

ARTICLES

ACTUALLY SHUTTING DOWN THE VIRTUAL MULTISTATE CORPORATION

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[O]ne in my place sees how often local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.¹

I. A VIRTUAL PROBLEM WITH COMMERCE

A. *Virtual Multistate Corporations*

Because of advances in telecommunications, computerization and shipping systems, small companies can now achieve the status of national corporations "virtually." In other words, they can operate throughout the country without having any contact with the various states except through common carriers, the mail system, and voice and data communications systems.²

An important trend in the business world is the formation of "Virtual Corporations."³ In common usage, a Virtual Corporation is a group of companies coming together to cooperate in a single project or a series of projects.⁴ The constituents of the Virtual Corporation may be manufacturers, designers, marketers, competitors, customers, or

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1. OLIVER W. HOLMES, LAW AND THE COURT, COLLECTED LEGAL PAPERS 296 (1920).

2. Soon companies will offer electronic "showrooms" to demonstrate their products on television sets in consumers' homes. See Raymond W. Smith, The Global, Interactive, Human Network: Life in the Information Age, Speech Delivered at the World Future Society Annual Conference (Jul. 1, 1993), in VITAL SPEECHES 691 (1993) ("[F]or day-to-day transactions, an entire electronic marketplace will be available on demand, offering familiar services in new forms, and new services that are just waiting to be invented."). "Soon, we'll be using interactive multimedia to shop in virtual stores, browse through virtual shelves, and check out through virtual sales devices." *Id.* See also Shawn Tully et al., *Winning Companies: 20 Companies on a Roll*, FORTUNE, Nov. 22, 1993, at 21, 32 (describing the "interactive shopping" network being set up by CUC International in Orlando, Florida and San Francisco).

3. See John A. Byrne et al., *The Virtual Corporation*, BUS. WK., Feb. 8, 1993, at 98 (stating that "the virtual model could become the most important organizational innovation since the 1920s").

4. Patrick Bloomfield, *Why Success Belongs to the Agile: Inside the "Virtual Corporation"*, FIN. POST, March 2, 1994, at 2, 23. The term was coined by Roger Nagel, a professor at the Iacocca Institute at Lehigh University in Bethlehem, Pennsylvania. *Id.*; see also Byrne et al., *supra* note 3, at 99; David C. Churbuck & Jeffrey S. Young, *The Virtual Workplace*, FORBES, Nov. 23, 1992, at 184, 186; Thomas W. Malone & John F. Rockart, *Computers, Networks and the Corporation*, SCI. AM., Sept. 1991, at 128, 134-36.

anyone else with an interest in the project. For example, a manufacturer will manufacture, while a product-design company decides what to make, and a marketing company sells it.⁵ Such corporations rely on high-speed communications⁶ to unite team members in different parts of the country—who, often, have never met.⁷

Virtual Corporations are more efficient than actual corporations because they only employ the people (or companies) they need to get a job done. When the job is done, the Virtual Corporations can disband and another differently constituted corporation can take its place to accomplish the next goal. Such corporations have been compared to “a more powerful and flexible version” of Japanese business’s keiretsu.⁸

“Virtual” is taken from the technology of virtual reality—the use of computers, video, and sound equipment to give the illusion of reality.⁹ In virtual reality, the world that appears to be there does not actually exist. A Virtual Corporation, similarly, appears to exist but does not.¹⁰

Virtual Multistate Corporations (VMCs) are corporations that do business in many states while concentrating their assets and personnel in a single state.¹¹ They appear to be multistate corporations because they solicit customers in, and ship products to, the fifty states, but they are actually small companies with their limited facilities and personnel concentrated in one state.

These VMCs have extremely low overhead because they do not have to set up offices or showrooms in each of the fifty states.¹² They can do business successfully with all of

5. Byrne et al., *supra* note 3, at 98.

6. See Ian Austen, *The Virtual Corporation; The Future Workplace: No Offices, No Staff and After the Work is Done, No Jobs*, OTTAWA CITIZEN, March 12, 1994, at B2. See also Bloomfield, *supra* note 4 (“The key to corporate success is using today’s worldwide communication and transportation systems to meet specific customer needs in specific markets in as cash-efficient a manner as possible.”).

7. See Byrne et al., *supra* note 3, at 102 (“InterSolve’s recently completed assignment for First Interstate, for example, saw the creation of four teams of 26 experts led by McPherson, who had met only one of the team members before the assignment.”).

8. Byrne et al., *supra* note 3, at 101. Keiretsu are powerful integrated groups of companies that, “[b]ecause of a network of social and educational links among executives, as well as extensive cross-holdings, interlocking directorships, and long-established business connections,” work together permanently to dominate their markets. WILLIAM J. HOLSTEIN, *THE JAPANESE POWER GAME* 200-01 (1990).

9. See Tanya Pobuda, *Virtual Stores Peddle Wares On-Line*, COMPUTER DEALER NEWS, Dec. 13, 1993, at 28.

10. See Roc McQueen, *Virtual Companies Learn that the Only Reality is Action*, THE FIN. POST, April 2, 1994, at 7 (“What is a virtual corporation? Think of it this way: if something’s transparent, that means it exists but it’s not visible. By contrast, if something’s not there, but you can see it, it’s virtual.”).

11. A VMC, as used in this Article, could well be a component of a virtual corporation. For example, a VMC in the marketing business could team up with a manufacturer and a product designer; this virtual corporation could produce a product and market it nationwide with minimal overhead. See, e.g., Tully et al., *supra* note 2, at 21, which discusses InfoNow, a company marketing a “‘virtual’ electronic store” on CD-ROM. The company does not write the software or produce the CD-ROMs; it contracts out the production and even customer relations. “Since the virtual store has no overhead, its prices are roughly equal to those of the cheapest mail-order houses.” Tully et al., *supra* note 2, at 21.

12. See Bloomfield, *supra* note 4, at 23 (“The key to corporate success is using today’s worldwide

their personnel in their home states. Similarly, they do not have to hire legal counsel or stock goods except in their home states. These low costs are passed on to consumers in several forms. For example, a VMC in the business of selling goods may offer consumers lower prices than intrastate companies or actual multistate companies.¹³ A VMC may also give credit to consumers who could not otherwise obtain it.¹⁴

B. Development Hindered by Regulations

Why is this sort of corporation—a corporation that provides the unquestionable social benefits of lower prices and more available credit—not developing faster? A nationwide framework of regulations makes the successful development of VMCs difficult. While having contact primarily with one state, VMCs are subject to the regulatory laws of all fifty states, as well as the laws of the federal government. The laws themselves are vague; no one could be sufficiently familiar with the laws of the other states to securely operate in them all.

An example of regulation that is extremely damaging to VMCs is that governing deceptive trade practices. All fifty states have laws forbidding “unfair” or “deceptive” trade practices (DTPAs).¹⁵ Under these laws, virtually anything could be an unlawful

communication and transportation systems to meet specific customer needs in specific markets in as cash-efficient a manner as possible.”). Actual multistate companies, by contrast, have offices and personnel in more than just their home states. For example, a large multistate company like General Electric will have representatives in all 50.

13. Most Americans take advantage of the benefits of virtual corporations by making mail-order purchases. *See State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991) (Over 54% of Americans made mail-order purchases in 1990.). *See Tara Aronson, Plans By Post*, S.F. CHRON., Feb. 16, 1994, at 1/Z1 (Consumers can purchase house plans by mail, saving thousands of dollars in architects’ fees.); Helen Susik, *Mail-Order Pharmacies can Provide Real Savings*, ST. PETERSBURG TIMES, Jan. 26, 1993, at 18 (Consumers can order drugs from “managed drug programs”—mail-order pharmacies—at a savings of up to 50% off local pharmacy prices.); *Mail-Order Pharmacies Mushroom, Saving Companies Money*, DALLAS MORNING NEWS, Nov. 29, 1992, at 17H (The mail-order drug market is worth \$4 billion.).

14. There are other advantages to mail-order purchasing. *See, e.g., Jeff Ubois, Being Savvy About Mail Order Can Save Your Company Cash*, MACWEEK, Jan. 11, 1993, at 22 (noting that mail order’s benefits include “fast, convenient delivery; large savings; money-back guarantees; . . . quality technical support . . . [and] guaranteed availability”). *See Smith, supra* note 2, at 691. The author stated that:

If the industrial [sic] revolution gave rise to the gigantic corporate monolith, the information revolution will create the thousand points of light of an entrepreneurial culture—where power and creativity are dispersed, decentralized, and democratized.

The key to success in this environment won’t be a monopoly franchise, but a market franchise, based on the characteristics of any winning company: cost, quality, variety, reliability, and choice.

Smith, *supra* note 2, at 691.

15. *See* ALA. CODE §8-19-1 (1993 & Supp. 1994); ALASKA STAT. § 45.50.471 (1986 & Supp. 1993); ARIZ. REV. STAT. ANN. § 44-1521 (1994); ARK. CODE ANN. § 4-88-101 (1991 & Supp. 1993); CAL. CIV. CODE § 1750 (West 1983); COLO. REV. STAT. § 6-1-101 (1973 & Supp. 1990); CONN. GEN. STAT. ANN. § 42-110 (West 1992 & Supp. 1994); DEL. CODE ANN. tit. 6 § 25 (1994); D.C. CODE ANN. 28-3904 (1991 & Supp. 1994); FLA. STAT. ANN. § 501.201 (West 1988 & Supp. 1994); GA. CODE ANN. § 10-1-370 (1994); HAW. REV. STAT.

practice.¹⁶ Since deceptive trade acts do not allow for the issuance of opinion letters by

§ 481A-1 (1992 & Supp. 1993); IDAHO CODE § 48-601 (1994); ILL. ANN. STAT. ch. 815, para. 505 (Smith-Hurd 1993 & Supp. 1994); IND. CODE § 24-5-0.5-1 (1980 & Supp. 1994); IOWA CODE ANN. § 714.16 (West 1993); KAN. STAT. ANN. § 50-623 (1983 & Supp. 1993); KY. REV. STAT. ANN. § 367.110 (Michie/Bobbs-Merrill 1987 & 1992); LA. REV. STAT. ANN. § 51:1401 (West 1987 & Supp. 1994); ME. REV. STAT. ANN. tit. 5, § 205-A (West 1989 & Supp. 1993); MD. CODE ANN. COM. LAW I § 13-101 (1990 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 93A (West 1984 & Supp. 1993); MICH. COMP. LAWS ANN. § 445.901 (West 1989 & Supp. 1994); MINN. STAT. ANN. § 325D.42 (West 1981 & Supp. 1994); MISS. CODE ANN. § 75-24-1 (1991 & Supp. 1994); MO. REV. STAT. § 407.010 (1990 & Supp. 1994); MONT. CODE ANN. § 30-14-101 (1993); NEB. REV. STAT. § 29-1601 (1994); NEV. REV. STAT. § 598.0903 (1994); N.H. REV. STAT. ANN. § 358-A:1 (1984 & Supp. 1993); N.J. STAT. ANN. § 56:8-1 (West 1989 & Supp. 1994); N.M. STAT. ANN. § 57-12-1 (Michie 1987 & Supp. 1994); N.Y. GEN. BUS. LAW § 349 (McKinney 1988 & Supp. 1994); N.C. GEN. STAT. § 75-1 (1985 & Supp. 1993); N.D. CENT. CODE § 51-15-01 (1989 & Supp. 1993); OHIO REV. CODE ANN. § 1333 (Anderson 1993); OKLA. STAT. ANN. tit. 15, § 751 (West 1993 & Supp. 1994); OR. REV. STAT. § 646.605 (1988 & Supp. 1994); 73 PA. CONS. STAT. § 201-1 (1993); R.I. GEN. LAWS § 6-13.1-1 (1992 & Supp. 1993); S.C. CODE ANN. § 39-5-10 (Law Co-op. 1985 & Supp. 1993); S.D. CODIFIED LAWS § 37-24-1 (1994); TENN. CODE ANN. § 47-18-101 (1988 & Supp. 1994); TEX. BUS. & COM. CODE ANN. § 17.41 (West 1987 & Supp. 1994); UTAH CODE ANN. § 13-11-1 (1992 & Supp. 1994); VT. STAT. ANN. tit. 9 § 2451a (1993); VA. CODE ANN. § 59.1-196 (Michie 1992 & Supp. 1994); WASH. REV. CODE ANN. § 19.86.010 (West 1989 & Supp. 1994); W.VA. CODE § 46A-6-101 (1992 & Supp. 1994); WIS. STAT. ANN. § 100.18 (West 1988 & Supp. 1993); WYO. STAT. § 40-12-101 (1993).

16. Whether a practice is deceptive or unfair depends on:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

FTC v. Sperry & Hutchinson, Co., 405 U.S. 233, 244-245 at 680 n.5 (1972) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. 8355 (1964)).

Actual deception is not required. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944). If an advertisement has the capacity to deceive an appreciable segment of the public, it will be found deceptive. *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957). The public includes “the ignorant, the unthinking, and the credulous.” *Feil v. FTC*, 285 F.2d 879, 902 n.18 (9th Cir. 1960). “Laws are made to protect the trusting as well as the suspicious.” *FTC v. Standard Educ. Society*, 302 U.S. 112, 115 (1937). Intent is not relevant to deceptiveness. *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988). Omission of “material” facts makes an advertisement deceptive. *Waltham Watch Co. v. FTC*, 318 F.2d 28, 30 (7th Cir. 1963), *cert. denied*, 377 U.S. 944 (1963) (Foreign origin was a material fact.). These illustrations of the deceptive trade practices minefield are all from cases applying the FTCA. A company’s uncertainty will increase when it is faced with 50 such vague statutes.

It makes sense that “deceptive” and “unfair” should be organic and flexible terms that can include newly-invented practices. The house conference report on the FTCA noted that:

[I]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the

the state regulators, a company cannot know if it is safe from suit under any state's deceptive trade practices law until it has tried a particular practice; by that time, it is too late. The uncertainty and instability created by these various regulations make interstate work difficult and expensive, especially for VMCs, who, despite the large geographic scale of their business, may actually do a relatively small volume.

C. A National Free Market

This difficulty in setting up national shop was not the intent of the framers of the Constitution.¹⁷ One of the main purposes of the United States Constitution was to encourage a free national market in goods.¹⁸ To this end, the Commerce Clause¹⁹ gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."²⁰ In addition to empowering Congress in the area of interstate commerce, the Commerce Clause acts to prevent the states from interfering with or discriminating against interstate commerce.²¹

Analysis of the sources contemporaneous with the drafting and adoption of the Dormant Commerce Clause finds that the intention of the framers was that Congress should have plenary power over what was then included in interstate commerce.²² One

method of definition, it would undertake an endless task.

H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess., 19 (1914). Thus, while 32 of the 51 DTPAs (*i.e.* in 50 states and the District of Columbia) have "laundry lists" itemizing practices that are deceptive, *see Lee, infra* note 193, at app. I, they also provide for other (non-itemized) practices to be found deceptive.

"What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed?" THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST].

17. THE FEDERALIST NO. 62, at 381.

18. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several states."). *See also Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) ("[A] central concern of the Framers that was an immediate reason for calling the Constitutional Convention" was the conviction that the Union would have to avoid economic balkanization.).

See also THE FEDERALIST NO. 56, at 346-47 (James Madison) ("What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia."); THE FEDERALIST NO. 42, at 283-84 (James Madison) ("The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples as well as our own.").

19. U.S. CONST. Art. 1, § 8, cl. 3.

20. *Id.*

21. *See* discussion *infra* subpart V.B.

22. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 493 (1941). "On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority *pari passu* from the states." *Id.* at 493. Abel also noted that

There is . . . not a single occasion in the proceedings of the convention itself where the grant of power over commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead, it was uniformly mentioned as a device for

thing then included in interstate commerce was “the mercantile aspect.”²³ The question of whether restrictions on deceptive trade practices by VMCs are encompassed by this aspect remains open.²⁴

The mercantile aspect of commerce in 1787 included foreign commerce and the carrying trade.²⁵ It also included, however, the idea of the merchant “as a person who characteristically possesses correspondents in other states The statement clearly envisaged large-scale operations as the merchant’s task and correspondingly excluded the processes of local distribution.”²⁶ The merchant’s activities “conform nicely to those of the present day importer, commission house, and wholesale firm, with just a dash of the commodity exchange; they hardly embrace those of the jobber, the hawker, or the retailer, who to us is the merchant par excellence.”²⁷

A sketch of eighteenth century merchants recognizes:

the difference between their status and that of tradesmen, and between commerce, and “buying and selling”; of their connection with correspondents in other states; of the possibility of their becoming segregated in a few centers instead of being dispersed throughout the country. They are the means by which the surplus manufactures and the staple agricultural products of the country are marketed, and a supply of goods not locally produced is introduced into the various sections of the country. They are “speculative traders” whose “adventures” are subject to be defeated by the possibility that their “plans may be rendered unlawful before they can be executed.”²⁸

These characteristics describe the modern direct-mail VMC. That entity has traits in common with the importer, the commission house, the wholesale firm, and the commodity exchange, as well as with the hawker and the retailer. Much of the business of the eighteenth century merchant is done by the twentieth century direct marketer. Accordingly, such a corporation is squarely within the ambit of the Commerce Clause.

preventing obstructive or partial regulations by the states.

Id. at 471. Abel draws extensively from FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911), using the documents collected in that work to discuss the stated and implied views of the candidates on all sides of each aspect of the commerce question.

23. Abel, *supra* note 22, at 459. Another aspect of commerce was the “customs and revenue aspect,” Abel, *supra* note 22, at 446, which encompassed the regulation of foreign trade for revenues through duties and imports. See Abel, *supra* note 22, at 480. The third aspect of “commerce” in 1787 was “the maritime and navigation aspect.” Abel, *supra* note 22, at 451. The subject matter at hand—use of DTPAs as revenue tools by AGs—is apparently neither foreign trade as such nor maritime or navigatory matters.

24. The reason the question is open—that no such thing as a virtual corporation existed in 1787—militates against asking the question at all. The founders did not conceive of the problems of virtual corporations, so one should ask only whether those problems are included within “commerce” today. This Article will nevertheless attempt to answer the question.

25. Abel, *supra* note 22, at 462.

26. Abel, *supra* note 22, at 463.

27. Abel, *supra* note 22, at 464.

28. Abel, *supra* note 22, at 464.

While it appears that the major focus of the convention was on foreign trade, the Clause also included the phrase “and among the several States.” This phrase was intended *mainly* in the negative—“to control state-created discriminations and preferences.”²⁹ One purpose of the Clause was the “purely negative function of vetoing state-imposed barriers (and specifically fiscal barriers) to interstate trade.”³⁰ Interstate commerce was discussed only nine times in the convention:

In three of these instances, reference was made to the potentialities of the clause as affording a means of protection against injury inflicted by hostile or harmful restrictions or regulations of sister states, without intimating what particular type of state commercial regulation was thus to be stricken down The other six all refer in like manner to the anticipated operation of the grant [of commerce power to Congress] in preventing discriminatory commercial regulations by states, but mention particular subjects of legislation as being affected.³¹

Thus, the intention of the framers of the Constitution was only to prevent state restrictions on interstate commerce, and not to allow the federal government the quantum of control over interstate commerce that it was given over foreign trade. Under this historical reading of the Commerce Clause, the interstate business of VMCs is an appropriate subject for constitutional protection.

In addition to empowering Congress in the area of interstate commerce, the Commerce Clause prevents the states from interfering with or discriminating against interstate commerce.³² The jurisdiction of the federal courts gives them the procedural power to protect the free market by preventing state actions that would harm interstate commerce.³³ For example, the Court has wielded this power to strike down state laws imposing sales taxes³⁴ and discriminatory use taxes³⁵ on out-of-state companies.

Because discriminatory taxation of out-of-state companies has been held unacceptable by the Supreme Court, states now seek other means of increasing their revenues at the expense of out-of-state businesses. One such method is the discriminatory use by state attorneys general (AGs) of trade practices regulations to force out-of-state companies to avoid expensive litigation by paying settlements.³⁶

Theoretically, the search for more money should be most thorough in those states that have self-funding, or predatory, agencies.³⁷ Many states’ attorneys general are funded, either directly or de facto, from their revenues—the more they bring in, the more they

29. Abel, *supra* note 22, at 469.

30. Abel, *supra* note 22, at 469.

31. Abel, *supra* note 22, at 470. These particular subjects are: state export duties, state imports, tolls on interior waterways, inspection fees, and “compulsory entry and clearance.” Abel, *supra* note 22, at 471.

32. See discussion *infra* subpart V.B.

33. See discussion *infra* subpart V.B.

34. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

35. See discussion *infra* subpart V.B.

36. See discussion *infra* Part IV.

37. A self-funding or predatory state agency is one whose budget depends on its income. See *infra* subpart II.B.4.

have to spend.³⁸ Therefore, they prey on national VMCs as a sort of “cash calf”—unable to defend itself in their state, yet still worth milking.

This Article will describe this practice by state attorneys general, and the burden it imposes on interstate commerce. It will then propose several solutions to this problem, both specific (to solve the problem in a particular case) and general (to remove the problem entirely).

II. FUNDING OF STATE ATTORNEYS GENERAL

Funding for AGs varies among the states. Almost half of the states require that all money received by the AGs be deposited directly into the state treasury. The other half of the states range from self-funded to partially-funded.

A. Direct Deposit into Treasury

The first group of states consists of those that require the AGs to turn over all funds to the state treasury. Alaska,³⁹ Colorado,⁴⁰ Connecticut,⁴¹ Georgia,⁴² Illinois,⁴³ Indiana,⁴⁴ Kansas,⁴⁵ Maryland,⁴⁶ Michigan,⁴⁷ Minnesota,⁴⁸ Mississippi,⁴⁹ Nebraska,⁵⁰ New York,⁵¹

38. See *infra* notes 39-60 and accompanying text.

39. ALASKA STAT. § 37.10.060 (1993) (“All fees and receipts received by the Department of Revenue from any source shall be deposited in the state treasury at least once each month, and credited by the department to the proper fund.”). In an action instituted by the AG, “necessary and reasonable costs of the suit and of the additional counsel shall be advanced by the state, and a sum recovered in the suit shall be deposited in the state treasury.” *Id.* § 37.10.100.

40. COLO. REV. STAT. § 24-31-101(d) (1988) (“Any moneys received by him belonging to the state or received in his official capacity shall be paid forthwith to the department of the treasury.”).

41. CONN. GEN. STAT. ANN. § 35-32(a) (West Supp. 1994) (“All . . . (2) funds awarded to the state or any agency of the state for the recovery of costs and attorney’s fees in an antitrust action, (3) civil penalties imposed . . . , (4) damages collected by the state for injuries to its business or property pursuant to a judgment or settlement agreement in an antitrust action, shall be deposited in the general fund.”). Is this indicative of other funds received?

42. GA. CODE ANN. § 45-12-92 (1990) (“All departments, agencies, and budget units charged with the duty of collecting taxes, fees, assessments, or other moneys . . . shall pay all revenues collected by them into the state treasury on a monthly basis.”).

43. In Illinois, the AG has the duty “to pay into the state treasury all moneys received by him for the use of the state.” ILL. REV. STAT. ch. 15, para. 205/4 (1993). The same information is restated in another paragraph. *Id.* ch. 30, para. 220/11 (1993) (“All fees collected by the . . . AG, shall be paid into the state treasury.”).

44. IND. CODE ANN. § 4-6-2-4 (Burns 1990) (“It shall be the duty of the AG to . . . pay over to the proper officer all money collected at the end of each month.”). The proper officer is the state treasurer. IND. CODE ANN. § 4-8.1-2-6 (Burns 1990) (“Before moneys may be deposited in the state treasury, the treasurer of state must receive from the person or agency making the deposit a report of collections due the state treasury.”).

45. KAN. STAT. ANN. § 75-706 (1989) (“All moneys received by the AG belonging to this state shall, immediately upon receipt thereof, be paid by him or her into the state treasury.”). In another section a list is given of the means by which the AG would receive money that is payable to the treasury. *Id.* § 75-709 (1989) (“It shall be the duty of the AG to pay into the state treasury for the benefit of the general revenue fund all fees

North Carolina,⁵² Pennsylvania,⁵³ Tennessee,⁵⁴ Texas,⁵⁵ Utah,⁵⁶ Virginia,⁵⁷ West Virginia,⁵⁸ Wisconsin,⁵⁹ and Wyoming⁶⁰ are discussed in this group. Although the AGs

and allowances of every kind and character paid to him or her under color of any general or special statute for criminal convictions secured by him or her in violations of the prohibitory law.”).

46. MD. CODE ANN. STATE FIN. & PROC. § 3-304(b) (1988 & Supp. 1994) (“[T]he Unit may enforce a statutory or written contractual obligation of a debtor to pay costs in addition to principal, including collection costs, counsel fees, or interest penalties.”). The funds that are collected are deposited into the State Treasury, unless the unit of State government being awarded the funds is not in the State Treasury, then only the net proceeds go into the State Treasury. *Id.* § 3-305.

47. MICH. COMP. LAWS. ANN. § 14.33 (West 1994) (“All moneys received by the AG, for debts due, or penalties forfeited to the people of this state, shall be paid by him, immediately after the receipt thereof, into the treasury.”).

48. In Minnesota, “[a]ll income, including fees or receipts of any nature, shall be credited to the general fund, except . . . as otherwise provided by law.” MINN. STAT. ANN. § 16A.72 (West Supp. 1994). Except when receiving fees from executive branch agencies, “[a]ll other receipts from assessments must be deposited in the state treasury and credited to the general fund.” MINN. STAT. § 8.15 (1993).

49. MISS. CODE ANN. § 7-5-33 (1991) (“He shall account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or any subdivision thereof.”).

50. In Nebraska, the AG must “pay all money received, belonging to the people of the state, immediately upon receipt thereof, into the state treasury.” NEB. REV. STAT. § 84-205 (1987).

51. In New York, the AG shall “pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.” N.Y. EXEC. LAW § 63 (McKinney 1993).

52. In North Carolina, the AG has a duty to “pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.” N.C. GEN. STAT. § 114-2 (1993).

53. PA. STAT. ANN. tit. 71 § 73-204 (1990) (“The attorney general shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth . . . for collection by any Commonwealth Agency.”).

54. In Tennessee, “it is the duty of every department, institution, office and agency of the state and every officer and employee of state government . . . collecting or receiving state funds, to deposit them immediately into the treasury.” TENN. CODE ANN. § 9-4-301 (1992).

55. In Texas, “[t]he attorney general shall immediately pay into the state treasury money received for a debt or penalty.” TEX. GOV’T CODE ANN. § 402.007 (West 1990).

56. In Utah, the AG has a duty to “account for, and pay over to the proper officer, all moneys which come into his possession, that belong to the state.” UTAH CODE ANN. § 67-5-1(3) (1993). The state treasurer is the proper officer. *Id.* § 67-4-1. (“It is the duty of the state treasurer: (1) To receive and keep all moneys belonging to the state . . .”).

57. VA. CODE ANN. § 2.1-180 (Michie Supp. 1987) provides:

Every state department, division, officer, board, commission, institution . . . collecting or receiving public funds, or moneys from any source whatever, belonging to or for the use of the Commonwealth, or for the use of any state agency, shall hereafter pay the same promptly into the state treasury, without any deductions on account of salaries, fees, costs, charges, expenses, refunds, or claims.

58. In West Virginia, the fees received by the AG when he appeared as counsel for the state, “shall be paid into the state treasury and placed to the credit of the state fund.” W. VA. CODE § 5-3-5 (1994).

59. WIS. STAT. ANN. § 20.906(1) (West 1986) provides:

Unless otherwise provided by law, all moneys collected or received by any state agency for or in

may seem immune from the incentives that this Article will discuss, they are not. The amount of money allocated to the AG is generally proportional to what he adds.⁶¹

B. De Facto Funding Methods

The AGs' offices in the remaining states range from partially-funded to self-funded. These states are classified into the four following groups: percentage of funds/partial control; percentage of funds/total control; total funds/partial control; and total funds/total control.

1. Attorney General Has Partial Control Over Certain Funds.—The following states allocate a percentage of the funds received by the AG into a special fund over which the

behalf of the state . . . shall be deposited in or transmitted to the state treasury All moneys paid into the treasury shall be credited to the general purpose revenues of the general fund unless otherwise specifically provided by law.

No specific instances are cited that would allow the AG to circumvent this rule. For example, in WIS. STAT. ANN. § 776.43 (1993), any “necessary costs and disbursements incurred in bringing and prosecuting such action by the attorney . . . shall be audited by the department of administration and paid out of the state treasury.”

60. WYO. STAT. § 9-1-409(c) (1994) (“Every state officer, employee, department or commission receiving revenue for or on behalf of the state from any source shall pay all revenue to the state treasurer as directed by him.”).

61. *See supra* notes 39-60.

AG exercises partial control: Arizona,⁶² Arkansas,⁶³ Florida,⁶⁴ Kentucky,⁶⁵ Louisiana,⁶⁶

62. ARIZ. REV. STAT. ANN. § 41-191.03(B) (Supp. 1992) (“The attorney general may expend from the collection enforcement revolving fund such monies as are necessary for the collection of debts owed to the state, including reimbursing other accounts or departments within the office of the attorney general from which monies or services for collection were provided.”). The funds are allocated 35% to the special fund and 65% to the general fund. *Id.* § 41-191.03(C), (D).

63. ARK. CODE ANN. § 19-2-101(a)(1), (8) (Michie 1994) provides:

It shall be the duty of . . . the Attorney General . . . to issue their receipts respectively for all moneys coming into the State Treasury through their departments, respectively, on account of:

(1) Fees of every kind and character; . . . and

(8) All matters pertaining to the duties of the Attorney General when money belonging to the state is to be collected

For example, “[a]ll moneys collected from civil penalties shall be paid to the State Treasurer for deposit in the general fund.” *Id.* § 20-21-204(7)(A) (Michie 1994).

Although § 20-21-204(7)(A) provides that all moneys be deposited in the general fund, Arkansas has a special fund called the Elder and Disabled Victims Fund, in which certain moneys received from civil penalties are deposited. ARK. CODE ANN. § 4-88-202(b) (Michie Supp. 1993) (“The civil penalties imposed . . . shall be deposited with the State Treasurer and placed into the Elder and Disabled Victims Fund, a special fund created in the state treasury and administered by the Attorney General for the investigation and prosecution of deceptive acts against elder and disabled persons and for consumer education initiatives.”).

64. FLA. STAT. ch. 16.53(2) (Supp. 1994) provides:

Twenty percent of all moneys recovered by the Attorney General on behalf of the state, its agencies, or units of state government and 10 percent of all moneys recovered on behalf of local governments . . . or, alternatively, attorneys’ fees and costs, whichever is greater, in any civil action for violation of state or federal antitrust laws shall be deposited in the fund.”

The remainder of the money is deposited in the General Revenue Fund. *Id.* ch. 16.53(4)(b).

The special fund remains part of the State Treasury, and the Legislature retains control over it. *Id.* ch. 16.53(1) (“There is created in the State Treasury the Legal Affairs Revolving Trust Fund, from which the Legislature may appropriate funds . . .”). This provision allows the State Legislature to fund other programs with the money the AG’s office generates and gives the AG an incentive to litigate as much as possible.

65. KY. REV. STAT. ANN. § 218A.435(7) (Michie/Bobbs-Merrill Supp. 1993) (“The principal of the trust fund shall be distributed: (a) Eighteen percent (18%) of the funds received in any fiscal year shall be allocated to the unified prosecutorial system to be disbursed by the Attorney General . . .”).

The AG has only partial control over the funds in that the AG may disburse the percentage of funds allocated to him by the Justice Cabinet. *Id.* § 218.435(4) and 218.435(6). (“The trust fund shall be administered and audited by the Justice Cabinet. . . . The Justice Cabinet shall ‘allocate the moneys in the fund quarterly, on a percentage basis.’”).

In other proceedings, the AG will deposit all moneys into state depositories and maintain records for the State Treasurer. KY. REV. STAT. ANN. § 41.070(1) (Baldwin 1993) (“All receipts of any character of any budget unit, all revenue collected for the state, and all public money and dues to the state shall be deposited in state depositories . . .”).

66. The money for the fund comes from judgments and settlements which the treasurer then matches for deposit into the fund. LA. REV. STAT. ANN. § 49:259B (“[T]he treasurer . . . shall pay into the fund an amount equal to the amount of proceeds received by the state from court-awarded judgments and settlements except those judgments and recoveries made on or pertaining to any office of risk management litigation,

Missouri,⁶⁷ Nevada,⁶⁸ New Hampshire,⁶⁹ New Jersey,⁷⁰ Ohio,⁷¹ and Washington.⁷²

recovery, or intervention.”). The money is then appropriated by the legislature to the Department of Justice for operating expenses. *Id.* § 49:259C (“The monies in the fund shall be available for appropriation by the legislature to the Department of Justice solely for the purpose of paying the . . . general operating expenses of the department, and defraying the costs of expert witnesses, consultants . . .”).

67. MO. ANN. STAT. § 416.081(3) (Vernon 1990) (“Ten percent of all recoveries obtained by the attorney general . . . whether by settlement or judgment, shall be paid into the state treasury to the credit of the antitrust revolving fund.”). The money in the fund is available for the payment of all costs and expenses incurred by the AG in investigation, prosecution and enforcement of laws relating to antitrust, trade regulation, restraint of trade, or price fixing activities. *Id.* § 416.081(2). The AG must, however, present a voucher to the State Auditor who will present a warrant to the State Treasurer. *Id.* § 416.081(1).

Missouri did have an Attorney General Court Cost Fund. MO. REV. STAT. § 27.080 (1992). This fund has been abolished by *id.* § 33.571(2), and is now an account in the general fund of the state treasury (“The state treasurer and the commissioner of administration shall establish appropriate accounts within the state treasury and . . . those accounts shall be the successors to the enumerated funds.”). *Id.* § 33.571(2).

68. NEV. REV. STAT. ANN. § 228.097 (Michie 1992) (“Except as he is required by NRS 228.096 to deposit certain money in a special fund, the attorney general shall deposit in the state general fund all money collected by him which is in excess of the amount authorized for expenditure by the legislature.”).

Nevada statutorily creates, however, a special revenue fund for the AG called the attorney general’s special fund. *Id.* § 228.096(1), 228.096(2) (“The attorney general’s special fund is hereby created as a special revenue fund. . . . 2. . . . all money received by the attorney general . . . relating to private investigators and to recoveries for unfair trade practices must be deposited in the state treasury for credit to the AG’s special fund.”).

The amount of money deposited into the special fund from the enforcement of unfair trade practices is set forth in NEV. REV. STAT. ANN. § 598A.260 (Michie 1994) (“1. All attorney’s fees and costs and 10 percent of all recoveries for credit to the AG’s special fund. 2. The balance of the recoveries for credit in the state general fund.”).

69. N.H. REV. STAT. ANN. § 125-F:22IV (1990) (“All civil penalties collected under this section, shall be forwarded to the state treasurer. The state treasurer shall deposit all moneys received under this section . . . to the public health services special fund, which shall be nonlapsing.”).

70. N.J. STAT. ANN. § 52:18-29 (West 1986) (“All moneys of the state collected or received by any state institution, board, commission, department, committee, agent or servant, from any source, shall except as otherwise provided by law be paid into the state treasury . . .”).

However, there is a revolving fund for the expense incurred by the AG in antitrust litigation. *Id.* § 56:9-19 (“[T]here are hereby appropriated as a revolving fund the sums derived [from litigation instituted by the Attorney General under this act or the antitrust laws of the United States] . . . for the purpose of paying any additional expenses incurred by the Attorney General in . . . litigation instituted under the antitrust laws of the United States.”). The Director of the Division of Budget and Accounting and the Legislative Budget and Finance Director must approve any expenditures from this fund. *Id.*

71. OHIO REV. CODE ANN. § 109.081 (Anderson Supp. 1993) (“Nine per cent of all amounts collected by the AG, . . . on claims due the state shall be paid into the state treasury to the credit of the AG claims fund, which is hereby created. The fund shall be used for the payment of expenses incurred by the office of the AG.”).

A second special fund is the attorney general antitrust fund in which ten percent of monies received from antitrust litigation are allocated. *Id.* § 109.82. (“Ten per cent of all recoveries obtained from antitrust cases by settlement or judgment in any court . . . shall be paid into the state treasury to the credit of the attorney general antitrust fund, which is hereby created. The fund shall be used for expenses of the antitrust section.”).

2. *Attorney General Has Total Control Over Certain Funds.*—In four states, the AG has total control of a percentage of the moneys deposited into a special fund. The states are Hawaii,⁷³ Maine,⁷⁴ North Dakota,⁷⁵ and Oklahoma.⁷⁶

72. “The Attorney General shall: . . . (11) [p]ay into the state treasury all moneys received by him for the use of the state.” WASH. REV. CODE ANN. § 43.10.030 (West 1983). The Legal Services Revolving Fund was created in the state treasury for legal services provided by the AG to other state agencies. *Id.* § 43.10.150. (“A legal services revolving fund is hereby created in the state treasury for the purpose of a centralized funding, accounting, and distribution of the actual costs of the legal services provided to agencies of the state government by the attorney general.”). Court costs, attorneys’ fees, and other expenses recovered by the AG shall be deposited in the fund. *Id.* § 43.10.200. Disbursements are pursuant to vouchers from the AG. *Id.* § 43.10.160.

73. The AG “shall account, in the manner provided by law, for all fees, bills of costs and other moneys collected or received by him by virtue of his office.” HAW. REV. STAT. § 28-7 (1988). A revolving fund called the criminal forfeiture fund is established in the Department of the AG. HAW. REV. STAT. § 712A-16(4) (1994) (“There is established in the department of the attorney general a revolving fund to be known as the criminal forfeiture fund, . . . in which shall be deposited one-half of the proceeds of a forfeiture. . . . All moneys in the fund shall be expended by the attorney general. . . . The payment of any expenses necessary to seize, detain, . . . or sell property seized, detained or forfeited.”). The AG has total control over this fund in that he may “promulgate rules and regulations concerning . . . the use of the fund.” *Id.* § 712A-16(5).

Hawaii has, with a few exceptions, legislatively abolished its special funds. *Id.* § 37-51 (“The purpose of this part is to place all special funds under legislative and executive budgetary control in the same manner as the general fund, with the exception of those funds subject to applicable federal laws or regulations and payments on principal and interest on revenue bonds.”).

74. ME. REV. STAT. ANN. tit. 5, § 203-A (West Supp. 1993). When the AG receives money for antitrust enforcement or the enforcement of the Maine Unfair Trade Practices Act, she deposits the money into a special revenue account. *Id.* The statute provides:

When, pursuant to a court order or settlement, the attorney general receives money that is specifically designated for antitrust enforcement or for enforcement of the Maine Unfair Trade Practices Act, the Attorney General is authorized to expend such funds for expert witness fees, . . . and any other purpose in accordance with the court order.

Id.

75. The AG has a duty to “[p]ay into the state treasury all moneys received by him for the use of the state.” N.D. CENT. CODE § 54-12-01.13 (Supp. 1993).

North Dakota does have two special funds which allow the AG total discretion in expending them. One fund is called the Attorney General Assets Forfeiture Fund, which includes all funds from the forfeiture of property. *Id.* § 54-12-14 (“The funds are appropriated to the attorney general . . . (3) For paying, at the discretion of the attorney general, any expenses necessary to seize, detain, inventory, safeguard, maintain, . . . or any other necessary expenses incident to the seizure, detention, or forfeiture of such property.”). The fund may not exceed \$500,000 and any monies in the excess of that amount are deposited in the general fund. *Id.*

76. The AG has a duty “[t]o pay into the State Treasury, immediately upon its receipt, all monies received by him belonging to the state.” OKLA. STAT. ANN. tit. 74 § 18b (West Supp. 1994). Of the money received by the AG and paid into the State Treasury, 25% will be deposited into a special fund designated the AG’s Evidence Fund. *Id.* tit. 74 § 19 (“[T]wenty-five percent shall be deposited in a special agency account fund in the State Treasury, designated the Attorney General’s Evidence Fund, which fund shall be a continuing fund.”). The money for the fund comes from “reimbursement of court costs, fees and other expenses and other appropriated monies” and will be used by the AG “for necessary expenses relative to any pending case or other

3. *Attorney General has Partial Control Over All Funds.*—Eleven states have funds into which all the monies from an action are paid, but the AG retains only partial control over the fund. The states are California,⁷⁷ Montana,⁷⁸ North Dakota,⁷⁹ Ohio,⁸⁰ Oklahoma,⁸¹ Oregon,⁸² Rhode Island,⁸³ South Dakota,⁸⁴ Vermont,⁸⁵ and Washington.⁸⁶

matter within the official responsibility of the Attorney General.” *Id.* The cost of litigation shall be paid out of the Attorney General’s Evidence Fund. *Id.* tit. 74 § 20hB (“Cost of litigation shall include, but is not limited to court costs, deposition expenses, travel and lodging, witness fees and other similar costs . . .”).

77. “The Attorney General shall account for and pay over to the proper officer all money which may come into his possession belonging to the State or to any county.” CAL. GOV’T CODE § 12521 (West 1992). However, the money from charitable trust enforcement actions by the AG, shall be used for future charitable trust enforcement actions. *Id.* § 12598(d) (“All moneys received by the Department of Justice pursuant to this section shall be deposited into the General Fund and shall be used to offset the costs of future charitable trust enforcement actions by the attorney general.”).

78. A 1991 amendment to the Montana Code, deleted the duty that the AG must “account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or to any county,” with no comparable statement as a substitute. MONT. CODE ANN. § 2-15-501 (1992). This amendment suggests that the AG no longer has this obligation and can control the funds of his office.

This interpretation may be supported by *id.* § 17-2-202, which provides:

The department of administration may, in its discretion, permit any state agency to retain in its possession, under conditions the department of administration may prescribe, moneys that would otherwise be deposited in the agency fund. . . . The department of administration may cancel this permission and require the deposit of the moneys with the state treasurer.

However, since permission would remain within the discretion of the Department of Administration, the AG would retain only partial control.

79. N.D. CENT. CODE § 54-12-18 (Supp.1993) (“The attorney general shall deposit all moneys recovered by the consumer protection division for refunds to consumers in cases where persons or parties are found to have violated the consumer fraud laws, all costs, expenses, attorney’s fees, and civil penalties collected . . . regarding consumer protection or antitrust matter . . .”). The monies are to “pay costs, expenses, and attorney’s fees and salaries incurred in the operation of the consumer protection division.” *Id.* § 54-12-18(4).

80. OHIO REV. CODE ANN. § 109.11 (Anderson Supp. 1992) (“There is hereby created in the state treasury the attorney general reimbursement fund that shall be used for the expenses of the office of the AG in providing legal services and other services on behalf of the state.”). Monies received for reimbursement for legal services and other services that have been rendered to other state agencies are paid to the state treasury and to the credit of the fund. *Id.*

81. OKLA. STAT. ANN. tit. 74 § 19.1 (West Supp. 1994) provides:

There is hereby created in the State Treasury a revolving fund for the Office of the Attorney General to be designated the “Attorney General’s Law Enforcement Revolving Fund.” The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of any monies received from the sale of confiscated property, the seizure and forfeiture of confiscated monies, property, gifts, bequests, revises or contributions, public or private, including federal funds unless otherwise provided by federal law or regulation. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Attorney General for the purposes of investigation, enforcement and prosecution of cases involving criminal and forfeiture laws of this state and the United States of America or to match federal grants. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law

4. *Attorney General is Self-Funded.*—In eight states the office of the AG is self-funded. The statutes in four states require the AG to “account for” monies received. This rule implies that the AGs have total control of incoming funds with the single limitation of having to “account” to the treasury. These states are Iowa,⁸⁷ Massachusetts,⁸⁸ New

with the Director of State Finance for approval and payment.

Id. The AG does not have total control over the funds because the Director of State Finance must approve of any expenditures from the fund. *Id.*

82. OR. REV. STAT. § 180.095(3) (1991) (“All sums of money received by the Department of Justice under a judgment, settlement or compromise, including damages, attorney fees, costs, disbursements and other recoveries, in actions and suits under the federal antitrust laws shall, upon receipt, be deposited with the State Treasurer.”). The monies in the account will be disbursed with approval of the State Treasurer “to pay for . . . all costs, disbursements and other litigation expenses incurred by the Department of Justice in preparing, commencing and prosecuting actions and suits under the federal antitrust laws.” *Id.*

A second special account is the Department of Justice Operating Account, from which monies are appropriated to pay Department of Justice expenses incurred by the Department of Justice except litigation expenses for actions and suits under federal antitrust laws. *Id.* § 180.180. These monies are deposited in the State Treasury. *Id.*

83. R.I. GEN. LAWS § 7-15-4.1(a) (1993) (“There is hereby established within the general treasury of the state a special fund to be known as the asset forfeiture fund in which shall be deposited all proceeds of any forfeitures.”). To receive money from this fund, the AG must apply to the presiding justice upon the application of a law enforcement agency. *Id.* § 7-15-4.1(d). (“[T]he Attorney General may apply to the presiding justice of the superior court for the release from the general treasury of sums of money not to exceed fifty thousand dollars (\$50,000) per investigation.”).

84. The AG has a duty “[t]o pay into the state treasury all moneys received by him, belonging to the state, immediately upon the receipt thereof.” S.D. CODIFIED LAWS § 1-11-1(10) (1992). The AG does, however, have access to the antitrust special revenue fund, into which the AG has the power to make deposits and from which the AG has the power to make disbursements under court order. “The fund may receive funds paid to the state of South Dakota as a result of judgments or settlements of antitrust lawsuits.” *Id.* § 1-11-6.1 “The Attorney General is hereby authorized to make deposits into and disbursements from said fund, pursuant to order of a court, on vouchers approved by him.” *Id.* § 1-11-6.3.

85. VT. STAT. ANN. tit. 32 § 502(a) (Supp. 1992) (“The gross amount of money received in their official capacities by every administrative department, board, officer or employee, from whatever source, shall be paid forthwith into the state treasury Such moneys shall be credited to such funds as are now or may hereafter be designated for the deposit thereof.”). The Commissioner of Finance and Management must warrant any expenditure from the funds. Vermont has an Anti-Trust Restitution fund and a Consumer Fraud Recoveries Fund similar to the funds discussed above. *Id.* tit. 32 § 589.

86. WASH. REV. CODE ANN. § 43.10.215 (West 1983) (“There is hereby created the antitrust revolving fund in the custody of the state treasurer which shall consist: of . . . funds awarded to the state or any agency thereof for the recovery of costs and attorney fees in an antitrust action”). The AG may expend funds “for the payment of costs, expenses and charges incurred in the preparation, institution and maintenance of antitrust actions under the state and federal antitrust acts.” *Id.* § 43.10.220.

87. IOWA CODE ANN. § 13.2 (West 1989) (“It shall be the duty of the attorney general . . . [to] promptly account, to the treasurer of state, for all state funds received by the attorney general.”).

88. In Massachusetts, “[t]he AG and the district attorneys shall account to the state treasurer for all fees, bills of costs and money received by them by virtue of their offices.” MASS. GEN. LAWS ANN. ch. 12, § 29 (West

Mexico,⁸⁹ and South Carolina.⁹⁰ The other four states are Alabama,⁹¹ Arizona,⁹² Delaware,⁹³ and Idaho.⁹⁴ Their statutes specifically allow them total control over incoming funds.

III. AGENCY BEHAVIOR

More than half of the state AGs are at least partially self-funded. This Part will discuss the critical effect of self-funding on the behavior of AGs. First is an examination

1986).

89. In New Mexico, the AG has a duty to "promptly account to the state treasurer for all state funds received by him." N.M. STAT. ANN. § 8-5-2 (Michie 1994).

90. In South Carolina, "[t]he Attorney General shall account to the State Treasurer for all fees, bills of costs and moneys received by him by virtue of his office." S.C. CODE ANN. § 1-7-150 (Law. Co-op. 1986).

91. ALA. CODE § 36-15-4.2 (1993) provides:

(a) There is hereby established in the state treasury a special fund to be known as the attorney general's litigations support fund.

(b) The said fund may consist of any and all moneys designated by a court order as reasonable attorney fees and related expenses received by the attorney general . . . as a result of any fees, fines, restitution, forfeitures, penalties, costs, interest or judgments collected pursuant to any criminal or civil litigation

(c) The Attorney General shall have the authority to expend moneys appropriated by the legislature from the fund

(e) The appropriation of these moneys shall be in addition to any moneys appropriated to the Attorney General's office from the state general fund"

92. In addition to the collection enforcement fund previously mentioned, Arizona had "created an antitrust enforcement revolving fund to be administered by the attorney general." ARIZ. REV. STAT. ANN. § 41-191.02A (1992). All monies recovered by the AG as a result of enforcement of antitrust, restraint of trade, or price-fixing activities or conspiracies will be deposited in the fund for the AG to use in future litigation of such issues. *Id.* §§ 41-191.01A, 41-191.02C. "Monies in the fund shall be used by the attorney general for costs and expenses of antitrust enforcement undertaken by his office and may be expended for such items as filing fees, courts costs, travel, depositions, . . . investigations, and like costs and expenses." *Id.* § 41-191.02C.

93. DEL. CODE ANN. tit. 6, § 7329(a) (1992). The fund will consist of moneys received by the state in securities actions ("All moneys received by the State as a result of administrative or court actions brought by the Attorney General . . . shall be credited by the State Treasurer to a fund to be known as the "Investor Protection Fund"). *Id.* The AG is authorized to expend moneys from the fund to further litigate administrative and court actions. *Id.* § 7329(d) ("The Attorney General is authorized to expend from the Investor Protection Fund such moneys as are necessary for: (1) The payment of costs, expenses and charges incurred in the preparation, institution and maintenance of administrative and court actions").

94. In Idaho, it is the duty of the AG to "account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or to any county." IDAHO CODE § 67-1401.3 (1989). The proper officer is the state treasurer. *Id.* § 67-1302. In an action for consumer protection with regard to monopolies and trade practices, however, the monies received by the AG are deposited in a special consumer protection account. *Id.* § 48-606 ("All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection account which is hereby created in the state operating fund. Moneys . . . shall be used for the furtherance of the attorney general's duties and activities under this chapter.").

of the rationale for regulation in a democratic society, focusing on rational choice literature. Second is a discussion on the incentive structures in which regulatory agencies act, concluding that the incentive structure encourages agencies and their members to behave in a manner that serves their self-interests and not those of the public. Third is a discussion of self-interested behavior in regulation. Fourth is an examination of the Federal Trade Commission as an example of self-interested behavior at the federal level. The final section relates perverse incentives for agency behavior to efforts to remedy the problem of strangulation of VMCs, and the implications of failure to do so.

A. Public Choice and Regulation

In a democratic society, people make collective decisions in order to prevent self-interested individuals from imposing unfair costs on other individuals.⁹⁵ The study of collective choice examines the economization of decision costs by comparing public decision-making to the economic theory of markets.⁹⁶ These studies also address the synonymous field, "social choice."⁹⁷ This discussion compares the Madisonian theory of democracy with modern economic theory to explain the use of collective choice in a democratic society.⁹⁸ While collective decision-making sacrifices some of the utility of each individual, it does so in order to protect individuals from others, thus preserving individual benefits in the long run. In modern societies, agencies or other representatives of the public make collective decisions in order to reduce decision-making costs.⁹⁹ The

95. VINCENT OSTROM, *THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION* 45 (1989).

The author stated:

The assumption that individuals will adopt a maximizing strategy implies the consistent choice of those alternatives which an individual thinks will provide the greatest net benefit as weighed by his or her own preferences. This can be expressed alternatively as the choice of the least-cost strategy and is equivalent to the efficiency criterion.

Id.

96. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 17 (1962).

97. Gary Durden, *Determining the Classics in Social Choice*, 69 *PUB. CHOICE* 265 (1991) ("The term 'social choice' is used broadly, to include not only works by K.J. Arrow . . . but also Anthony Downs, James Buchanan, Gordon Tullock, Mancur Olson, William Niskanen, and others from modern 'public choice.'").

98. BUCHANAN & TULLOCK, *supra* note 96, at 24; Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 *DUKE L.J.* 469, 520 n.189 (1992) ("Public choice can be defined as the economic study of nonmarket decisionmaking, or simply the application of economics to political science." (quoting DENNIS C. MULLER, *PUBLIC CHOICE* 1 (1979))). The author further stated that:

The FDIC can be seen as an agency trying to expand its power and protect the insurance fund. Members of Congress, meanwhile, have been concerned since the passage of FIRREA with avoiding voter backlash for the bailout. With the interests of FDIC and Congress thus aligned, the result has been a 'strict' approach to bank and thrift failures, expressed as the grant of extraordinary new powers to the FDIC. The temptation for the agency and Congress is to push costs of the bailout off-budget and onto third parties.

Id. at 520-521.

99. BUCHANAN & TULLOCK, *supra* note 96, at 5; SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* 187 (1992) has noted that:

Self-interested behavior is a fact of life. People who recognize this are neither liberal or

importance of this cost reduction must be emphasized in order to understand the reconciliation of conflicting interests.¹⁰⁰

A considerable body of literature discusses the modeling and analysis of individual benefits and costs in collective decision-making. The above statements, however, provide a good basis for examining bureaucracies and their role in regulation. If the public agents assigned to make public decisions do so in a manner that results in increased costs, whether imposed directly or incurred through the decision-making process, then the agency is not serving the best interests of the public. Logic dictates that regulation should be restricted to those activities that serve the public interest at large. Likewise, it is fair to argue that any agency behavior that imposes unnecessary costs on the public is outside the scope of the mission of the agency.

The public choice model, as presented here, explicitly requires that an agency be chartered to work within a structure that is conducive to efficient operation. This prescription, however, is not always strictly followed.¹⁰¹ Many analyses of bureaucratic structure, and the results thereof, lead to the conclusion that many inefficiencies result from attempts to improve the situation of agency personnel, especially administrators.¹⁰² Most economic theories of agency behavior suggest that all actors in the political arena, including bureaucrats, wish to improve their own situations.¹⁰³ As bureaucrats gain tenure

conservative. They are realists. The dream of foregoing a public policy consensus is just that. People have different goals, tastes, talents, and resources. Procedures for managing conflict are central to the design of social institutions.

The market is one such institution. Its great strength in a diverse world is its impersonality. . . . Political institutions and decisionmaking procedures are required for decisions that can only be made collectively.

Id.

100. BUCHANAN & TULLOCK, *supra* note 96, at 4; ROSE-ACKERMAN, *supra* note 99, at 187.

101. See ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 235 (1953).

The authors stated that:

The prescribed charter of a bureaucracy represents, to a very high degree, a conscious and deliberate attempt to adapt the structure and personnel of the organization to the most efficient achievement of goals prescribed by the top leaders in, or outside, the bureaucracy. The operating charter tends, of course, to depart from prescription, sometimes quite extensively.

Id.

102. *Id.* at 243. See OSTROM, *supra* note 95 at 53; GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY*, PUBLIC AFFAIRS PRESS (1965).

103. BUCHANAN & TULLOCK, *supra* note 96, at 5; GORDON TULLOCK, *CONCLUDING THOUGHTS IN PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION* 336 (1987). See also LOUIS K. BRAGAW, *MANAGING A FEDERAL AGENCY: THE HIDDEN STIMULUS* 6 (1968); WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967). The author noted that:

The fundamental premise of the theory is that bureaucratic officials, like all other agents in society, are significantly—though not solely—motivated by their own self-interests. Therefore, this theory follows the tradition of economic thought from Adam Smith forward, and is consistent with recent contributions to political science made by such writers as Simmel, Truman, Schattschneider, Buchanan, tullock, Riker, and Simon.

in their agency, their interest in maintaining a foothold in the agency increases, due to their potential losses and their loyalty to the agency. As a result, they are more selfish and exhibit less public-oriented behavior.¹⁰⁴ In light of these tendencies, that public choice theorists question regulatory policy on a consistent basis is not surprising.¹⁰⁵

B. Incentive Structure in American Public Policy

In the social sciences, it has become commonplace to say that politicians and bureaucrats behave in their own best interests. This is no longer cynical or speculative, but simply realistic.¹⁰⁶ The truth of this assertion was not commonly recognized, however, until James Buchanan and William Niskanen each produced extensive models on self-interested behavior in agencies.¹⁰⁷ Buchanan's work won him a Nobel prize, and has been cited extensively. Niskanen, an Economic Adviser to President Ronald Reagan and later Chairman of the Cato Institute, provided a model that applies more directly to this discussion.¹⁰⁸ Under Niskanen's model, the public choice rationale, government officials

Specifically, the theory rests upon three central hypotheses:

....

2. Bureaucratic officials in general have a complex set of goals including power, income, prestige, security, convenience, loyalty (to an idea, an institution, or the nation), pride in excellent work, and desire to serve the public interest. This book postulates five different types of officials, each of which pursues a different subset of the above goals. But regardless of the particular goals involved, every official is significantly motivated by his own self-interest even when acting in a purely official capacity.

Id. at 2.

104. ADA W. FINIFTER, *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II* at 416 (1993).

105. In ROSE-ACKERMAN, *supra* note 99, at 15, the author noted that:

As cost-benefit analysts began to accept the limitations of their techniques, public choice scholars started to use economic analysis to undermine the legitimacy of existing regulatory policies. They saw legislation as the outcome of political dealmaking that frequently did no more than preserve or enhance the monopoly power of existing producers. Some concluded that government should be prevented from intervening in the economy since its actions were usually no more than devices to benefit narrow, well-organized interests.

ROSE-ACKERMAN, *supra* note 99, at 15.

106. ROSE-ACKERMAN, *supra* note 99, at 187.

107. ROGER E. MEINERS & BRUCE YANDLE, *REGULATORY LESSONS FROM THE REAGAN ERA: INTRODUCTION 5* (1989). The authors commented that:

The media commonly described Buchanan's contribution as the 'discover' that politicians and bureaucrats work to further their own self-interest. Shallow-minded political commentator's . . . attempted to belittle Buchanan's work by commenting to the effect that any idiot knows that people act in their own self-interest. Actually, economists for years talked, and most political scientists today talk, as if elected and appointed officials do not operate in their own self-interest.

Id.

108. See Albert Breton & Ronald Wintrobe, *The Equilibrium Size of a Budget-Maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy*, 83 J. POL. ECON. 195 (1975); Dennis Patrick Leydon & Albert N. Link, *Privatization, Bureaucracy, and Risk Aversion*, 76 PUB. CHOICE (1993).

are the cause of most inefficiency due to their budget-maximizing tendencies.¹⁰⁹ The overall structure of the system creates an environment in which individuals must sacrifice efficiency in order to improve their own situations. The means for these improvements are higher salaries, better perks, more power, and higher importance, all of which equate to a great need for the continual expansion of agencies and their budgets.¹¹⁰ This incentive structure manifests itself visibly in the relationship between agency administrators and their employees. Both rewards to individuals and the performance of the bureau are dependent upon the agency's budget. Because of this dependence, both administrators and their employees recognize that budget maximization is key to their respective goals.¹¹¹

The incentive structure of bureaucracy encourages agencies to build constituencies or engage in other means of bringing themselves either more money, greater importance, or both.¹¹² This incentive structure interacts with the self-interest of individuals to

109. NISKANEN, *supra* note 103, at 102; Robert E. Easton, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 2002 (1990) ("A common theory suggests that the prime motivation for administrative behavior is the desire to accumulate the largest budget or other elements of administrative prestige or independence."). See also JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 171 (1986). The author asked:

What do bureaucrats seek to maximize? One answer is provided by W.A. Niskanen, a member of the Council of Economic Advisers in the Reagan administration and a former vice-president of the Ford Motor Company [B]ureaucrats seek to maximize the size of their agency. . . . [T]he bureaucrat attempts to promote the activities of his bureau in many of the same ways that a firm attempts to increase its size.

. . . .

It is when competition among bureaucrats becomes limited that the bureaucrats' interest and the public interest may diverge most markedly. Niskanen argues that there has been an increasing centralization within the bureaucracy. The attempts to 'rationalize' the bureaucracy, to ensure that two government agencies do not perform duplicative functions, has the disadvantage that it reduces competition.

Id.

110. FINIFTER, *supra* note 104, at 387; Ronald N. Johnson & Gary D. Libecap, *Agency Growth, Salaries and the Protected Bureaucrat*, 27 ECON. INQUIRY 431, 431-35 (1989).

111. WILLIAM A. NISKANEN, *BUREAUCRACY: SERVANT OR MASTER?* 24 (1973). He noted that: Profit maximization is also not inherently consistent with higher level goals; in some conditions, it leads to exploiting either consumers, owners of factors, or both. Budget maximization, also, may or may not be consistent with higher-level goals; it can lead to the supply of a valued service or to exploitation.

A bureau's employees . . . indirectly influence a bureaucrat's tenure both through the bureaucrat's personal rewards and through the real and perceived performance of the bureau The employees' interests in larger budgets are obvious and similar to that of the bureaucrat: more opportunities for promotion, more job security, etc., and more profits to the contract suppliers of factors.

Id.

112. William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 618 (1968).

perpetuate the growth of agencies in size and in budget. One writer has noted that members of agencies "act as if they own their positions" and thus use them for their own benefit.¹¹³ The image of the self-interested agency is similar to the feudal system of the Middle Ages. When noblemen bought tax franchises from kings at fixed prices, they were able to maximize their income by taxing the citizens more than they had to pay.¹¹⁴ The problem involves the inability of bureaucrats to distinguish between their own well-being and that of their agency.¹¹⁵ In order to increase their salary, perks, and other benefits, bureaucrats must work to increase the factor that most directly affects these variables—the budget of the agency.¹¹⁶

Niskanen's model of budget-maximization is widely cited as applicable to all types of public entities.¹¹⁷ The progression is toward higher budgets in terms of a supply and demand calculus. Bureaucrats create more demand for their services, then require more funding, and then continue to shift their demand curve so as to provide a spiraling growth pattern.¹¹⁸ That these growth patterns are not efficient in serving the public interest is generally accepted.¹¹⁹ The effects of the growth pattern and the overall structure are described in the literature on "institutional choice," in which the interests of the public are simply replaced by the interests of the institution, and its individual members.¹²⁰ The theory of institutional choice finds that the primary negative factor in any bureaucracy is that it is probably structured in such a way that rational employees are encouraged to act

113. CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* 14 (1986) ("People tend to act as if they own their positions; they use them to generate income, status, and other things that rightfully belong to the organization.").

114. *Id.* at 15. The author stated that:

During the Middle Ages, the king who wanted revenues from the land and from the people he controlled would sell a tax franchise to someone, generally a nobleman. This official would agree to pay the king a set fee; he was then free to collect as much money as he could from the people and keep anything beyond the set fee.

Id.

115. *Id.* at 18 ("The practice of feathering one's nest in large part reflects the problem of separating the interests of the person from the interests of the organization. In our organizational society, this becomes increasingly difficult.").

116. NISKANEN, *supra* note 111, at 294.

117. Dieter Bos et al., *Bureaucratic Public Enterprises*, ZEITSCHRIFT FÜR NATIONALÖKONOMIE SUPPLEMENT 127 (1984) ("The public utility acts similarly to a W.A. Niskanen mixed bureau, maximizing the sum of discounted revenues over the different periods.").

118. NISKANEN, *supra* note 111, at 293, 300.

119. NISKANEN, *supra* note 111, at 36-42; STIGLITZ, *supra* note 109, at 171; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 101 (1983) ("Rather than seeking to maximize social benefit, administrators will seek to maximize 'budgets,' 'votes,' or 'power.'"). See generally John A. C. Cronybeare, *Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy*, 28 AM. J. POL. SCI. 479 (1984); William A. Niskanen, *Competition among Government Bureaux*, 22 AM. BEHAV. SCIENTIST 517 (1979).

120. STIGLITZ, *supra* note 109, at 171.

wrongly.¹²¹ Empirical tests of agency behavior in public service provision support these arguments.¹²²

Niskanen's work on incentive structures is not limited to the relationship between the individual employee and the agency. The "incentive structure" is the entire political process. The constraints and opportunities presented to agencies by appropriating bodies, budgeting entities, executives, businesses, and the public, all contribute to the incentive for agency personnel to increase their domain in any way possible. The most important relationship is between the agency and its sponsor—the legislature that provides its appropriations. This relationship is a "bilateral monopoly," in which threats, respect, gaming, and appeals to mutual objectives are common.¹²³ These characteristics stem from the monopolistic relationship between the legislature and the agency.¹²⁴ The legislature, in most cases, cannot obtain the services provided by any one agency from any other, and most agencies cannot fund themselves without appropriations. Agencies become interest groups, lobbying the legislature for favors, especially budgetary ones.¹²⁵ Legislative

121. JACK H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* 173 (1987) ("The problem with bureaucracies is that they have structured a system of incentives that guides rational individuals to the wrong behavior.").

122. Richard S. Sterne et al., *Serving the Elderly?—An Illustration of the Niskanen Effect*, 13 *PUB. CHOICE* 81, 90 (1972).

123. See NISKANEN, *supra* note 111, at 113. The author noted that:

A bureau's environment is defined by its relations with three groups: first, the collective organization which provides the bureau's recurring appropriation or grant; second, the suppliers of labor and material factors of production; and third, in some cases, the customers for services sold at a per-unit rate. Of the three, a bureau's relations with its sponsor most strongly distinguishes its environment from that of other forms of organization.

NISKANEN, *supra* note 111, at 13.

124. Niskanen has also stated that:

In the jargon of economics, the relation between the bureau and its sponsor is that of a "bilateral monopoly." As with all such relations (including conventional marriage), this relation is awkward and personal—characterized by both threats and deference, by both gaming and appeals to a common objective. No other type of relation combines threat, exchange, and integrative relations in such equal proportions. . . . The primary difference for the differential bargaining power of a monopoly bureau is the sponsor's lack of a significant alternative and its unwillingness to forego the services supplied by the bureau. Also, the interests of those officers of the collective organization responsible for reviewing the bureau are often best served by allowing the bureau to exploit this monopoly power.

NISKANEN, *supra* note 111, at 14.

125. DOUGLAS YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 65 (1982). The author stated that:

The political nature of bureaucracy is initially revealed in the behavior of administrative agencies acting as interest groups. Administrative agencies operate in a highly charged political environment. They are constantly brought into contact with external groups, both governmental and non-governmental. To retain their power, or to expand, all agencies must maintain a balance of political support over opposition.

Id. See also PAUL APPLEBY, *POLICY AND ADMINISTRATION* (1949); FRANCIS E. ROURKE, *BUREAUCRACY*,

reviewers, as well as those in the Executive Branch, serve their own best interests by allowing the agency to take advantage of this monopolistic relationship.¹²⁶ Few executives or legislators comprehend completely any one agency's budget or activities. As a result, most budget reviews concentrate only on the increases requested by each agency. The review process, too, requires that "legislators and budget officials depend heavily on the agency for information on its budgetary needs and program intentions."¹²⁷ Few can deny that agencies, by controlling the flow of information to the legislature, can influence decisions toward increasing agency budgets.¹²⁸

In addition to the problem of monitoring agency budgets, most legislatures have experienced great difficulty legislating regulation effectively. The tendency over the last few decades has been for a legislature to write more ambiguous statutes, leading to a quasi-legislative duty on the part of agencies.¹²⁹ The result of this trend is that agencies might take advantage of their discretion and use it in ways that, politically or financially, benefit the agency more than the public.¹³⁰ One writer has even suggested that this tendency is the result of a conscious arrangement between the legislature, agencies, and favored interest groups.¹³¹ Conversely, she observed that the legislature, through the

POLITICS, AND PUBLIC POLICY (1984); PETER WOLL, *AMERICAN BUREAUCRACY* 7 (1977).

126. NISKANEN, *supra* note 111, at 14.

127. NISKANEN, *supra* note 111, at 25. The author stated that:

The total activities and budget of most bureaus are beyond comprehensive understanding, so the executive and legislative officers focus most of their review on the proposed increments and reveal their priorities by approving different proportions of them. At every stage of a multistage review process, the review officers are dependent on the bureaucrat to make a forceful case for his proposed budget, in part to determine whether a previous review has made too large a reduction.

NISKANEN, *supra* note 111, at 25.

128. DOWNS, *supra* note 103; TULLOCK, *supra* note 103; Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 *YALE J. ON REG.* 167, 170 (1985) ("[I]nformation about the subject of the regulation[] can convince the legislature to approve a budget larger than necessary to achieve the bureaucracy's regulatory goals, thus resulting in an inefficient use of resources."); Susan Rose-Ackerman, *Comment, Progressive Law and Economics—And the New Administrative Law*, 98 *YALE L.J.* 341, 346 (1988) ("[R]esearch on the budgetary process shows how an agency's control over program information and over the allocation of funds can be used to increase or maintain budgetary appropriations.").

129. ROSE-ACKERMAN, *supra* note 99, at 33. The author stated that:

Many statutes are ostensibly concerned with improving the efficient operation of the economy but leave considerable discretion to the executive branch. Agencies may exploit the freedom given to them by the Congress to favor narrow groups or to further their own agendas. Given this possibility, I argue that courts should impose a background norm on agency deliberations. The norm I propose is one that respects the costs and benefits imposed on all citizens. In the absence of specific language outlawing policy analysis, courts would require agencies to seek the net benefit maximizing solution. Of course, legislation which explicitly rejects this approach should be upheld. Courts should simply give notice to the legislature that without clear cut language, they will impose a policy analytic test in reviewing economic regulation.

ROSE-ACKERMAN, *supra* note 99, at 33.

130. ROSE-ACKERMAN, *supra* note 99, at 33.

131. ROSE-ACKERMAN, *supra* note 99, at 38. The author stated that:

legislation of deadlines and compliance goals, mandates stricter regulation than can be achieved with allocated agency resources. One example is environmental regulation. Since the 1970s, Congress has given the Environmental Protection Agency (EPA) more and stricter guidelines, but fewer resources for enforcement. The combination of strict goals and deadlines along with a lack of funding allows congressional members to claim credit for proactive legislation, then blame the ineffective results on agency ineptitude.¹³²

To better understand the plight of the bureaucrat, one can observe the “treadmill phenomenon.” This phenomena occurs when bureaucrats, striving for higher budgets, make the legislature’s review of the agency’s budgets and activities more difficult, leading to probable increases in further appropriations.¹³³ In this model, bureaucrats work to increase their budgets until they move on, and then turn over the agency to a fresh bureaucrat, whose interests are, once again, to expand the agency. Although Niskanen did recognize that budget maximization could serve the public interest—through innovative programs or improved services—he suggested that to exploit citizens and firms is just as likely.¹³⁴ In reconciling these two possibilities, not all bureaucrats respond to the incentives in the same manner. One may safely conclude, however, that the goal of

Second, this research implies that statutes may be carelessly or vaguely drafted or constructed to permit subsequent favorseeking. Judicial insistence on net benefit maximization as a default rule can help repair some of the carelessness and can force Congress to be explicit about a state’s narrow focus. It can also constrain an agency from selling out to the groups it oversees. Agency assistance to a narrow group at the expense of greater costs imposed on other would be upheld only if expressly intended by the enabling legislation.

ROSE-ACKERMAN, *supra* note 99, at 38.

132. ROSE-ACKERMAN, *supra* note 99, at 71. The author stated that:

In the regulatory area, conflicts between budgetary stringency and statutory goals are a familiar feature of many current programs. Among those reaching the courts are cases involving the numerous deadlines included in environmental statutes. Deadlines appear to be a politically attractive way to signal that one is serious about the environment. Congress gives voters the impression that it is taking a tough stand without having to do the difficult work of really understanding the problem addressed in the statute. These deadlines are widely ignored. One study found that the Environmental Protection Agency had met only 14 percent of its deadlines. While critics in Congress and the environmental movement blame lack of commitment at the EPA, at least part of the explanation seems to be the low level of appropriations, which makes speed compliance impossible.

ROSE-ACKERMAN, *supra* note 99, at 71.

133. *See infra* notes 137-41 and accompanying text.

134. NISKANEN, *supra* note 111, at 36-77, 127-37, 155-86; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 413 (1989) (“[A]ny agency will exhibit tendencies to maximize its budget or power at the expense of social policy, to minimize its external constraints, and to engage in various other nasty Niskanen behaviors.”); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 885, 886 (1990) (“Bureaucrats do not always maximize general welfare; instead they often allocate goods and services according to personal interest.”).

maximizing the budget is common to all agencies.¹³⁵ The most highly recognized administrators are usually those whose budgets have increased substantially.¹³⁶

Other scholars have addressed the issue of self-interested behavior in agencies with considerable diligence. Anthony Downs is particularly well-known for his work, *Inside Bureaucracy*.¹³⁷ He had previously argued that agencies must prove their importance in order to survive.¹³⁸ In *Inside Bureaucracy*, he further contended that the agency must demonstrate to its funding body that its services are important enough to justify increased monetary support.¹³⁹ In addition to this incentive, a desire for qualitative improvements exists because a fast-growing agency can lure more highly qualified, better-educated employees, providing some assurance for future expansion of the agency. Agencies grow in cyclical patterns. One other important cause for agency growth is that it defies the zero-sum nature of agency resources. Most agencies begin with, or experience at some time, a lack of resources, in which any change will necessitate sacrifices among employees. Maintenance of heavy growth obviates these sacrifices by providing additional resources for change, especially for the improvement of personal wealth or status for employees.¹⁴⁰ In this way, growth prevents the agency from having to

135. NISKANEN, *supra* note 111, at 36-42; Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 64 n.180 (1991) ("Administrators act to maximize their bureaus' budgets [T]he desire of administrators [is] to increase or protect their budget or their discretion.").

136. NISKANEN, *supra* note 111, at 22-24. The author stated that:

The problems of making changes and the personal burdens of managing a bureau are often higher at higher budget levels, but both are reduced by increases in the budget. This effect creates a treadmill phenomenon, inducing bureaucrats to strive for increased budgets until they can turn over the management burdens of a stable higher budget to a new bureaucrat. Hence an interesting cyclical pattern emerges: bureaucrats interested in making changes resign when budgets are stabilized; their replacements will be satisfied with the other rewards of higher budgets, or strive for further increases, or, possibly, cut the budget in order to provide a basis for further increases. . . . [B]udget maximization should be an adequate proxy even for bureaucrats with a relatively low pecuniary motivation and a relatively high motivation for making changes "in the public interest." This conclusion is supported by the observation that the most distinguished U.S. public servants of recent years substantially increased their budgets.

NISKANEN, *supra* note 111, at 22-24.

137. ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1971).

138. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957). See also NISKANEN, *supra* note 111; Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990).

139. DOWNS, *supra* note 137, at 7. The author stated that:

No bureau can survive unless it is continually able to demonstrate that its services are worthwhile to some group with influence over sufficient resources to keep it alive. If it is supported by voluntary contributions, it must impress potential contributors with the desirability of sacrificing resources to obtain its services. If it is a government bureau, it must impress those politicians who control the budget that its functions generate political support or meet vital social needs.

DOWNS, *supra* note 137, at 7.

140. DOWNS, *supra* note 137, at 28; Kahn, *supra* note 138, at 312 ("Anthony Downs, for example,

experience some conflicts between members struggling for personal resources.¹⁴¹ Niskanen has generally agreed with Downs on the matter of self-interested bureaucratic behavior and its usual results.¹⁴²

Other reasons exist for the growth incentives experienced by administrators. High-profile public leaders, such as AGs or commissioners, are under tremendous strain to produce quick and visible results. This pressure, combined with organizational constraints, eventually results in short-cuts, a sacrificing of quality, or unethical behavior.¹⁴³ The mere desire to serve the public interest does not ensure that administrators will do so effectively. Self-interested behavior is likely to overtake altruism when resources are tight.¹⁴⁴

assumed that politicians 'act solely in order to attain the income, prestige, and power which come from being in office.'").

141. DOWNS, *supra* note 137, at 17. The author stated that:

The major reasons why bureaus inherently seek to expand are as follows: An organization that is rapidly expanding can attract more capable personnel, and more easily retain its most capable existing personnel, than can one that is expanding very slowly, stagnating, or shrinking. This principle was examined in the preceding section. . . . The expansion of any organization normally provides its leaders with increased power, income, and prestige; hence they encourage its growth. . . . It implies that the leaders of any given organization can normally increase their power, income, and prestige by causing their organization to grow larger Growth tends to reduce internal conflicts in an organization by allowing some (or all) of its members to increase their personal status without lowering that of others.

DOWNS, *supra* note 137, at 17. See William J. Baumol, *On the Theory of Expansion of the Firm*, 52 AM. ECON. REV. 1078 (1962).

142. Dan B. Wood, Review, in *THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE* 87, 113 (Andre Blais & Stephane Dion eds., 1993).

143. DOWNS, *supra* note 137, at 72. The author stated that:

The pressure to produce results quickly will sooner or later cause him to use short-cut methods of dubious quality. In many cases, such methods are entirely appropriate to the situation, but they would be difficult to justify in public later when the exigencies of the moment are no longer visible. . . . [N]o leader of any large organization can avoid undertaking acts he does not want made public.

DOWNS, *supra* note 137, at 72.

144. DOWNS, *supra* note 137, at 87. The author stated that:

Although many officials serve the public interest as they perceive it, it does not necessarily follow that they are privately motivated solely or even mainly by a desire to serve the public interest per se. If society has created the proper institutional arrangements, their private motives will lead them to act in what they believe to be the public interest, even though these motives, like everyone else's, are partly rooted in their own self-interest. Therefore, whether the public interest will in fact be served depends upon how efficiently social institutions are designed to achieve that purpose. Society cannot insure that it will be served merely by assigning someone to serve it.

DOWNS, *supra* note 137, at 87.

C. *Self-Interest and the Regulatory Agency*

To add to the evidence for individual incentives to make agencies grow, much effort is devoted to other financial incentives that can drive agency policies in relation to growth. These incentives in particular are quite applicable to regulatory agencies. In describing the relationship between agencies and the public, the effort that an agency puts into serving the public will depend on the relationship between that service and the agency's income. If no relationship between the outputs of the agency and its income exists, then agency behavior will not serve the public. In a regulatory agency where income might be extracted from business or industry, this relationship dictates that agencies are likely to be quite interested in performing their duties of regulation,¹⁴⁵ whether or not the performance of these duties serves the interests of the public.¹⁴⁶

The amount of discretionary revenue spent to benefit the growth of an agency can prove to be a key component of budget-maximizing behavior in the agency.¹⁴⁷ Similar to the reinvestment of discretionary revenue in private firms, agencies and their employees enjoy improved status or pay from the maximization of discretionary revenues. That most bureaucrats desire increased budgets is commonly accepted.¹⁴⁸ In an agency where regulation can affect the amount of discretionary revenue, employees are most likely to do what they can to serve their own interests by maximizing discretionary revenues.¹⁴⁹ While this self-interested behavior improves the standing of the agency and the individuals within, it is likely to impose undue costs on the public. When explaining self-interested behavior in regulation, scholars generally seek a motive to which they can attribute bureaucratic decisions. They often point to regulation which may serve the

145. NISKANEN, *supra* note 111, at 19. The author stated that:

In bureaus, the attention to customer interests depends on the addition to the total financing (revenue) that originates in the sale of a service; in profit seeking firms, this attention depends on the attention to total profits. A bureau whose sponsor is willing to compensate for any loss of revenues from sales, or that is a monopoly supplier of a service with a nearly fixed demand, will usually be quite indifferent to the interests of its customers, even if a large proportion of the total financing its from sales revenues.

NISKANEN, *supra* note 111, at 19.

146. This proposition is contrary to the prevailing view that agencies are coopted by the people they regulate through the medium of special interest groups. See generally Margaret G. Farrell, *Doing Unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITT. L. REV. 883, 948 (1992); Louis L. Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201, 252-53 (1937); Thomas L. McGovern, III, Note, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1499 (1987); George J. Stigler, *The Process of Economic Regulation*, 17 ANTITRUST BULL. 207 (1972). It is, however, in keeping with the maxim that, to misquote Benjamin Franklin, the law helps those who help themselves.

147. Barry M. Mitnick, *The Theory of Agency: The Policing "Paradox" and Regulatory Behavior*, 24 PUB. CHOICE 27 (1975).

148. Rubin, *supra* note 135, at 1; Wood, *supra* note 142, at 113.

149. Mitnick, *supra* note 147, at 37.

public interest, but more directly serves the interest of a particular industry or business, usually at some cost to consumers or competition.¹⁵⁰

This known existence of ulterior motives sometimes casts a dark shadow over the study of regulatory agency behavior. The decision rules and guidelines that determine priorities in regulatory enforcement policy can often be particularly secretive, or at least superficial in that they do not reflect the true intent of many agency actions. One writer has noted that few agencies promote careful outside studies of their decision rules. Reasons for this tendency have been posited, but most are speculative. Agencies feel that their priorities and procedures are sufficient, or they prefer to remain blissfully ignorant as to the effectiveness of their actions. Consider also that the agency may be aware of problems, but has no desire to alleviate them. Perhaps the worst possibility is that the agency knows that there are serious problems or unethical motives behind its procedures, and it does not want these motives to be exposed to other agencies, the legislature, or the public.¹⁵¹

When one attributes self-interested behavior to a regulatory agency, the most serious implication is not only that this behavior is likely to be inefficient in terms of serving the public, but also that the costs imposed upon the regulated are unfair, and will probably be passed on to the public. The literature on incentives for regulatory behavior clearly states that few regulatory agencies are likely to find adequate incentives for efficient and unbiased regulatory enforcement in the current political environment.¹⁵² This conclusion not only defies the public choice model for efficient agency behavior; it also presents new problems in terms of the control of agencies and the ability for government to regulate efficiently.

In order to maintain equilibrium among competing interests that must be pacified, most administrators will find growth to be the easiest and most harmonious route for defeating zero-sum criteria. The results of this type of behavior are widespread and visible. Agency decisions often favor consumers who are more affluent or politically active. More often, they favor larger, more established firms by preventing smaller firms from entering into the market. In addition, agency decisions tend to promote long-term growth in the industry, and emphasize the need for more and larger programs for compliance. The result is that more resources will be expended in the future, assuring a larger piece for the agency and its employees.¹⁵³ This tendency is reflected in the

150. ROBERT E. MCCORMICK, *A REVIEW OF THE ECONOMICS OF REGULATION: THE POLITICAL PROCESS*, ROGER E. MEINERS & BRUCE YANDLE *REGULATION AND THE REAGAN ERA* 28 (1989). The author stated that:

There is abundant evidence in the economics literature that when the flag of public interest is raised to support regulation, there is always a private interest lurking in the background. There is hardly a regulatory program anywhere that does not benefit some industry or subset, most often at the expense of rivals or consumers.

Id. at 28.

151. WESLEY A. MAGAT & STEVEN ESTOMIN, *THE BEHAVIOR OF REGULATORY AGENCIES, ATTACKING REGULATORY PROBLEMS* 97 (1981).

152. *Id.*

153. Milton Russell & Robert B. Shelton, *A Model of Regulatory Agency Behavior*, 20 *PUB. CHOICE* 47, 49-59 (1974); see Meredith Associates, *Report to the Chairman of the Federal Trade Commission: False-Advertising Law and Policy under FTC Administration*, in *THE FEDERAL TRADE COMMISSION SINCE 1970:*

behavior of the agency, which responds to the prevailing incentive structure by working continuously to increase the demand for agency activities.¹⁵⁴

Agencies, in general, prefer policies that serve to increase their budgets or advance members in their careers.¹⁵⁵ Because of these trends in agency behavior, many economists and analysts have written off regulation as a political tool for self-interested individuals rather than as the result of a collective decision-making process.¹⁵⁶

D. An Empirical Example: The Federal Trade Commission

In order to bring the preceding discussion “down to earth,” examination of a real agency—the Federal Trade Commission (FTC)—will be helpful. In terms of self-interested regulatory enforcement, the most interesting component of FTC activities are those related to deceptive advertisement. This discussion addresses enforcement of deceptive advertisement regulations and traces the growth patterns and bureaucratic behavior of the FTC.

The FTC has been involved in regulating deceptive advertisement for most of the twentieth century. The decision rules for this enforcement, as well as the actual enforcement behavior, have changed considerably over the years. In the 1970s, the FTC concentrated much time and energy on the activities of smaller companies in very competitive businesses, dwelling on “petty matters and minor infractions.”¹⁵⁷ The problem is that the FTC had previously relied upon information provided by businesses on the activities of their competitors for their enforcement agendas. Thus, small companies in highly competitive industries were subject to an unfair majority of

ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 56 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) [hereinafter *THE FTC SINCE 1970*]. The Report provides:

Initial compensation for attorneys and other key employees in the lower and medium levels is competitive with comparable positions outside the FTC. The maximum level for salary growth, however, is limited, and is usually quickly reached, causing the turnover rate of FTC attorneys to nearly double that of private law firms.

The Civil Service Commission further constrains the FTC with its authority to disapprove any supergrade (GS-16 or above) positions. Such approval is often denied, causing the Commission to lose qualified people whom it is unable to promote or cannot hire from the outside at the position and salary it desires.

Id.

154. Randall G. Holcombe & Edward O. Price, III, *Optimality and the Institutional Structure of Bureaucracy*, 33 *PUB. CHOICE* 1, 55-59 (1978) (“[A] supply-demand analysis is used to develop an incentive system. The supply conditions faced by a bureaucracy are not unusual; however, a bureaucracy acts as if it were faced with an all-or-nothing demand curve.”).

155. DENNIS C. MUELLER, *PUBLIC CHOICE* 156-70 (1979); NISKANEN, *supra* note 111; Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 *MICH. L. REV.* 917 (April 1990) (“[G]overnment agencies . . . skew the policy agenda in favor of maximizing the agency budget or furthering its bureaucrats’ career goals.”).

156. ROSE-ACKERMAN, *supra* note 99, at 15.

157. ALAN STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE* 53 (1977).

complaints.¹⁵⁸ Advertisers claimed that large firms were less likely to receive FTC attention because they did not participate in much deceptive advertising. According to advertisers, knowledge of deceptive advertising discourages repeat customers, which is very damaging financially to a large, nationally advertised firm.¹⁵⁹

Efforts were made during the Nixon administration (after exposés by Ralph Nader and his associates) to improve the efficacy of FTC deceptive trade enforcement,¹⁶⁰ but few scholars note any significant improvements in advertising during the 1970s.¹⁶¹ The circumstance remains, no matter what the policy stance, that the FTC cannot expend the resources required to monitor all advertising. The result is that spot-checks and complaints are the primary means of detecting deceptive advertising.¹⁶² Since the FTC continues to spend a good part of its time dealing with complaints from business and industry, the items in question do not necessarily affect consumers directly. Rather, they are those to which businesses object because of the possibility of an unfair advantage.¹⁶³

The unfortunate result of this tendency is that the Commission might devote its attention to any claim, as long as some support is provided. Businesses that wish to protect their market share are then compelled to watch for any encroachment, or hint thereof, and find a reason to call the competitor's advertisement deceptive. Whether the matter has any serious implications for consumers is not as important as who lodges the complaint and whether or not it can be shown as actionable.¹⁶⁴

In the early 1970s, the prevalent policy directive for the FTC was to prosecute any advertisement that had a "tendency or a capacity to deceive."¹⁶⁵ In enforcing this directive, the agency did not concern itself with the well-being of the majority of the people. Moreover, the effort effectively increased the scope of the agency's mission, so the FTC was, according to the rule, justified in taking action against any advertisement that could be misinterpreted. The support from the courts on this type of enforcement was largely dependable. As a result, advertisers had to take extreme caution when formulating advertising claims. No clear standard for the determination of deception remained, and the agency could call any claim deceptive at its discretion. In this way, enforcement of the Federal Trade Act might have kept useful information from consumers, injuring them in yet another manner.¹⁶⁶

158. *Id.* at 68.

159. *See id.* at 166; Tom Dillon, *What Is Deceptive Advertising?*, 13 J. ADVERTISING RES. 10 (1973).

160. *See* EDWARD COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969).

161. STONE, *supra* note 157, at 169-170.

162. STONE, *supra* note 157, at 173.

163. STONE, *supra* note 157, at 173; COX ET AL., *supra* note 160, at 16.

164. STONE, *supra* note 157, at 183.

165. THE FTC SINCE 1970, *supra* note 153, at 39.

166. THOMAS F. WALTON & JAMES LANGENFIELD, REGULATORY REFORM UNDER REAGAN—THE RIGHT WAY AND THE WRONG WAY, REGULATION AND THE REAGAN ERA 77-78 (1989). The authors noted that:

[Federal Trade Commissioner] Miller initially attempted to have Congress pass a definition of deception, so that advertisers would better know what constituted an illegal act and truthful advertisements would not be deterred. Specifically, he sought to clarify the guidelines by explicitly requiring consumer injury to be demonstrated; that a representation, omission, or practice should be likely to mislead consumers; and that the commission rely more on empirical evidence than its own

In analyzing the incentive structure for FTC employees, three entities hold influence over the FTC: small companies, who want protection from larger ones; big industry, which lobbies heavily to prevent small companies from entering the market; and, the staff of the FTC itself.¹⁶⁷ While the inclusion of small businesses and big industry in this set is somewhat intuitive, the mention of FTC staff brings the discussion back to the organizational self-interest of agency employees.

Both FTC lawyers and FTC economists are strong lobbyists for agency expansion and rule complication.¹⁶⁸ Lawyers are seen as encouraging further complexity and the promulgation of increasingly more difficult rules, while economists are seen as desiring more complex policy directives. Although no one proposed that either group actively seeks out these activities, one writer stated that in no case will either seek to simplify or economize operations at the FTC.¹⁶⁹ Other scholars have found FTC staff to show an affinity for expansion.¹⁷⁰ This conclusion represents consensus on the matter of incentives for agency expansion. One writer has asserted that this tendency is closely related to the ideology (usually liberal) of agency employees.¹⁷¹ Moreover, regulatory agency staff tend to favor regulation in general. The EPA, for example, is known for employing environmentalists.¹⁷²

From 1973 to 1976, sixteen new trade regulation rules were developed under Section 5 of the Federal Trade Act. These rules significantly broadened the authority of the commission, and resulted in a budget increase from \$21 million to \$70 million between 1970 and 1979.¹⁷³ Self-interested expansion seems apparent. Similar motivations for

expertise. . . . Eventually a majority of commissioners voted for the policy statement.

Id.

167. TULLOCK, *supra* note 103, at 336.

168. TULLOCK, *supra* note 103, at 336.

169. TULLOCK, *supra* note 103, at 336-37.

170. Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 184 (1986).

171. Wood, *supra* note 142, at 114.

172. WILLIAM LILLEY, III & JAMES C. MILLER, III, *THE NEW SOCIAL REGULATION, PUBLIC POLICY: ISSUES, ANALYSIS, AND IDEOLOGY* 221 (1977). The authors stated that:

Regulatory agencies tend to lure personnel who "believe" in regulation. It is not surprising, for example, that EPA has a reputation for having a staff composed largely of "environmentalists" (just as ICC is staffed principally by people who disagree strongly with those economists who argue that the transportation sector would be much more efficient without regulation). Moreover, abetted by the civil service system, regulatory agencies tend to be staffed by people who are risk-averse, very security-conscious about their jobs, and unwilling to take initiatives they fear may conflict with the agency's "mission." These tendencies are reinforced by actual on-the-job incentives to produce inefficient regulation.

It has been our experience that, particularly in the area of social regulation, many officials behave as though driven by a desire to "punish" a transgressor.

Id.

173. WILLIAM C. MACLEOD & ROBERT A. ROGOWSKY, *CONSUMER PROTECTION AND THE FTC DURING THE REAGAN ADMINISTRATION, REGULATION AND THE REAGAN ERA* 72 (1989). The authors noted that:

More creative interpretation of the unfairness doctrine of Section 5 of the Federal Trade Act led to

individuals in the FTC to further the activities of the agency are cited, such as increases in private legal fees as being attractive to FTC attorneys and increases in caseload and theoretical questions as being beneficial to economists.¹⁷⁴

Recognizing the FTC as a budget-maximizing entity and desiring more tangible standards for deceptive advertising, policy makers in the Reagan Administration wrote a new policy statement for deceptive trade. It stated that in order to be actionable, a matter must be injurious to the consumer, likely to mislead, and both of these qualities must be empirically demonstrable.¹⁷⁵ Despite new and stricter guidelines for application of the deception rule, much useful information is prevented from entering the market. Reduction of profits harms advertisers, prevention of trade damages firms, and denial of useful information harms consumers. The only beneficiaries, outside of the FTC, of this type of enforcement are the larger firms, who are less susceptible to the costs of enforcement than are smaller firms.¹⁷⁶

In the extensive literature on individual incentives for FTC employees, growth continues to be the key to almost any problem. In addressing questionable complaints, for example, employees tend to refer to the resources already sunk into the investigation. Not wanting to admit defeat or to "waste" sunken resources, agency staff tends to refuse to drop a questionable action. Moreover, dropping a questionable action would mean giving up an opportunity to further expand the functions of the agency.¹⁷⁷ This tendency

the initiation of sixteen major trade regulation rules during the 1973 to 1976 chairmanship of Lewis Engman. . . . Although this broad reach of the commission's authority was questioned, these rules, designed to transform practices of entire industries, formed a major regulatory front for the agency. To handle the increased activity, the agency's budget grew from about \$21 million in 1970 to nearly \$70 million in 1979.

Id. See generally COX ET. AL, *supra* note 160 (discussing the FTC through the late 1960s).

174. THE FTC SINCE 1970, *supra* note 153, at 300, provides:

Third, increases in private legal fees spent to litigate FTC issues enhance the marketability of FTC employees, at least to the extent that current increases raise the probability of future higher fees. Budget increases further this goal. Moreover, private fees probably rise, all else equal, when the FTC pursues more projects with multiple respondents, as with the 1970s emphasis on rule making and the market concentration doctrine.

175. WALTON & LAGENFIELD, *supra* note 166, at 47; Gary T. Ford & John E. Clafee, *Recent Developments in FTC Policy on Deception*, 50 J. MARKETING 82 (1986).

176. Richard S. Higgins & Fred S. McChesney, *An Economic Analysis of the FTC's Ad Substantiation Program*, in EMPIRICAL APPROACH TO CONSUMER PROTECTION ECONOMICS (Pauline M. Ippolito & David T. Scheffman eds., 1986).

177. THE FTC SINCE 1970, *supra* note 153, at 291-299 notes:

When a complaint is issued or a rule proposed, the amount of resources already spent plays a key, albeit perverse, role. Rather than realizing that past costs are sunk and therefore irrelevant to current decisions, the opposite notion prevails, reflecting distaste for "wasting" already spent resources. Indeed, the staff evokes this attitude, asking how the Commission could discard years of work. Further, the staff now has a vital stake in a "yes" vote. With a "no" vote, staff members, who must have litigation experience to maximize their value in this job market, see their investment in a good prospect lost. Thus, faced with a yes or no decision, the commissioners are under great pressure to say yes.

is closely related to Niskanen's claim that bureaucrats are risk-averse and will prefer low-risk financial gains over high-risk endeavors.¹⁷⁸ These factors are all closely related to the functions of utility-maximization and budget expansion discussed previously in this Article.¹⁷⁹

This examination of FTC procedures provides empirical evidence for the proposition of self-interested actions of agency individuals in relation to expansion and relations with regulated firms. Much of the rational, self-interested behavior and the incentive for individual self-proportion generally attributed to agencies is seen in the FTC. In these categories, the FTC fits the mold of the self-interested, predatory regulatory agency. However, little has been said about the FTC and its relations with the courts.

The courts, over the years, have been generally favorable toward the FTC's efforts to grow. As early as the 1930s, the courts were confirming the right of the Commission to regulate deceptive trade, whether consumers are harmed or not.¹⁸⁰ One outstanding dissent to this judicial support notes that the probable beneficiary of this liberal enforcement is typically not the average citizen.¹⁸¹ As stated, the typical beneficiary

has a short attention span; he does not read all that is to be read but snatches general impressions. He signs things he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid bills. Most of all, though, he is thoroughly avaricious. Fortunately, while he is always around in substantial numbers, in his worst condition he does not represent the major portion of the consuming public.¹⁸²

Of many possible preferences (*i.e.*, sources of utility), we discuss two that are often complementary, one for power, the other for wealth. Both are available within existing FTC constraints. A person's preference for power manifests itself in a desire to reshape society in his or her own image. An individual with this preference will be attracted to organizations that lack the discipline of profit or other stringent constraints.

178. John R. Gist & R. Carter Hill, *The Economics of Choice in the Allocation of Federal Grants: An Empirical Test*, 36 PUB. CHOICE 1, 63 (1981) ("[T]he Niskanen budget maximization hypothesis . . . [posits that] bureaucrats attempt to avoid risky projects and select financially successful ones.").

179. DOWNS, *supra* note 137; TULLOCK, *supra* note 103.

180. THE FTC SINCE 1970, *supra* note 153, at 37 ("[I]n the 1934 decision of *FTC v. Algoma Lumber Co.*[.] . . the Court implied that whether or not consumers were harmed, the FTC was correct to consider the practice to be corrupting and injurious." Citing 291 U.S. 67, 76 (1934).)

181. THE FTC SINCE 1970, *supra* note 153, at 38. Justice Black argued that:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

THE FTC SINCE 1970, *supra* note 153, at 38 (referring to *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937), *cert. denied*, 305 U.S. 642 (1938)).

182. THE FTC SINCE 1970, *supra* note 153, at 38-39 states:

As to the standard of deception, the courts eased the FTC's burdens considerably by concluding that

One writer has noted that the sort of unbridled authority and discretion enjoyed by the FTC is not conducive to prudent regulation.¹⁸³

Overall, however, the support of the courts is substantial and widespread. Several years passed during which the FTC lost no Federal Trade Act Section 5 cases because of a practice being non-actionable.¹⁸⁴ In addition, the courts allowed FTC functions to expand into corrective advertising and advertising substantiation.¹⁸⁵ Finally, the courts have supported the right of the Commission to levy back-payments for deceptive advertising.

E. The New Federalism and State Agency Preclusion

During the 1980s, the Reagan administration, in an effort to decrease the influence of the national bureaucracy and improve accountability and efficiency, implemented several programs aimed at decentralizing public administration in general. Much of the responsibility for regulatory enforcement and service provision shifted to state and local governments, and stricter rules on federal funding for lower levels of government were established.¹⁸⁶ If one were to apply Niskanen's model and subsequent findings on regulatory behavior to the state-level counterparts of federal regulatory agencies, the difference in political scale would result in reliance on outside funding, and more incentives for self-interested regulatory behavior.¹⁸⁷

For a national firm to deal with a state agency operating under these conditions is a risky endeavor at best. Add to this the burden of complying with federal rules as well as

actual deception was unnecessary; instead, the FTC need only show a "tendency or capacity to deceive." Coupled with the standard for judicial review of Commission actions—a Commission finding would be affirmed if supported by substantial evidence on the record—this test for deception made it virtually impossible to reverse Commission findings of deception.

See George J. Alexander, *Honesty and Competition: False-Advertising Law and Policy Under FTC Administration*, 8 SYRACUSE UNIV. PRESS 8 (1967).

183. NISKANEN, *supra* note 111, at 36-42; Ernest Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 955 ("[U]nconfined authority generally leads to its use.").

184. THE FTC SINCE 1970, *supra* note 153, at 44 provides:

The Commission did not lose (even partially) a single case because the practice under question was not an unfair method of competition or an unfair or deceptive act or practice within Section 5. Further, the courts affirmed important expansions of Commission authority, such as corrective advertising and advertising substantiation. Third, the courts continued to affirm antitrust cases under a Section 5 theory when it was not clear that the Commission would win under a pure antitrust theory. Finally, prohibition of a merchandising claim that probably few, if any, consumers would misunderstand was upheld in 1974 despite a strong attack by a dissenting circuit court judge and a dissenting commissioner that the problem was too trivial for FTC concern and that there was no proof of public injury.

185. THE FTC SINCE 1970, *supra* note 153, at 44.

186. THE FTC SINCE 1970, *supra* note 153, at 160 ("Cuts in federal grant assistance to state regulators accompanied the increased emphasis on state-level implementation. In contrast, other policies worked against decentralization by preempting state government regulations and mandating lower-level governments to act in particular ways.").

187. THE FTC SINCE 1970, *supra* note 153, at 163.

forty-nine other state agencies, and a small or moderately-sized national business will be swamped with rules, confusing precedents, and numerous threats of adjudication. One writer has suggested that this predicament is largely a result of lobbying efforts by larger companies, leading to effective barriers to entry for smaller companies.¹⁸⁸ Interviews with corporate leaders show that many prefer uniform federal rules over sporadic and unpredictable state regulation. In fact, businesses would rather work “with one federal gorilla than 50 state monkeys.”¹⁸⁹ The prevalence of strict state regulation, especially when dealing with small and out-of-state businesses, leads to a very strong conclusion that state agencies participate in regulation that protects local, or larger and more influential businesses by preventing others from competing effectively.¹⁹⁰ Unfortunately, much of the regulation that is accomplished today is done so not through uniform policy making, but through “concentrating on a few squeaky wheels.”¹⁹¹

The lessons learned from the FTC and state agencies are hard and discouraging. The public choice model, while ambitious in its prescriptions, is reasonable in its intent. Agencies created by the people to improve the general welfare should not hold as a

188. THE FTC SINCE 1970, *supra* note 153, at 163.

189. THE FTC SINCE 1970, *supra* note 153, at 173 provides:

Therefore, in areas without absolute federal preemption, efficiency may sometimes require an active federal agency that establishes uniform rules. Corporations are often on the side of federal uniformity rather than interstate diversity and competition. One business critic claimed that the new federalism resulted in a “state regulatory nightmare, a 50-headed hydra.” Another, using equally colorful language said, “I would rather deal with one federal gorilla than 50 state monkeys.” Firms that sell in national markets (*e.g.*, railroads, trucking, and telecommunications) and compete with local firms in some markets (*e.g.*, supermarket chains and producers of beer, mineral water, dairy products, or prefabricated houses) will often prefer national regulation. Even if a firm’s bargaining power is high in most states, the benefits of uniform national laws may outweigh the costs resulting from a higher average level of regulation. If state and local laws seem designed to protect local businesses rather than reflect genuine differences in tastes across jurisdictions, the federal government should take a hard look to determine the possible interference with interstate commerce.

190. THE FTC SINCE 1970, *supra* note 153, at 173.

191. THE FTC SINCE 1970, *supra* note 153, at 191 provides:

My hunch is that, at the federal level, most real progress can be made in the reform of social, as opposed to economic, regulation. In the area of social regulation, statutes should emphasize agency rulemaking rather than adjudication as the preferred method of rulemaking rather than adjudication as the preferred method of settling general policy. The administrative process should be streamlined so that agencies institute broad-based policies of wide coverage rather than concentrating on a few squeaky wheels.

....

[There are plans to] impose budgetlike constraints on those agencies that make few demands on the Treasury but that nevertheless may impose large costs on the private sector. I oppose these proposals because they suffer from a failure to incorporate benefits and focus undue attention on the costs of regulation. Although some regulatory statutes, agency rules, and judicial decisions have certainly gone too far in overemphasizing benefits and ignoring costs, that is no excuse for going in the opposite direction. Both the costs and the benefits of regulations are largely outside of the federal budget and are therefore unconstrained by the check-writing ability of the treasury.

primary goal their own expansion and ornamentation.¹⁹² Yet another negative observation is that these findings can most likely be applied to state and local regulatory agencies with similar results. The federal system, as practiced in the United States, allows for regulatory activities at the state level that are quite similar to those practiced nationwide by federal agencies. The imposition of numerous state agencies on businesses and consumers, in addition to the costs of dealing with the federal bureaucracy, is a frightening reality.

IV. PREDATORY BEHAVIOR BY STATE ATTORNEYS GENERAL

Because of the predatory incentive structure created by the funding system, many state AGs develop an entrepreneurial spirit with respect to litigation, feeding from the entities they regulate. In effect, these state agencies have become bounty hunters.

An example of predatory behavior by state AGs is the way they apply their states' DTPAs¹⁹³ discriminatorily¹⁹⁴ against out-of-state companies. The archetype of this discrimination is the handling of claims involving deceptive trade practices claims by out-of-state companies doing direct mail business in all fifty states.¹⁹⁵

Such companies send the same mailings to at least forty-eight foreign states.¹⁹⁶ They are subject to the deceptive trade practices laws of those states. Because those laws are substantially uniform, a direct-mail company that violates the deceptive trade practices law of one state probably violates the laws of many, if not all, of the other states.¹⁹⁷ Just because a company has been shown not to violate one state's DTPA, however, does not deter a second state's AG; each state's AG gets a "bite at the same apple."

A state AG can take advantage of the uniformity of deceptive trade practices laws by tracking the companies being sued in other states,¹⁹⁸ and approaching those companies with a threat to sue¹⁹⁹ in the AG's state unless the companies do not settle.

For example, if a Delaware direct-mail company, with its principal place of business in New York, is being sued in Mississippi under the Mississippi deceptive trade practices

192. FINIFTER, *supra* note 104, at 387.

193. All states have legislation forbidding deceptive trade practices. See David Benjamin Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora's Box?*, 70 DENV. U. L. REV. 141, 143 (1992).

194. In general, states may not discriminate against interstate commerce. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29 (1988).

195. See *supra* text accompanying notes 15-16.

196. A foreign state is any state in which the company is not a citizen. Because a company is a citizen only of its state of incorporation and of its principal place of business, a company will always have 48 (and sometimes 49) foreign states.

197. This is not a "uniformity" problem because the state statutes under which the AGs are threatening suit are substantially the same from state to state. See Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 106-09 (1988-89) ("Outside the peculiar field of transportation[,] . . . the [D]ormant Commerce Clause does not, in the name of uniformity, prohibit the states from taking differing approaches to problems that exist in every state.").

198. The National Association of Attorneys General has a consumer protection division to help AGs track consumer actions in other states. *AGs in 10 States Take More than 70 Consumer Actions*, 1993 Antitrust & Trade Reg. Rep. (BNA) No. 1638 at 591 (Nov. 4, 1993).

199. See *infra* notes 202-04.

statute,²⁰⁰ the AG of Missouri may approach the company and offer to settle Missouri's potential suit against the company, for the same allegedly deceptive practice but under Missouri's statute,²⁰¹ for \$50,000.

Because the company does no business in Missouri except through the mail and common carriers, the cost of preparing a defense against the Missouri claim is greater than the settlement offer. Even if the company has not engaged in any deceptive practices, for the company to accept the Missouri settlement and avoid litigation expenses is rational.²⁰²

This behavior by the state's AG discriminates against companies that do interstate business because they are the only ones that are susceptible to suits by foreign AGs. A company will rationally settle for any amount less than the nuisance value of defending a suit. Purely intrastate companies are covered by their home states' DTPAs. Therefore, the cost of defending will be lower for them (because they can only be sued in their home states) than for out-of-state VMCs. AGs can extract more money from corporations to which prospective suits have more nuisance value. Therefore they will naturally choose to go after those VMCs without local representation.²⁰³

The company's problems are compounded by the fact that there are forty-eight more predatory AGs eager to cash in with similar settlement offers. In each case the AG will ask for something less than the amount it would cost the company to prepare for litigation, and in each case the company would be well-advised to pay.²⁰⁴

This pattern could result in direct mail companies being forced to pay millions of dollars to avoid suits in all fifty states. These potential litigation costs will make the venture *ex ante* unprofitable, especially since a company cannot know what practices will

200. MISS. CODE ANN. § 75-24-1 (1991 & Supp. 1994).

201. MO. REV. STAT. § 407.010 (1990 & Supp. 1994).

202. "A rational party should settle only if it can obtain at least what it would achieve by proceeding to trial and verdict, taking into account all of the economic and noneconomic costs of both settlement and trial. . . . The point where a party is indifferent to whether the case goes to trial or settles is the party's break-even point, or reservation price." Peter T. Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 3. Settlement can only occur where the plaintiff's reservation price is lower than or equal to the defendant's, *i.e.*, where the plaintiff expects to gain less from trial than the defendant expects to lose. The difference between the parties' break-even points is known as the parties' bargaining range. If there is no bargaining range, the parties will not settle. *Id.* at 5.

203. The break-even point, or reservation price, for a local company will be lower than for an out-of-state company because the cost of defending against a suit will be lower for the former than for the latter. The break-even point for a state AG will be approximately the same in a suit against a local company as in a suit against an out-of-state company.

Because the in-state company's break-even point will be much lower than the out-of-state company's (assuming the same potential liability for both), the out-of-state company will be willing to pay more to avoid litigation, and so will be worth more to the state AG.

The increased value of out-of-state companies to AGs makes them the logical targets for threatened suits under consumer protection statutes. Because they are more likely to be hit up by AGs for protection money, out-of-state companies suffer a significant detriment from the behavior of the state AGs.

204. An extreme version of this problem would be suits by threatened AGs acting in bad faith—threatening deceptive trade practices litigation, with no reason to believe there is a violation, only to collect protection money from a company.

be considered deceptive until it is too late. Interstate companies are being discriminated against on a grand scale because, unlike local companies, they can be crushed by these settlement demands. The kind of burden on interstate commerce foretold by Justice Holmes occurs when the company has not in fact engaged in the deceptive practices with which it is charged.²⁰⁵

Therefore, the predatory environment conflicts with Commerce Clause values by interfering with interstate commerce and discriminating against out-of-state companies. VMCs have to deal with different regulatory actors in every state, making interstate business more like international business and violating the spirit of the entire Constitution.

The added burden on companies trying to do multistate business is an impossible situation. It destroys the ideal of an open national market, and makes interstate business much more expensive²⁰⁶ and difficult.²⁰⁷ Companies cannot, and should not have to, pay a state-by-state toll on the highway of interstate commerce, yet the national incentive statute has created exactly that result.

V. DELIVERING VMCs INTO THE LIGHT

One solution to the problem of predatory suits would require that, once one state has begun an action against a company, other states must refrain from bringing actions for the same behavior. It would also require that, if the company is exonerated in the first suit, other states be bound by the Full Faith and Credit Clause of the U.S. Constitution.

For the discussion in this Article, the "primary suit" is the first suit instituted against the company for a particular allegedly deceptive practice. The plaintiff in the primary suit is the "primary state." "Secondary suits" are suits by other states, inspired by the primary suit. These states are "secondary states."

A. Preemption

The first possible solution to the problem of predatory suits is to find the states' DTPAs preempted. The five possible ways a state law may be preempted by federal law are: (1) explicit preemption; (2) pervasive federal regulation leaving no room for state regulation; (3) dominant federal interest; (4) federal regulations that reveal a congressional purpose to preclude enforcement of state law; or (5) conflict with federal law.

In the case of interstate commerce, preemption can be accomplished by an act of Congress. "It is well-settled law that Congress may regulate any activity, however local in nature, if it rationally finds that the activity affects interstate or foreign commerce in

205. See *supra* note 1 and accompanying text.

206. *But see* *Frontier Fed. Sav. & Loan v. National Hotel Corp.*, 675 F. Supp. 1293, 1299 (D. Utah 1987) (The defendant engaged in interstate business is acquainted with and therefore able to bear the burden of out-of-state litigation.); *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989) (Even a small corporation may not be inconvenienced by going to another part of the country to litigate.).

207. This is comparable to the field of employees' retirement benefits, in which Congress concluded that "the burden of complying with regulation is so heavy that parties should have to follow only one set of laws," and expressly preempted state laws. Wolfson, *supra* note 197, at 73. The chief difference is, of course, that in the present case Congress has not explicitly preempted state deceptive trade practices laws.

any discernable way."²⁰⁸ Several federal statutes could be found to preempt actions against direct-mail companies under state DTPAs.

For example, the Federal Trade Commission Act (FTCA)²⁰⁹ forbids "unfair or deceptive acts or practices in commerce,"²¹⁰ but it does not satisfy the accepted tests for preemption:

It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed on it may reveal the same purpose."²¹¹

Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."²¹² In this case, Congress has not limited state authority explicitly, and no scheme of federal regulation is pervasive enough to make reasonable the inference that Congress left no room for the states to supplement it.²¹³

The third theory of preemption—where an act of Congress (here, the FTCA) touches a field in which the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"²¹⁴—may apply to enforcing many states' similar DTPAs.

This would, however, only be evidence of Congress's *intent* to preempt state action. Imputing such an intent to Congress in this case is counterintuitive. That the states were intended to be able to protect their citizens from deceptive trade practices is hard to deny.

The fourth and fifth types of preemption, similarly, are based on the assumption that Congress intended to preempt state action. Congress has not revealed its intent to completely supplant state legislatures in passing laws against deceptive trade practices. State law would be preempted "to the extent that it actually conflicts with federal law."

208. George T. Conway, III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1116 (1987).

209. 15 U.S.C. §§ 41-77 (1988 & Supp. V 1993).

210. 15 U.S.C. § 45 (1988). Only the FTC may sue under the FTCA. *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

211. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982)).

212. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidow*, 312 U.S. 52, 67 (1941)).

213. In fact, the FTC has encouraged the states to pass their own DTPAs. See *Lee*, *supra* note 193, at 143 n.10.

214. *Fidelity Fed. Sav. & Loan*, 458 U.S. at 153.

State law conflicts with federal law if obedience to both state and federal laws is impossible,²¹⁵ or if state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”²¹⁶

In order to use this last line of analysis, one must accept that Congress has the same purposes and objectives as the drafters of the Constitution.²¹⁷ Because of the lack of congressional intent to preempt and the lack of actual conflict between state and federal law, the traditional preemption doctrine does not resolve this issue.²¹⁸

B. Dormant Commerce Clause

Where Congress has not acted, “negative” or “dormant” Commerce Clause theory governs.²¹⁹ Although the Dormant Commerce Clause is “hopelessly confused,”²²⁰ it provides that states may not act to impede interstate commerce even where Congress has not spoken.²²¹

Dormant Commerce Clause theory is based on the proposition that the framers of the Constitution gave commerce power to Congress in “the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”²²²

215. This sort of conflict is not involved here, since the state acts are similar to the FTCA (and, indeed, many of the state acts are modeled after the FTCA). See Lee, *supra* note 193.

216. See Lee, *supra* note 193.

217. One of the chief purposes of the Constitution was to remove obstacles to interstate commerce. As Alexander Hamilton stated:

An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and rigor from a free circulation of the commodities of every part.

THE FEDERALIST NO. 11 (Alexander Hamilton).

218. See Wolfson, *supra* note 197, at 111-14 (“The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation outside those areas that the Constitution reserves for Congress alone.”).

219. For a history of Dormant Commerce Clause jurisprudence, see Lisa J. Petricone, Comment, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443 (1987).

220. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981).

221. There are several different tests of whether a state statute is valid under the Dormant Commerce Clause. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (three-prong test); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (different test where purpose of state statute is to promote the public health or safety). But see Wolfson, *supra* note 197, at 72 (“[C]ourts could act to ensure that plaintiffs relying on preemption doctrine are not trying to revive [D]ormant [C]ommerce [C]lause restrictions on state power.”). There was a constitutional theory that the Commerce Clause forbade state courts from asserting jurisdiction over out-of-state defendants when to do so would unreasonably burden interstate commerce. See *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312 (1923). This theory was short-lived. The current solutions may require reconstitution of this ephemeral theory.

222. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1349 (1994)

The notion of a Dormant Commerce Clause has existed in some form in the Court's decisions for more than a century and a half.²²³ The test for violations of the Dormant Commerce Clause has evolved throughout this time "as the volume and complexity of commerce and regulation have grown in this country."²²⁴ James Madison's initial view, embraced by Chief Justice Marshall in *Gibbons v. Ogden*,²²⁵ posited that Congress's power to regulate commerce under the Commerce Clause was plenary, and that state legislation was permitted to impact upon commerce somewhat only if it did not regulate or tax commerce.²²⁶ The Madisonian approach was countered by those on the Court, like Marshall's successor, Chief Justice Taney, who asserted that the Commerce Clause only forbade state legislation that conflicted with federal law.²²⁷ Under this view, no Dormant Commerce Clause existed in relation to Congress's power to preempt state action.²²⁸

The test that developed from the synthesis of these antithetical principles was one of "subject." State legislation would be upheld if its subject were "local" rather than "national."²²⁹ Uniform regulation was necessary for the national economy, so state regulations affecting the national economy were held unconstitutional. State regulation of local commerce was held valid.²³⁰ Whether a particular subject matter was local or national depended on whether that field required diverse treatment or a uniform plan.²³¹ In one expression of this test, the Court held that a regulated field was national because commerce would be disrupted by all states making their own rules.²³²

The "local/national" dichotomy was used by the Court until the 1880s,²³³ when it shifted to the "direct/indirect" test.²³⁴ Regulation was valid under this test if it affected interstate commerce "indirectly, incidentally, and remotely,"²³⁵ but not if it was a "direct

(quoting *Hughes*, 441 U.S. at 325-26). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . has as its corollary that the states are not separable economic units." *Id.* (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949)).

223. *Id.*

224. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

225. 22 U.S. (9 Wheat.) 1 (1824).

226. *Id.* at 209.

227. *See The License Cases*, 46 U.S. (5 How.) 504, 573-86 (1847) (Taney, C.J., concurring). Taney acknowledged that "[i]t is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this Court." *Id.* at 578.

228. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 322 (1978).

229. *Cooley v. Board of Warrons*, 53 U.S. 299, 318-19. *See generally* TRIBE, *supra* note 228, at 405 (1988).

230. *Cooley*, 53 U.S. at 318-19.

231. *Id.*

232. *Wabash, St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 557 (1886).

233. *See, e.g., Wabash*, 118 U.S. 557; *Ex Parte McNeil*, 80 U.S. (13 Wall.) 236 (1871); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

234. *Smith v. Alabama*, 124 U.S. 465 (1888).

235. *Id.* at 482.

burden" on interstate commerce.²³⁶ In the 1940s, the test changed again²³⁷—to the test that has survived to the present.

The current test for whether a law violates the Dormant Commerce Clause has two parts. First, a court will "determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'"²³⁸ Discrimination in this context is treatment that benefits in-state economic interests and burdens out-of-state interests.²³⁹ If a restriction on commerce is discriminatory, it is "virtually per se" invalid.²⁴⁰

If, on the other hand, a restriction is not discriminatory but has incidental effects on interstate commerce, it is valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."²⁴¹ Under this test—known as the *Pike* balancing test—whether a burden on interstate commerce will be tolerated depends on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."²⁴²

236. See, e.g., *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

237. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

238. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 114 S. Ct. 1345, 1351 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

239. *Id.* One writer has suggested that the Dormant Commerce Clause requires a discriminatory purpose. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986), but the Court itself has not required such a purpose.

240. *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1351. See also *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1913 n.6 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

241. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1351.

For an argument that the Court, in applying this test, is not actually balancing factors, see generally Regan, *supra* note 239. See also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) ("If Regan is not correct, he ought to be."). As long as a statute is not discriminatory, it should be upheld. *Id.*

Justice Scalia has, in several concurrences, argued for the Dormant Commerce Clause. See, e.g., *Goldberg v. Sweet*, 488 U.S. 252, 271 (1989) (Scalia, J., concurring); *Tyler Pipe Indus. v. Department of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part).

Despite Regan's argument that the Justices are "imperfectly aware of what they are doing" in the Dormant Commerce Clause context, Regan, *supra* note 239, at 1284, this Article takes the Court at its word and analyzes the burden of multistate regulation on interstate commerce using the *Pike* test.

242. *Pike*, 397 U.S. 137 at 142. Challenges to safety regulations face a "strong presumption of validity." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (market regulation justified by environmental concerns); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978) (truck length statute invalidated despite presumed validity); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island, & Pac. R.*, 393 U.S. 129 (1968) (train crew statute upheld); *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960) (smoke abatement regulation upheld despite burden on interstate commerce); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938) (truck length statute upheld); *Bradley v. Public Utility Comm'n*, 289 U.S. 92 (1933) (state's refusal to license interstate carrier to travel over congested route upheld).

The jurisdiction of the federal courts gives them the procedural power to protect the free market by preventing state actions from harming interstate commerce.²⁴³ For example, the court has wielded this power to strike down state laws imposing sales taxes²⁴⁴ and discriminatory use taxes²⁴⁵ on out-of-state companies. The constitutional principle that the interstate market in goods should be free stands behind all of these Dormant Commerce Clause cases.

Two possible Commerce Clause challenges could be made to the state AGs' behavior. The first is that the DTPAs under which they sue violate the Dormant Commerce Clause because they interfere with interstate commerce. The second is that the DTPAs as applied by secondary states to extract money from interstate companies violate the Dormant Commerce Clause.

1. *State's Deceptive Trade Practices Act—Per Se—as Violation of Dormant Commerce Clause.*—On their faces, state DTPAs regulate even-handedly. Their broad language forbids anyone from engaging in deceptive trade practices. Because the acts do not discriminate against interstate commerce on their face, they pass the first prong of the *Pike* balancing test. Having determined that, facially, the statute will have only incidental effects on interstate commerce, the next question is whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.²⁴⁶ Answering this question requires consideration of “the nature of the local interest involved, and [of] whether it could be promoted as well with a lesser impact on interstate activities.”²⁴⁷

The local interest involved is the protection of citizens from deceptive trade practices. Facially, these statutes create a burden on interstate commerce. Because vague laws exist, a company cannot know whether its behavior will expose it to liability in one state, or in all fifty.²⁴⁸ The cost of doing interstate business increases because VMCs must anticipate and prepare for suits in every state.

The states' interest in passing DTPAs is undeniably great. That interest could be promoted as well with a lesser impact on interstate activities, as through the federal deceptive trade practices provisions of the FTCA.²⁴⁹

243. *Commissioner v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

244. *See Goldberg v. Sweet*, 488 U.S. 252, 260 n.12 (1989); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Cf. International Harvester Co. v. Department of Treasury of Ind.*, 322 U.S. 340 (1944).

245. *See Dennis v. Higgins*, 498 U.S. 439 (1991) (constitutional right to free trade, under the Commerce Clause, recognized); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (“It is now established beyond dispute that ‘the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.’” (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946))).

246. *Pike*, 397 U.S. at 142.

247. *Id.*

248. *See supra* subpart I.B.

249. 15 U.S.C. § 45(a)(1) (1988) (all “deceptive acts or practices” declared unlawful). The FTC may sue in state or federal court for redress to consumers or other persons. Such redress, including damages, rescission, contract reformation, or restitution, may run against a person who has violated a trade regulation rule or engaged in dishonest or fraudulent conduct. *Id.* § 57b(a), (b).

Since the earliest Dormant Commerce Clause cases, the Court has recognized that “[w]hatever subjects of [the commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”²⁵⁰ In *Cooley v. Board of Wardens*,²⁵¹ the Court addressed a challenge to a Pennsylvania statute requiring vessels arriving at or departing from Philadelphia to employ a pilot or pay half the cost of pilotage to the Society for the Relief of Distressed and Decayed Pilots, their Widows and Children.²⁵² The Court upheld the statute because, while regulation of pilotage was regulation of interstate commerce, it was “likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.”²⁵³

As evidence of the desirability of local regulation of pilotage, the Court cited an act passed by the first Congress affirmatively maintaining the state regulations then in existence.²⁵⁴ Furthermore, the nature of the subject left “no doubt of the superior fitness and propriety . . . of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.”²⁵⁵

The Court has found several fields to require national uniform regulation. In *Bibb v. Navajo Freight Lines*,²⁵⁶ Illinois required trucks and trailers to use a certain type of rear splash guards.²⁵⁷ The law made illegal the straight mudflaps that were legal in at least forty-five other states²⁵⁸ and required in Arkansas.²⁵⁹

The court had upheld highway safety laws in the past although they materially interfered with interstate commerce.²⁶⁰ Highway safety measures will not be invalidated under the Dormant Commerce Clause unless “the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.”²⁶¹

In *Bibb*, commerce was impeded by the requirement that operators of trucks or trailers operating in Illinois spend \$30 per truck to bring them into compliance with the Illinois law.²⁶² The mud flaps required by Illinois, further, presented no safety advantage

250. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

251. *Id.*

252. *Id.* at 299, 301.

253. *Id.* at 319.

254. *Id.* at 317 (citing Act of Aug. 7, 1789, § 4 (repealed 1837)).

255. *Id.* at 320.

256. 359 U.S. 520 (1959).

257. *Id.* at 521-23.

258. *Id.* at 523.

259. *Id.*

260. See *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (truck width and weight regulation sustained); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Sproles v. Binford*, 286 U.S. 374 (1932) (truck weight regulation upheld).

261. *Bibb*, 359 U.S. at 524 (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-76 (1945)).

262. *Id.* at 525.

over the straight mud flaps required in other states.²⁶³ The Court held, however, that if these were the only two factors involved—if the only question were whether the cost of adjusting to the Illinois statute unduly burdened interstate commerce—the statute would be upheld.²⁶⁴ The statute was invalidated because the Illinois law conflicted with other states' laws such that an interstate carrier would have to shift its cargo to different vehicles depending on the state it was entering.²⁶⁵ Interstate travel, the Court concluded, required national uniformity.²⁶⁶

In *Morgan v. Virginia*,²⁶⁷ the Court used similar logic to void Virginia's bus segregation statute. It found that racial seating arrangements in interstate travel required a single uniform law²⁶⁸ and that, as a result, the Virginia statute requiring interstate buses to segregate black passengers and white passengers "to avoid friction between the races"²⁶⁹ was invalid.²⁷⁰

Like interstate travel, interstate trade through the media of the mail, common carriers, and electronic communication requires national uniformity. While it would be possible for a VMC to conform with all fifty states' deceptive trade practice laws,²⁷¹ the burden of determining what these laws are and how they can be followed creates a huge burden on interstate commerce, especially since the companies involved do not have staffs or legal representation in any but a few of the states.²⁷²

In *Southern Pacific Co. v. Arizona*,²⁷³ the Court addressed the constitutionality of an Arizona statute requiring trains operating in that state to be less than a certain length.²⁷⁴ The Court noted, as a basic proposition, that

ever since *Gibbons v. Ogden*, [22 U.S. (9 Wheat.) 1 (1824)], the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.²⁷⁵

263. *Id.* (quoting *Navajo Freight Lines v. Bibb*, 159 F. Supp. 385, 388 (S.D. Ill. 1958)).

264. *Id.* at 526 ("We would have to sustain the law under the authority of the *Sproles, Barnwell*, and *Maurer* cases.").

265. *See id.*

266. *Id.* at 527 (citing *Morgan v. Virginia*, 328 U.S. 373, 386 (1946)).

267. 328 U.S. 373 (1946).

268. *Id.* at 386.

269. *Id.* at 374, 380.

270. *Id.* at 386.

271. *I.e.*, by conforming to the law of the strictest state.

272. *See supra* notes 12-13 and accompanying text.

273. 325 U.S. 761 (1945).

274. *Id.* at 763.

275. *Id.* at 767-68 (citing *Edwards v. California*, 314 U.S. 160, 176 (1941); *Minnesota Rate Cases*, 230 U.S. 352, 399-400 (1913); *Leisy v. Hardin*, 135 U.S. 100, 108-109 (1890); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)). The Court noted that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Id.* at 767-68 n.2.

The Court balanced the state and national interests involved.²⁷⁶ Operation of long trains—those that would not pass the Arizona statute—was “standard practice over the main lines of the railroads of the United States.”²⁷⁷ Because of this discrepancy, the subject of train lengths demanded national uniformity.²⁷⁸ Arizona’s train length statute burdened interstate commerce by increasing the cost of operating trains in Arizona “to about \$1,000,000 a year”²⁷⁹ and by impeding efficient operation of interstate trains.²⁸⁰

Arizona’s enforcement of its train length law, while other states regulated by different standards, “must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application.”²⁸¹ The Court did not suggest that the Arizona statute conflicted with other states’ statutes—Arizona and Oklahoma were the only states with train length limits, and both limited freight trains to seventy cars.²⁸² In this case, the burden was not that companies would be unable to operate the same train in all states, but rather “confusion and difficulty . . . under the varied system of state regulation and the unsatisfied need for uniformity.”²⁸³

Because of the nature of the activity regulated, the statute invalidated in *Southern Pacific Co.* required interstate companies to break up trains passing through Arizona.²⁸⁴ The Arizona Supreme Court had upheld the train-length statute because, while it burdened interstate commerce, it was within the state’s police power.²⁸⁵ The Court responded that invocation of the police power was not enough to justify a burden on interstate commerce if the regulation passes “beyond what is plainly essential to safety.”²⁸⁶ The statute thus “control[ed] the length of passenger trains all the way from Los Angeles to El Paso.”²⁸⁷ The impediment to the free flow of commerce, said the Court, was “apparent.”²⁸⁸

In *Kassel v. Consolidated Freightways Corp.*,²⁸⁹ the Court again addressed the problem of a statute that regulated interstate transportation under a claim of safety

276. *Id.* at 768-69.

277. *Id.* at 771.

278. *Id.*

279. *Id.* at 772. The Court does not say what the cost of operating trains in Arizona would be absent the statute. It does say, however, that the law requires the appellant to haul “over 30% more trains in Arizona than would otherwise have been necessary.” *Id.* at 771-72.

280. *Id.*

281. *Id.* at 773.

282. *Id.* at 774.

283. *Id.* at 774.

284. *Id.*

285. *Id.* at 764.

286. *Id.* at 781 (citing *Kelly v. Washington*, 302 U.S. 1, 15 (1937)).

287. *Id.* at 774-75.

288. *Id.* at 775.

289. 450 U.S. 662 (1981).

regulation and police power. Iowa had a statute forbidding shippers from using sixty-five-foot double-trailer rigs in the state.²⁹⁰ It claimed that the law was “a reasonable safety measure enacted pursuant to its police power.”²⁹¹

The District Court struck down the law, holding that “[t]he total effect of the law as a safety measure . . . is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it.”²⁹² The Court of Appeals for the Eighth Circuit affirmed,²⁹³ as did the Supreme Court, holding that the burden on interstate commerce—the requirement that companies using sixty-five-foot double trailers route them around Iowa or ship the trailers through separately—added “about \$12.6 million each year to the costs of trucking companies,”²⁹⁴ and thus outweighed the safety interest putatively promoted by the statute.²⁹⁵

The DTPAs, like train and truck length statutes, control companies’ behavior in states other than their own. A VMC, like the railroads in *Southern Pacific Co.*, is “subjected to regulation which is not uniform in its application.”²⁹⁶ While all of the DTPAs forbid “deceptive” trade practices, the standard for unfairness will vary with judicial interpretation from state to state. Interstate commerce is impeded because VMCs must anticipate what all of the states will say about a given practice and must conform their practices in dealing with citizens of each state to that state’s law of deception.

VMCs’ low overhead is partially attributable to the fact that they deal the same way with all fifty states, and do not need either to hire legal counsel in all the states nor to change their mass communications to conform to the individual states’ nonuniform laws.²⁹⁷ The serious impediments to the free flow of commerce by the local regulation of deceptive trade practices and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.²⁹⁸

In the case of deceptive trade practices by VMCs, no act of Congress grants the states individual control. Because these corporations send the same materials into all the states, the subject matter is national in scope and demands uniform national regulation;²⁹⁹

290. *Id.* at 665, 667.

291. *Id.* at 667.

292. *Id.* at 668. Unlike in *Bibb*, other states did not have laws conflicting with the challenged law that would make it impossible to operate the same equipment in all states. The statute was struck down anyway. *Cf. Huron Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) (Because “[t]he record contains nothing to suggest the existence of any such competing or conflicting local regulations[,] . . . no impermissible burden on commerce has been shown.”).

293. *Kassel*, 450 U.S. at 668.

294. *Id.* at 674. The court also considered the fact that there were exemptions to the statute that were helpful to local interests or “offered the benefits of longer trucks to individuals and businesses in important border cities without burdening Iowa’s highways with interstate through traffic.” *Id.* at 676.

295. *Id.* at 678-79.

296. *Southern Pacific Co.*, 325 U.S. at 773.

297. See *supra* notes 12-13 and accompanying text.

298. *Southern Pacific Co.*, 325 U.S. at 775 (“The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.”).

299. The commerce in which the VMCs are engaged is similar to that of interstate transportation

disparate state regulations—even if they are disparate only because they are subject to different interpretations by the different state courts—constitute a minefield for VMCs and a burden on interstate trade.

Balanced against the burden caused by the disparate deceptive trade practices regulations is any putative benefit of having different regulations from state to state. No such benefit exists if the definition of deceptive varies from state to state—that is, if residents of one state are more intelligent or alert than those of another. That notion is clearly wrong because while people certainly differ in how easily deceived they are, no reason exists to believe that these differences depend on the state in which they live. Rather, it depends on their sophistication in the subject area. For example, a Little Rock lawyer may be more difficult to deceive in business matters than an Ozark mountain man, but should not, by mere dint of his state of residence, be more susceptible to skulduggery than a Wall Street lawyer. The notion that deceptive trade practices regulations should vary from state to state is silly.

The interests of both in-state consumers and interstate trade will be best served by a rule that allows consumers to take advantage of the low-cost services of VMCs³⁰⁰ without allowing unethical corporations to take advantage of the consumers. A prototypical rule would allow the states to continue using their DTPAs against in-state companies³⁰¹ and force them to act against foreign VMCs either through the federal statutes or through their own statutes in federal court.³⁰² Such a rule would increase the efficiency of our courts,³⁰³ decrease the cost of doing multistate business, and protect the interests of each state's consumers.³⁰⁴

A related proposition that was not directly explored in this line of cases, but that has gained some authority since then, is that a state may not regulate a company's activities in another state. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,³⁰⁵ the Court addressed the problem of New York's Alcoholic Beverage Control (ABC) Law.³⁰⁶ The law required every liquor distiller or producer selling liquor to wholesalers within New York to sell at a price "no higher than the lowest price at which such item of liquor will be sold . . . in any other state of the United States." *Brown-Forman*, the

companies. Rather than roads, the VMCs send their wares through the mail and over voice and data lines. Regulations of this commerce might be described as "information superhighway" (as opposed to actual highway) safety regulations.

300. It must be noted that "consumer protection" statutes do not provide an unattenuated benefit to consumers. Any addition to the cost of doing business will be passed on to those consumers by the companies affected.

301. The societal cost of subjecting a local company to a state's DTPA is minimal. Such a company will already have legal representation in the state, and will be able to become familiar with the law and defend against charges of violations at very small marginal cost. As a result, a virtual corporation would be subject to suit under the law of its home state and federal law; multistate corporations would be subject to suit wherever they did business.

302. See *infra* notes 317-29.

303. A company could be sued in one action for allegedly deceptive acts in all 50 states.

304. Consumers might be better protected by this rule than by the present chaotic state of the law.

305. 476 U.S. 573 (1986).

306. *Id.* at 575.

appellant distilling company, wished to offer its wholesalers kickbacks as a “promotional allowance.”³⁰⁷ The New York Liquor Authority barred the company from paying these kickbacks to New York wholesalers and determined that these payments lowered the effective retail price in other states, putting the appellant in violation of the ABC Law.³⁰⁸ Brown-Forman argued that because other states had price affirmation statutes that did not treat the promotional allowances as discounts, the New York ABC Law would have the effect of requiring Brown-Forman to abandon the promotional allowances in all states.³⁰⁹ The New York courts rejected this argument, holding the effects argument as “speculative.”³¹⁰

The New York affirmation law, it was agreed, “regulate[d] all distillers of intoxicating liquors evenhandedly”;³¹¹ the state’s interest—low liquor prices for residents—was legitimate.³¹² Because the ABC Law *effectively* regulated the price of liquor in other states, however, it violated the Dormant Commerce Clause.³¹³ The fact that the law was addressed only to sales in New York was irrelevant;³¹⁴ “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”³¹⁵

Like New York’s liquor price affirmation statute, a state’s DTPA, insofar as it applies to the interstate communications of a VMC, effectively forces that corporation to conform its entire business to the law of that state or forego business with its residents.

Because an available method of achieving the goals of the states’ DTPAs without adverse impact on interstate commerce exists, those acts—on their faces, in their applicability to VMCs—violate the Dormant Commerce Clause under the *Pike* balancing test,³¹⁶ and are thus void.

2. *States Deceptive Trade Practices Acts Applied.*—The DTPAs themselves, applied to VMCs, violate the Dormant Commerce Clause because they create an undue burden

307. *Id.* at 576.

308. *Id.* at 577.

309. *Id.* at 578. The result of the New York law was that Brown-Forman would have to either stop giving the kickbacks in other states or lower the price of liquor in New York. If it did the latter, it would be violating the price affirmation statutes of other states, so it was forced to do the former. *Id.* at 577-78.

310. *Id.* at 578.

311. *Id.* at 579.

312. *Id.*

313. *Id.*

314. *Id.* at 583.

315. *Id.* at 582. The argument that the company could have avoided the discriminatory effect of the statute by ceasing its operations in New York was not presented, and should not have been. If states are allowed to force companies into what amount to contracts of adhesion in violation of the Dormant Commerce Clause, the result will be the economic balkanization that the drafters of the Constitution feared. For the same reason, VMCs should not be forced to choose between, on the one hand, discerning and following the law of deceptive trade practices in a state and, on the other hand, ceasing operations in that state. This explanation is simply another way of describing the need for uniform national regulation governing the practices of VMCs.

316. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

on interstate commerce. As noted *supra*, because of the vagueness of current statutes, a company cannot know whether its behavior will expose it to liability in all fifty states.³¹⁷

The statutes are not facially discriminatory because they may be applied equally to in-state and out-of-state companies. However, they have an incidental detrimental effect on interstate commerce.³¹⁸ Because of this detrimental effect, the second half of the *Pike* test³¹⁹ comes into play. Under this test, the court must determine whether the burden on commerce is clearly excessive in relation to the local benefits of the statute.³²⁰ “[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”³²¹

The local interest involved in the DTPAs of protecting consumers from exploitation by unscrupulous business is undeniably great. That interest could be successfully promoted with a lesser impact on interstate activities, through the federal deceptive trade practices provisions of the FTCA³²² and mail fraud statutes.³²³

Even if the deceptive trade practices acts were not invalid because of their application to VMCs—if, for example, they created identical standards of conduct in the fifty states—their application as revenue enhancers by predatory AGs violates the Dormant Commerce Clause. The key to many of the Supreme Court’s Dormant Commerce Clause cases is the effect of the challenged statute *as applied*.³²⁴ A state’s regulation may have a discriminatory effect where it gives local goods a larger share of the total market in that state.³²⁵ States may not interfere “with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”³²⁶

The use of DTPAs by predatory state AGs as tools for revenue enhancement through settlement offers is constitutionally objectionable. The strategy is intended to squeeze as much money as possible from VMCs—in other words, to burden them as much as possible—without affecting the in-state companies that are in a position to affect, through state legislatures, the budget and the power of the state AG. If the DTPAs, as applied, were not a burden on interstate commerce, they would not make money; if they were as much of a burden on in-state commerce, they would be halted by in-state businesses.

The argument for a violation of the Dormant Commerce Clause by state AGs depends, again, on the Court’s two-part test. A discriminatory effect is immediately

317. See *supra* note 248 and accompanying text.

318. This detrimental effect is that the cost of interstate commerce increases because VMCs must anticipate suit in all the states.

319. See *supra* notes 241-47 and accompanying text.

320. *Pike*, 397 U.S. at 142.

321. *Id.* at 143.

322. 15 U.S.C. § 45(a)(1) (1988) (all “deceptive acts or practices” declared unlawful). The FTC may sue in state or federal court for redress for consumers or other persons. Such redress, including damages, rescission, contract reformation, or restitution, may run against a person who has violated a trade regulation rule or engaged in dishonest or fraudulent conduct. *Id.* § 57b(a), (b).

323. 18 U.S.C. §§ 981(a)(1)(A), 1341, 1956(a)(1)(A)(i) (1988).

324. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 n.16 (1978).

325. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

326. *Oregon Waste Systems v. Environmental Dept.*, 1994 U.S. LEXIS 2659, at 14-15.

apparent in the use of the statutes to gain revenue discriminatorily from out-of-state companies. Because of the direct discriminatory effect, the AG's use of the statute as a revenue-enhancer through settlement offers virtually per se violates the Dormant Commerce Clause.³²⁷ This virtual per se test requires the state to "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."³²⁸

The purposes served by the AGs' application of their DTPAs—protection of citizens from deceptive practices and revenue enhancement—could both be served by the nondiscriminatory alternative of treating in-state companies the same as VMCs. This goal can be accomplished by (focusing on the protective justification of the policy) reserving DTP enforcement efforts for those companies that an AG's investigation reveals to be a probable offender (rather than those companies that happen to be the targets of other AGs' suits), as well as by waiting for the conclusion of the primary suit, with preclusive effect under the Full Faith and Credit Clause, bringing a secondary suit.

Because the legitimate local purposes for applying a state's DTPA to VMCs can be adequately served by these reasonable nondiscriminatory alternatives, the use of state DTPAs as revenue enhancers by predatory state AGs violates the Dormant Commerce Clause.³²⁹

3. *An Alternative "Process-Oriented" Theory.*—One critic of the Court's Dormant Commerce Clause decisions, Professor Julian N. Eule, argues that, while the Commerce Clause was originally intended to prevent state actions interfering with interstate commerce, the justification for such an interpretation no longer exists.³³⁰ Eule's argument takes the writings of James Madison as the strongest justification for a plenary commerce power in the federal government.³³¹ Madison's view was that Congress would be impotent in the commercial field,³³² so that, considering the state's absence of commerce power, no commercial legislation would exist at all.³³³

Under this "impasse theory,"³³⁴ the courts were the logical actors to prevent the courts from interfering with "the national interest in free trade."³³⁵ Now, however, Congress has

327. U.S. CONST. art. IV, § 1, cl.1.

328. The most important of these fact questions is, of course, whether the company's actions are deceptive.

329. As the suit is only *threatened*, the VMC's appropriate cause of action is an injunction against the secondary AGs or a § 1983 action for violation of the Dormant Commerce Clause.

330. Julian N. Eule, *Laying the Dormant Clause to Rest*, 91 YALE L.J. 425, 431-32 (1982).

331. See e.g., Eule, *supra* note 330, at 430-31 ("Judging from the constitutional language alone, one might tend to conclude that the Framers left protection of the national market to congressional supervision rather than judicial enforcement. This, however, does not appear to have been the vision of the original framer.").

332. See Eule, *supra* note 330, at 431. "Madison expected the competing economic interests represented in Congress to neutralize each other and prevent the enactment of regulation of interstate trade." Eule, *supra* note 330, at 431 (citing LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-3 at 321-22 (1978)).

333. Eule, *supra* note 330, at 431.

334. Eule, *supra* note 330, at 431.

335. Eule, *supra* note 330, at 431. (If Congress were "paralyzed in the face of potent and conflicting local interests," it could not act to void unconstitutional state actions.)

proven, through a plethora of acts and regulations,³³⁶ that to regulate interstate commerce is anything but impotent.³³⁷

Because Congress has shown its ability to regulate interstate commerce, Eule argues, [i]t no longer makes sense for the Court to invalidate evenhanded state legislation merely because it burdens interstate commerce too heavily. Under the court's present standard, the likelihood of judicial invalidation increases with the degree of burden imposed by state law, and the weight of the national interest. But this is precisely the situation in which action by Congress of administrative agencies is most likely.³³⁸

Eule goes on to propose a "process-oriented approach"³³⁹ to the Dormant Commerce Clause. While the Court's current "value-oriented" or "free trade"³⁴⁰ approach weighs the burden imposed on interstate commerce against the national interest threatened, Eule's proposed standard would focus on the "proportional division of the burden" between in-state and out-of-state interests.³⁴¹ The states' regulatory attacks on direct-mail companies violate the Dormant Commerce Clause under the process-oriented standard. Eule's proposed test under this standard has four parts.³⁴²

The first step is to determine whether there is a legitimate purpose for the state's actions.³⁴³ If the state has no legitimate goal, the statute is invalid *per se*.³⁴⁴ At this point, discriminatory purpose (but not effect) invalidates the state action.³⁴⁵ In the case of state regulation of deceptive trade practices, we may presume that the state can articulate a legitimate goal in protecting its citizens from deceptive trade practices.³⁴⁶

336. See Eule, *supra* note 330, at 431 (This plethora of acts and regulations includes legislation "in such diverse areas as crime, civil rights, job safety drug manufacturing, and endangered animals.").

337. See Eule, *supra* note 330, at 432. ("The Madisonian impasse model of a Congress deadlocked by competing geographic economic concerns is no longer reflected in reality.").

338. Eule, *supra* note 330, at 436.

339. See Eule, *supra* note 330, at 439-46.

340. See Eule, *supra* note 330, at 439.

341. Eule, *supra* note 330, at 439.

342. See Eule, *supra* note 330, at 457-74.

343. Eule, *supra* note 330, at 457. Under this first step, the state has the burden of producing evidence of the goals of its actions; once the state produces a goal, it will be "taken at its word." Eule, *supra* note 330, at 457-59.

344. Eule, *supra* note 330, at 459.

345. Eule, *supra* note 330, at 459 n.187.

346. If, instead of the statute, a company is challenging the state's policy of seeking revenge from out-of-state companies by threatening deceptive trade practice suits, the state's goal may be mere revenue collection—another legitimate goal. In either case, the state action will be invalidated under one of the later steps in Eule's test.

Assuming the state action passes the first step, the company must show that the state action³⁴⁷ has a “disproportionate impact on nonrepresented interests.”³⁴⁸ The VMC can demonstrate a disproportionate impact four ways.³⁴⁹

The first way to show disproportionate impact is to show facial disparity—a statute that “distinguishe[s] between the represented and unrepresented interest[] on [its] face.”³⁵⁰ If facial disparity exists, “[t]he impact of these provisions falls entirely on those to whom the legislators are not answerable,”³⁵¹ and thus, is disproportionate. The states’ DTPAs are not facially discriminatory; they forbid deceptive trade practices by in-state as well as out-of-state actors.

The second possible way to show disproportionate impact is to show that the statute “provides important exemptions obtainable only by local interests.”³⁵² These exemptions may be explicit³⁵³ or hidden.³⁵⁴ In either case, they may demonstrate disproportionate impact. In the case of states’ DTPAs, local interests are protected from becoming revenue sources under the Acts by the fact that they will not be as willing to settle as are out-of-state VMCs.³⁵⁵ Because the AGs have discretion as to their targets, in-state companies are disproportionately exempted, *de facto*, from the AGs’s revenue-raising settlement offers.

Third, disproportionate impact may reveal itself in the nature of the regulated industry.³⁵⁶ If the affected industry is entirely out of state, an otherwise-neutral state regulation may be entirely disproportionate,³⁵⁷ especially if the regulation benefits in-state

347. Eule talks in terms of valid or invalid “statutes,” but there is no reason the same analysis would not apply to state policies not codified in statutes.

348. See Eule, *supra* note 330, at 460-68. Eule speaks of “disproportionalism” rather than discrimination to emphasize that an improper legislative intent is not necessary for a statute to be invalidated. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), in which the Court invalidated a facially proportionate Wisconsin trailer-length regulation because its exemption provisions were not applied proportionately. *Id.* at 447. See also Eule, *supra* note 330, at 464 (Where interstate commerce was treated disproportionately, “it would exalt form over substance to recognize a distinction between the facially disparate legislation and the superficially neutral statute that conceals its discriminatory treatment of nonresidents in the trappings of restrictively afforded exemptions.”).

349. See Eule, *supra* note 330, at 461-68.

350. See Eule, *supra* note 330, at 461.

351. See Eule, *supra* note 330, at 461. The recurrent theme in Eule’s process-based Dormant Commerce Clause test may be stated as “no regulation without representation.” “The contemporary dangers of state parochialism lie in its evisceration of the democratic process, not in its impairment of free trade.” Eule, *supra* note 330, at 461.

352. See Eule, *supra* note 330, at 463-64.

353. See Eule, *supra* note 330, at 464 (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981)).

354. See Eule, *supra* note 330, at 464 (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978)).

355. See *supra* notes 202-03 (discussing the relative values of settlement offers by AGs to in-state and out-of-state companies).

356. See Eule, *supra* note 330, at 465-66.

357. See Eule, *supra* note 330, at 465. Eule quantifies disproportionality under the name “outsider impact percentage” or “OIP.” The higher the OIP, the more disproportionate the effect of the state action; an

industry.³⁵⁸ In the present case, the statutes in question regulate all industries, so no disproportionate impact exists under this third criterion.

The fourth criterion for disproportionate impact is the nature of the regulation.³⁵⁹ If the state action affects “only a small subgroup of the regulated whole[,] . . . composed exclusively or predominantly of unrepresented entities,” the virtual company will have proven disproportionate impact.³⁶⁰ In the case of the DTPAs, only out-of-state companies are forced to set up defenses or settle. Furthermore, evidence suggests that actual multistate corporations³⁶¹ encourage states to use their DTPAs to reduce the commercial advantage enjoyed by low overhead VMCs.³⁶² These factors provide at least a *prima facie* case for disproportionate impact.³⁶³

If, under the second step of Eule’s test, no disproportionate impact exists, the state may justify its actions under a “rational basis” test.³⁶⁴ If, on the other hand, out-of-state interests are disproportionately impacted (as in the case of settlement offers by state AGs under DTPAs), the next step is to inquire “whether the proposed legislative scheme is likely to achieve the proffered goal.”³⁶⁵ Under this inquiry, “the state [must] demonstrate

action with an OIP of 100% affects only out-of-state interests. *See Eule, supra* note 330, at 460. Eule cites a “hypothetical New York statute prohibiting the sale within the state of any orange juice product” as an example of a legislative effort with an OIP of 100%. The Court did not share Eule’s views. *See Eule, supra* note 330, at 465-66 (discussing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (holding a statute valid despite the fact that nearly all of the entities affected were out-of-state firms) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (same)).

358. *See Eule, supra* note 330, at 465 n.215.

359. *See Eule, supra* note 330, at 467-68.

360. *See Eule, supra* note 330, at 467.

361. “Actual,” as opposed to virtual, multistate corporations are companies doing business in many states and having personnel and assets in more than their home states. The prototypical actual multistate corporation is Wal-Mart, which does business through its stores in more than 40 states and does not sell its products by mail-order. *See supra* note 12.

362. *See supra* notes 11-14 and accompanying text (describing the low overhead and strategic advantage of virtual direct-mail corporations).

363. Further evidence of disproportionate impact by nature of the regulation would exist if there were a conflict between the laws of the states, such that the regulated parties could not operate in the challenged state and another. *See Eule, supra* note 330, at 467-68. *But see Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (upholding Illinois’s mudflap statute even though the statute made it impossible to use the same truck equipment in Arkansas and Illinois, and therefore had a disproportionate impact under Eule’s test). Eule’s analysis here resembles the Court’s test under which a state statute is preempted if it is impossible to obey both laws. *See supra* note 221 and accompanying text (discussing the court’s preemption tests).

364. *See Eule, supra* note 330, at 461. Where the legislative act falls equally or more heavily on parties whose interests are represented in the regulating body, the state need only show that its chosen means bear a natural relationship to the articulated end.

365. *See Eule, supra* note 330, at 469. This step (the “efficacy inquiry”) and the next step (the “cost-effectiveness inquiry”) would act as judicial substitutes for the legislative weighing process that has operated when legislation has a proportionate impact. When legislation has a disproportionate impact, it raises the suggestion of nonrepresentation. “Because burdens falling on nonrepresented interests post no political liabilities, the legislative inquiry of ‘Is it worth it?’ is likely to be replaced with a simpler ‘Do we want it?’” The

that it has in fact considered the efficacy of the promulgated means, that it has concluded that the end will be obtained by the means selected, and that its conclusion is empirically sound.”³⁶⁶ The question is one of subjective knowledge—was the policy (whether legislative or executive action) likely to achieve its articulated end when instituted?³⁶⁷ The policy may be articulated in terms of the executive policy—tracking companies who are sued in other states and settling with them for nuisance value. The end may be expressed either as “to protect the consumers of the state” or “to raise revenues.”

The policy appears unlikely to achieve the first goal. It allows the most egregious out-of-state wrongdoers to buy their peace³⁶⁸ and punishes innocent and beneficial companies.³⁶⁹ The policy would probably fail this step of Eule’s test if consumer protection were its only goal. The policy is, however, effective in enhancing revenue.

Having established the efficacy of the policy in achieving a legitimate articulated goal, we must move on to the fourth and final step in Eule’s process-oriented test. This test has two parts. The initial question is whether the impact of the policy falls exclusively on outsiders. If it does, the state must prove that no less disproportionate alternative for achieving its goal exists.³⁷⁰ If the state proves this, the statute is upheld.

If, on the other hand, the burden of the policy falls, though disproportionately, on in-state as well as out-of-state interests, the state must “articulate [a] legitimate reason for [its] selection of the disproportional means.”³⁷¹ If it cannot, the statute fails.³⁷² If it can, the company must prove that a less disproportionate means will achieve the goal as effectively.³⁷³ If the company cannot prove this, the statute is upheld. If it can, the statute is void.³⁷⁴

In the case of the settlement offer policy, the burden falls on in-state interests, though less than on out-of-state interests.³⁷⁵ The state must therefore articulate a non-protectionist reason for using the settlement offer policy to raise revenues. Even if the state is able to

legislative process is further distorted when the law will affect only outsiders because “the statute’s burden in such an instance may not merely cease to be a burden in the legislator’s mind—it may effectively become a beneficial aspect of the legislation.” Eule would have our courts ensure that the outsiders’ interests are not neglected. Eule, *supra* note 330, at 469-72.

366. See Eule, *supra* note 330, at 471.

367. See Eule, *supra* note 330, at 471.

368. Assuming, *arguendo*, that settlements with possible wrongdoers actually help to protect citizens, this policy requires a state AG to spend as little money as possible developing a case—the less an AG spends developing each case, the more cases he can settle.

369. Because of the effect this policy has on virtual corporations, it may harm consumers more than it helps them because it reduces the availability of cheap products and credit.

370. See Eule, *supra* note 330, at 458.

371. See Eule, *supra* note 330, at 458. “[L]egitimate” in this context means non-protectionist. See Eule, *supra* note 330, at 474.

372. See Eule, *supra* note 330, at 458.

373. See Eule, *supra* note 330, at 474.

374. See Eule, *supra* note 330, at 458.

375. This result occurs because of the lower nuisance value of suits to in-state defendants.

do this, the VMC will indubitably be able to suggest a less disproportionate means of raising revenue.³⁷⁶

C. Declaratory Actions

The Declaratory Judgment Act empowers federal courts to declare the rights of a party so as to provide litigants an "experient and economical forum in which to clarify legal relations and issues and to afford relief from uncertainty."³⁷⁷ The advantage of a declaratory action is that it provides certainty in a party's legal affairs by permitting parties who perceive themselves under a threat of liability to get a judicial determination of their rights before actual litigation.³⁷⁸ The court has discretionary power as to whether to entertain a declaratory judgment or not. The court bases this determination on whether the declaratory action will probably result in "a just and more expeditious and economical determination of the entire controversy."³⁷⁹

A declaratory judgment action could be pursued in federal court against the state AGs, with certification of a class of defendants including all state AGs.³⁸⁰ Jurisdiction would be based on a federal question³⁸¹—constitutionality of suit by the AGs under the Dormant Commerce Clause. This action would serve to prevent a multiplicity of suits against the company in state court. It would also bind all of the AGs to a single decision in a single action.

On a related note, once a state AG has obtained a judgment against a VMC with all its assets in another state, it has the problem of collecting against that judgment. Because the assets are in another state,³⁸² it must go to that state to execute the judgment. To make this process easier, most states have adopted versions of the Uniform Enforcement of Foreign Judgments Act (UEFJA).³⁸³ Under this statute, the AG may follow a simple procedure—for example, file the judgment with a state court and send the judgment debtor notice of execution in the other state—to make the judgment executable in a state

376. For example, a use tax on all products purchased in the state might be upheld under Eule's test. Even if the policy is upheld in the third step as an efficacious way to protect the interests of the state's consumers, it will be invalidated in the fourth step because there is a more cost-effective (*i.e.* less disproportionate) way to do so. For a description of that less disproportionate method, *see supra* notes 347-63 and accompanying text.

377. 28 U.S.C. §§ 2201-2202 (1988 & Supp. V 1993); Gia. L. Honnen, Note, *Continental Casualty Co. v. Robsac Industries: Federal Declaratory Judgment Actions and Parallel State Proceedings—A Fifth Branch of Abstention*, 29 SAN DIEGO L. REV. 361 (1992).

378. Neil M. Goodman, Note, *Patent, Licensee Standing and the Declaratory Judgment Act*, 83 COLUM. L. REV. 186, 187 (1983).

379. CHARLES ALAN WRIGHT, *THE LAW OF THE FEDERAL COURTS* 100 (4th ed. 1983).

380. *See* David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759 (1979) (discussing the binding effect of federal declaratory judgments on state courts). *See also* Honnen, *supra* note 377, at 363 ("Circuits have split over whether parallel state proceedings require abstention and what the appropriate standard of review for the district court's exercise of discretion should be.").

381. The Federal Declaratory Judgment Act requires independent grounds for federal court jurisdiction over a declaratory judgment. 28 U.S.C. §§ 2201, 2202 (1988 & Supp. V 1993).

382. The assets are probably in the VMC's state of incorporation or its principal place of business.

383. UNIF. ENFORCEMENT OF FOREIGN JUDGMENT ACT, 13 U.L.A. 154 (1964).

other than the one issuing it. The UEFJA is intended to give foreign state judgments full faith and credit.

The VMC may sue its own AG³⁸⁴ in its own state court under a declaratory judgment action, the purpose of which is to determine whether a given practice of the VMC is deceptive. The judgment in this court will have the benefit of the full faith and credit of other courts. If the VMC's home state court finds a practice deceptive, this finding of fact will be adopted, under the Full Faith and Credit Clause, and by other state and federal courts.

If, however, the VMC's home state court finds the practice not to be deceptive, other jurisdictions will be bound by this finding. A foreign AG wishing to sue the VMC in another state will be forced to convince that state's court that the Full Faith and Credit Clause does not demand the preclusive effect of the finding of non-deceptiveness. If he succeeds in getting a judgment, he will have to convince the VMC's state court that, despite the violation of the Full Faith and Credit Clause, the judgment is valid and enforceable under the UEFJA.

D. Multidistrict Litigation

Multidistrict litigation (MDL) presents a situation where the parties will be forced to consider the same issue separately and repeatedly in different districts.³⁸⁵ The example presented in the Article is the VMC that is forced to fight about the same behavior in all fifty states.³⁸⁶ There are many advantages to multidistrict litigation from the viewpoint of the plaintiff, defendant, and judicial system.

Congress has created the Judicial Panel on Multidistrict Litigation (the "Panel") "to promote efficient and expeditious processing of . . . factually related cases."³⁸⁷ In deciding whether or not a transfer is appropriate, the Panel looks at specific standards to see whether the requirements have been met.³⁸⁸ One of the requirements is that "[t]he transfer must promote the just and efficient conduct of the actions."³⁸⁹ In determining whether or not this requirement has been met, the Panel looks at several factors. One factor is preventing duplication of discovery on common issues.³⁹⁰ Under subsection 1407(b), the court supervises discovery, which results in a more "rapid and orderly progression to trial."³⁹¹ The advantages of the national disposition program are that duplication of discovery is avoided,³⁹² and that the defendants can no longer stretch out

384. The VMC may also sue any other person who might sue it under the state's DTPA.

385. Francis J. Nyhan, Comment, *A Survey of Federal Multidistrict Litigation—28 U.S.C. § 1407*, 15 VILL. L. REV. 916, 917 (1970).

386. See *supra* Part IV.

387. Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711 (1991).

388. Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33, 41 (1979).

389. Herndon & Higginbotham, *supra* note 388, at 41.

390. Herndon & Higginbotham, *supra* note 388, at 45.

391. Nyhan, *supra* note 385, at 945.

392. Rhodes, *supra* note 387, at 719.

the proceedings in hopes that the tired and discouraged plaintiff will settle,³⁹³ which is exactly what is happening to the VMCs who find it easier and more convenient to settle than to fight in all fifty states.³⁹⁴

The defendants also benefit from MDL in that national document depositories are set up to make document production less expensive, less time consuming, and less disruptive.³⁹⁵ In litigation where a huge quantity of documents exists, these common depositories "may save hundreds of hours of the attorneys' and deponents' time."³⁹⁶

Another factor the Panel uses to determine if an MDL will be just and efficient is whether or not it will "economize judicial effort by having a single judge handle matters that otherwise would have been brought to the attention of several different judges."³⁹⁷ By consolidating in one district, under one judge, MDLs undisputably provide for more efficient use of all the judges' time.³⁹⁸

Multidistrict litigation is advantageous to all parties. In the absence of section 1407, the independent and uncoordinated litigation of claims that arise out of a common incident—a direct-mail company that sends material to all fifty states—might take years to resolve, with strain to everyone involved.³⁹⁹

To consolidate in federal court all state DTPA claims against foreign companies is therefore reasonable. Jurisdiction could be based upon a federal question or the Dormant Commerce Clause. Alternatively, the law could be changed to allow the Panel "to remove cases from, and to transfer cases to, *state* courts."⁴⁰⁰

E. Full Faith and Credit

Once the challenged act has been found in one court not to be deceptive or unfair, the other sovereigns must be precluded from suing the virtual corporation for the same conduct. Otherwise, the corporation will still have to litigate or settle in each state.

The Full Faith and Credit Clause of the Constitution mandates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁴⁰¹ Under this provision, the secondary sovereigns' courts must treat the primary sovereign's determination that the corporation's practices are not deceptive as they would treat their own decisions, *i.e.*, they must not allow their own AGs to relitigate the already-decided factual questions.⁴⁰² The secondary sovereigns' AGs should honor the Full Faith and Credit Clause and refrain from suing the virtual corporation for the practices already challenged in the primary sovereign's court.

393. Nyhan, *supra* note 385, at 945-46.

394. *See supra* notes 180-93 and accompanying text.

395. Nyhan, *supra* note 385, at 948.

396. Rhodes, *supra* note 387, at 720.

397. Herndon & Higginbotham, *supra* note 388, at 45.

398. Nyhan, *supra* note 385, at 949.

399. Herndon & Higginbotham, *supra* note 388, at 35.

400. Conway, *supra* note 208, at 1100 (suggesting that Congress grant the Panel discretion "to direct litigation to and from state courts").

401. U.S. CONST. art. IV, § 1, cl.1.

402. The most important of these fact questions is, of course, whether the company's actions are deceptive.

If a practice is found not to be deceptive in the primary state, that finding of fact will carry over to the other courts of that state; other parties in the primary state cannot challenge the practice on grounds of deceptiveness. Other state courts (and federal courts⁴⁰³) will therefore be bound by that finding of fact. If a secondary sovereign's AG and court insist on suing after the primary sovereign has determined that the practice is not deceptive, the defendant company may sue for an injunction for this violation of the Full Faith and Credit Clause.⁴⁰⁴

This rule has an obvious defensive application—once the primary suit has been decided in the VMC's favor, the VMC may seek summary judgment in the secondary states based on the primary state's findings of fact. Under the Full Faith and Credit Clause, the secondary states' courts are barred from adjudicating the already-decided question of whether a practice is deceptive. If they insist on attempting to relitigate the issue, the VMC may seek a writ of mandamus against the secondary state court judges, compelling them to grant summary judgment on the issue of the deceptiveness of the practice.

The Full Faith and Credit Clause also has an offensive application. When a VMC is threatened with suit in several foreign states, it can strike first by seeking a declaratory judgment in the courts of its home state on the issue of whether the challenged practice is deceptive.⁴⁰⁵ If it wins this action, it will have a finding of non-deceptiveness that it can

403. See 28 U.S.C. §1738 (1988). The statute provides:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

404. Note, however, that if the DTPAs were criminal, rather than civil, statutes, one sovereign's prosecution of the virtual corporation would not preclude another state from prosecuting for the same criminal act.

The Double Jeopardy Clause is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 794, 796 (1969). The Court held in *United States v. Halper*, 490 U.S. 435, 448-49 (1989), that the Double Jeopardy Clause bars government suits for retributive or deterrent civil fines against someone who has already been tried under a criminal statute for the same behavior; the Court may be expected to treat punitive fines similarly and hold that one action for a punitive fine bars another under the Double Jeopardy Clause.

However, "the doctrine of Double Jeopardy does not apply to suits brought by separate sovereigns, even if both are criminal suits for the same offense." *United States v. A Parcel of Land with a Bldg. Located Thereon*, 884 F.2d 41, 43 (1st Cir. 1989); see also *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that the Double Jeopardy Clause does not bar one state from bringing a criminal case against an appellant on the basis of the same acts for which he was previously tried by another State).

Under the dual sovereignty doctrine, the Double Jeopardy Clause does not apply when two states prosecute a defendant for the same act because offenses against different sovereigns are different offenses. See *id.* at 88. This view would justify a finding that one state's suit for deceptive trade practices would not preclude another's if the deceptive trade practices statutes were criminal.

405. This declaratory judgment could be brought against the VMC's home state's AG or anyone else entitled to sue the VMC under its home state's DTPA.

export to all of the foreign states under the Full Faith and Credit Clause.⁴⁰⁶ By initiating the primary suit itself, the VMC chooses the forum and minimizes its legal costs. The detrimental effects to interstate commerce of forcing VMCs to defend against DTP actions all over the country are minimized, as is the value of these actions to predatory AGs.

CONCLUSION

The use of state DTPAs by predatory AGs to collect revenues from out-of-state companies is a real problem, and one that violates the Dormant Commerce Clause. It burdens interstate commerce, and it hampers the growth of VMCs, which otherwise provide immense benefits to residents of all the states.

The problem is not insoluble, however. It may be solved in a federal declaratory action against foreign state AGs, in MDL against the same parties, and in a state declaratory action on the deceptiveness of a practice. The goal of these procedures is to delay suits by secondary state AGs until the primary suit is resolved. The primary state court's finding on the deceptiveness of the practice will then be binding on the secondary states' courts under the Full Faith and Credit Clause of the United States Constitution. Miscreant companies may be punished in each of the fifty states, and righteous VMCs will be forced to defend themselves in only one foreign state's court. Consumers will be protected; the purpose of the Constitution—encouragement of a national free market—will be promoted; and the VMC, the business of the future, will thrive.

406. See *supra* note 405. If the VMC loses this action, it will, of course, be vulnerable to actions under the DTPAs of all the states—as it should be if its practices are deceptive. If it wins this action, the finding of non-deceptiveness will be stronger for its origin in the court system with jurisdiction over the VMC's assets. Out-of-state AGs rely on the VMC's home courts giving full faith and credit to out-of-state judgments against the VMC. If an out-of-state judgment were handed down despite (that is, without according full faith and credit to) the home state's finding of non-deceptiveness, the home state may not be inclined to give full faith and credit to that judgment.

Another consideration in the area of full faith and credit is that one state is not required, under the Full Faith and Credit Clause, to enforce the penal laws of another state. See, e.g., *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932); *Converse v. Hamilton*, 224 U.S. 243, 260 (1912); *Huntington v. Attrill*, 146 U.S. 657, 676 (1892). While the Court has not directly addressed the question of whether a judgment based on a penalty is entitled to full faith and credit, see *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935) (“We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law . . . is within the jurisdiction of the federal district courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.”), it is possible that the VMCs' home state courts cannot be compelled to enforce a judgment under a foreign state's DTPA insofar as it is penal rather than compensatory.