the MDL context.[266] Regardless of their validity, these actions demonstrate that courts are aware that the issue of fees is critical in aggregate litigation, and they show that courts are willing to innovate to ensure that fees are justly apportioned. This power over fees under the common fund doctrine, however, is limited: whereas a court overseeing a class action can limit class counsel's fees to a certain percentage under

261. *See supra* note 71 and accompanying text.

262. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.927 (2004) ("If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a *certain percentage of the fees* they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well." (emphasis added) (citations omitted)).

263. *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., No.1203, 1999 WL 124414, at *2 (E.D. Pa. Feb. 10, 1999).

264. *Id.* at *3.

265. *E.g.*, Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 430 (1998) ("At the conclusion of [multidistrict] litigations, when attorney fee payments come into play, the equitable common fund doctrine enables judges to supervise the payment of fees and costs to attorneys."). The common fund doctrine provides that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

266. *See generally* Silver & Miller, *supra* note 9, at 119–30 (concluding, after looking at several requirements underlying the use of the doctrine, "that the common fund doctrine does not apply to MDLs"). R

Rule 23(h),[267] a transferee court does not have that authority under the common-fund doctrine. The quasi-class action addresses this concern.

Class actions, in summary, are increasingly unable to resolve instances of mass harms. Multidistrict consolidations are filling the resulting void, but a transferee courts' powers over consolidations are not clearly defined. Transferee courts have looked to a range of procedural mechanisms to meet the two objectives of the MDL Statute by providing justice and efficiency in the resolution of the consolidated actions. Despite these efforts, courts lacked the ability—at least before *Zyprexa* in 2006—to limit attorneys' fees under contingent-fee arrangements, leading to a potentially unjust and inefficient allocation of resources. By addressing these problems and helping to ensure that multidistrict consolidations are more just and efficient, the quasi-class action model furthers the objectives of the MDL Statute itself.

III.
THE QUASI-CLASS ACTION MODEL AND THE OBJECTIVES OF MULTIDISTRICT LITIGATION: ADVANTAGES AND DISADVANTAGES

This Part analyzes the advantages and disadvantages of the quasi-class action model.[268] It concludes that the quasi-class action model furthers the primary aims of the MDL Statute and that, on balance, the model's advantages outweigh its disadvantages. Section A discusses the comparative merits of the quasi-class action model by examining two of the most important purposes of the MDL Statute: justice and efficiency. Section B discusses the potential drawbacks of the model.

A. Advantages of the Quasi-Class Action Model

The MDL Statute states that the MDL Panel may consolidate and transfer related actions provided that, inter alia, the transfer would "promote the just and efficient conduct of such actions."[269] As discussed above, the promotion of justice and efficiency is the most important factor the Panel considers when deciding whether

267. *E.g.*, *In re* Joint E. & S. Dists. Asbestos Litig., 878 F. Supp. 473, 561–62 (E. & S.D.N.Y. 1995) (reducing amount of attorneys' fees under contingency contracts from 33.3% to 25%), *vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996).

268. As explained above, this Note addresses the quasi-class action model only insofar as it relates to the limiting of attorneys' fees. *See supra* notes 10–13 and accompanying text.

269. 28 U.S.C. § 1407(a) (2006).

to consolidate and transfer actions.[270] This Note has laid out a variety of tools transferee courts have adapted to the MDL process to further such just and efficient conduct: pretrial conferences,[271] plausibility pleading,[272] evidentiary gatekeeping,[273] bellwether trials,[274] and allocation of common-benefit attorneys' fees.[275] The quasi-class action model, a new adaptation, similarly promotes the just and efficient conduct of actions consolidated under the MDL Statute, thereby furthering the two primary purposes of multidistrict consolidation. This Section addresses both justice and efficiency under the quasi-class action model, beginning with the latter. Subsection 1 examines the efficiency rationale underlying multidistrict litigation, and Subsection 2 analyzes the justice rationale.

1. The Efficiency Rationale

By allowing a court to limit the amount an attorney can be paid, the quasi-class action model allows for a more efficient allocation of resources than is available without it. Because a non-adjustable fee agreement creates a free-rider problem, a transferee court should have the ability to limit the amount a free-riding attorney is paid and thus adjust such attorney's incentives, ensuring that resources are more efficiently allocated. Moreover, the ability to set a single cap for all attorneys furthers judicial economy.

A multidistrict consolidation presents a significant risk of free riders. A plaintiff's attorney who is assured of receiving her contracted-for fee has the incentive to sit back and let other attorneys do the work in the case, collecting effectively the same fee whether she works on the case herself or lets others do so. The problem, in other words, is that attorneys have the incentive to take a large portion of any settlement without adding any value to the settlement process. And this incentive is more than theoretical. In *Guidant*, Judge Frank observed that "the Court . . . received numerous communications from [plaintiffs] stating that their attorneys have never contacted them or that their attorneys are making the [plaintiffs] complete, by themselves, all of the settlement documents."[276] Pro-

270. *See supra* notes 28–29 and accompanying text.
271. *See supra* Part II.A.
272. *See supra* Part II.B.
273. *See supra* Part II.C.
274. *See supra* Part II.D.
275. *See supra* Part II.E.
276. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

viding compensation to attorneys who perform common-benefit work—a step courts have taken without invoking the quasi-class action model[277]—helps alleviate the free-rider problem by providing incentives for attorneys to do such work. The quasi-class action model, however, takes the further step of providing a *dis*incentive to free riders and encouraging them to not forsake their clients like some *Guidant* attorneys did. Limiting the compensation available to attorneys who free ride ensures that every attorney is motivated to provide a benefit to his client and the legal system by working to bring the consolidation to a conclusion. As a policy matter, an attorney should not be entitled to a windfall for simply signing up a client, agreeing to a fee, and forgetting about his client until other attorneys resolve the case. Allowing a court the power to cap such an attorney's fee helps prevent these kinds of windfalls. The quasi-class action, in short, allows a transferee court to allocate resources so as to encourage efficiency. A court's ability to limit the amount available to an attorney ex post ensures that otherwise potentially free-riding attorneys are motivated to work to resolve the case and aid their clients.

Furthermore, setting a single cap for all contingent fees furthers judicial economy by ensuring that, as a baseline matter, a court does not have to determine appropriate fees for all attorneys but can instead set one percentage that is applicable to all.[278] Due to the economies of scale created by consolidations, the vast majority of attorneys will often perform the same relatively straightforward tasks for their clients. In *Vioxx*, for instance, most attorneys did not pursue individual discovery or draft individual motions.[279] Instead, the attorneys "were able to simply wait while a $4.85 billion settlement was negotiated and then do no more than enroll their clients in the settlement and monitor their progress through the claims valuation process."[280] The court decided that, as a matter of both economy and equity, the fact that the attorneys performed similar tasks mandated "a uniform, consistent result for all attorneys and their clients."[281] By allowing for a more effective use of re-

277. *E.g.*, *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., No.1203, 1999 WL 124414, at *3 (E.D. Pa. Feb. 10, 1999).

278. This does not take into account common-benefit work or other special circumstances, which may be considered by a special master ex post. As the *Vioxx* court observed, "there may be one or more cases in which special treatment might be justified." *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 564 (E.D. La. 2009).

279. *Id.* at 563.

280. *Id.*

281. *Id.*

sources and justifying a court's setting of a single cap for attorneys' fees, the quasi-class action furthers one of the two principal grounds for multidistrict consolidation: efficiency.

2. The Justice Rationale

Aside from efficiency, the other primary justification for multidistrict consolidation is the furtherance of just conduct of the consolidated actions.[282] The quasi-class action furthers justice in three ways: by providing a method to distribute resources to those who deserve them, by treating similarly situated plaintiffs similarly, and by strengthening confidence in and the fairness of the MDL mechanism itself.

First, the quasi-class action helps to ensure that resources go to those who deserve them. If a court can cap contingent-fee agreements and thus decrease the funds available to free-riding attorneys, it can allocate those funds to two groups of people: attorneys who have performed common-benefit work, and clients who have been harmed by a defendant's actions. As a purely equitable matter, either distribution is preferable to distributing the funds to a free-riding attorney. Moreover, the quasi-class action model allows a court to collect funds in a fair way. Instead of, say, taking a percentage of *all* attorneys' fees or *all* clients' awards to supply the common-benefit fund, under the quasi-class action model a court can capture resources that would otherwise go to attorneys whose only claim to them is that they happened to have a higher contingent-fee arrangement than other attorneys. The court can then distribute these resources either to attorneys who have performed work for the common benefit of all plaintiffs, or to the plaintiffs themselves. This process helps to ensure that attorneys are paid for the work they do, rather than simply the retainer contracts they draft.

Second, the power to alter contingent-fee contracts allows a court to treat similarly situated plaintiffs in similar ways. Specifically, it extends to plaintiffs in multidistrict consolidations the protections that plaintiffs in class actions already have. As Judge Weinstein and other judges to adopt his reasoning have noted, mass-harm multidistrict consolidations and class actions are similar in many respects,[283] and the former are supplanting the latter in many in-

282. 28 U.S.C. § 1407(a) (2006).

283. *In re* Vioxx Prods. Liab. Litig, 574 F. Supp. 2d 606, 612 (E.D. La. 2008); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *17 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No.

stances in the mass-harm context.[284] On a surface level, of course, both sorts of actions involve large numbers of plaintiffs. Even more, though, these plaintiffs are similarly disadvantaged. While it is true that each individual plaintiff in a multidistrict consolidation may well have individual representation,[285] where most individual class members do not, the mere fact of representation is insufficient to provide each plaintiff in a consolidation the sort of attention from her attorney that she would have in traditional one-on-one litigation. A single plaintiff whose attorney or whose attorney's law firm represents dozens or hundreds of other clients in the same multidistrict consolidation may, depending on the nature of the underlying claim, have as little individualized attention as a class action plaintiff represented by class counsel. Indeed, Judge Frank commented on such a lack of attention in *Guidant*.[286] Particularly in light of the fact that multidistrict consolidations have begun to replace class actions in the mass-harm context,[287] plaintiffs in one type of action in a mass-harm aggregation should have similar protections to those in the other. Plaintiffs who are similarly situated in all respects save for the type of aggregation mechanism at work in their cases should, as a normative matter, be treated similarly. The historical accident that procedural law has developed in a certain way should not affect the ability of courts to police unfair attorney-client contracts.

Additionally, the quasi-class action model allows a court to treat all plaintiffs in the same way if one of the cases designated for

05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

284. *See supra* Part I.B. Of course, class actions and multidistrict consolidations are dissimilar in a number of important ways as well. As Professors Silver and Miller note:

> In MDLs, lawyers often have valuable client inventories. . . . The pre-existing incentives of class counsel, by contrast, are usually much weaker. Class counsel typically has a few signed clients whose claims, standing alone, scarcely justify the cost of litigation. The problem in class actions is to create incentives from whole cloth; in MDLs, it is to enhance pre-existing incentives that may already be quite strong.

Silver & Miller, *supra* note 9, at 148; *see also* Willging & Lee, *supra* note 35, at 794 ("MDL aggregation is not *exactly* an alternative to class action aggregation of claims.").

285. A plaintiff in a multidistrict consolidation might not have individual representation if she is an absent class member in a class action that was consolidated and transferred to the transferee court.

286. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 3896006, at *9 (D. Minn. Aug. 21, 2008).

287. See *supra* Part I.B.

consolidation is itself a class action. Allowing transferee courts to exercise the same powers over class members and individual plaintiffs ensures that the court can treat all plaintiffs as equity requires. The plaintiffs all ultimately looked to the same court to aid in the resolution of their dispute, and the court should be able to ensure that all plaintiffs are treated similarly. In the words of one commentator, "there is a compelling logic in ensuring that plaintiffs from around the country brought together in mass tort litigation pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum."[288] Such equitable treatment is particularly important in light of the fact that, as in *Zyprexa*, *Guidant*, and *Vioxx*, plaintiffs in mass-harm consolidations often require extra solicitude due to their injuries or the particularities of their situations.[289]

Third, and finally, the quasi-class action model furthers justice by enhancing trust in the MDL mechanism and ensuring that it is fair. As Judges Weinstein, Frank, and Fallon noted, the ability to prevent excessive MDL attorneys' fees may enhance public confidence in the justice system.[290] But the quasi-class action mechanism may accomplish even more than that. Although they are judicially efficient, multidistrict consolidations have been criticized as pro-defendant to the point that "Congress appears to have lost confidence in a judicial management mechanism that once had such great promise."[291] The Class Action Fairness Act of 2005 (CAFA)[292] includes a provision prohibiting transfer under the MDL Statute of any class action that was itself removed from state court to federal court under CAFA, unless a majority of plaintiffs request such a transfer.[293] One court has called this pro-plaintiff non-transferabil-

288. Grabill, *supra* note 10, at 58.

289. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 561 (E.D. La. 2009) ("[L]ike the elderly and physically ill claimants in *Zyprexa* and *Guidant*, Vioxx claimants have all suffered some form of physical injury and many are elderly. Accordingly, the Court was justified in exercising its inherent authority and responsibility to examine contingent fee contracts for fairness and consistency.").

290. *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 613 (E.D. La. 2008); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008), *overruled in part by* MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 493–94 (E.D.N.Y. 2006).

291. Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 156 (D. Mass. 2006).

292. 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006).

293. § 1332(d)(11)(C)(i). Notably, this provision is in a piece of legislation that, in the eyes of many observers, was drafted so as to benefit business defendants at the expense of plaintiffs. *See, e.g.*, Stephen B. Burbank, *The Class Action Fairness*

ity provision "an unmistakable rebuke to the [MDL] Panel."[294] If CAFA indeed includes a congressional strike against the MDL process, any actions by judges designed to protect plaintiffs may help to allay congressional fears that multidistrict consolidations are unfair and that further legislation limiting the MDL process is necessary. The quasi-class action model allows for just such pro-plaintiff actions, since it provides judges a means to look after the interests of plaintiffs in an area—fee determination—in which they are inherently at odds with their own counsel.[295] Moreover, Professor Judith Resnik has argued that public adjudication is a good thing in and of itself: "Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, firsthand, about processes and outcomes."[296] Public scrutiny of what would otherwise be a private contractual arrangement may help to educate the public about the nature of the attorney-client relationship and the manner in which attorneys and clients contract, ensuring savvier clients and, accordingly, more informed bargaining in future attorney-client relationships.

In sum, the quasi-class action model for limiting attorneys' fees furthers both of the primary rationales underlying the MDL Statute: justice and efficiency. By providing for a more efficient and equitable allocation of resources, by allowing for the similar treatment of similarly situated plaintiffs, and by helping to guarantee the fairness and strength of the MDL mechanism itself, the quasi-class action model assists in ensuring that multidistrict consolidations are the just, efficient mechanisms they were designed to be.

B. Disadvantages of the Quasi-Class Action Model

Despite the benefits outlined above, the quasi-class action model is not without its shortcomings. First, and most obviously, the

Act of 2005 in Historical Context: A Preliminary View, 156 U. PA. L. REV. 1439, 1441 (2008) ("[S]ome critics regard the . . . legislation as inimical to the interests of numerous groups of potential litigants."); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2005) (arguing that CAFA "may take away a plaintiff's 'day in court'").

294. *Delaventura*, 417 F. Supp. 2d at 156.

295. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 560 (E.D. La. 2009) ("[W]hen it comes to the percentage or amount of the contingency fee, a conflict of interest necessarily exists between the claimants and their attorneys who both seek to maximize their own percentage of an award.").

296. *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 694 (2011); *see also id.* at 690–94 (describing "the arguments for the public facets of the due process model").

quasi-class action model, by providing for the capping of attorneys' fees, allows a court to disregard private contracts, which may seem inequitable to the contracting parties. In cases in which judges have altered fees, they have in essence used their equitable powers to override terms they consider unfair to plaintiffs.[297] However, as discussed above, the quasi-class action provides substantial benefits to MDL plaintiffs and the broader public.[298] On balance, those advantages outweigh any unfairness to the contracting parties. This is particularly so since the reason courts employ the quasi-class action model in the first place is to make the attorney-client contract fairer to the contracting parties and to make the settlement fairer to the plaintiffs as a group. Furthermore, a fee cap need not be permanently fixed. For instance, in *Zyprexa*, the court granted a special master the authority to adjust particular attorneys' fees up or down within a specified range.[299] In *Guidant*, Judge Frank altered the fee structure as the changing circumstances of the case required.[300] In *McMillan*, both attorney and client agreed that the original contract was indeed fair, and Judge Weinstein amended his order accordingly.[301] Nothing, in short, prevents a court from taking into account the equities of a particular situation and adjusting fee caps as necessary.

Second, the quasi-class action appears cut from whole cloth. As one law firm argued to the Second Circuit on appeal from a *Zyprexa* ruling, "[t]here is no such thing as a quasi-class action."[302] Although "quasi-class action" is undoubtedly a new term in this context, other courts have exercised powers like those the quasi-class action model encompasses. For instance, the Fifth Circuit held in 1977 that a "the district judge had the power to award compensation to the [Plaintiffs'] Committee to be paid by other plaintiff counsel out of the fees they were entitled to receive."[303] Nor is such power limited either to federal courts or to the precise issue at stake in the quasi-class action model. In *Tax Authority, Inc. v. Jackson Hew-*

297. *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 612 (E.D. La. 2008); *Guidant*, 2008 WL 682174, at *18; *Zyprexa*, 424 F. Supp. 2d at 497.

298. *See supra* Part III.A.

299. *Zyprexa*, 424 F. Supp. 2d at 497.

300. *See supra* notes 151–55 and accompanying text.

301. McMillan v. City of New York, Nos. 08-CV-2887, 03-CV-6049, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010).

302. Reply Brief & Supplemental Appendix for Appellant at 23, *In re* Zyprexa Prods. Liab. Litig. (Mulligan Firm Injunction Appeal), 594 F.3d 113 (2d Cir. 2010) (No. 07-3815-cv), 2008 WL 7947269, at *23.

303. *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1008 (5th Cir. 1977).

itt, Inc.,[304] for example, the Supreme Court of New Jersey held that an attorney may not "obtain[ ] consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement."[305] In that case, one attorney represented 154 plaintiffs in a single mass action.[306] A provision in the retainer agreement with each client provided that a vote in favor of a settlement by 60% of the attorney's clients would bind all of the clients to the settlement.[307] In invalidating that provision, the court held that a client must have knowledge of the terms of a settlement before agreeing to them.[308] In short, the court nullified a term in attorney-client contracts based on unfairness to the clients. The quasi-class action may be a new theoretical concept, but as a practical matter, other courts have limited the ability of clients and attorneys to contract based on potential inequity to the clients.

Third, Jeremy Grabill has criticized the courts that have at least partially based their fee caps on the similarity of the multidistrict consolidations before those courts to class actions.[309] He argues that such reasoning is unnecessary, since "the inherent judicial authority to ensure that contingency fees are not excessive is well established."[310] Moreover, such reasoning has "muddied the waters and added to the confusion that now exists concerning the proper role for courts to play more generally vis-à-vis private mass tort settlements."[311] While Grabill supports fee caps,[312] he criticizes the manner in which such caps have been justified and the resulting confusion that such justifications may cause. However, the authority of the courts using the quasi-class action model is not as well estab-

304. 898 A.2d 512 (N.J. 2006).

305. *Id.* at 522.

306. *Id.* at 515.

307. *Id.*

308. *Id.* at 522. The court based its decision on New Jersey's aggregate settlement rule, which provides that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." *Id.* at 518 (citing SYLVIA B. PRESSLER, CURRENT N.J. COURT RULES 1.8(g) (2003)).

309. Grabill, *supra* note 10, at 58–59. **R**

310. *Id.* at 58.

311. *Id.* at 59.

312. *Id.* at 58 ("I believe there is a compelling logic in ensuring that plaintiffs from around the country brought together in mass tort litigation pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum.").

lished as Grabill suggests. As Grabill points out,[313] two cases from the 1980s support the proposition that judges have the authority to regulate contingency fees,[314] as does a nineteenth-century Supreme Court decision.[315] Indeed, *Zyprexa*, *Guidant*, and *Vioxx* all ground their authority in part in one or more of these prior cases.[316] Nevertheless, not many cases support this authority: the most recent Supreme Court word on the topic was in 1884.[317] Moreover, the *Zyprexa*, *Guidant*, and *Vioxx* courts broke new ground in asserting control over contingency fees on a much larger scale than did courts in the nineteenth and twentieth centuries. Supporting this large-scale action by looking to courts' analogous authority in class actions makes sense as a way to ground this newly expanded power. While it is true that the term "quasi-class action" brings with it some uncertainty,[318] no court has used the term to support anything other than a cap on attorneys' fees. Furthermore, the courts' need to anchor their authority over fees justifies the uncertainty.

Finally, Professors Charles Silver and Geoffrey Miller have articulated a robust critique of the quasi-class action.[319] This critique is based on a broader definition of the quasi-class action model than this Note adopts: they consider the quasi-class action method of handling multidistrict consolidations to include "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts,"[320] whereas this Note's

313. *Id.* at 58 n.208.

314. *E.g.*, Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982) ("The district court's appraisal of the amount of the fee is . . . justified by the court's inherent right to supervise members of its bar."); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1277 (8th Cir. 1980) ("The court has the power and responsibility to monitor contingency fee arrangements for reasonableness.").

315. Taylor v. Bemiss, 110 U.S. 42, 45–46 (1884) ("This . . . does not remove the suspicion which naturally attaches to such [contingency] contracts, and where it can be shown . . . that the compensation is clearly excessive, . . . the court will in a proper case protect the party aggrieved.").

316. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (citing *Rosquist*, 692 F.2d 1107); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL 05-1708 DWF/AJB, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (citing *Rosquist*, 692 F.2d 1107; *Travel Arrangers*, 623 F.2d 1255; and *Taylor*, 110 U.S. 42); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006) (citing *Rosquist*, 692 F.2d 1107).

317. *Taylor*, 110 U.S. 42.

318. As Grabill asks, "[I]s all Rule 23 authority imported into the non-class aggregate settlement context, some subset of that authority, or only the authority to regulate attorneys' fees?" Grabill, *supra* note 10, at 59 n.212. R

319. Silver & Miller, *supra* note 9, at 111. R

320. *Id.* at 110.

functional definition—based strictly on case law—encompasses only fee caps.[321] With respect to such caps, however, Professors Silver and Miller offer both theoretical and practical criticisms. On the theoretical side, they argue that economies of scale do not justify fee limitations, since "aggregation is predictable"[322] and "lawyers compete for clients in competitive markets."[323] In other words, the market should drive plaintiffs' attorneys to price their services competitively and efficiently. There may still be instances in any particular multidistrict consolidation, though, in which the market functions imperfectly. In a consolidation of nationwide cases covering thousands of geographically dispersed plaintiffs who have filed cases over a number of months or years, it is reasonable to believe that the market alone does not create a situation in which similarly situated plaintiffs pay similar attorneys' fees. To ensure equity among plaintiffs, judges should have the authority to counter any market failures that arise and cap fee arrangements that are unjust in light of the facts of a given consolidation. This point is particularly important given that—as in *Zyprexa*, *Guidant*, and *Vioxx*—mass-harm MDL plaintiffs are often particularly vulnerable.[324] Moreover, given that a primary goal of the MDL Statute is to encourage the just conduct of consolidated actions, fee caps are directly in line with the purpose of the Statute. Finally, even if a particular contract was fair ex ante, a judge should be able to decide whether the work an attorney has done justifies the agreed-upon fee. As Judge Frank pointed out in *Guidant*, some attorneys virtually abandon their clients.[325] Regardless of the market forces governing ex ante contracting, a court should be able to adjust for the actual events of a case ex post. In short, a client should not bear the risk that her attorney will be a free rider.

321. *See supra* notes 11–13 and accompanying text.

322. Silver & Miller, *supra* note 9, at 137. R

323. *Id.*

324. *See In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 561 (E.D. La. 2009) ("In order to qualify for the Vioxx Settlement Agreement, a claimant must have suffered a heart attack, ischemic stroke, or sudden cardiac death."); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 DWF/AJB, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) ("In this MDL, many of the individual Plaintiffs are both physically ill and aging and, understandably, do not have the strength or knowledge to negotiate fair fees for themselves."); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) ("Many of the individual plaintiffs are both mentally and physically ill and are largely without power or knowledge to negotiate fair fees . . .").

325. *See supra* note 1 and accompanying text.

Even if the market is imperfect, Professors Silver and Miller argue that, in practice, judges do not tend to exercise fee-capping authority in an informed, data-driven manner, but that "[t]hey invent numbers instead."[326] However, even conceding that judges have not yet perfected the process of setting fee caps, the quasi-class action model as thus far adopted should not be abandoned. An ideal version of the model may require more data and more study than judges have thus far employed, but, as detailed above, the quasi-class action model furthers the rationales—justice and efficiency—that justify multidistrict consolidations themselves.[327] Given the advantages the model offers, the framework it has put in place is worth keeping.

In sum, the quasi-class action model is not perfect. While critics have articulated valid concerns, the concerns justify tinkering with the model, not discarding it. A court sensitive to the equities of a particular case and willing to look to hard data can bring about the model's benefits while mitigating its potential drawbacks. The quasi-class action model remains a viable way to ensure that multidistrict litigation continues to perform the functions it was designed to perform and meet the objectives it was designed to meet.

326. Silver & Miller, *supra* note 9, at 110. Professors Silver and Miller offer a solution to the problems they identify with MDL practice more broadly: **R**

> The proposal would establish a default rule requiring an MDL judge to appoint a Plaintiffs' Management Committee ("PMC") made up of lawyers with valuable client inventories: often, but not necessarily, lawyers with the largest numbers of signed clients. The PMC would then select, set compensation terms for, and monitor a group of common benefit attorneys ("CBAs") who would perform the common benefit work ("CBW") MDLs require. CBW is legal work beneficial to all plaintiffs, such as discovery relating to factual issues common to all plaintiffs' claims. PMC members would receive only fees from their signed clients, but this should motivate them to select, incentivize, and monitor CBAs with care because good CBW will make their client inventories more valuable. CBAs would draw fees on a pro rata basis from all lawyers with cases in an MDL.

Id. at 111–12 (footnote omitted). Since this Note considers the quasi-class action to be exclusively related to the authority to cap fees, the Professors' solution is not directly applicable to the narrow issue discussed in this piece. Rather, their recommendation takes into account all of the elements that they consider to be part of the quasi-class action model (i.e., "judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts," *id.* at 110). The Professors' suggestion does not seem to provide a solution to the problem of inequity among plaintiffs in the event of a market failure leading to similarly situated plaintiffs ending up with different contingent-fee agreements. This is one of the problems Judge Weinstein identified when he introduced the quasi-class action in *Zyprexa*, and it is one that a well managed and thoughtful fee cap still helps to resolve.

327. *See supra* Part III.A.

CONCLUSION

The quasi-class action model for limiting attorneys' fees is a new tool in the MDL toolkit, but it is one that promises to further the purposes of the MDL mechanism. The MDL Statute is explicit that cases should be consolidated to ensure that they are handled justly and efficiently, but the statute is less forthcoming as to precisely what powers courts have to ensure this justice and efficiency. Consequently, judges have had to innovate. The quasi-class action model is just such an innovation, filling a gap in courts' powers while at the same time furthering both of the primary objectives of the MDL Statute. Though not without its shortcomings, the model provides enough benefits that the framework it establishes should be kept in place. The power to limit attorneys' fees is a valuable tool for judges overseeing multidistrict consolidations, and it helps ensure that the legal system can continue to solve complex and significant problems.