

ASSESSING INTEREST GROUPS: A PLAYING FIELD APPROACH

*Paul J. Stancil**

INTRODUCTION

For the last thirty-five years, a substantial majority of Americans has expressed biannually the cynical belief that government is “pretty much run by a few big interests looking out for themselves” rather than “for the benefit of all the people.”¹ This belief may to some extent be justified. “Earmarks,” government subsidies, and “special interest legislation” are regular features of the political landscape, as are the lobbying operations whose sole *raison d’être* is to make interest group dreams a reality. An entire subfield of economics, known variously as “public choice theory” or “interest group theory” (IGT), has developed to help explain how industries and interests can sometimes subvert the political process.

But generalized electoral antipathy toward interest group politics simply has not translated into meaningful legal obstacles to interest group subversion of deliberative democracy; progress in applying interest group theory to improve regulatory function has been stalled for the better part of a generation.²

According to the conventional wisdom, insuperable constitutional, normative, and institutional hurdles await anyone foolhardy enough to attempt IGT-driven reform. But careful analysis reveals that many of these purported roadblocks share two common origins: (1) lack of a consensus normative framework in which to apply the insights of interest group theory; and (2) confusion and concern over how best to

* Visiting Assistant Professor of Law, University of Illinois College of Law. For helpful comments on earlier stages of this project, thanks to Geoffrey Miller, Tom Ulen, David Hyman, Lee Fennell, Neil Richards, Jim Rossi, Amitai Aviram, Scott Moss, David Mills, Todd Zywicki, participants in law faculty workshops at the University of Virginia, Washington University in St. Louis, Florida State University, the University of Cincinnati, and Marquette University, and participants in the Fall 2006 Midwestern Law & Economics Association annual meeting.

¹ ANES Guide to Public Opinion and Electoral Behavior, available at http://www.electionstudies.org/nesguide/toptable/tab5a_2.htm (last visited Feb. 27, 2007). ANES ceased asking the relevant question in its 2006 study.

² For one of the last major theoretical contributions to the debate, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

measure interest group dynamics in the real world. If these interrelated problems can be solved, the primary objections to reform diminish substantially.

These problems are difficult. Some would challenge prescriptive application of interest group theory on the grounds that it is inherently undemocratic or that it fails to acknowledge the largely virtuous and public-regarding behavior of regulators. Similarly, interest group theory is arguably normatively ambiguous, at least from an instrumentalist perspective. For some, the old saw about lawyers applies to interest groups with equal force: All interest groups are horrible, except mine.³ Thus, any project designed to curb interest group influence must advance some coherent normative theory under which intervention can be justified.

Measurement of interest group dynamics is also difficult. Many of the most intuitively attractive measurement approaches are fatally flawed, and the most obvious and familiar modes of analysis—ex post evaluation of interest group *behavior* or ex post evaluation of substantive regulatory *results*—are utterly unworkable for a variety of reasons. Behavioral assessments are inherently subjective and can easily be circumvented by infinitely creative political actors. It is also extremely difficult to quantify the impact of various attempts to influence government action.⁴ More subtly, substantive results affect assessments of behavior. Whether a given interest group action is viewed as “excessive” is inevitably driven at least in part by normative preferences regarding the substantive outcome. In a world where virtually any regulatory outcome is defensible under at least one normative theory and may be indefensible under others, measurement approaches based upon or influenced by the desirability of specific results are not the answer.⁵

The measurement problem is also difficult because it implicitly seems to require a coherent and complete theory of the interaction between interest groups and regulators. This is hotly contested space, to say the least. To some, it might seem important whether regulators can generally be trusted to work in furtherance of the public good, whether their votes are for sale to the highest bidder, or whether the truth is somewhere in between. Given these challenges, is it possible to measure interest group dynamics in a useful way?

This Article has two conceptual aims. First, it seeks to identify

³ This can be true even for economic libertarians whose overarching philosophy is likely to be most closely aligned with general hostility toward interest groups. As Jill Fisch demonstrates in her illustrative case study of Federal Express and its political activity, corporations are sometimes extremely effective agents for deregulatory change. Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1518-28 (2005).

⁴ See, e.g., *id.*

⁵ See Elhauge, *supra* note 2, at 49-59.

realistic, consensus normative goals for regulatory function. That is, this Article attempts to define the circumstances under which interest group theory is both (1) most reliably predictive and (2) least likely to yield normatively desirable results. Having staked out this normative territory, the Article then designs a metric around it. The metric this Article proposes will assist in identifying regulatory scenarios in which interest group subversion is objectively likely and unambiguously undesirable.

This Article has three parts. Part I briefly summarizes and assesses interest group theory and its implications for the demand for regulation. In general, IGT predicts that small, focused interests often will be able to overcome collective action hurdles and petition government for benefits where large diffuse interests will not. To the extent we think that regulatory processes reflect some combination of enlightened public interest and democratic or majoritarian influence, IGT is somewhat disquieting. Nonetheless, prescriptive approaches based upon IGT are few and far between, in large part because of the absence of a consensus normative framework and measurement approach through which IGT's insights can be filtered and applied.

Part II proposes a normative baseline for measuring interest group dynamics. As it turns out, the predictive value of IGT is often independent of supply-side theories of regulation; whether regulators are romantically republican or slyly self-serving, IGT still has predictive force. Moreover normative aspirations to republican objectivity can have disastrous side-effects. Thus, instead of untenable and potentially counterproductive focus upon encouraging republican civic virtue, the "second-best" norm this Article proposes—workably competitive pluralism—seeks to ensure that the competing interests on either side of an enacted or proposed regulation are relatively evenly balanced. Though such a norm cannot guarantee republican deliberation, it can promote effective regulatory deliberation by proxy.

Part III introduces and develops the Playing Field Index (PFI). An ideal measurement of workably competitive pluralism would assess the extent to which organizational dynamics predict a relatively fair fight before regulators. As disparity between competing interests' organizational opportunities increases, so too does the risk of regulatory subversion. Thus, the PFI attempts to predict the likelihood of regulatory petitioning on either side of a given regulatory nexus. The concentration of benefits and costs accruing to interested parties is critical to predicting whether interests will collectively or unilaterally seek regulatory protection. This Article adapts the familiar Herfindahl-Hirschman Index (HHI) industrial concentration measure⁶ to the interest

⁶ In reality, this "adaptation" returns HHI closer to its economic-political historical roots. See ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 157-62

group context. Economists use HHI to predict the likelihood of coordinated or unilateral anticompetitive behavior as a function of industry concentration. Because the primary concern of IGT is the *relative* rather than absolute dispersion of the benefits and costs of regulation, this Article defines the PFI as the ratio between a “benefits HHI,” measuring concentration of the benefits of regulation, and a “costs HHI,” measuring concentration of the costs of regulation. The PFI can be measured using existing economic and econometric tools, and is conceptually similar to calculations performed routinely by courts, administrative agencies, and watchdog groups in a variety of contexts. More important, the PFI is calculable primarily in contexts where regulatory outcomes are normatively undesirable—naked rent-seeking by special interests. The self-limiting PFI approach thus undermines the foundations of our current remedial paralysis and offers an important first step toward reform.

I. THE DEMAND FOR REGULATION

In 1886, Simon Newcomb observed that corporate interests could “collect an extra profit of one cent per annum out of each inhabitant of the country” and that “[n]ot one person out of a thousand would give a moment’s attention to the wrong, or indeed ever find it out.”⁷ Newcomb astutely noted that the average citizen “could not send a letter, or print a handbill, or call a meeting of his neighbors without spending more time than the question was worth.”⁸ But not until the middle of the 20th Century did interest group theory evolve from the groundbreaking work of economists Anthony Downs, Mancur Olson, George Stigler, James Buchanan, Gordon Tullock, Gary Becker, Sam Peltzman and others.⁹ This Article is primarily concerned with a deceptively simple key insight of this early work, typically attributed to

(1945). Albert Hirschman’s 1945 book, introducing what would later be renamed the Herfindahl Hirschman Index, used a substantially identical measure to assess the relationship between national power and foreign trade from the beginning of World War I through the end of the 1930s. *Id.*

⁷ See SIMON NEWCOMB, PRINCIPLES OF POLITICAL ECONOMY 457 (1886).

⁸ See *id.*

⁹ See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard Univ. Press 1971) (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) [hereinafter Stigler, *Economic Regulation*]; JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

Olson: small intensely interested groups can often overcome collective action hurdles where large diffusely interested groups cannot.¹⁰ Within the economics and legal academies, this and other related insights ultimately evolved into the “public choice” school of regulatory theory.

A. *Traditional Conceptions of Regulatory Demand*

Demand-side interest group theory posits that groups face substantial organizational obstacles to collective action. When the benefits those groups seek are “public” or “collective;” that is, when all similarly situated parties benefit from the provision of the good regardless of whether they contributed to its acquisition, the collective action problems increase substantially.

While basic economic theory predicts that *all* collective or public goods will be “underdemanded”¹¹ due to collective action problems,¹² the *extent* to which public goods are undersought is a function of the size of the group benefiting from the public good and the distribution of benefits within that group.¹³ For small groups seeking concentrated (i.e., high per-capita) benefits, the collective action hurdles are lowest. For large groups seeking diffuse (i.e., low per-capita) benefits, collective action hurdles are highest.¹⁴

More formally, information costs, organization costs, and free rider costs combine to advantage smaller, more intensely focused groups at the expense of larger groups. “Information costs” refers primarily to the costs voters face in informing themselves of the implications of a given regulation.¹⁵ In a world characterized by “package” or “bundled” voting in which voters necessarily must concern themselves with multiple issues, voters with small per-capita stakes will have little incentive to incur the costs associated with obtaining information.¹⁶ Similarly, the organization costs associated with full participation in legislative demand may exceed the price low per-capita voters are willing to pay.

Finally, free rider costs present a significant impediment to the formation and effectiveness of large diffusely interested groups. For actors whose per-capita benefits are low, there is a substantial incentive

¹⁰ See, e.g., OLSON, *supra* note 9, at 22-33.

¹¹ “Underdemanded” in this context refers only to the optimal level of demand predicted by the self-interest of the demanders, not to any sort of *normative* optimal.

¹² See OLSON, *supra* note 9, at 32-33.

¹³ See *id.* As discussed below, the demand for economic rents is usually decidedly suboptimal from society’s perspective.

¹⁴ See *id.*

¹⁵ See Stigler, *Economic Regulation*, *supra* note 9, at 11-12.

¹⁶ See Peltzman, *supra* note 9, at 213 (restating Stigler).

to rely upon others to provide public goods. In a typical agricultural subsidy scenario, for example, individual consumers may rationally prefer to sit on the sidelines and let others carry their water. In the aggregate, this free-riding risk substantially impedes effective organization.

These same phenomena affect small intensely focused groups as well.¹⁷ But given the greater concentration of benefits to small focused groups, these information and organization costs are sometimes surmountable.¹⁸ There is often sufficient incentive for at least some members of a small focused group to coordinate and seek collective benefits, regardless of free rider problems.¹⁹ The point is not that small focused groups can easily overcome collective action hurdles, but rather that they can do so relatively more easily than their large diffuse opponents. In short, traditional demand-side interest group theory asserts a sort of “law of diminishing returns to group size in politics.”²⁰ Thus, demand for regulation is often driven by the relative collective action hurdles facing various interested constituencies.²¹

B. *Rent Extraction and Coasean Bargaining*

More recent economic modeling of regulatory demand suggests a slightly different understanding of the demand for regulation, but it does not substantially affect the analysis of this Article. Fred McChesney in particular has argued that the traditional Olson/Stigler/Becker free rider model is incomplete, both because it fails to account for various other economic incentives affecting demand-side actors and because it fails to incorporate regulators as active, utility-maximizing participants in the regulatory process.²² McChesney notes that free riding is neither necessary nor sufficient to explain the failure of some groups to

¹⁷ See OLSON, *supra* note 9, at 34-35.

¹⁸ And as discussed in Part III.A.3 below, small focused commercial groups may enjoy additional benefits from organization as well. See *supra* notes 97-104 and accompanying text.

¹⁹ See OLSON, *supra* note 9, at 22-33.

²⁰ See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211, 213 (1976).

²¹ For discussion of how even larger groups can sometimes overcome collective action challenges, see OLSON, *supra* note 9 at 132-33, 141-48; see also Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 92-101 (1989).

²² See, e.g., Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) [hereinafter McChesney, *Rent Extraction*]; Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73 (1991) [hereinafter McChesney, *Interest-Group Organization*]; FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997) [hereinafter MCCHESENEY, MONEY FOR NOTHING].

organize.²³

In McChesney's view, part of the difference between observed rates of organization to seek regulatory rents can be attributed solely to the relative side benefits of that organization.²⁴ Producers are far more likely to enjoy side benefits from organization than are consumers—cost-reducing technical information exchanges, development of industry standards, and demand-increasing collective advertising all may encourage producer organization wholly exclusive of any rent-seeking purpose, for example.²⁵ By contrast, consumers enjoy “few (if any) comparable interdependencies”; thus, the expected benefits from consumer organization are often wholly political.²⁶ This benefit disparity has explanatory power “independent of any greater free-rider problem afflicting consumers.”²⁷ McChesney also notes that in the traditional model, the benefits of organization rise along with the costs of organization,²⁸ thus at least potentially weakening the explanatory power of the free-riding explanation.

McChesney also highlights another weakness in the traditional account: regulators in the traditional public choice model are treated as passive recipients of rent-seeking payments, rather than active, self-interested players in the regulatory rents game.²⁹ McChesney notes that regulators themselves face incentives to maximize their own utility by demanding compensation for rent transfers.³⁰ Thus, McChesney hypothesizes that a self-interested legislator will invest in credible threats to undertake “surplus-transferring policies” to extract payments from would-be victims.³¹ According to McChesney, California state legislators refer to such threats (usually issued in the form of draft legislation) colloquially as “milker bills,” a term used “to describe legislative proposals” that are intended not to pass, but to elicit contributions from those who would like to make sure they do not pass.³² Thus, in McChesney's model, the very *existence* of organization

²³ See McChesney, *Interest Group Organization* at 74-85.

²⁴ Here McChesney's model looks little different than Olson's. See OLSON, *supra* note 9 at 132-33, 141-48.

²⁵ See McChesney, *Interest Group Organization*, *supra* note 22, at 77.

²⁶ See *id.*

²⁷ See *id.* at 77-78.

²⁸ See *id.* at 78-79.

²⁹ See, e.g., McChesney, *Rent Extraction*, *supra* note 22, *passim*.

³⁰ See McChesney, *Interest-Group Organization*, *supra* note 22, at 79; compare Becker, *supra* note 9, *passim*.

³¹ See McChesney, *Interest-Group Organization*, *supra* note 22, at 79-80. In a recent article, Professors Edward McCaffery and Linda Cohen describe an apparent example of McChesney's extortion dynamic in the context of federal estate tax regulation. See Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159 (2006).

³² See MCCHESENEY, MONEY FOR NOTHING, *supra* note 22, at 29-30. Other legislatures apparently refer to such threats as “cash cows,” “juice bills,” and “fetchers.” See *id.*; see also

is actually potentially costly to consumers, because it lowers politicians' transaction costs in connection with delivering credible rent-extracting threats to those consumers.³³

McChesney's Coasean theory of regulatory demand offers a more complete picture of the forces affecting interest organization and the concomitant demand for regulation. And recent research suggests that it has some predictive power as well.³⁴ But properly understood, McChesney's insights are more supplement to the Olsonian understanding than critique.³⁵ McChesney's amplification of exogenous demand-side interests, for example, merely expands upon the incentives Olson identified. His analysis does not purport to dethrone collective action hurdles as the most significant problem facing those with political interests in organizing. If anything, McChesney's "additional benefits to small groups" observation implies that large diffusely interested groups may be even *less* likely to organize than a pure rent concentration-driven analysis might suggest. McChesney's mode renders the approach proposed in this Article slightly more conservative because the analysis considers only endogenous costs and benefits. Moreover, circumstances in which the McChesneyan dynamic would cut against the measurement approach proposed in this Article are likely to be few and far between. Finally, the side benefits of which McChesney speaks are likely unquestionable. With respect to McChesney's observation that the benefits of organization increase with the costs, the Article's proposed concentration approach implicitly subsumes this issue in its analysis. The normative model and measurement approach should account for McChesney's theory, where possible. But his demand-side insights do not substantially alter the character of the inquiry. We will take up McChesney's supply-side critique of traditional public choice theory in Part II of this Article.

Douglas Ginsburg, *A New Economic Theory of Regulation: Rent Extraction Rather Than Rent Creation*, 97 MICH. L. REV. 1771, 1774 (1999) (reviewing FRED S. MCCHESENEY, MONEY FOR NOTHING, *supra* note 22).

³³ See McChesney, *Interest-Group Organization*, *supra* note 22, at 84-85.

³⁴ See generally McCaffery & Cohen, *supra* note 31.

³⁵ McChesney's insights do, however, substantially undermine as overly simplistic the early Stigler/Becker/Peltzman models built upon Olson's insights. See generally sources cited *supra* note 9.

II. A NORMATIVE FRAMEWORK FOR INTEREST GROUP THEORY: WORKABLY COMPETITIVE PLURALISM

A. *Understanding the Present Prescriptive Paralysis*

Despite its flaws, IGT has substantial predictive power. Why, then, has IGT failed to provide the theoretical spearhead for a regulatory revolution?

IGT has not gained much prescriptive traction for several reasons. First and perhaps foremost, there is no consensus normative framework through which to apply interest group theory to mitigate subversion of the democratic process. The absence of this framework can be attributed primarily to the fact that many find interest groups useful for pursuing their policy preferences.³⁶

Given the human tendency toward ends-justified behavior, it is perhaps unsurprising that few raise their voices in unequivocal, universal opposition to interest groups. Instead, for many the implicit denouncement is far more hypocritical: All interest groups are bad except those promoting my desired goals. At least some of interest groups' persistence is attributable to the collective realization that interest groups and interest group dynamics are often useful instrumental means to our preferred ends. Thus, large-scale attempts to limit interest group influence are likely to run into a particularly confounding problem: sometimes interest group theory works in our favor.

This is not necessarily limited to the context of commercial self-interest. One could argue that many of the consensus societal advances of the last two generations were in fact a product of Olsonian interest group dynamics, with relatively small, concentrated minorities obtaining substantial economic and other benefits from larger, more diffuse majorities facing insufficient individual incentives to organize or complain.³⁷ For those whose primary focus is upon regulatory results rather than regulatory process, interest group subversion can sometimes be justified. Thus, to gain broad-based support, any attempt to limit interest group subversion of regulators should find some way to identify and carve out interest group subversion that cannot easily be defended on the basis of the substantive results it generates.

Almost as important, it is extremely difficult to identify and measure interest group influence using traditional behavioral

³⁶ Disputes regarding how and to what extent republican government should protect the rights and interests of small groups are also potentially relevant to this discussion. The petitioning rights guaranteed by the First Amendment, for example, arguably reflect a normative commitment to giving minorities voice before regulators. See U.S. CONST. amend. I.

³⁷ See, e.g., Elhauge, *supra* note 2, at 49-54.

approaches. There is no comprehensive list of objectionable rent-seeking conduct to be proscribed,³⁸ and there is no meaningful way to measure the effects various rent-seeking actions actually have upon regulators.

Eliminating interest groups entirely is not in the cards.³⁹ Thus, any attempt to measure interest group dynamics for prescriptive purposes must establish some “acceptable” level of activity, influence, or incentives against which “excessive” interest group dynamics can be identified by contrast. But as Einer Elhauge has persuasively argued, most attempts to identify allegedly “excessive” interest group influence necessarily depend upon our normative assessment of the regulatory result.⁴⁰ For many, the existence of a normatively acceptable outcome will be *prima facie* evidence that interest group influence stayed within acceptable levels; a normatively undesirable outcome will be proof that interest groups sabotaged the regulatory process. Because there can be no normative consensus regarding regulatory results, it is impossible to design an objective system for assessing interest group influence based upon quantification or characterization of specific interest group activity.

Thus, any attempt to construct a consensus normative framework for IGT must contend with two foundational issues. First, how do we account for the supply side of the equation; that is, how does the backstop of regulatory autonomy affect the predictive power of IGT? Does it matter if regulators are truly public-spirited? What if they are instead passive utility maximizers? What if they are more active in their pursuit of personal gain?

Second, assuming IGT is broadly predictive, is that necessarily a bad thing? Regardless of what Olsonian organizational dynamics may suggest about the integrity of the regulatory *process*, they do not inevitably suggest bad regulatory *results*. That is instead a function of the specific small, concentrated interests that manage to bend regulators’ ears successfully. If organizational disparities provide a useful means for the accomplishment of normatively desirably ends in certain circumstances, is that necessarily fatal to prescriptive application of IGT? Or is there some way to limit the use or abuse of organizational disparities in pursuit of undesirable goals while simultaneously tolerating their use as a tool for the accomplishment of less objectionable ends?

³⁸ Short of prohibiting all contact between regulators and the regulated, this might raise a few minor constitutional questions.

³⁹ Nor should it be. The constitutional concerns raised by significant attempts to limit interest group activity are real, and interest groups also can serve valuable functions within the regulatory state. See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND DEMOCRACY 297-98 (1986).

⁴⁰ See Elhauge, *supra* note 2, at 49-59.

In short, is there a way to reconcile IGT with mainstream normative preferences?

B. *The Normative Irrelevance of Supply-Side Dynamics*

Public choice theory's demand-side model of legislation is relatively uncontroversial. How hard will peanut farmers fight to obtain or retain government subsidies? How often will the general public take to the streets regarding government-induced overcharges for peanut butter?⁴¹ On the legislative demand side, at least, it is hard to deny that public choice theory looks a lot like the real world. In that one respect, life now is little different than it was when Simon Newcomb previewed modern interest group theory in 1886.

But the supply side of the market for legislation is considerably more complicated and controversial than the demand side. There are a number of competing supply-side theories of regulatory motivation, ranging from the hopelessly cynical to the naively optimistic. In addition, there are myriad possible variations on each major theory, and regulatory reality almost certainly consists of some continuously shifting combination of the competing models. That said, I will briefly sketch three major theories: traditional public choice, "extortionist" public choice, and republicanism.

Some commentators argue that regulators predictably act in their own self-interest, typically interpreted in terms of maximization of reelection chances.⁴² In these traditional public choice models, regulators essentially take interest groups as they find them, attempting to secure reelection by maximizing campaign contributions, maximizing voting blocs, or by identifying and then pandering to median voters of different types. In the traditional public choice context, the organization of interest groups occurs independent of the regulator; she merely reacts to interest group pressure in ways most likely to improve her personal prospects.⁴³

⁴¹ According to one recent government publication, farming subsidies resulted in between \$300 million and \$500 million in annual overcharges to peanut purchasers. See U.S. GENERAL ACCOUNTING OFFICE, PEANUT PROGRAM: IMPACT ON PEANUT PRODUCERS, USERS, AND THE GOVERNMENT 4 (1995) (testimony of Robert A. Robinson, Associate Director, Food & Agriculture Issues, Resources, Community & Economic Development Division, United States General Accounting Office, before the Subcommittee on Risk Management and Specialty Crops, Committee on Agriculture, House of Representatives) [hereinafter GAO, *Peanut Program*].

⁴² See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); Stigler, *Economic Regulation*, *supra* note 9, at 11; see also DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21-24 (1991) (summarizing literature).

⁴³ The ways in which regulators maximize differ substantially from theory to theory, and, to the extent public choice theory is broadly descriptive, regulators probably maximize differently at

The McChesney/McCaffery/Cohen “regulators-as-extortionists” model offers another sophisticated but extreme example of the public choice approach.⁴⁴ Specifically, this model argues that regulators face incentives to maximize their own utility by demanding compensation for rent transfers.⁴⁵ McChesney’s regulators will threaten financially harmful regulation to any group capable of paying “protection.”⁴⁶ Thus, in McChesney’s model, the fact of *being* organized is actually potentially costly to consumers, because it makes it possible for regulators to deliver credible rent-extracting threats.⁴⁷ If regulators act as McChesney, McCaffery and Cohen predict, then regulators will prefer any situation in which competing interest groups can in fact be goaded into competition with one another over situations in which only one side or no side can be extorted.⁴⁸

At the other edge of the continuum, some model the regulatory process in more republican terms.⁴⁹ To republican theorists, regulators are public minded and altruistic, at least in the aggregate. Republican theories of government hold that most regulatory processes are reliably deliberative; at worst, more pluralistically minded republicans might contend that the clash of competing demand-side interests typically will proxy for the deliberation most would prefer to see.

Regardless of one’s personal conception of the regulatory process, it should be beyond dispute that interest groups are sometimes successful in obtaining economic rents from legislators and regulators.⁵⁰ The real *descriptive* debate is not over if, but rather when, how, and how much capture occurs; the real *prescriptive* debate is over whether, when and how the law should react to such capture. Accordingly, this

different times and in different situations. The fact that a regulator may attempt to maximize today, by increasing campaign contributions, and tomorrow, by assembling a majority voting bloc, suggests that any attempt to limit interest group influence by limiting specific interest group behaviors is doomed to failure. Even a complete ban on campaign contributions could not prevent interest groups from attempting to deliver blocs of voters to a candidate, for example. See, e.g., Brody Mullins, *No Free Lunch: New Ethics Rules Vex Capitol Hill*, WALL ST. J., Jan. 29, 2007, at A1 (reporting on lobbyist workaround to avoid limitations of new ethics rules).

⁴⁴ See McChesney, *Interest-Group Organization*, *supra* note 22.

⁴⁵ See *id.* at 79; compare Becker, *supra* note 9, *passim*.

⁴⁶ See McChesney, *Interest-Group Organization*, *supra* note 22, at 79-80; see also McCaffery & Cohen, *supra* note 31.

⁴⁷ See McChesney, *Interest-Group Organization*, *supra* note 22, at 84-85.

⁴⁸ See, e.g., McCaffery & Cohen, *supra* note 31, at 1177-78.

⁴⁹ See, e.g., Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988). For a slightly less rhetorically heated defense of republicanism, see Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167 (1988) (symposium issue on public choice theory); see also FARBER & FRICKEY, *supra* note 42, at 42-47 (summarizing literature).

⁵⁰ One admittedly preliminary empirical study estimated the overall societal costs of rent-seeking at 22.6% of U.S. gross national product in 1985. See David N. LaBand & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 PUB. CHOICE 269 (1988).

Article need not and does not seek to answer definitively the question, “How is regulatory sausage made?” As it turns out, the implications of demand-side IGT are much the same regardless of how regulators behave. The predictive capacity of IGT simply does not depend on selecting the correct theory of regulatory motivation, nor should its prescriptive implications depend upon one’s personal political preferences.

1. When Stigler Is Right: Traditional Public Choice Theory

If traditional public choice theory is correct, the story is straightforward: regulators reliably act in their self-interest, albeit primarily in *response* to interest group advances. Though public choice traditionalists assume that regulators take the existence (or nonexistence) of interest groups as a given, they posit fairly mercenary behavior from that point forward. In the traditional public choice view, regulators are primarily interested in reelection, or otherwise maximizing their own political power. Thus, the paradigm public choice regulator will attempt to maximize campaign contributions by selling votes, or will make promises in order to secure the electoral support of important voting constituencies or median voters.

In a traditional public choice world, therefore, rent-seekers’ success or failure will depend in large part upon the existence or credible threat of opposition on the opposite side of the regulatory nexus. As discussed below, most rent-providing regulation is in fact socially inefficient.⁵¹ Thus, absent organizational hurdles, those paying for a rent-providing regulation will generally have a greater aggregate incentive to oppose its passage than those seeking the rent.⁵² As Neil Komesar notes in the context of a hypothetical protectionist tariff, if consumers are able “to represent their interests in the political process, . . . the inefficient tariff would not be imposed.”⁵³ More important, a credible threat of consumer organization would in fact deter rent-seeking in the first place.⁵⁴ Accordingly, regulatory results in a world in which traditional IGT governs regulatory actors’ behavior will depend almost exclusively on the relative organizational dynamics story.

⁵¹ See Part II.C.1; *infra* notes 70-76 and accompanying text.

⁵² See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 61-62 (1994).

⁵³ *Id.* at 61.

⁵⁴ *Id.* at 62 n.18.

2. Interest Group Theory in a Republican World

What if regulators instead reliably act in their perception of the public interest? When organizational disparities are sufficiently great, even the best-intentioned regulators are at risk. As Komesar explains, the distortions and biases associated with “narrow self-interest” versions of interest group theory also “occur in the presence of public-regarding, public-interested, or ideological [legislative] motives.”⁵⁵ Komesar correctly characterizes the “motivation” focus of current regulatory theory debates as “unfortunate.” Most important, he observes, excessive focus on *individual* regulators’ motives tends to obscure the importance of *institutional* dynamics in decisionmaking.⁵⁶ Traditional economic theories of behavior are aggregative, funneling self-interest through market mechanisms to yield publicly valuable results. Summarizing the literature colloquially, Komesar cites the “well worn maxim” that “private vice can be public virtue.”⁵⁷ This dynamic applies to economic theories of regulation just as it applies to price theory.⁵⁸

To demonstrate his point, Komesar hypothesizes a perfectly altruistic legislature. Even with angelic regulators, demand-side public choice theory is still both useful and disquieting, especially if we acknowledge the obvious fact that legislatures often lack perfect information regarding the effects of proposed regulation. Given this unmet need, IGT predicts that small, focused groups will be substantially more likely to organize and fill that information void than will large diffuse groups.⁵⁹ Thus, if public-choice theory predicts collective action on one side of a debate but not the other, even a public-spirited regulatory body can be co-opted by way of its own ignorance.⁶⁰

⁵⁵ *Id.* at 60.

⁵⁶ *Id.*

⁵⁷ *Id.* at 61.

⁵⁸ *See id.* at 61-65. Komesar notes, for example, that traditional Coasean bargaining assumes perfect information, a condition unlikely to hold in the regulatory context. Given the existence of informational asymmetries, playing field conditions become highly relevant. *Ceteris paribus*, small intensely interested groups are likely to provide more information to legislators than large diffusely interested groups. The interest-group-driven exacerbation of informational asymmetries can in turn influence legislators regardless of their pureness of heart.

⁵⁹ This is due to both free-rider problems and because those small focused groups often organize for other internally beneficial purposes as well.

⁶⁰ The greater the disparity in collective action problems between beneficiaries and payors (i.e., the higher the PFI, see Part III.D.3; *infra* notes 151-154 and accompanying text), the more pronounced this problem becomes. Because greater disparity in the likelihood of collective action leads to greater disparity in the amount and quantity of information being provided to the legislature, there is a real risk that the relative quiet from one quarter will be taken as evidence of agreement or acquiescence. This is particularly true in connection with the economic rent scenarios the PFI approach is best-suited to measure. The more financial the fight, the less non-

As Komesar elegantly summarizes, “In effect, an interest group can obtain a favorable result in three ways—propaganda, replacement (by election), and inducement (bribes, contributions, and so forth). Only the last is eliminated by assuming that public officials are public interested.”⁶¹

Rent-seekers are rarely overt regarding their motives. Instead, even regulation that excludes competition—probably the most common and most obviously undesirable⁶² form of rent-seeking—is “often cast in terms of consumer health and safety.”⁶³ Accordingly, as in the traditional public choice model, the dynamics of organizational challenges again drive the calculus; when members of the paying majority “do not even have the incentive to recognize that they are being harmed,” regulators may find it particularly difficult to resist interest group temptation.⁶⁴

3. Regulators as Extortionists

Finally, what if the McChesney/McCaffery/Cohen model of activist regulatory rent extraction is correct?⁶⁵ If regulators are actively playing rent-seekers against their victims to extort surplus, wouldn't that dramatically change the analysis of interest group dynamics? Not really. Though this theory may paint a disturbing picture of regulators generally, it does not dramatically alter the demand-side analysis of interest group behavior.

Even if regulators behave the way McChesney predicts, there are few implications of any sort where the disparity in organizational dynamics is sufficiently acute. In such cases, the only real potential difference from the traditional public choice model may be the distribution of surplus or rents between rent-seekers and regulators—activist regulators may demand a larger piece of the rent pie than they would if they were merely responding to interest group attentions.⁶⁶ When organizational disparity is high, regulators will not be able to

economic utility functions are likely to engender opposition to rent-seeking behavior.

⁶¹ KOMESAR, *supra* note 52, at 63-64. Also, one should not underestimate the power of self-deluding rationalization in the regulatory environment, where compromise is an absolute prerequisite to accomplishment.

⁶² See Part II.C.1; *infra* notes 70-76 and accompanying text.

⁶³ KOMESAR, *supra* note 52, at 68-69.

⁶⁴ As discussed below, aspiration to a republican norm is untenable in any event. See Part II.C.2.a.; *infra* notes 79-81 and accompanying text. Thus, even if regulators consistently do their best, the only viable way to improve the regulatory process as a whole is to limit the number of one-sided conversations.

⁶⁵ See McChesney, *Interest-Group Organization*, *supra* note 22, at 79-85; see also McCaffery & Cohen, *supra* note 31.

⁶⁶ Even this difference may be overstated.

create competing interest groups—they can play only a one-sided game. Thus, the potential for regulatory subversion is roughly the same as in the traditional model.

What if organizational dynamics suggest that competing interest groups can or will form? In such cases, McChesney's model disturbs, because it suggests that one interest can be played off against another ad infinitum. At first blush, the McChesney model could be read to suggest that the existence of competing interest groups would actually be the *worst* of all possible worlds, because regulators could continually extract surplus from both sides. But this reading ignores the nature of the regulatory game. The credibility of regulatory threats is critically important to the success of any extortionist strategy. Thus, to the extent organizational dynamics suggest a relatively even regulatory playing field, the expected value of any particular rent-seeking strategy decreases.⁶⁷ And the lower the expected value of a rent-seeking strategy, the less likely it will be employed. For this reason, the McChesney approach does not dramatically alter the broader demand-side analysis—the tilt of the regulatory playing field still matters substantially, albeit for slightly different reasons.

The insights of IGT apply to each of the three major theories of regulatory motivation discussed above and, by extension, to the myriad permutations and combinations observed in the real world. In each case, IGT implies procedural subversion when there is substantial disparity in the organizational hurdles facing interests on opposite sides of the regulatory nexus. These flaws are magnified when the interests in question are largely pecuniary; without an ideological rallying point, large diffuse interests are even less likely to organize, and regulators will be forced to operate without the ideological touchstones that can in other circumstances help mitigate interest group activity. In any event, theories of legislative motivation are largely irrelevant to the question of how we should think about IGT from a normative perspective. *Ceteris paribus*, the appropriate normative preference is therefore for less rather than more disparity in organizational dynamics.

C. *Extracting a Normative Consensus from Ambiguity*

Even if one adopts a *ceteris paribus* preference for relative equality in organizational dynamics, interest group theory is normatively ambiguous from an abstract instrumentalist perspective. The same

⁶⁷ In colloquial terms, expected value is simply the pecuniary value of a given outcome multiplied by its probability. As the probability decreases (here due to the existence of a credible threat of competing regulatory petitioning), so does the expected value. As expected value of an economic rent decreases, so does the amount parties are willing to spend to obtain that rent.

forces that allow “bad” interest groups to obtain “bad” regulatory outcomes can also work the other way, allowing “good” groups to obtain “good” results.⁶⁸ It all depends on one’s point of view. The Constitution itself increases the uncertainty, incorporating both structural features and enumerated rights designed to protect and even amplify minority voices. But this ambiguity conflicts with a deep, abiding and important consensus within American society that interest group subversion is *wrong*, that we know it when we see it, and that something should be done to fix it. Can the circle be squared?

The normative framework this Article proposes for evaluating interest group dynamics develops in two parts. First, it argues that a cross-ideological consensus can and should exist as to a specific *type* of interest group-influenced regulation to be condemned: pecuniary rent-seeking.⁶⁹ Second, recognizing that aspiration toward a pure republican process is unwise, the Article instead argues for a process-driven norm in which the goal is to have a relatively fair fight before regulators. As between the two components, the preference against “pecuniary rent-seeking” is subordinate to the preference for a level regulatory playing field. The Article labels the resulting norm “workably competitive pluralism.”

1. The Social Costs of Pecuniary Rent-Seeking

Interest group activity comes in many flavors. Though disparities in organizational environments can ultimately yield regulatory results different from the results that would have obtained in an interest group-free context, *different* is not always obviously *worse*, especially where majoritarian passions may be suspect.⁷⁰ Thus, it is not necessarily desirable to condemn *all* interest-group behavior or to condemn all

⁶⁸ See, e.g., Elhauge, *supra* note 2, at 50 (“Rather, under any plausible measure of social desirability, it will in some instances be desirable for the intensely interested minority to win.”). That the intensely interested minority’s interests may be consonant with the greater good does not ipso facto mean that subversion of the deliberative process is a legitimate means to that legitimate end.

⁶⁹ Adoption of this normative goal does *not* mean that regulation of interest group activity in pursuit of that goal is better attempted at the results nexus. But see Elhauge, *supra* note 2, at 51-52, 62. Elhauge’s argument that “once one has such a normative baseline, interest group theory provides no additional normative insight” is incorrect if, as here, the normative baseline in question seeks a level procedural playing field. *Id.* at 51-52. The subsidiary normative goal of preventing pecuniary economic rent-seeking does not necessarily mean that all regulatory results properly identifiable as such must be condemned. Rather, given the competing concerns attendant with any analysis of the regulatory process, this Article instead adopts a normative framework in which regulators would be allowed to regulate in normatively undesirable ways, provided there is reason to believe that all sides will be heard in the regulatory process. The norm against “pecuniary rent-seeking” simply informs the method of measurement and analysis.

⁷⁰ See generally THE FEDERALIST NO. 10 (James Madison).

regulatory action resulting from Olsonian disparities in organizational dynamics.⁷¹ When interest groups take advantage of lower relative costs of organization to promote racial equality, or to protect the environment, these desirable ends arguably justify procedurally subversive means.

But one type of rent-seeking is particularly difficult to defend: pecuniary rent-seeking. Economic rent-seeking of this sort typically is embodied in commercial actors' attempts to insulate themselves from market forces, either by limiting entry (tariffs, licensing regimes, production quotas), or by directly fixing prices. This sort of rent-seeking incurs substantial and indisputable social costs, many of which fall directly or indirectly upon individual consumers. Equally important, these costs are not typically offset by countervailing social gains, financial or otherwise.

The social costs of economic rent-seeking have been well-documented elsewhere, thus this Article will not recapitulate the analysis in detail. However, I will summarize briefly the three primary categories of social loss associated with rent-seeking behavior.

a. Tullock Losses

One category of social losses associated with rent-seeking behavior comprises expenditures made in the pursuit and administration of rents. By definition, parties seeking economic rents will be willing to spend just up to the value of that rent to obtain the benefit. In the regulatory context, these payments take the form of lobbying expenditures, campaign contributions, and the other commitments of time and money interests make in pursuit of their rent-seeking goals. Though such expenditures might make lobbyists, restaurants and resorts happy, they are socially wasteful, as Gordon Tullock demonstrated in a seminal article.⁷² Tullock also identified another similar form of social costs: the administrative costs associated with running a rent-providing program.⁷³ Like expenditures made in pursuit of rents, these administrative costs have no redeeming social utility.

b. Harberger Losses

Successful rent-seeking programs often engender further social costs in the form of "deadweight" or "Harberger" losses associated

⁷¹ Nor is it necessarily constitutional. *See generally* Elhauge, *supra* note 2.

⁷² *See* Tullock, *supra* note 9, at 228; *see also* Becker, *supra* note 9, at 387.

⁷³ *See* Tullock, *supra* note 9, at 225-26.

with the artificial shift of the supply curve that rent-providing programs usually cause.⁷⁴ The deadweight social costs of interest group success arise primarily out of the reduction in output associated with that success. Much rent-seeking activity demands regulation that limits entry into specific markets or cartelizes production of a good or service.⁷⁵ These restrictions either directly or indirectly allow rent-seeking interests to select output levels below those that would obtain in a competitive market.⁷⁶

Deadweight loss can also be characterized as an allocative efficiency problem. In a traditional economic rent scenario, producers allocate fewer resources to production than they would in a competitive market, thus leaving some number of potential consumers unserved despite a willingness to pay at or above the competitive equilibrium price for the good or service. In virtually every circumstance and under virtually every serious normative theory of economics, allocative efficiency losses of this sort are undesirable.

c. Transfer/Overcharge Costs of Successful Rent-Seeking

Another category of social losses resulting from successful rent-seeking consists of the overcharges paid by consumers for the good or service whose supply has been artificially reduced by government regulation.⁷⁷ While this category of social loss is more obvious and intuitive than the deadweight losses discussed above, its redistributive character also makes it somewhat more controversial. It may be less clearly objectionable to transfer wealth from one interest to another—by whatever mechanism—than to create allocative efficiency losses. Thus, some might argue that overcharges paid by consumers are not clearly undesirable to the extent they end up not lost but merely transferred to the successful regulatory petitioner.⁷⁸

⁷⁴ See, e.g., Arnold C. Harberger, *The Measurement of Waste*, 54 AM. ECON. REV. 58 (1964); Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77 (1954).

⁷⁵ See Stigler, *Economic Regulation*, *supra* note 9, at 5-6. Olsonian interest group theory extends beyond the traditional pecuniary rent-seeking context as well, though it is of course possible to characterize any such activity in rent-seeking terms. Whenever a concentrated minority seeks benefits at the expense of a diffuse majority, those benefits can be defined as “rents” to the extent they would not have been provided absent Olsonian organizational dynamics. Nonetheless, because the normative implications of interest group activity grow ever murkier the further one moves from traditional financial rent-seeking, the antitrust-focused approach this Article introduces is superior to approaches that would attempt to limit interest group activity more broadly.

⁷⁶ See OECD Glossary of Statistical Terms, Dead-Weight Welfare Loss, <http://stats.oecd.org/glossary/detail.asp?ID=3187> (last visited Dec. 5, 2006).

⁷⁷ See, e.g., Richard A. Ippolito & Robert T. Masson, *The Social Cost of Government Regulation of Milk*, 21 J.L. & ECON. 33 (1978).

⁷⁸ See Elhaage, *supra* note 2, at 53-54 (summarizing the argument without expressly adopting

Yet ultimately, the redistributive losses associated with most economic rents are objectionable under any credible theory of regulation or total social welfare. Even when there is a facially credible public interest justification for rent-providing regulation (e.g., public health or safety), the economic rents themselves are usually a side-effect rather than a goal of the regulatory scheme.

This is typically true even if one adopts a relatively liberal attitude toward redistribution generally. If we seek to maximize total economic welfare, it is difficult to posit a redistributive equilibrium superior to a rent-free competitive equilibrium. This is especially true where there is significant organizational disparity because the marginal utility of each additional dollar to rent-seekers will almost always be lower than the marginal value of that same dollar to payors. Is an extra dollar for a large dairy farm more or less valuable than that same dollar in the hands of a single parent purchasing milk for her children? While the total utility of the dairy farm may increase by more than the total utility of any one consumer decreases, it is extremely unlikely that aggregate utility will increase by virtue of a rent-driven redistribution.

2. Toward Workably Competitive Pluralism

If IGT is descriptively accurate regardless of regulatory motivation, and if pecuniary rent-seeking is normatively undesirable, one question yet remains: what sort of regulatory environment should our normative framework promote? Given the realities of the regulatory process, this boils down to a choice between two options: promoting republicanism or promoting a relatively level playing field among interests competing for regulatory influence. Because aspiration to a republican norm is politically and normatively untenable, the level playing field option is a preferred second-best.⁷⁹ This “workably competitive pluralism” should be the goal regardless of our understanding of the legislative process—it should be equally attractive to cynical public choice theorists and starry-eyed republicans alike.

a. Odysseus and the Sirens’ Song: The Argument Against Republican Aspirations

Direct analogy between interest group activity and the sirens’ song of Greek myth may or may not be completely fair; nonetheless, one

it).

⁷⁹ See R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

possible response to the interest group problem is that of Odysseus. When passing by the sirens' island, Odysseus had his men block their ears with beeswax.⁸⁰ Aspirations to republicanism would necessarily take this form, and the only way to promote republicanism beyond the current incentive structure would be to limit the extent to which regulators can hear or respond to interest groups' petitions.

This would be a bad idea. Given the infinite ingenuity of the human mind, the Odyssean approach would necessarily be all or nothing—limits on specific categories of conduct (e.g., campaign contributions) are singularly ineffective. There's no such thing as selective beeswax. Rather, the republican norm can be promoted effectively only by a wholesale ban on interest group activity or its functional equivalent. In addition to the substantial First Amendment problems attending such a "solution," this approach would unjustifiably impugn the integrity of regulators and would prevent interest groups from serving their two potentially valuable functions: protection of minority rights in non-pecuniary contexts and provision of information to rationally ignorant regulators.

The republican norm is attractive. From junior high civics classes forward, we learn that the republican process is sacrosanct. It is but a small leap to conclude that its sanctity should also be our end. And measured against the refined elegance and purity of Athenian deliberation, the pluralist alternative seems gauche and primal by comparison. Nonetheless, aspirations to pure republicanism are politically and normatively untenable because untainted republican deliberation can only be accomplished through the destruction of other core republican and democratic values. Thus we must look for a second-best.⁸¹

b. Another Way Past the Island: Workably Competitive Pluralism

Odyssean beeswax was not the only solution to the problem posed by the sirens' song. Jason and his Argonauts faced the same seduction but prevailed in a different way: competition. Where Odysseus's men

⁸⁰ HOMER, *THE ODYSSEY* 107-08 (Samuel Butler trans., Barnes & Noble Books 1993) (800 B.C.E.).

⁸¹ See, e.g., Lipsey & Lancaster, *supra* note 79. Somewhat ironically, wholesale attempts to curtail interest group activity become less attractive the more republican the actual regulatory baseline. If regulators can generally be relied upon to act in the public interest, then further restricting interest group activity as a whole is likely to fare quite badly on the constitutional cost/benefit scale. Such restrictions would significantly impair the constitutional rights of *all* interests and interest groups, with little or no improvement to the regulatory process. By contrast, workably competitive pluralism hones in on contexts in which even purity of regulatory heart may be insufficient to ensure purity of regulatory result.

plugged their ears, Jason's men instead listened to the competing tune of Orpheus's harp.⁸² If we cannot seek a system in which regulators' ears are plugged, we can do the next best thing by seeking to ensure that they are hearing more than one song.

To this end, IGT should be applied in pursuit of a "workably competitive pluralism" norm. What is meant by "workably competitive pluralism?" Though the specific contours of the norm should be left undefined in the absence of hard experiential data, the concept is simple enough: the universally applicable insights of IGT suggest a normative preference for environments in which the pecuniary interests on either side of a regulatory nexus are somewhat evenly matched. Relative parity of interests in turn implies a relatively equal likelihood of organization and petitioning, thus promoting either legitimate regulatory deliberation or a close facsimile thereof.

Interests need not be precisely matched to be workably competitive. Rather, the norm would necessarily promote a balance designed to ensure some appropriate level of deliberation by proxy without impinging excessively upon constitutional and other interests. Importantly, workably competitive pluralism works regardless of the operative theory of regulatory motivation.

Whether regulators are republicans or extortionists, workably competitive pluralism will improve regulatory function. Assume, for example, a regulatory nexus in which the players are relatively evenly matched. If the regulators sitting atop that nexus are reliably republican, this playing field parity suggests that there will be little or no informational asymmetry; regulators will act in response to a "fully litigated" adversarial process. If regulators instead respond to interest groups as traditional public choice theory suggests, playing field parity is still preferable. As Professor Komesar notes in the context of a hypothetical protectionist tariff benefiting a single industry at the expense of all consumers, if consumers are able "to represent their interests in the political process, . . . the inefficient tariff would not be imposed."⁸³ Consumers' interests in opposing the rent-seeking typically exceed rent-seekers' interests in obtaining the rent. More important, the credible threat of consumer organization deters rent-seeking in the first place.⁸⁴ Accordingly, a world in which traditional IGT governs regulatory actors' behavior should seek relative organizational parity among competing interests as a bulwark against interest-group subversion.

The story is the same if regulators are the extortionists McChesney

⁸² APOLLINIUS RHODIUS, *THE ARGONAUTICA* II. 885-921, at 86 (R. C. Seaton, trans., MacMillan 1912) (3rd Century B.C.E.).

⁸³ KOMESAR, *supra* note 52, at 61.

⁸⁴ *See id.* at 62 n.18.

models. In such cases, significant organizational disparities continue to prefigure a regulatory market failure. With only one side to pick on, regulators will ultimately provide the requested rent;⁸⁵ McChesney's model merely suggests that regulators may extract quite a lot of the value of that rent through regulatory extortion, and that even "one-player" scenarios do not necessarily yield rent-providing regulation "on the cheap."

But what happens if regulatory extortionists face a relatively level playing field?

If organizational dynamics are similar on both sides of the regulatory nexus, McChesney suggests that regulators will play one side off the other, extracting surplus from both and potentially doing very little actual regulating. This doesn't speak well of regulators, but it doesn't make organizational parity any less desirable.

Workably competitive pluralism may not guarantee a deliberative result before McChesney's regulators. But organizational parity will substantially affect various interests' ex ante assessments of the value of petitioning activity. With two equally matched interests, the expected value of rent-seeking decreases substantially. This will in turn deter rent-seeking, and it will limit the credibility of regulators' threats of regulation. Thus, workably competitive pluralism is also a desirable norm if regulators are best characterized as extortionists.⁸⁶

III. THE PLAYING FIELD INDEX

A "workably competitive pluralism" norm implies a measurement. If we are concerned not specifically about regulatory results, but instead about the potential procedural subversion of the democratic process that produces those results, then we must develop some way of identifying when regulatory markets are workably competitive and when they are not. And if we limit our concern to situations involving pecuniary rent-seeking, an ideal measurement would be self-limiting, assessing only contexts in which that specific form of activity is involved.

⁸⁵ In cases of substantial organizational disparity, true "milker bill" extortion would ultimately be self-defeating for regulators; they would have to provide the rent in order to encourage rent-seekers to spend.

⁸⁶ This Article takes no formal position on the correct theory or theories of regulatory motivation, in part because regulatory reality is quite complicated. There is undoubtedly a grain of truth in each competing theory, and many regulatory decisions are probably influenced by some combination of the various incentives commentators have identified. See generally FARBER & FRICKEY, *supra* note 42.

A. *What Then Should We Measure?*

The twin goals of any prescriptive application of IGT must be to promote workably competitive pluralism and to limit the extent to which regulatory processes yield pecuniary economic rents to market participants. With these normative goals in mind, how should interest group dynamics or activity be measured? There are several possible approaches to this problem, but only one—measurement and comparison of the costs and benefits of successful regulatory petitioning—is technically feasible and normatively appropriate.

1. Results Focus: Can the Ends Define the Means?

One possible measurement approach would focus on the *results* of regulatory petitioning. In other words, one could analyze the economic effects of various regulatory regimes, identifying interest group influence as “excessive” whenever the regulatory process yields pecuniary economic rents. Though results-oriented approaches have been proposed before,⁸⁷ they are ultimately unworkable for a variety of reasons.

First and foremost, a results-focused measurement would essentially collapse the two-pronged inquiry suggested by the normative framework into a single inquiry: do we dislike the outcome? Though opposition to pecuniary economic rent-seeking is substantial, it is far from universal.⁸⁸ One can hypothesize several scenarios in which a regulatory body may affirmatively desire, after due deliberation, to provide an economic rent to a specific group.⁸⁹ Under many theories of regulation, the granting of that rent is not *a priori* undesirable.⁹⁰ This is especially true when the regulation is produced via a workably competitive process. There is far less normative ambiguity when the process itself is inherently suspect.

Results-based measurements are also necessarily binary and thus allow for no calibrated measurement of the regulatory process. In a results-driven framework, regulation either does or does not provide an economic rent. The existence or nonexistence of the rent, proven by

⁸⁷ See John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

⁸⁸ See Elhauge, *supra* note 2, at 49-59.

⁸⁹ The most obvious examples involve attempts to compensate historically disadvantaged groups for the effects of prior discrimination.

⁹⁰ See Elhauge, *supra* note 2, at 49-59.

preponderance of the evidence, would in turn drive any prescriptive application based upon the measurement approach.

It would be difficult to compromise based upon other competing interests in a results-oriented framework, and yet that compromise may be necessary. For example, the American system values both regulatory autonomy and petitioning rights.⁹¹ Concerns regarding interest group subversion of the regulatory process may not always trump these competing values, especially when one posits even the slightest stirrings of an altruistic spirit among regulators.⁹² Because a results-oriented measurement approach would prove useless in any context involving a compromise among competing values (of which limiting pecuniary rent-seeking is but one), results cannot form the basis for a measurement approach dedicated to workably competitive pluralism.

2. A Possible Process Approach: Behavioral Focus?

Many traditional solutions to the interest group problem have taken a behavioral approach, seeking to identify and limit particular categories or quanta of conduct in an attempt to limit interest group influence on the regulatory process.⁹³ Is it possible to identify workably competitive pluralism by measuring behavior?

A behavioral approach is attractive for at least one reason: it would seem to lower the risk of “false positives,” a legitimate concern any time the endgame is likely to involve placing limits upon the discretion of regulators. After all, in the absence of actual objectionable behavior, it might seem counterproductive to intervene in the functioning of regulatory markets. A behavioral measurement would thus seem well-suited to identifying only those scenarios in which interest group subversion had actually occurred. Unfortunately, however, things are not that simple. Like results-oriented approaches, behavioral measurement criteria suffer from a variety of fatal flaws.

First, behavior is neither easily measured nor easily intercomparable. Workably competitive pluralism demands both. The goal of a workably competitive pluralism norm is to ensure a relatively level regulatory playing field. A behavioral measurement approach

⁹¹ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 315 U.S. 127 (1961); U.S. CONST. amend. I.

⁹² To the extent regulators are motivated at all by a commitment to the public interest, results-oriented measurement would necessarily contain an implicit judgment that regulators' views of the public interest were inconsistent with some quasi-natural-law public interest standard. This approach is untenable. See Elhauge, *supra* note 2, at 50-51.

⁹³ Among the most notable behavioral approaches are limits on campaign contributions and limits on political speech.

would necessarily infer the pitch of the playing field from the conduct of the players. Thus a critical component of any measurement based upon behavior is the intercomparability of various actions.

The effects of behavior upon regulators simply cannot be measured. A single phone call to the right person at the right time may be substantially more effective than a six-figure campaign contribution. Given the variability of human nature, it is impossible to quantify the effects of various activities in any meaningful sense. These difficulties are compounded in the context of a goal of *relative* parity. If it is impossible to determine the impact of any given conduct on one side of the regulatory nexus, how much more difficult will it be to weigh one side's conduct bundled against the other's in an attempt to infer playing field dynamics? Measurement difficulties alone counsel against adopting a behavioral measurement approach.

But measurement is not the only problem with behavioral metrics. There's also the problem of human ingenuity. Any prescriptive approach based upon a behavioral measurement would either implicitly or explicitly limit certain categories of behavior.⁹⁴ When faced with explicit but incomplete conduct bans, enterprising rent-seekers (or rent-opposers) seek other conduct.

Thus, even assuming that the measurement difficulties could be overcome, a behavioral measurement approach ultimately would either (1) prove wholly ineffective; (2) devolve into the results-oriented approach rejected in Part III.A.1. above; or (3) lead to draconian (and likely unconstitutional) restrictions on the very existence of interest groups. Along the more benign path, behavioral measurements would simply be useless, because their catalogue of subversive conduct would be incomplete. As long as there exist alternative forms of influence outside the measurement, behavioral approaches are ineffective. Those at risk of condemnation will simply adopt strategies not covered by the metric in question.

What if the behavioral analysis instead attempted to catalogue and compare, *ex post*, each behavior at a specific regulatory nexus? Even assuming away the substantial evidentiary problems associated with this approach, it would still prove unworkable, because it would ultimately produce results-oriented measurements. Given the intercomparability problems associated with weighing the relative effects of the various forms of rent-seeking conduct, the only effective way to rank the

⁹⁴ Explicit limitations would ban certain forms of conduct because they are deemed to interfere excessively with regulatory function. Implicit limitations would arise if the prescriptive approach were to instead condemn regulatory results in more general terms when behavioral thresholds are crossed. If a behaviorally based application were to invalidate regulation on the basis of behavioral measurements, rent-seekers could avoid invalidation by avoiding conduct condemned as effective by the metric.

effectiveness of various conduct bundles would be by reference to the regulatory result. If the regulatory result were unacceptable measured against some exogenous normative baseline, then the rent-seeker's single phone call must have been far more effective than the consumer group's seven-figure ad campaign. Without ex ante categorization and quantification of behaviors, any attempt to weigh regulatory market dynamics holistically after-the-fact is likely to be infected by results-based thinking.⁹⁵

Taken to their logical extreme, behavioral approaches ultimately lead to wholesale condemnation of interest group formation and activity. The only principled and effective way to implement a behaviorally driven approach is to ban all behavior that might yield a normatively undesirable result. Yet the principles behind such a ban hardly enjoy broad consensus support. Any "cure" based upon wholesale restrictions on interest group formation and activity is likely to be worse than the disease. Such restrictions would substantially limit interest groups' constitutional petitioning rights, without inquiry into the specific regulatory playing field dynamics that might justify such limitation.⁹⁶

3. A Process Focus on Costs and Benefits

Instead of focusing on results or behavior, the approach to measuring interest group dynamics must focus upon the costs and benefits of regulation to the interests on opposite sides of the regulatory nexus.⁹⁷ Appropriately filtered, the relative benefits and costs of regulation provide the best indication of the incentives facing parties on both sides, and thus provide the best available information for assessing the likely pitch of the regulatory playing field.⁹⁸

Unlike results-oriented approaches, a cost/benefit measurement

⁹⁵ See Elhauge, *supra* note 2, at 49-59.

⁹⁶ And any attempt to limit interest group formation and conduct in specific contexts ultimately devolves into a results-oriented approach.

⁹⁷ This Article defines "costs" and "benefits" in net present value terms. Accordingly, the cost/benefit calculus I propose by definition takes into account possible changes in the distribution of costs and benefits over time. Radical intertemporal variance in costs or benefits might weaken the predictive value of the index, but such variance is likely to be uncommon. In the event that no intertemporal variance is expected, net present value is unnecessary to the analysis.

⁹⁸ See OLSON, *supra* note 9, at 33-36; see also KOMESAR, *supra* note 52, at 54-56, 67-71; George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 359 (1974) [hereinafter Stigler, *Free Riders*]. William Eskridge proposed a less concrete version of this cost/benefit analysis when he recommended that courts engage in less deferential statutory interpretation when the benefits of a statute are highly concentrated and the costs are not. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

approach is not necessarily binary. It can instead vary as the relative dispersion of costs and benefits varies. Accordingly, a prescriptive application based upon a relative cost/benefit analysis could establish any number of different intervention thresholds based upon the importance of competing concerns. If we value petitioning rights and federalism more highly, we could demand greater disparity in the costs/benefits dispersion than if we think those values should be subordinated to the integrity of the process.

Similarly, a cost/benefit approach is not enslaved to its normative baseline in the same way other results-oriented approaches are.⁹⁹ There are two normative baselines inherent in workably competitive pluralism: (1) a relatively level regulatory playing field is normatively desirable; and (2) regulatory provision of pecuniary economic rents is undesirable.¹⁰⁰ But the level playing field norm dominates the pecuniary economic rents norm, which exists primarily to help identify the market characteristics worth measuring. The preference for a “level playing field” is a *process* preference—it is not concerned with regulatory results. Where a true results-oriented norm would legitimately be subject to many of the criticisms Professor Elhauge levels,¹⁰¹ a process norm is not. For example, because of its process focus, workably competitive pluralism (measured by reference to costs and benefits) would permit successful pecuniary rent-seeking of the sort economic efficiency proponents would find objectionable, provided that it was the result of a workably competitive process.

A cost/benefit focus also subsumes within it the consensus against pecuniary economic rent-seeking in a way results-oriented and behavioral approaches do not. Results-oriented and behavioral approaches stand independent of normative goals. Results-oriented measurements, for example, could be used to condemn any category of purportedly undesirable regulatory result—the result defines the “excessiveness” of interest group influence. Behavioral measurements fare even worse. First, they suffer from the same goals disconnect from which results-oriented measurements suffer. Second, prescriptive approaches based upon behavioral assessments may be dramatically overinclusive. Specifically, a behavioral approach almost necessarily would condemn conduct without reference to its aims; behavioral measurements will therefore encourage limitations on interest group activity that go beyond the consensus against pecuniary rent-seeking.

By contrast, a cost/benefit approach is likely only useful and

⁹⁹ *But see* Elhauge, *supra*, note 2, at 51.

¹⁰⁰ *See supra* notes 68-86 and accompanying text.

¹⁰¹ *See* Elhauge, *supra* note 2, at 49-59. To the extent Elhauge is arguing merely that applications of interest group theory cannot be utterly devoid of normative content, granted. This Article explicitly adopts a normative baseline.

calculable when the regulatory nexus in question involves pecuniary economic rents. Because it is difficult if not impossible to calculate costs and benefits when they are non-pecuniary, a cost/benefit approach is inherently and attractively self-limiting. Thus, the cost/benefit focus helps ensure that prescriptive applications of IGT will not spread beyond relatively confined consensus normative boundaries.

A cost/benefit-derived metric would also be far less subject to gaming or workaround than behavioral metrics. Though interests can mask or alter behavior and mask their true intentions (what piece of rent-seeking regulation is *not* presented as promoting the public interest, after all?), they cannot so easily mask the costs or benefits of the regulation they seek. As discussed below, costs and benefits can be determined with relative accuracy. As important, a cost/benefit focus would limit the extent to which enterprising interests could “game” the system by, for example, propping up a straw man whose sole purpose is either to surrender or to offer nominal behavioral opposition.

Finally, costs and benefits can be measured and compared. Though calculation of the costs and benefits of rent-seeking regulation is probably well beyond the capacity of the average lawyer or judge, such calculations are in fact the stock-in-trade of economists. Calculation of economic rents is a staple of the public interest watchdogs,¹⁰² the GAO,¹⁰³ and certain academic economists.¹⁰⁴ Moreover, similar calculations are a routine feature of virtually every significant antitrust case, where damages are typically a function of overcharges absorbed by consumers as a result of anticompetitive behavior.

B. *Costs, Benefits, and Concentration*

It is not enough, of course, merely to measure the costs and benefits associated with regulatory action. In most cases, aggregate costs will substantially exceed aggregate benefits, because Harberger (allocative inefficiency/deadweight) and Tullock (administrative and rent-seeking activity) costs will not be counterbalanced by corresponding benefits to the rent-seeking party.¹⁰⁵ Yet rent-providing regulation is a regular feature of the political landscape—higher aggregate costs do not automatically imply a higher likelihood of

¹⁰² For example, Citizens Against Government Waste routinely prepares such analyses. *See generally* Citizens Against Government Waste, <http://www.cagw.org> (last visited Dec. 17, 2007).

¹⁰³ *See* GAO, *Peanut Program*, *supra* note 41.

¹⁰⁴ *See, e.g.*, Ippolito & Masson, *supra* note 77.

¹⁰⁵ *See supra* notes 72-76 and accompanying text; *see also* Stigler, *Economic Regulation*, *supra* note 9, at 10.

organization. Instead, organizational incentives are driven by the *concentration* and *distribution* of costs and benefits among stakeholders.¹⁰⁶

In simplest terms, IGT predicts that the likelihood of collective or unilateral regulatory petitioning is primarily a function of two factors: (1) the extent to which any individual faces economic incentives to provide the collective good regardless of the participation of other similarly interested parties; and/or (2) the extent to which the concentration of costs or benefits will allow similarly situated parties to overcome the free-rider and other collective action hurdles inherent in any attempt to secure collective government goods.¹⁰⁷ The predicted demand-side dynamics for regulation depend primarily upon the concentration and distribution of benefits and costs among beneficiaries and payors.¹⁰⁸ The pitch of the regulatory playing field—and thus arguably the legitimacy of the regulatory result depends on the *relative* likelihood of regulatory petitioning across the cost/benefit divide. Thus, the concentration and distribution of benefits and costs offer proxies for the likelihood that economic actors will organize for collective action or that individual actors will seek government action on their own.

C. *The Antitrust Parallel and the Herfindahl-Hirschman Index*

Substantive antitrust law has long struggled with a virtually identical problem: how to determine whether markets are sufficiently concentrated to imply either (1) a likelihood of collusive anticompetitive behavior among market participants; or (2) the unilateral exercise of market power by a dominant firm. For the past twenty-five years, antitrust law has embraced the Herfindahl-Hirschman Index (“HHI”) as the concentration measure best able to answer those questions in a practical and useful way.¹⁰⁹ In simplest terms, the HHI in a given context is the sum of the square of each participant’s “market

¹⁰⁶ See OLSON, *supra* note 9, at 33-36; see also KOMESAR, *supra* note 52, at 67-71; Stigler, *Free Riders*, *supra* note 98, at 362.

¹⁰⁷ See Stigler, *Free Riders*, *supra* note 98, at 362.

¹⁰⁸ This Article generally assumes a binary distribution of costs and benefits for any single piece of legislation. This is not the same as assuming that only one interest or type of interest will exist on either side of the costs/benefit divide; rather, it assumes that demand for a given legislative provision is influenced only by the costs and benefits attendant with that specific provision. Though this assumption seems reasonable in many contexts, one possible extension of the Article would address situations in which Arroviaan logrolling across multiple cost/benefit axes ultimately produces demand for multiple legislative provisions and horse-trading among regulators. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (1951).

¹⁰⁹ See, e.g., Merger Guidelines, 47 Fed. Reg. 28,493 at § III.A. (Dep’t of Justice Antitrust Div., June 30, 1982), available at 1982 WL 141384 [hereinafter 1982 Merger Guidelines].

share” (typically expressed as a percentage) in that context.¹¹⁰ In other words, $HHI = \sum_1^n x_n^2$, where x_n is the market share of each firm n in the particular market.

Albert Hirschman first introduced the index later to bear his name in a 1945 book assessing the relationship between national power and foreign trade from the beginning of World War I through the end of the 1930s.¹¹¹ In 1950, Orris Herfindahl’s doctoral dissertation independently developed and applied a virtually identical index to describe the deconcentration of the American steel industry over time.¹¹² Calculating the HHI is a straightforward process, assuming the existence of reliable market share data. For example, a market consisting of ten equal-sized competitors would have an HHI of $10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2=1000$. For a market served by a single monopolist, the $HHI=100^2=10000$. In a market of 100 equal-sized competitors, the HHI is 100.

Acceptance of HHI as an appropriate measure of market concentration is not universal.¹¹³ It has been criticized as “pseudoscientific”¹¹⁴ and challenged because its conclusion that the likelihood of collusion is a function of the *square* of market shares is not reliably linked to demonstrated concentration effects.¹¹⁵ These criticisms are overblown.¹¹⁶

As Herfindahl argues, the purpose of a concentration measure “is

¹¹⁰ See, e.g., *id.*

¹¹¹ HIRSCHMAN, *supra* note 6, at 157-60. Hirschman’s formal index was defined as the square root of the sum of squared market shares, but the principle is the same. See *id.* at 159, 161.

¹¹² See Orris Clemens Herfindahl, Concentration in the Steel Industry (1950) (unpublished Ph.D. dissertation, Columbia University) (on file with author). Herfindahl defined the index as the sum of the squared market shares divided by the sum of all market shares, squared, or

$$C = \frac{\sum_1^n x_n^2}{\left(\sum_1^n x_n\right)^2}. \text{ As before, this is the functional equivalent of the modern HHI.}$$

¹¹³ See, e.g., FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 59 n.46 (1980); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 946 (1987).

¹¹⁴ Fox & Sullivan, *supra* note 113, at 946.

¹¹⁵ See, e.g., SCHERER, *supra* note 113 at 59 n.46 (noting that “[t]here is no a priori reason why the weighting scheme need be quadratic . . .”); LESLIE HANNAH & J. A. KAY, CONCENTRATION IN MODERN INDUSTRY 41-63 (1977) (recommending variable exponent weights); WILLIAM G. SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION 66-67 (3d ed. 1990) (describing HHI as “pure numbers, with no real direct real equivalent,” and thus “intrinsically an empty index.”).

¹¹⁶ See, e.g., HIRSCHMAN, *supra* note 6, at 160-62, Herfindahl, *supra* note 112, at 15-23 (anticipating and defending measure from traditional criticisms).

to show the likelihood of monopolistic policies in an industry.”¹¹⁷ Herfindahl further notes that even measures with “obscure” theoretical foundations “may still possess heuristic value and, in turn, may provide the theorist with valuable clues.”¹¹⁸ In Herfindahl’s view, his measure of concentration offered an improvement over previous measures because it combined the two elements essential to predicting anticompetitive outcomes: the number of firms and the dispersion of size among those firms.¹¹⁹

The HHI has demonstrated its heuristic value time and again over the past two decades. In 1982, the Justice Department formally adopted HHI as its concentration index of choice in the then-new Horizontal Merger Guidelines. Under the Justice Department’s approach, mergers resulting in different post-consummation industry HHIs and in different merger-induced *changes* in industry HHIs are subject to different legality presumptions. For mergers resulting in a post-merger HHI below 1000, for example, the 1982 Merger Guidelines establish a presumption of competitive insignificance. For mergers resulting in a post-merger HHI above 1800, on the other hand, only small increases in HHI are needed to create a presumption of anticompetitive effects. HHI is now a well-established feature of the antitrust landscape. Moreover, HHI measurements in merger enforcement law proxy for the likelihood of both major types of anticompetitive behavior: coordinated action among market participants and unilateral anticompetitive conduct by large or dominant firms.¹²⁰

Despite critics’ concerns, HHI captures something important to modern competition theory: the notion that the risk of suboptimal competitive outcomes increases as the market shares of large firms increase and as inequality of market shares increase.¹²¹ By squaring

¹¹⁷ Herfindahl, *supra* note 112, at 15.

¹¹⁸ *Id.* at 15-16.

¹¹⁹ *See id.* at 20.

¹²⁰ *See* U.S. DEP’T OF JUSTICE ANTITRUST DIV. & FEDERAL TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, Part 2 (March 2006), available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm> (last accessed February 27, 2007); *see also, e.g.*, Herfindahl, *supra* note 112, at 19 (describing measure as “going some distance toward incorporating both the number of firms and the degree of domination by the large firm.”).

¹²¹ *See, e.g.*, Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1602 (1969) (“One can complain that the Herfindahl measure is also arbitrary. But too little is known about the precise relationship of concentration to collusion to devise a measure of concentration that will accurately gauge the probable effect of different concentration patterns on pricing, and the Herfindahl measure, in addition to the virtues already mentioned, correlates well with a factor that is crucial to behavior in oligopolies: the ease of detecting cheating.”); Morris A. Adelman, *Comment on the “H” Concentration Measure as a Numbers-Equivalent*, 51 REV. ECON. & STAT. 99 (1969) (suggesting that HHI is most useful in its reciprocal fractional form, which describes the number of equal-sized firms generating the same concentration. For example, a fractional industry HHI of 0.25 (a percentage HHI of 2500), whatever its component parts, is equivalent to a market in which there are four equal-sized firms (1/0.25). A fractional industry HHI of 0.05 (percentage HHI of 500) is equivalent to a market

market shares, the HHI correctly attaches disproportionate weight to firms with larger market shares. This approach is consonant with common sense: consider two different markets in which the largest eight firms account for 80% of the market. *Ceteris paribus*, we are understandably more concerned about competitive conditions in a market in which one of those four firms has a market share of 52% and the other seven 4% apiece, than in a market in which the 80% is divided equally among all eight firms. The HHI reflects this concern: HHI for the former market will be far higher—in excess of 2800¹²²—than for the latter.¹²³ However imprecise, the HHI approach provides additional helpful information about the market,¹²⁴ information deeply relevant to determining whether unilateral or coordinated nonmarket conduct is likely.¹²⁵

consisting of twenty equal-sized firms. Under Adelman's numbers-equivalent approach, *ceteris paribus*, a larger numbers-equivalent represents a more competitive market); Charles R. Laine, *The Herfindahl-Hirschman Index: A Concentration Measure Taking the Consumer's Point of View*, 40 ANTITRUST BULL. 423 (1995); Stigler, *Free Riders*, *supra* note 98, at 362.

¹²² The 52% market share alone generates a percentage HHI of 2704, and each of the seven 4% firms contributes an additional 16 points to the calculation. Even if the remaining 20% were spread evenly among an infinite number of atomistically small competitors, the market HHI in that case would exceed 2816. Using Adelman's numbers-equivalent approach, a fractional industry HHI of 0.2816 suggests concentration effects equivalent to those present in a market consisting of $1/0.2816=3.55$ equal-sized firms.

¹²³ Assuming an atomistically small competitive fringe, the market HHI for an industry characterized by eight firms each with 10% of the market would approximate 800 ($8*10^2$). Even if the competitive fringe consisted of relatively large firms (e.g., 7%, 7%, 6%), the industry HHI would be only 934, *far* less than the 2800 generated by a market containing a single dominant player. Using Adelman's numbers-equivalent approach, a fractional industry HHI of 0.0934 suggests concentration effects equivalent to those present in a market consisting of $1/0.0934=10.7$ equal-sized firms.

¹²⁴ Though criticisms of the HHI itself may be somewhat overblown, criticisms of specific HHI liability or presumption thresholds are not; such thresholds are unavoidably subjective. At this writing there exists no meaningful "test of significance" either for HHI or for the number of total market participants at which competitive concerns materialize. See Adelman, *supra* note 121, at 101. The Merger Guidelines, for example, established a percentage HHI of 1000 as the "moderately concentrated" threshold at least in part because it was a "nice round number," and because the level was perceived by then-Assistant Attorney General and former Stanford professor William Baxter as "a political anchorage to windward;" that is, a threshold sufficiently low to appease those most likely to criticize Reagan Administration merger policy as too permissive. See William F. Baxter, in *AMERICAN ECONOMIC POLICY IN THE 1980S*, at 610 (Martin Feldstein ed., 1994).

¹²⁵ Hannah and Kay suggest that exponential indices of the Herfindahl type are particularly attractive measures of concentration for certain applications, noting that an exponent value of between 0.6 and 2.4 seems to capture "the range of interesting values." HANNAH & KAY, *supra* note 115, at 58-63. The Hannah & Kay analysis supports the notion that exponential weighting captures important information about the relationship between market concentration and market performance in ways more traditional measurements (concentration ratios, etc.) do not.

D. *Adapting HHI to the Interest Group Context*

The likelihood of interest petitioning and influence depends in large part upon the same phenomena HHI was developed to address—hurdles to collective action in the market context are strikingly similar to those facing potential rent-seekers, and the unilateral power to maximize profits parallels unilateral incentives to rent-seek. In both situations, the same type of concentration matters. Thus, the HHI is an attractive starting point for designing a measurement capable of describing the organizational dynamics associated with a given regulatory program. But the interest group calculus differs from the antitrust calculus in one important respect: workably competitive pluralism is concerned with *relative* organizational hurdles on opposite sides of the regulatory nexus. The index this Article proposes (the Playing Field Index or “PFI”) therefore applies a substantially modified HHI approach to measure relative interest group dynamics.¹²⁶

The PFI consists of three separate calculations. First, it assesses the concentration and distribution of benefits accruing to rent-seekers in HHI terms by estimating, squaring, and summing the “benefit shares” of individual beneficiaries. Second, it performs the same analysis on the “cost” side of the ledger, generating an HHI for those from whom the benefits in question are extracted. Finally, it compares the “benefits” HHI to the “costs” HHI to obtain a rough assessment of the parity or disparity of organizational challenges facing the respective sides.

Thus, there are two primary differences between standard HHI calculations and the Playing Field Index. First, the PFI is a relative measure, pitting benefit concentration against cost concentration in an attempt to decipher whether and when interest group dynamics are likely to yield one-sided regulatory demand. By contrast, traditional HHI measures an absolute: market concentration. Also, the relevant nominal “concern thresholds” almost certainly differ substantially between HHI and the PFI’s component parts: many industries and interests traditional HHI would tend to define as relatively unconcentrated and thus posing little *competitive* risk may still be sufficiently concentrated to foster collective or unilateral regulatory rent-seeking. Accordingly, though the raw numbers from which the PFI is derived are calculated in much the same way HHIs are calculated, it is not a nominally parallel measure. For example, an HHI of 100 is highly unlikely to raise competitive concerns,¹²⁷ but that same nominal value

¹²⁶ Using HHI in the interest group context is but a small step from its original use as a measure of the concentration of state political power. See HIRSCHMAN, *supra* note 6, at 158-62; see also Stigler, *Free Riders*, *supra* note 98, at 360-62 (using traditional HHI to explain that small groups foster collective action).

¹²⁷ See, e.g., 1982 Merger Guidelines, *supra* note 109, at § III.A.1. (post-merger concerns not

will often imply the likelihood of collective rent-seeking in the interest group context.¹²⁸

In formal terms, this Article defines PFI as the \log_{10} of the ratio of the “benefit HHI” (BHHI) to the “cost HHI” (CHHI), or:

$$PFI = \log_{10} \left(\frac{BHHI}{CHHI} \right)$$

I further define BHHI and CHHI immediately below.¹²⁹

1. Measuring BHHI

To calculate the BHHI, we must first identify the entities¹³⁰ that stand to benefit from the proposed regulation, and the extent to which each stands to benefit. Given the relative sophistication of modern econometrics, this is feasible, even in the early stages of litigation. The proportional distribution of benefits provides the basis for the “market shares” used to calculate the sum-of-squares BHHI. Formally,

$$BHHI = \sum_1^x (S_{bx})^2, \text{ where } S_{bx} \text{ is the individual benefits share of}$$

beneficiary x expressed as a percentage.

Consider a paradigm case involving 10 identical producers seeking uniform legislative benefits, perhaps in the form of a state-mandated cartel that will result in substantial output restrictions and concomitant price increases.¹³¹ In that case, each producer would enjoy a 10% “market share” in the putative benefits. Summing the squares of those market shares yields a BHHI of 1000.¹³² The HHI-derived approach in this case accesses both “market share” effects and the “number of

raised unless postmerger HHI exceeds 1000).

¹²⁸ This is due primarily to differences in the nature of the benefits of traditional collusion and the pursuit of collective good.

¹²⁹ Readers are also encouraged to visit and use the associated PFI calculator available at <http://www.law.uiuc.edu/stancil/index.asp>.

¹³⁰ One additional strength of the HHI approach lies in the relative irrelevance of small market shares (here, benefit or cost shares) in otherwise concentrated markets. Because the HHI sums the squares of market shares, small shares add disproportionately little to the calculation when dominated by larger shares. Thus it is not always necessary to identify *all* of the beneficiaries or payors, so long as we are comfortable that the unknown fringe is relatively small compared to the known body of stakeholders. For example, in a 51-firm market consisting of one 50% entity and fifty 1% entities, the HHI calculation is utterly dominated by the single large firm; of the total industry HHI of 2550, fully 2500 points derives from the dominant firm’s market share. If the remaining 50% of the market were instead shared equally by 200 tiny firms, the resulting HHI would be 2512—an immaterial change from the 51-firm HHI. See Adelman, *supra* note 121, at 100.

¹³¹ To the extent assigning a dollar value to these benefits helps concretize the hypothetical, assume \$1 million apiece in benefits, although the absolute figure is ultimately irrelevant.

¹³² $BHHI=10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2=1000$.

participants” effects, each of which are critically important in assessing whether collective action problems can be overcome.

Changing the paradigm case to a “dominant firm/competitive fringe” variant (e.g., one firm receiving 50% of the benefits, with the remaining 50% spread equally over 9 firms) generates a BHHI of approximately 2777.¹³³ This increase comports with intuition and with economic theory predicting an increased likelihood of rent-seeking behavior. If a single firm will benefit to that extent, it is likely to seek the rent on its own. On the flip side, a 1000-producer market with equal benefit distribution would yield a BHHI of 10. Experience teaches that interest groups of 100, 1000, or even more members can often overcome their collective action hurdles to form effective rent-seeking organizations,¹³⁴ but all other things being equal, it is obviously more difficult for 1000 producers to organize than for 10.¹³⁵

2. Measuring CHHI

The CHHI is the mirror image of the BHHI from the cost side.

Formally, $CHHI = \sum_1^y (S_{cy})^2$, where S_{cy} is the individual cost share of

each payor y expressed as a percentage. If the paradigm benefits group introduced above makes the mistake of seeking an economic rent from an equal but opposite group (ten payors each paying an equal share of the benefits), the CHHI would also be 1000.¹³⁶ In many cases, however, the CHHI is likely to be below 1 or even close to 0. As Simon Newcomb observed, it makes sense for rent-seekers to extract their desired rents as broadly as possible among payors.¹³⁷ Consider, for example, a regulatory program whose rents will be paid in equal proportion by the entire American population—300,000,000 individual citizens.¹³⁸ The CHHI associated with this program would be very small indeed.¹³⁹

Importantly, this Article deliberately treats legislative rent seeking

¹³³ $BHHI=50^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2+(50/9)^2=2777$.

¹³⁴ See *supra* note 24 and accompanying text.

¹³⁵ See, e.g., OLSON, *supra* note 9, at 132-65.

¹³⁶ $CHHI = \sum_1^y (S_{cy})^2 = 10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2+10^2 = 1000$.

¹³⁷ See NEWCOMB, *supra* note 7, at 457.

¹³⁸ Using the dollar figures from the paradigm example discussed above, a \$10 million benefit paid pro rata by each American citizen would result in per-citizen payments of approximately \$0.33.

¹³⁹ $CHHI=\sum (1/(3*10^8)*100)^2 = \sum 1.11 * 10^{-13} = (3*10^8) * (1.11 * 10^{-13}) = 0.000033$.

as akin to a zero-sum game in which absolute differences between costs and benefits are effectively irrelevant. This simplification is admittedly technically incorrect in a rather important way: legislative rent-seeking tends in fact to be a *negative*-sum game resulting in social welfare losses arising out of (1) decreased output of desirable goods or services; (2) inefficient allocation of resources toward the procurement of economic rents rather than productive activity; and (3) socially wasteful expenditures associated with the administration of rent-providing regulation.¹⁴⁰ Nonetheless, with one important exception, it is appropriate to exclude these additional losses from the calculations for two reasons, one theoretical and one pragmatic.

At a pragmatic level, deadweight costs are both difficult to calculate and difficult to assign. Compared to “overcharge” costs—costs obtained by estimating the aggregate out-of-pocket expenses of payors resulting from a given regulation, deadweight costs may be more complicated to locate and estimate. Similarly, it would be substantially more difficult to assign these costs to payors for the purposes of CHHI calculation, since they tend to be costs associated with foregone consumption.

From a theoretical perspective, deadweight or non-overcharge costs should only be included in the CHHI measure to the extent they represent a legitimate bloc of economic power for which it is rational to assess the likelihood of collective action. Those bearing the cost of *foregone* consumption, as opposed to merely higher-priced consumption, are substantially less likely than “overcharge consumers” to be aware of and internalize those costs. As a result, deadweight costs do not proxy for collective action probability in the same way overcharge costs do. Similarly, a significant portion of the deadweight loss associated with legislative rent seeking lies in the resources expended to obtain and administer economic rents. In concrete terms, campaign contributions, lobbying costs, media expenses, administrative costs and the other traditional accoutrements of regulatory rent-seeking are by definition a net social loss.¹⁴¹ And these inefficient expenditures simply cannot be assigned to a payor with any incentive to vindicate the public interest. For stakeholders in the rent-seeking enterprise, for example, such costs are by definition worthwhile if they yield a single dollar in economic rent. And the politicians, lawyers, restaurants, advertising agencies, television stations and bureaucrats benefiting from these expenditures are hardly likely to complain. Thus, while those costs are a very real part of the equation, they are not borne directly by any constituency for whom that burden is likely to stimulate collective opposition. Accordingly, deadweight costs are excluded from the

¹⁴⁰ See, e.g., *supra* notes 70-86 and accompanying text.

¹⁴¹ See Tullock, *supra* note 9, at 225-26, 228.

calculation of CHHI.

a. Of Pass-Through and Pivots

In many or even most cases, calculation of CHHI will be relatively straightforward. Payors will be easy to identify, and calculation methodology, while contestable and subject to competing assumptions, will generally be simple. But there are two potentially complicating (and interacting) factors, each of which may warrant further research: (1) the potential for pass-through and (2) the problem of “pivots.” Both of these issues arise in multi-level payor structures, where there are multiple levels of distribution between producers and consumers.

i. The Potential for Pass-Through

CHHI measurements are accurate only to the extent they capture the likelihood of actual opposition to rent-seeking regulation. This is in turn determined by the extent to which payors actually feel the sting of that regulation. If upstream payors are able to pass through the costs they bear to downstream consumers, a CHHI calculation based upon those upstream producers’ costs may overstate the upstream payors’ incentives to oppose that regulation. What, if anything, should be done about multiple layers of payors?

At first blush, it might appear that the CHHI calculation must take pass-through into account for any structure involving intermediate payors. Consider, for example, peanut subsidies, one of the clearer examples of economic rent provision in contemporary experience.¹⁴² The beneficiaries of peanut subsidies (which take the form of explicit production limits) are obvious:¹⁴³ holders of peanut farming permits.¹⁴⁴ On the payor side, however, there are several classes of potential victims. First, there are direct peanut purchasers, who roast peanuts for individual consumption or incorporate peanuts into their products. Second, there are wholesalers and retailers of peanut-containing products. Finally, there are end-users of those products. The extent to which the *intermediate* levels of payor—manufacturers using peanuts, wholesalers, retailers, etc.—are likely to organize in opposition to

¹⁴² See, e.g., GAO, *Peanut Program*, *supra* note 41.

¹⁴³ The existence and composition of other potential classes of beneficiaries (e.g., producers of substitute goods whose profits increase when peanut prices are high) are too speculative to include in the calculation, essentially for the same reasons the CHHI calculation excludes consideration of Harberger and Tullock costs.

¹⁴⁴ Many permit holders do not farm themselves, but rather sell their rights on the open market. See GAO, *Peanut Program*, *supra* note 41, at 4.

regulatory rent-seeking is not dictated solely by the overcharges those payors incur. Instead, their collective action calculus would appear to be driven by the *economic* costs associated with those overcharges. In most cases, this would translate to the profits lost by virtue of the inflated prices they pay for peanuts. By contrast, end consumers' costs are effectively "overcharge costs."

Accordingly, further research might analyze whether the PFI should assess upstream costs on a "lost profits" basis and final downstream costs on an "overcharge" basis. In other words, it is possible that upstream payors (e.g., peanut butter manufacturers, etc.) should be subject to a CHHI cost share calculation based upon the profits they lose by virtue of government rent-provision to peanut farmers. Assuming demand for peanut butter is not perfectly inelastic, the economic rents provided to peanut growers will have the effect of shifting the supply curve to a less profitable point for peanut processors; their actual incentive to oppose rent-seeking behavior may not be directly proportional to the quantum of the "but for" overcharges they pay, but rather to the lost profits they suffer because they pay too much.

Ultimate downstream payors (consumers of peanut butter, perhaps), by contrast, would face economic incentives to oppose regulation primarily in proportion to the overcharges they pay. Accordingly, a rent-seeking beneficiary is likely to face the least opposition from a multilevel payor structure when the top level (in which economic rents are likely to be relatively concentrated) can pass through all or most of those rents to more diffuse downstream purchasers without suffering significant lost profits. This occurs when demand for the downstream product(s) is relatively inelastic.

It admittedly would be more difficult and more expensive to calculate CHHI using incidence analysis. But it is hardly impossible. Economists routinely perform similar calculations in so-called "indirect purchaser" antitrust lawsuits, apportioning economic damages among direct and indirect purchasers of price-fixed goods.¹⁴⁵ Under the reasonable assumption that lost profits and overcharges are generally ascertainable, calculation of the CHHI remains relatively straightforward.

For example, consider an industry in which the six direct purchasers of a product each would suffer \$50,000 in lost profits in connection with a proposed regulation. In addition, the general population (approximately 300 million people) would suffer a per-capita loss of \$1 apiece. In such a situation, the CHHI would be approximately 0.0017.¹⁴⁶ By contrast, consider an industry in which the

¹⁴⁵ See, e.g., George Kosicki & Miles B. Cahill, *Economics of Cost Pass Through and Damages in Indirect Purchaser Antitrust Cases*, 51 ANTITRUST BULL. 599 (2006).

¹⁴⁶ These calculations can be replicated on the website associated with this Article. See *supra*

six direct purchasers of a product would each suffer \$2 million in lost profits, passing on only a \$0.25 per-capita overcharge to the general population. In that case, the CHHI would be 31.70.¹⁴⁷

The single most obvious implication of the pass-through problem is that demand elasticity is an important predictor of collective opposition in most multi-level payor structures. The less elastic the demand for a particular product or service, the more likely it is that intermediate levels will be able to pass through overcharges without sacrificing profits. Thus, while one could take an *Illinois Brick*¹⁴⁸ approach to the PFI process, basing PFI calculations solely upon the nominal concentration dynamics at the initial cost-benefit interface, this would be enormously problematic in any relatively inelastic context. Inelastic demand implies the ability to pass through overcharges to lower levels of distribution without sacrificing significant profits, so nominally concentrated top-level payors frequently will have little or no incentive to organize in opposition to rent-seeking producers.

ii. The Pivot Problem

Despite the potential for pass-through, this Article tentatively recommends ignoring multiple distribution levels until further research suggests otherwise. Instead, the CHHI should be measured at the lowest possible level of payor, typically individual consumers of the goods or services subject to rent-seeking. Why? Because intermediate payors may also act as economic “pivots,” deliberately aligning with either producers or end-consumers to promote their own economic self-interest. If, for example, intermediaries were to align with producers, they might insist that the producers buy them off, exchanging some portion of the economic rent for their silence or support before regulators. Judge Frank Easterbrook hypothesizes just such a state of affairs in the case of milk handlers, direct purchasers who traditionally remain silent in the face of producers’ demands for rent-providing price supports.¹⁴⁹ Intermediate purchaser extortion is conceptually similar to

note 129.

¹⁴⁷ See *id.*

¹⁴⁸ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The much-criticized *Illinois Brick* rule rejects federal antitrust suits by indirect purchasers. Instead, it allows only direct purchasers to sue for the full amount of overcharges, even if they have been able to pass through the overcharges to downstream customers. The *Illinois Brick* rule has been rejected by a majority of states, and a bipartisan blue-ribbon Commission has tentatively recommended that it be statutorily overruled. See, e.g., ANTITRUST MODERNIZATION COMM’N, TENTATIVE RECOMMENDATIONS 16, available at http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf.

¹⁴⁹ See Frank Easterbrook, *The Supreme Court—1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 48-50 (1984). Though Easterbrook seems to ascribe milk

the regulatory extortion modeled by McChesney.¹⁵⁰

When pivot intermediaries align themselves with producers, the total rent would be split among various upstream interests, producers included. But its overall impact upon consumers remains the same. Thus, whenever a rent-seeker anticipates opposition from high-level purchasers, it is in the rent-seeker's interest to buy them off. Of course, intermediaries capable of organization ostensibly have a choice. Instead of sharing rents with the rent-seekers, they could theoretically align themselves with downstream payors (usually consumers). But in reality, the same organizational dynamics that can operate to deny consumers' meaningful participation in the regulatory process will likely limit the extent to which intermediate purchasers can align with consumers: compared to the well-organized producers, there will be no one for pivots to talk to on the consumer side. Accordingly, this Article recommends calculation of CHHI at the lowest level of payor for the time being. Nonetheless, the potential for pass-through and the pivot problem are worthy of further study, and a more evolved PFI analysis might account for those phenomena in some way.

3. The Playing Field Index

Boiled down to its mathematical essentials, the raw index this Article proposes is simply the ratio of BHHI to CHHI. Thus, in a perfectly matched demand scenario, where BHHI=CHHI, the raw index would be one. As the concentration of benefits rises relative to the concentration of costs, the ratio approaches infinity. For example, if a monopolist/sole beneficiary (BHHI=10000) seeks rents to be extracted equally from each taxpayer (CHHI=0.0000333), the raw index would be approximately 300,000,000. By contrast, when concentration of costs exceeds the concentration of benefits (thus suggesting that interest group activity is unlikely to produce the desired regulation), the raw index drops below one; as the CHHI further increases relative to the BHHI, the raw index approaches zero.

For a variety of reasons, the straight ratio approach is inferior to a logarithmic approach. Thus, this Article defines PFI as the base-10 logarithm of the ratio between BHHI and CHHI, or

$$PFI = \log_{10} \left(\frac{BHHI}{CHHI} \right).$$

Logarithmic transformation gives the index the "proper" intuitive

handlers' entire silence to rent-splitting, the relatively inelastic demand for milk suggests that pass-through might also contribute.

¹⁵⁰ See McChesney, *Interest-Group Organization*, *supra* note 22, at 79-82.

sign. A PFI of zero, for example, represents a playing field in perfect demand equipoise—the collective action infrastructure on one side of the equation sees its mirror image across the divide, and workably competitive pluralism is predicted. By extension, any positive PFI would indicate a playing field favoring beneficiaries, and any negative PFI a playing field favoring payors.¹⁵¹ In addition, the logarithm approach imbues the index with a helpful symmetry—a logarithmic PFI of 2 represents a playing field favoring beneficiaries to exactly the same extent that a logarithmic PFI of -2 represents a playing field favorable to payors.¹⁵² By contrast, a straight ratio approach would assign the facially different values of 100 and 0.01 to each of these mirror image PFIs, respectively.

Finally, though it is admittedly a minor point, the logarithm approach keeps the index “reasonable”: a raw index of 1,000,000 translates to a \log_{10} PFI of 6, and a straight ratio index of 0.000001 to a \log_{10} PFI of -6.¹⁵³ Logarithmic transformation is not mathematically necessary to make the index useful, but it is nonetheless attractive.¹⁵⁴

E. *A Milk-Based Hypothetical*

A detailed sample PFI calculation, based upon a historical real-world example, helps illustrate both the mechanics and the utility of a PFI approach more completely. In much of the country, the production

¹⁵¹ Compare this to the straight ratio approach, in which equipoise is represented by a value of 1, beneficiary tilt by any value above 1, and payor tilt by any value between 0 and 1.

¹⁵² As should be obvious, the terms “payors” and “beneficiaries” are under certain circumstances interchangeable or are determined by the interests’ initial positions. See McChesney, *Interest-Group Organization*, *supra* note 22, at 79-82.

¹⁵³ Given a U.S. population of 300 million, the straight ratio PFI has a practical maximum value of approximately 300 million. See *supra* note 129. The \log_{10} PFI for that same scenario is approximately 8.5.

¹⁵⁴ The ratio approach has at least one apparent weakness: an index derived solely by dividing BHHI by CHHI fails to take into account the absolute benefit and cost levels associated with regulation. As such, the ratio approach may be criticized because it will fail to identify situations in which the absolute benefit levels are too low to encourage rent seeking (i.e., when the cost of seeking the rent exceeds the expected value of the rent) or when the absolute cost levels are sufficiently high to encourage opposition without collective action. However, these problems are more apparent than real. As to the latter scenario, the index is still useful to the extent it identifies massive disproportionality in rent seeking incentives. At some PFI level, the fact that unilateral opposition may be likely as an absolute matter cannot overwhelm the disparity in interests and the likely implications that disparity has as to the resources the parties will bring to bear to accomplish their legislative ends. As to the former scenario, while it is true that a large PFI could generate a “false positive” because the benefit level is too low to encourage rent-seeking in the first place, these scenarios are likely of very limited practical significance. It may well be worthwhile to append an absolute costs/absolute benefits “reality check” to academic applications of the PFI, but the market likely will self-correct for this flaw in any real-world (e.g., judicial or legislative) application.

of fluid milk is subject to heavy price regulation by the federal government.¹⁵⁵ And like most price regulation programs, the federal milk marketing order system has historically provided substantial economic rents to producers—in this case, dairies.¹⁵⁶ According to an empirical study performed by Richard Ippolito and Robert Masson based on 1973 data, the social costs of these milk marketing orders are substantial: the authors there estimated gross rent transfers to regulated farmers of approximately \$210 million annually.¹⁵⁷ This figure did not include the approximately \$60 million in annual social costs associated with the programs.¹⁵⁸

Others can debate the validity of the Ippolito/Masson conclusions.¹⁵⁹ Regardless of its accuracy, it both demonstrates that economists can in fact perform the primary calculations necessary to the calculation of a PFI and permits rough calculation of a back-of-the- napkin PFI in the federal milk marketing order context. In addition, publicly available data regarding the dairy business provides some ability to examine possible permutations and combinations beyond a simple arithmetic PFI calculation.¹⁶⁰

According to Ippolito and Masson, there were approximately 300,000 dairy farmers in the mid-1970s.¹⁶¹ Though this number was far too large to support any traditional theory of private collusion, it is well-documented that dairies had successfully lobbied regulators for nearly a century by the time the article was published.¹⁶² The federal milk regulations in question were themselves almost 40 years old during the sample analysis period.¹⁶³ By contrast, the U.S. population in 1973 was approximately 210 million.

Using certain simplifying assumptions, it is possible to calculate a PFI from this data alone. For example, assume that all dairies were of the same size and thus stood to benefit equally from any regulatory rent

¹⁵⁵ See, e.g., <http://www.ams.usda.gov/dairy/orders.htm>.

¹⁵⁶ See, e.g., Ippolito & Masson, *supra* note 77.

¹⁵⁷ See *id.* at 53-55.

¹⁵⁸ See generally *id.* and at 59-60. The authors of the study categorized social costs separately from transfers, which are at least arguably efficiency-neutral. The social costs they calculated included: (1) Harberger or deadweight losses, *id.* at 51-55; see also *supra* notes 74-76 and accompanying text; (2) inefficient transport costs resulting from distorted shipment incentives, Ippolito & Masson, *supra* note 77, at 56-59; and (3) Tullock or administrative costs (including both the costs of seeking economic rents, and costs of administering those rent-providing programs), *id.* at 59-60.

¹⁵⁹ In fact, any application of the PFI in practice is likely to be subject to substantial methodological debate.

¹⁶⁰ The point of this exercise is *not* to provide an accurate calculation of a PFI, but is rather to sketch the outlines of the *process* and offer thoughts on some of the complexities that might be encountered in a real-world application.

¹⁶¹ Ippolito & Masson, *supra* note 77, at 33.

¹⁶² See, e.g., Miller, *supra* note 21, at 88.

¹⁶³ Ippolito & Masson, *supra* note 77, at 36-38.

program.¹⁶⁴ Further assume that the transfer burden of this rent fell equally on each resident of the United States and that cognizable costs and benefits are the same (\$210 million annually).¹⁶⁵ Using these assumptions, each dairy stands to benefit to the tune of approximately \$700 annually from regulation. By contrast, each resident would pay approximately \$1 in extra milk costs annually. Using these figures and assumptions, the PFI calculation yields a BHHI of 0.03, and a CHHI of 0.00004672. Thus, the ratio of BHHI to CHHI is 700, and the PFI is 2.85.¹⁶⁶

But what if the appropriate cost-side economic unit is not “residents” but is instead “households?” This would seem to comport more with reality, since households tend to function as the primary consuming economic unit in American society. Leaving all other figures constant but changing the “number of payors” to 68 million (a rough approximation of the number of U.S. households in 1973) yields per-household costs of \$3.10 and a PFI of 2.36.

Of course, this would not be the only possible change in approach. More sophisticated analysis might account for differences in size among dairies. The variations inherent in a sample size of 300,000 take such analysis beyond the scope of this Article, but it is possible to generate a stylized version by assuming a generally uniform benefit-side market structure with a few idiosyncratically large beneficiaries. For example, assume all dairies are of identical size except for six large “mega-dairies,” each of which stands to enjoy a \$1 million annual benefit from regulation. Assuming a household-based payor structure, the PFI in this context rises from 2.36 to 3.97. This massive increase (equivalent to an increase of well over ten times the concentration disparity compared to the uniform benefits case), is nonetheless reasonable; if six dairies stand to benefit to that extent individually, they would face substantial incentives to organize and seek rents even without the participation of the much smaller fringe dairies.¹⁶⁷

CONCLUSION

The PFI approach this Article suggests is at once modest and ambitious. On the “modest” end of the spectrum, it offers no sweeping,

¹⁶⁴ This is a conservative assumption. Any disparity in size among dairies will necessarily increase the BHHI.

¹⁶⁵ For purposes of this Article, it would unnecessarily complicate matters to calculate PFIs in net present value terms; however, more sophisticated analyses might take this step as well.

¹⁶⁶ All of these calculations can be verified on the website associated with this Article. See *supra* note 129.

¹⁶⁷ The presence of even a single million-dollar “mega-dairy” would increase PFI substantially, from 2.36 to 3.24.

universal solution to the interest group problem, in part because no such solution exists. Neither does it attempt to reconcile the disparate strains of regulatory theory or indeed to persuade anyone that any particular theory is correct. Instead, built on a normative framework that should enjoy substantial cross-ideological consensus, the PFI provides an objective mechanism for identifying the low-hanging fruit¹⁶⁸—pecuniary economic rent-providing government regulation obtained on a decidedly tilted regulatory playing field—without endorsing any universal normative standard under which to judge *all* alleged instances of regulatory capture. Thus, though the PFI can help identify scenarios in which workably competitive pluralism is unlikely, it does not measure (and a PFI-driven prescriptive approach thus would not condemn) rent-providing regulation obtained on a workably level legislative playing field.

Nor does a particular PFI measurement *guarantee* the presence or absence of “undue” interest group influence. Indeed, to the extent the PFI is prescriptively useful, it is only as a barometer of conditions, rather than as proof of process corruption. At its very best, prophylactic use of the PFI may still yield false positives.

As important, absent future empirical testing of its predictive value, the PFI is at most an adjunct to other existing economic theories of regulatory function. For example, Becker’s “interest group competition” model predicts efficient regulatory equilibria by way of dynamic interaction between competing interest groups and regulators.¹⁶⁹ Other scholars suggest that opportunities for exit—voting with one’s feet—may be sufficient to protect regulatory systems from capture.¹⁷⁰ To the extent the PFI is useful, its value may lie in identifying organizational disparities so substantial that neither dynamic interest group competition nor exit are likely to solve the problem; further work should focus on identifying such “breaking points.”

At the same time, the PFI approach is also ambitious. Any meaningful prescriptive application of the PFI would dramatically reshape the interface between regulators and the regulated. Prescriptive limits based on the PFI are superior to other possible approaches, but they would inevitably limit petitioning activity and would likely involve some level of judicial intrusion into the legislative and executive domains.¹⁷¹

¹⁶⁸ And it is often fruit—agricultural subsidies are among the most obvious examples of pecuniary economic rent provision in the American system.

¹⁶⁹ See Becker, *supra* note 9, at 376-81.

¹⁷⁰ See, e.g., Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 33-40 (1983); Larry E. Ribstein and Bruce H. Kobayashi, *The Economics of Federalism*, (U Illinois Law & Economics Research Paper No. LE06-001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875626.

¹⁷¹ But see *Chevron*, *supra* note 91.

Where do we go from here? There are several possible applications of the PFI, from purely academic investigations of its utility to full-scale use of the PFI to arrest or reverse some of the excesses of the interest group state. Among other possible prescriptive applications, two stand out: (1) *Lochner*-style invalidation of regulation that fails to pass an appropriate PFI screen,¹⁷² or (2) limiting of antitrust immunity under the *Parker*,¹⁷³ *Noerr-Pennington*,¹⁷⁴ and *NASD*¹⁷⁵ doctrines when the regulation in question fails a similar screen. Revival of *Lochner* could actually be justified on quasi-*procedural* rather than substantive due process grounds—any sufficiently high PFI could be interpreted as *prima facie* evidence that those bearing the costs of regulation did not have a meaningful opportunity to defend their property before regulators. That said, *Lochner* is perhaps better off dead after all, and it is difficult in any event to envision a court seizing on the PFI approach to overturn seventy-five years of judicial deference to economic regulation. By contrast, locating an application of PFI within antitrust law seems somewhat more promising, since it would operate only to strip private parties of immunity from antitrust suit (rather than to invalidate regulation wholesale) and then only when the democratic process appears to have been compromised.

Regardless of its ultimate prescriptive application, the PFI solves two of the problems that have essentially frozen interest group theory for almost a generation. It provides a broad-based normative framework that can help evaluate the interaction of interest group theory and the regulatory process. And building on that framework, it offers a useful real-world mechanism for measuring organizational dynamics that can dramatically affect regulatory outcomes.

¹⁷² See *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁷³ See *Parker v. Brown*, 317 U.S. 341 (1943).

¹⁷⁴ See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 315 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

¹⁷⁵ See *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975).