THE GUARDIAN TRUSTEE IN BANKRUPTCY COURTS AND BEYOND*

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Litigation systems create dangers of unfairness. Citizens worry, and should worry, about exploitive settlements in aggregate litigation, potential biases in administrative proceedings, and troubling power imbalances in criminal trials. Public confidence in adjudicative processes has eroded to an all-time low. This Article explores the untapped potential of adding independent watchdog entities to address systemic threats to the integrity of government decisionmaking. These entities, which I call "guardian trustees," do not fit within the traditional framework of our adversary system. Though guardian trustees already operate in bankruptcy proceedings, they have thus far received little attention in scholarly literature. This Article begins the work of highlighting the contributions of these entities and their promise for restoring confidence in at-risk systems.

In bankruptcy, the United States Trustee serves as an independent guardian trustee of systemic integrity. Congress created the U.S. Trustee Program in response to waning trust in the early bankruptcy system. Building upon the example of the U.S. Trustee, this Article identifies the qualities of effective guardian trustees, and addresses questions relating to their design and powers. It then highlights, as a general matter, elements of systems that may merit incorporation of a guardian trustee, and introduces aggregate litigation as an ideal environment to deploy the concept. Finally, this Article identifies additional situations that could benefit from the creation of a guardian trustee, including administrative agency enforcement and the problems raised by plea bargains and prosecutorial misconduct in the criminal process. In part by identifying and addressing potential pitfalls of expanding the guardian trustee concept and outlining a path to implementation, this Article sets the stage for the American legal system to employ the guardian trustee.

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INTRODUCTION

For as long as legal systems have existed, parties have found ways to work around governing rules. Some judicial systems are structured in ways that effectively combat this threat, but others remain at risk. Aggregate litigation systems, which center on class action lawsuits and multidistrict adjudication, are particularly susceptible to abuse.[1] In this context, dangers of collusion, manipulation, and evasion combine to erode both the integrity of the system and public trust in it. Past efforts have failed to remedy these problems. Other analysts have proposed ameliorative interventions, such as increasing resources or incentivizing objectors.[2] These suggestions, however, hold little promise of complete success. Thus, this Article offers a new and previously unexplored idea for improving aggregate litigation and other key forms of dispute resolution: the guardian trustee.

This Article defines a "third-party trustee" as an entity in litigation that is neither the arbiter nor a party.[3] Third-party trustees already operate in some corners of the law. The vast majority are "representative" trustees, designed to advocate on behalf of stakeholders or viewpoints that are not yet represented within a case or proceeding. Some examples include an intervenor in class actions, a guardian ad litem in family law proceedings, and the patient care ombudsman in bankruptcy.[4] In contrast, a "guardian" trustee, which is the focal point of this Article, does not represent an absent party or interest in a case, but instead exists to guard the integrity of the decisionmaking system itself. Bankruptcy law provides the quintessential example, in the form of the U.S. Trustee.[5] The U.S Trustee has no client, but instead looks out for the interests of *all* stakeholders in the bankruptcy process. The U.S. Trustee is not motivated

1. *See infra* Section III.B.

2. *See infra* Section III.C.

3. The traditional litigation framework involves parties bringing a dispute and an arbiter charged with deciding it. Sometimes, however, this standard balance is joined by a third presence. A "third-party trustee" in litigation is an additional entity in a case that is not a party but also has no connection to the arbiter.

4. *See infra* Section III.C.1.

5. Throughout this Article, the abbreviation "U.S. Trustee" means the Acting United States Trustee and its individual representatives and agents that may appear in each case, the "Program" means the nationwide United States Trustee Program, and the "Office" refers to an individual Office of the United States Trustee. For background, the overall system is called the "U.S. Trustee Program." Each of the twenty-one regions within the Program has an Acting U.S. Trustee who oversees one or more Offices. *See United States Trustee Program, About the Program*, U.S. DEP'T JUST., https://www.justice.gov/ust/about-program [https://perma.cc/URK5-E3RN] (last updated Dec. 6, 2019). Each Office has a team that may include an Assistant U.S. Trustee, trial attorneys, bankruptcy analysts, paralegals, and others. *See id.* Note that there is a critical distinction between the U.S. Trustee and other forms of private trustees, such as the Chapter 7 trustee, which is appointed to stand in and act on behalf of the debtor in the context of a Chapter 7 case. Although the Program oversees a panel of standing trustees that may be appointed in this context, the role of private trustees is distinct from the U.S. Trustee and beyond the scope of this Article.

by specific outcomes or incentivized by money; rather, its purpose is to oversee compliance with the U.S. Bankruptcy Code and to ensure that business restructurings do not fall victim to abuse.[6] The U.S. Trustee does not answer to the bankruptcy judge; rather, it is designed to operate independently of the court and the parties before it.[7] Although representative trustees represent absent interests in a way that may also protect the integrity of a system, they are fundamentally different from guardian trustees, which purposefully act to prevent systemic abuse for *all* stakeholders, including the general public.[8]

Guardian trustees offer a viable solution only if they are effectively designed and carefully deployed. The entity must have sufficient powers and insulation from influence to remain neutral and provide a useful check. The requisite process must include standing to appear and be heard, and the ability to collect critical information. Neutrality is ensured by shielding the guardian trustee from financial leverage and other pressures that participants in the controversy might exert. Careful attention must be paid to how the guardian trustee is designed, so as to avoid principal-agent issues and separation-of-powers concerns. Congress utilized pilot programs to create the Program, and similar pilot programs could promote a positive introduction for other guardian trustees.[9]

Any effort to employ the guardian trustee in settings beyond bankruptcy should take account of the distinct problems of the "at-risk" systems that warrant such a guardian's use. In particular, the use of a guardian trustee holds out the greatest promise of success when (1) there is a likelihood that the parties' interests will align in a way that circumvents the system's overarching goals, rules, and procedures; (2) the court (or other decisionmaker) has insufficient access to information about the potential problems that prevent it from serving as an effective check on self-interested parties; (3) the system has built-in weaknesses that render it subject to abuse; and (4) public concern about the basic fairness of the system has been stretched to a breaking point. When evaluating such decisionmaking systems—including those that involve aggregate litigation, agency enforcement, and criminal law proceedings—policymakers should not overlook the option of incorporating into them an

6. *Id.*

7. One could raise valid arguments that the U.S. Trustee is beholden to the executive branch in a way that counteracts the perception of independence. *See infra* Section I.D. However, this shortcoming is avoidable with adjustments to where it is structured. *See infra* Section I.D.

8. To be clear, I do not advocate for abandoning representative trustees or wholly replacing them with guardian trustees. Instead, I suggest that guardian trustees be considered among the viable possibilities when lawmakers and commentators evaluate approaches to remedy systemic integrity threats.

9. *See infra* notes 23–24 and accompanying text.

unbiased and independent entity dedicated to advancing the concerns of all those involved.[10]

In aggregate litigation, for example, all of the risk factors identified here combine to negatively impact public trust in the system. Counsel for both the plaintiffs and the defendants may share an interest in the pursuit of fees and settlement.[11] The court has oversight authority, but relies upon the parties to bring problems to its attention, while also facing resource challenges.[12] Flexible review standards allow the parties to evade challenges, and public confidence in aggregate litigation is not high.[13] Creating an independent trustee to oversee problematic parts of the aggregate litigation process, such as an "Aggregate Settlement Guardian" to evaluate class action settlements, could address these problems and improve the quality of final results. Scholars have previously highlighted the comparison between bankruptcy and aggregate litigation, suggesting that bankruptcy may provide a useful model for improving challenges of the aggregate litigation process (including the presence of the U.S. Trustee as a "monitor").[14] Missing from the conversation until now, however, is a full analysis of the role that guardian trustees like the U.S. Trustee play and the benefits that such entities could bring beyond the bankruptcy context.

Some observers may question why a guardian trustee, with its inherent costs, offers a superior solution to alternatives. To be sure, in many situations, concerns regarding integrity could be reduced by creating additional representative trustees or dedicating more resources to the affected decisionmaker. But these measures will not always work well, particularly where a combination of factors has led to the decay of public trust in the process. Use of the guardian trustee should be limited, both in the scope of its role and the circumstances in which it is deployed. In some contexts, however, the guardian trustee may drastically improve the operation of at-risk systems.

This Article proceeds in four parts. Part I explores historical challenges within the bankruptcy system that led to the creation of the U.S. Trustee and explores the use of that entity in modern bankruptcy proceedings. Part II offers

10. In some circumstances, the inherent problems in a system may only be remedied by legislative or regulatory action. The guardian trustee is not a replacement for Congress's role to reshape and refine legal systems. To the contrary, in many cases the addition of a guardian trustee will highlight the need for legislative revision by influencing the system to function according to its design. Only after a system's rules and procedures are actually being followed can commentators and legislators accurately evaluate whether those rules and procedures are effective.

11. *See infra* Section III.B.

12. Supplementing a court's resources, for example by increasing reliance on special masters, could address some (but not all) of these concerns. *See infra* Section III.C.2.

13. *See infra* Section III.B.

14. *See, e.g.*, Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 999–1000, 1018 (2012) [hereinafter McKenzie, *Bankruptcy Model*] ("The institutions of bankruptcy—committees representing various groups and a monitor (the U.S. Trustee)—counterbalance the limited power of dispersed and potentially unsophisticated claimants.").

a blueprint for designing a guardian trustee by identifying the key components that make these entities work well. Part III explores the circumstances that invite use of a guardian trustee, specifically by demonstrating aggregate litigation as a paradigm case in which this overlay on the decisionmaking process offers many advantages. Part IV identifies additional opportunities to expand the use of the guardian trustee, including in the administrative and criminal law contexts.

I. WATCHDOGGING THE BANKRUPTCY PROCESS

The U.S. bankruptcy system offers relief to struggling businesses and consumers while providing stability and structure to frustrated creditors. Bankruptcy replaces a chaotic alternative and is a fundamental pillar of the modern American economy. The U.S. Trustee is one feature of the bankruptcy process, and its development provides a useful example of the guardian trustee concept and how it can support a critical system. This part introduces the U.S. Trustee by describing the historical context that necessitated its creation. It then explores the various administrative and guardian functions that Congress designed for the U.S. Trustee, and identifies the Program's structural orientation within the government. Finally, this part describes the reception to the U.S. Trustee over time and the ways that the U.S. Trustee impacts behaviors and outcomes in bankruptcy cases.

A. *Bankruptcy as an At-Risk System*

The Program began as an experiment in reforming a bankruptcy system in distress. Prior to the U.S. Trustee pilot program, which was created as part of the comprehensive modernization of the Bankruptcy Code in 1978,[15] the restructuring process encountered two main problems.

First, two core elements of the modern bankruptcy process—the "debtor in possession" and absent-party committees—were all but eliminated due to changes made by the Chandler Act in 1938.[16] Instead of permitting private groups to collectively negotiate their interests to reach a resolution in bankruptcy, the Chandler Act directed the Securities and Exchange Commission ("SEC") to oversee all business bankruptcies involving firms that

15. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 101 (2018)).

16. Pub. L. No. 75-695, 52 Stat. 840 (repealed 1978); *see also* Troy A. McKenzie, *"Helpless" Groups*, 81 FORDHAM L. REV. 3213, 3220–21 (2013) [hereinafter McKenzie, *Helpless*] (describing committees in bankruptcy). In modern Chapter 11 cases, the debtor company retains control of its operations rather than turning them over to a trustee, meaning it is a debtor "in possession" of the estate. *See* ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 366 (Erwin Chemerinsky et al. eds., 7th ed. 2014).

had issued publicly held securities.[17] Unlike the modern Program, the SEC replaced committees of stakeholders and was vested with significant authority to direct case reporting on any proposed plan of reorganization.[18] This reform, however, proved to be a complete failure,[19] in part because the "SEC lacked the resources to perform its assigned tasks in bankruptcy cases because of restrictive budgets."[20] As a result, bankruptcy cases languished, and parties turned to alternative tools for dealing with insolvent businesses.

Second, bankruptcy judges (or referees, as they were previously called) were overburdened by a combination of administrative and judicial functions.[21] The overlap of these functions fostered distrust in the integrity of the system. The referee and parties to the litigation closely interacted on many elements of each case in ways that often created a perception of favoritism and preferential treatment for certain stakeholders.[22] In response to these difficulties, Congress implemented a pilot program in eighteen judicial districts that removed the administrative roles of referees and created the Program.[23] This program was successful, and Congress extended it to all bankruptcy courts in 1986.[24]

17. McKenzie, *Helpless*, *supra* note 16, at 3221.

18. § 173, 52 Stat. at 891.

19. Though the role of the SEC did not successfully improve the bankruptcy process due to the combination of structural changes that accompanied its rise to power and the shortage of resources it held, the idea that an independent agency could add legitimacy to the bankruptcy process survived in creation of the Program.

20. McKenzie, *Helpless*, *supra* note 16, at 3225.

21. *See* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 435–40 (1995).

22. *In re* Schollett, 980 F.2d 639, 641 (10th Cir. 1992) (citing H.R. REP. NO. 99-764, at 17–18 (1986)).

23. H.R. REP. NO. 99-764, at 17; *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 396 (2012) (discussing the six-year pilot term of the Program).

24. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 28 U.S.C. § 581 note (2018)). Not all states agreed to participate in the pilot program. Even after the 1986 Act permanently established the Program nationwide, *id.*, two states resisted its adoption. Despite pressure to join the Program, North Carolina and Alabama remain without U.S. Trustees to this day. Each of these two states has a similar institution, the U.S. Bankruptcy Administrator Program. *See* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws"*, 42 SETON HALL L. REV. 1081, 1132–33 (2012) (describing distinctions between the U.S. Trustee and Bankruptcy Administrator Program). In present form, Bankruptcy Administrators share nearly identical powers with U.S. Trustees under the Bankruptcy Code. *See, e.g.*, FED. R. BANKR. P. 9035 (extending bankruptcy rules to the Bankruptcy Administrator Program). Key differences between the two entities include a number of U.S. Trustee functions that are carried out by the court, rather than a Bankruptcy Administrator. *See* Pardo & Watts, *supra* note 23, at 398 (noting the distinctions between the two entities, most notably of which is that the Bankruptcy Administrator does not select members of the Official Committee of Unsecured Creditors). The creation of parallel monitors, housed in different branches of government, provides a useful example of how structural orientation can impact a trustee.

The U.S. Trustee played an integral role in bringing the bankruptcy system back from the brink of collapse. While many significant structural revisions contributed to this result, the creation of the U.S. Trustee was a central part of Congress's successful effort to rebuild public trust in a system at risk.[25] The next section describes the modern U.S. Trustee and the role it plays within today's bankruptcy system.

B. *Introducing the Guardian Trustee: The United States Trustee Program*

Bankruptcy practitioners tend to take the Program and the role it plays in the restructuring process for granted. By statute, a U.S. Trustee oversees each bankruptcy case filed under Chapters 7, 11, 12, 13, and 15 of the Bankruptcy Code,[26] and the U.S. Trustee's delegated tasks are usually completed with little controversy or notice. The significance of the U.S. Trustee, however, reaches beyond the bankruptcy context because it illustrates how a neutral guardian can be incorporated into a decisionmaking system in a way that greatly mitigates abuses. This section introduces the U.S. Trustee and explores its history, purpose, responsibility, and reception.

Understanding the U.S. Trustee requires a basic understanding of bankruptcy. The debtor is the individual or corporation seeking debt restructuring in bankruptcy. Each debtor has creditors to whom the debtor owes money or performance. The creditors may have secured or unsecured status depending on the nature of the debt.[27] A U.S. Trustee is automatically appointed in most bankruptcies and is responsible for administrative tasks and overseeing that the actions of all stakeholders comply with the Bankruptcy Code.[28] If there is sufficient interest among unsecured creditors, the Bankruptcy Code requires the U.S. Trustee to form a committee of unsecured creditors to act on their behalf.[29] Even if a committee is formed, however, unsecured creditors may still individually represent their interests in the bankruptcy case.[30] The Bankruptcy Code provides that professionals

25. *See, e.g.*, Peter C. Alexander, *A Proposal To Abolish the Office of United States Trustee*, 30 U. MICH. J.L. REFORM 1, 4 (1996) (explaining that the U.S. Trustee permitted each bankruptcy judge to "function as a neutral jurist"); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995).

26. 28 U.S.C. § 586(a)(3) (2018).

27. WARREN ET AL., *supra* note 16, at 40–41.

28. *See infra* Section I.C (outlining in more detail the duties and obligations of the U.S. Trustee).

29. 11 U.S.C. § 1102(a)(1) (2018); *see also* Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U. L. REV. 1155, 1159 (2011) (discussing the creditors' committee and the role it serves).

30. After all, the committee represents the interests of *all* unsecured creditors, not just those of an individual creditor (which may conflict with the committee's position). *See* EDWARD L. SCHNITZER & ANTING J. WANG, CREDITOR AND CREDITOR COMMITTEE CONFLICTS IN REPRESENTATION (2010), https://hahnhessen.com/uploads/39/doc/2010_01_els_aw_creditorconflicts.pdf [https://perma.cc/257Y-N8Z9].

representing the committee will be paid by the debtor's estate,[31] a program feature designed to ensure that unsecured creditors (many of whom have claims so small that the cost of a lawyer is not justified) can obtain meaningful representation in the case.[32]

Once a debtor files for bankruptcy, the Bankruptcy Code imposes an automatic stay to halt all efforts to seek repayment from the debtor.[33] By stopping creditors from racing to collect their debts from the dwindling (and usually insufficient) funds of the debtor's estate, the automatic stay provides the debtor with time and a forum to negotiate with key constituencies; to decide which of its ongoing contracts to keep in place or abandon; and (above all) to develop an overarching strategy to exit bankruptcy, usually through liquidation, sale to another owner, or reorganization. The court must approve the resolution of a case, as well as any distributions of the estate's assets to creditors.

The Bankruptcy Code imposes a priority scheme by which certain classes of creditors must be paid in full before others may receive any payment.[34] If the assets are insufficient to pay any class of creditors in full, each member of that class receives a pro rata distribution.[35] Additional rules apply when the proposed plan of reorganization is not consensual and is being "crammed down" on dissenting creditors. The Bankruptcy Code requires that a Chapter 11 plan be "fair and equitable," which includes compliance with the absolute priority rule.[36] This rule requires that no creditors in a class junior to the class of dissenting creditors receive payment or retain estate property if the dissenting class is not paid in full.[37] From the creditors' perspective, the automatic stay and priority rules prevent a disproportionate amount of assets from being

31. *See* Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263, 264–66 (2010) (describing professional fee allocation under the Bankruptcy Code and how it influences the parties' behavior).

32. *Id.* at 266.

33. 11 U.S.C. § 362 (2018).

34. *Id.* § 507 (outlining the obligation to pay administrative claims before priority unsecured claims and then general unsecured claims). The Bankruptcy Code does not expressly state that secured creditors receive payment first, but prioritization of secured debt is an undisputed core tenet of bankruptcy law. Furthermore, although the Bankruptcy Code imposes a priority scheme, stakeholders commonly take efforts to avoid or circumvent the limitations imposed by that scheme through various creative measures. *See* Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1246 (2013) (identifying instances of priority jumping).

35. Pro rata distribution is not dictated by the Bankruptcy Code in Chapter 11 cases as it is in Chapter 7 liquidations, *see* 11 U.S.C. § 726(b) (2018), but is so established in the bankruptcy process that the principle is not challenged, *see, e.g.*, Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1454 n.193 (2012) (explaining support behind the "equity is equality" distribution norm in bankruptcy, including pro rata distribution).

36. *See* 11 U.S.C. § 1129(b)(2)(B) (2018).

37. *Id.*; *see also* Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 123 (1991) (describing the fundamental nature of the absolute priority rule).

distributed to the loudest, quickest, or most well-connected creditors. In this way, the Bankruptcy Code imposes an orderly scheme for distribution within a system that is rife with opportunities to act unfairly.[38]

Once in bankruptcy, the debtor has significant reporting obligations, and must publicly disclose its assets and debts, as well as information about its operations if it is a corporation. Depending on the intended resolution of a case, the debtor may file (1) motions to sell all or substantially all of its assets under § 363 of the Bankruptcy Code, (2) motions to approve a disclosure statement and plan of reorganization, or (3) motions to wind down the company through a liquidation plan, among others.[39] Throughout the life cycle of a bankruptcy case, the parties may conduct discovery, challenge the propriety of the debtor's actions leading up to and during the bankruptcy, and pursue causes of action related to the debtor's estate in connected adversary proceedings before the bankruptcy court.[40] Once the various issues are resolved, the restructuring is completed, and the distributions (if any) are made to creditors, the court dismisses the case and the debtor's debts are discharged. The bankruptcy court maintains jurisdiction to oversee later challenges relating to the parties' obligations.[41]

The U.S. Trustee is involved in every part of this process, and may interact with and impact the action of every party involved in the proceeding.[42] Among other things, the U.S. Trustee reviews the debtor's petition and required disclosures, solicits and selects members of the creditors' committee, and ensures that all pleadings and actions in the case comply with the Bankruptcy Code. Simply put, the U.S. Trustee is a fixture of the bankruptcy process. It has tools that can alter the course of a case and has both the resources and the institutional support to take the actions that it deems proper. Beyond

38. In almost all cases, unsecured creditors that receive any return on their debts will be given less than a full recovery, or 100 cents on the dollar. The goal of the priority scheme is to ensure that creditors of the same status are on a level playing field, for example returning a 10-cent recovery to all unsecured creditors rather than 100 cents for 2 creditors and 1 cent for the rest. *See* David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors"*, 166 U. PA. L. REV. 699, 706 (2018) (explaining the possibility of favored treatment under prior versions of bankruptcy law then identifying instances where current application of bankruptcy law may permit creditors to work around fundamental distribution principles).

39. *See* 11 U.S.C. §§ 363(b)(1), 1123(a)(5)(D) (2018).

40. Adversary proceedings are akin to a civil case within a case. For example, creditors may litigate allegations of fraudulent transfers, preferential prepetition payments, or other challenges against the debtor, and the debtor may bring an adversary proceeding to raise claims that may not be raised within the bankruptcy case itself but are related. *See* FED. R. BANKR. P. 7001; Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 953–54 (2005) (outlining trends in adversary proceeding use and its role in consumer and corporate restructuring cases).

41. This may include instances where the parties do not follow performance or payment requirements of an approved sale or confirmed plan.

42. *See infra* Section I.C.

the confines of the bankruptcy court, however, few have heard of the Program and its role. When learning for the first time about the U.S. Trustee's near-constant presence in bankruptcy cases, many non-bankruptcy lawyers and academics are surprised that it has standing to appear and be heard, that it does not represent any specific party, and that it has existed for more than three decades without generating controversy.

C. *Functions of the United States Trustee*

Congress assigned various functions to the U.S. Trustee, many of which are mundane and ministerial. However, the U.S. Trustee also has important powers designed to permit it to safeguard the integrity of the bankruptcy system. It is the U.S. Trustee's distinctive guardian function that makes it a valuable vehicle for exploring the notion—and the potential—of the guardian trustee concept.

1. Administrative Functions

The U.S. Trustee is tasked with supervising the administration of bankruptcy cases filed under Chapters 7, 11, 12, 13, and 15.[43] Among other functions, the U.S. Trustee's supervisory responsibilities include oversight of professional compensation,[44] review of the debtor's payment of mandatory fees,[45] and evaluation of final reports in Chapter 7 cases.[46] The U.S. Trustee must both oversee random audits of individual bankruptcies filed under Chapters 7 and 13, and provide reports of relevant findings to the Attorney General.[47] It is also responsible for selecting, appointing, and monitoring private trustees who serve in all Chapter 7 and Chapter 13 cases, as well as in select Chapter 11 cases.[48] The U.S. Trustee solicits and appoints the official committee of unsecured creditors, a critical stakeholder in the bankruptcy process.[49] Importantly, the U.S. Trustee's handling of all these matters allows the court to spend its time determining the merits of cases, rather than administering them.

Although the U.S. Trustee role resembles, in some aspects, that of an adjunct to the arbiter (such as a magistrate or special master), it is critical to highlight differences as well. For example, the U.S. Trustee's administrative

43. 28 U.S.C. § 586(a)(3) (2018).

44. *Id.* § 586(a)(3)(A), (I). Fees for certain bankruptcy professionals are paid out of the estate's assets, and detailed applications must be submitted to the U.S. Trustee and bankruptcy court for review prior to approval. *See* 11 U.S.C. § 330.

45. 28 U.S.C. § 586(a)(3)(D).

46. 11 U.S.C. § 704(a)(9).

47. 28 U.S.C. § 586(a)(6).

48. *See* 11 U.S.C. §§ 1302, 1104(d); 28 U.S.C. § 586(a)(1).

49. 28 U.S.C. § 586(a)(3)(E); 11 U.S.C. § 1102(a)(1).

and information-gathering role is similar to that of a federal magistrate judge,[50] or a special master that oversees a particular issue within a broader dispute. Magistrates and special masters, however, are adjuncts of the court and act as the decisionmakers in making findings of facts and conclusions of law. Neither of these characteristics applies to the U.S. Trustee, which has no power to rule on any matter, but instead solely advocates for proper implementation of the Bankruptcy Code.

2. Guardian Functions

Apart from shifting administrative tasks from bankruptcy judges to the U.S. Trustee, Congress structured the entity to serve as a "watchdog" for the bankruptcy process. The Program's mission is "to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public."[51] To effectuate that mission, "[t]he Program monitors the conduct of bankruptcy parties and private estate trustees, oversees related administrative functions, and acts to ensure compliance with applicable laws and procedures."[52]

In furtherance of its guardian role, the U.S. Trustee has powers that few, if any, non-parties possess. Within a bankruptcy case, the strongest power granted to the U.S. Trustee is its ability to appear and be heard on matters relating to any issue in a case or proceeding under the Bankruptcy Code.[53] For example, the U.S. Trustee often appears at the first-day hearing, an important milestone at the beginning of a bankruptcy case that occurs within days of the filing when many creditors do not yet know about the bankruptcy and the creditors' committee is not yet formed.[54] At this hearing, the U.S. Trustee often challenges the debtor's efforts to push for immediate relief on matters that could impact the absent stakeholders.[55] Later, the U.S. Trustee conducts the § 341(a) creditors' meeting, at which all creditors may appear and ask the debtor questions under oath.[56] Additionally, it can also call for further discovery, both

50. *See* 28 U.S.C. § 631 (2018); *see also* Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted for*, 16 NEV. L.J. 783, 807–11 (2016) (explaining the development, structural orientation, and role of magistrate judges as judicial officers in the U.S. federal judicial system).

51. *United States Trustee Program*, *Mission Statement*, U.S. DEP'T JUST., https://www.justice.gov/ust/strategic-plan-mission [https://perma.cc/W7BW-6B2H] (last updated May 8, 2015).

52. U.S. DEP'T OF JUSTICE, UNITED STATES TRUSTEE POLICY AND PRACTICE MANUAL 8 (2015).

53. 11 U.S.C. § 307.

54. *See* WARREN ET. AL., *supra* note 16, at 373.

55. *See generally* Frederic J. Baker, *The Rush to Judgment*, AM. BANKR. INST. J., Mar. 1998 (describing the U.S. Trustee's influence at the first-day hearing).

56. 11 U.S.C. § 341(a), (c).

formally through a Rule 2004 examination, and informally via direct requests for information.[57]

To fulfill its guardian function, the U.S. Trustee monitors the progress of each case and takes action to prevent undue delay.[58] The U.S. Trustee may move to dismiss or convert cases that are improperly filed or managed;[59] monitor and comment on the debtor's plan, disclosure statement, and other filings; and object when these documents do not comply with the requirements of the Bankruptcy Code.[60] The U.S. Trustee may also bring an adversary proceeding to argue that the debtor's discharge should be revoked or denied, threatening the core relief offered by a restructuring.[61]

Some of the U.S. Trustee's powers that enable it to act as a guardian are shared by federal agencies acting on behalf of the government. For example, the Program occasionally implements interpretations of bankruptcy law through the federal notice and comment rulemaking process.[62] The Program also assists with federal enforcement efforts to combat bankruptcy fraud and crime through coordination with the FBI and other law enforcement agencies.[63] At the same time, the Program independently exercises the majority of its entrusted responsibilities without influence from any branch of government. Beyond its powers and obligations, the U.S. Trustee's structural orientation within the government shapes its role as guardian trustee.

D. *Structural Orientation of the United States Trustee Program*

One of the most noteworthy elements of the Program is the way it is structured within the executive branch. The Department of Justice, through the Attorney General, oversees the Executive Office of the United States Trustee,

57. *In re* Luxa, No. Bankr. 06-01543, 2007 WL 187982, at *2 (Bankr. N.D. Iowa, Jan. 22, 2007) (concluding that informal discovery was inherent in the U.S. Trustee's role "as the 'watchdog' of the bankruptcy system" and pursuant to 28 U.S.C. § 586 (2018)).

58. 28 U.S.C. § 586(a)(3)(G).

59. *See, e.g.*, 11 U.S.C. § 1112(b).

60. 28 U.S.C. § 586(a)(3)(B).

61. 11 U.S.C. § 727(c), (d).

62. *See, e.g.*, *Rules and Federal Register Notices*, U.S. DEP'T JUST., https://www.justice.gov/ust/rules-and-federal-register-notices [https://perma.cc/7WJU-5WAA] (last updated Aug. 7, 2017) (listing final rules promulgated by the Program). The statutory source of the U.S. Trustee's ability to regulate ambiguities in the Bankruptcy Code is unclear, and courts and commentators alike have questioned whether such regulations are entitled to the force and effect of law. *See, e.g.*, *In re* Johnson, 106 B.R. 623, 624 (Bankr. D. Neb. 1989); Pardo & Watts, *supra* note 23, at 399 n.99.

63. 28 U.S.C. § 586(a)(3)(F).

which in turn oversees each U.S. Trustee.[64] There are twenty-one regional U.S. Trustee offices,[65] and each Trustee is appointed for a five-year term.[66]

While many assume that the U.S. Trustee is an adjunct of the courts—and bankruptcy judges did previously handle many of the U.S. Trustee's assigned tasks[67]—the Program is situated solely within the executive branch. The U.S. Trustee differs from other specialists within the Justice Department because it does not directly represent "the government" in bankruptcy cases.[68] In many ways, the U.S. Trustee is a hybrid entity, taking on some quasi-judicial tasks, such as reviewing petitions filed with the court for completeness or forming a committee, and others that are quasi-executive, such as reporting suspected bankruptcy fraud (which is a federal crime) to the Federal Bureau of Investigation.[69]

While on the one hand the U.S. Trustee is designed to be independent, on the other having an arm of the executive branch serving as a watchdog for bankruptcy cases is an oddity that cannot be overlooked. Setting aside the benefits of having a centralized, nationwide pool of bankruptcy experts tasked with the guardian role,[70] the system creates a fundamental separation-of-powers tension—the executive may influence judicial procedures through a constant presence in cases not involving the U.S. government.[71]

Two states—Alabama and North Carolina—did not join the Program but instead opted to create their own parallel system, the Bankruptcy Administrator

64. *About the Program*, U.S. DEP'T JUST., https://www.justice.gov/ust/about-program [https://perma.cc/G6G4-ZG9X] (last updated Dec. 6, 2019).

65. Interestingly, the U.S. Trustee regions do not map onto the circuit boundaries of the U.S. Court of Appeals. For example, Puerto Rico is in the First Circuit, yet its U.S. Trustees are from Region 21 (which also includes Georgia and Florida, both part of the Eleventh Circuit). *Compare* FED. JUDICIAL CTR., GEOGRAPHICAL BOUNDARIES OF U.S. COURTS OF APPEALS AND U.S. DISTRICT COURTS (1999), https://www.fjc.gov/sites/default/files/2012/IJR00007.pdf [https://perma.cc/SCT9-BDXY] (showing Puerto Rico in blue as part of the First Circuit while Georgia and Florida are in gray as part of the Eleventh Circuit), *with UST – Region 21*, U.S. DEP'T JUST., https://www.justice.gov/ust-regions-r21 [https://perma.cc/W7LE-NCVT] (listing Georgia, Florida, and Puerto Rico as part of U.S. Trustee Region 21).

66. 28 U.S.C. § 581(b).

67. *See supra* text accompanying notes 21–24.

68. Despite the appearance of independence and connection with the judiciary, courts have found that the U.S. Trustee's committee appointments are subject to arbitrary and capricious review, the standard normally applied to "an administrative agency in carrying out its administrative functions." *See In re* JNL Funding Corp., 438 B.R. 356, 362 (Bankr. E.D.N.Y. 2010).

69. Courts interpreting the various privileges and immunities doctrines recognize the unique and hybrid identity of the U.S. Trustee. *See* Balser v. Dep't of Justice, 327 F.3d 903, 905, 910 (9th Cir. 2003) (extending both sovereign immunity, which applies to agencies of the United States, and judicial immunity, which is reserved for courts, to the U.S. Trustee).

70. *See infra* Section II.A.1.d (discussing benefits of uniformity).

71. *See infra* text accompanying notes 111–18.

Program.[72] In contrast to the U.S. Trustee, the Bankruptcy Administrator falls under the control of the judicial branch—specifically the Administrative Office of the United States Courts.[73] The judiciary exerts significantly more control over the Bankruptcy Administrator, including its selection (by the circuit court of appeals that oversees each respective district), which matters it addresses, and the policy guidance it follows.[74] The Bankruptcy Administrator Program itself has faced criticism, including challenges relating to its independence and effectiveness.[75] Notwithstanding the potential merit of such arguments, the Bankruptcy Administrator Program still offers a view into the possibility of alternatively structuring the same guardian entity.

E. *Reception of the United States Trustee*

Many who first learn of the Program are surprised by its unconventional characteristics and broad powers.[76] The questions they raise often include: "What do parties to a bankruptcy case make of the U.S. Trustee? And is the Program accepted and respected?" Tucked within these questions is an intuitive understanding that the U.S. Trustee's watchdog function may be odd and burdensome enough to draw objections.

The truth is that parties (and even courts)[77] often see the U.S. Trustee as a valuable part of the bankruptcy system. Due to the U.S. Trustee's access to information from the debtor, it may well have insight into a case. Creditors may call upon the U.S. Trustee to evaluate the direction or progress of the case, or to identify a concern they have with a disclosure or a filing. An individual creditor may not have sufficient resources to hire counsel to enter a notice of appearance, draft and file an objection, or argue at a hearing. But the U.S. Trustee has those resources, and is willing and able to pursue challenges. For example, the U.S. Trustee has actively objected to the propriety of expansive

72. *See, e.g.*, Peter C. Alexander & Kevin A. Hays, *Non-Uniform Bankruptcy Laws After BAPCPA*, 31 S. ILL. U. L.J. 549, 551–52 (2007). For further discussion of the bankruptcy administrator system, see Pardo & Watts, *supra* note 23, at 394–97 (discussing the development of parallel U.S. Trustee and Bankruptcy Administrator programs).

73. *See* ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY BASICS 20–21 n.5 (2011).

74. *See* Richard P. Carmody, *Streamlining Administration in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 502, 502 (1996) (noting differences between the Bankruptcy Administrator and U.S. Trustee models).

75. *See, e.g.*, Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 92–94 (1995) (highlighting criticism relating to distinctions between the U.S. Trustee and Bankruptcy Administrators).

76. *Id.* at 93–94.

77. *See In re* Parsley, 384 B.R. 138, 145, 147 (Bankr. S.D. Tex. 2008) ("But for the extremely thorough investigation by the Office of the U.S. Trustee (UST), the Court may never have become aware of the numerous other issues discussed herein. . . . The Court greatly respects the UST's work in this case and anticipates that the UST will participate in future hearings in this Court.").

third-party releases in Chapter 11 plans.[78] Such releases impact individual creditors by preventing future recovery against released parties, yet the U.S. Trustee is often the only objector.[79] Similarly, a creditors' committee may be hesitant to object to a problematic filing after it has reached a global settlement with the debtor, especially if the deal requires the committee's support throughout the case.[80] At the request of just one creditor, however, the U.S. Trustee can evaluate the objection and bring it before the court without involving the committee at all.[81] The U.S. Trustee can also assist with inter-party negotiation by offering independent judgment about the best approach for addressing contested issues by way of compromise, thus eliminating the need for hearings before the court.[82] In hallway meetings prior to and during hearings, the U.S. Trustee will walk through its concerns, provide suggested revisions, and address whether proposed edits to a plan are sufficient. This negotiation occurs without requiring the court to delve into and decide countless mundane nuances of a debtor's case.

78. *See* Katherine A. McLendon & Lily Picon, *The Changing Landscape of Consensual Third-Party Releases in Chapter 11 Plans: Does Silence = Consent?*, HARV. L. SCH. BANKR. ROUNDTABLE (May 7, 2018), http://blogs.harvard.edu/bankruptcyroundtable/files/2018/05/The-Changing-Landscape-of-Consensual-Third-Party-Releases-in-Chapter-11-Plans.pdf [https://perma.cc/N3WJ-274C] (noting various cases where the U.S. Trustee objected to third-party releases).

79. *Id.*

80. It is not uncommon for a creditors' committee to file objections and challenges to a debtor's actions, only to withdraw the objection on the eve of a large hearing once a settlement is reached. The court and other stakeholders may never hear the full details of the challenge, and unless it is subsequently raised by another party with standing, there will never be a decision about whether the action was permissible. Counsel for the creditors' committee may feel strongly that the challenge to an action is meritorious, but when committee members decide that taking the best possible deal is in the best interest of unsecured creditors, the merit of an objection fades in importance. Furthermore, after the debtor settles with the committee, it is less likely that the committee will continue to challenge the debtor's proposed plan. The committee's support of the plan or other path to reorganization is often a condition of the debtor's settlement with the committee. To the extent the committee is designed to serve as a check on the debtor, the value of its check is diminished once a settlement has been reached. *See* Ann K. Wooster, Annotation, *Construction and Application of Fed. R. Bankr. P. 9019(a), Concerning Judicial Approval of Compromise or Settlement in Bankruptcy Proceeding—Based on Paramount Interest of Creditors*, 35 A.L.R. FED. 2d 209, § 6 (2009).

81. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 73, at 11.

82. While it may seem intuitive that informal negotiations with the U.S. Trustee can reduce costs, those without exposure to the professional fee issues in the restructuring process may underestimate the scope and impact of such costs. Under the Bankruptcy Code, professional fees for both the debtor and the creditors' committee (and sometimes other professionals) are paid by the estate in Chapter 11 cases. 11 U.S.C. §§ 326(a), 327(a) (2018). Unlike other areas of the law where clients bear the cost of—and have an incentive to police—inefficiencies, in bankruptcy, many counsel bills are paid at 100 cents on the dollar, all before the creditors get a single penny. When some large debtor cases have dozens of attorneys, financial advisors, and other restructuring professionals, many billing in excess of $1000 per hour, the impact of streamlining negotiations can result in significant savings to the estate. *See, e.g.*, STEPHEN J. LUBBEN, ABI CHAPTER 11 PROFESSIONAL FEE STUDY xi (2007), https://ssrn.com/abstract=1020477 [https://perma.cc/4KKT-KKU4] (evaluating the expense of professional fees in Chapter 11 cases and noting that "requested fees are rarely reduced"); *see also* Rapoport, *supra* note 31, at 263–65.

To be sure, the Program is not universally revered. If one were to ask bankruptcy practitioners who represent debtors, they might point to the hassle of having to deal with the U.S. Trustee.[83] By nature of their role within a bankruptcy, debtors bear the brunt of the U.S. Trustee's focus, and may spend large amounts of time complying with the U.S. Trustee's demands for additional information and modified pleadings. Creditors, too, may be displeased with the burden involved in addressing the U.S. Trustee's concerns. The debtor, lenders, and creditors' committee may all have agreed to a global settlement, for example, only for the U.S. Trustee to throw a wrench in that resolution by objecting to its particulars.[84] In those circumstances, every party to the litigation would prefer that the U.S. Trustee not have the power to intervene, as the parties would otherwise be able to resolve their dispute and move on. And while cases in which the U.S. Trustee stands as the lone objector are not rare, those are the very cases in which an independent voice, and representative of the public interest, is most needed. Perhaps for this reason, in the thirty years since Congress expanded the Program nationwide, there has been no significant effort undertaken to remove the entity from bankruptcy cases altogether.[85]

The absence of backlash is potentially attributable to bankruptcy practitioners' acceptance of the role the U.S. Trustee serves. In any particular case the U.S. Trustee may block a litigant's desired path, but in the next case the same litigant may be relieved that the U.S. Trustee raises an objection that was too costly or risky for the litigant to raise himself. On balance, it seems that the U.S. Trustee does enough good, and inflicts sufficiently minor harm, that participants in the bankruptcy system embrace the Program. In the sort of "lone

83. *See United States Trustee Program: Watch Dog or Attack Dog?*: *Hearing Before the Subcomm. on Commercial and Admin. Law & the H. Comm. on the Judiciary*, 110th Cong. 2 (Oct. 2, 2007) (identifying complaints about aggressive and unproductive demands from U.S. Trustees).

84. Such is the case in the context of the U.S. Trustees' objection to structured dismissals. *See infra* text accompanying notes 112–16; *see also In re* Buffet Partners, L.P., No. 14-30699, 2014 WL 3735804 (Bankr. N.D. Tex. July 23, 2014) ("[T]his court looks to the UST to raise issues to cause it to stop and completely consider a matter even when no creditor objects."). While it is far from certain that a court will be persuaded by the U.S. Trustee's objection when waged against the unified voice of the parties, the cost and risk of an adverse ruling may alone be enough to push the parties to address the source of the objection. *See* CLIFFORD J. WHITE III, U.S. DEP'T OF JUSTICE, WHY U.S. TRUSTEE ENFORCEMENT SHOULD NOT YIELD TO DEBTOR AND CREDITOR PREFERENCES, https://www.justice.gov/sites/default/files/ust/legacy/2014/05/01/abi_201303.pdf [https://perma.cc/WN2R-5UK8] (identifying the U.S. Trustee's obligation to fulfill its watchdog role, even when the parties with "economic interests" are in agreement).

85. Because the Program is the most prominent example of an existing guardian trustee, it plays a significant role in this Article to outline and develop the guardian trustee concept. To clarify, I do not believe that the Program is a perfectly designed or implemented model of the guardian trustee. Commentators have outlined a litany of concerns, challenges, and frustrations with the office and how it operates, many of which are well founded. *See, e.g.*, Carmody, *supra* note 74, at 502 (critiquing the bureaucratic growth of the Program). But imperfections in the Program do not, alone, undermine the promise of the guardian trustee device.

objector" example above, certainly the U.S. Trustee earns the ire of the constituents that want a quick and seamless resolution. However, as previously noted, the very unanimity of parties may signal the need for a close look by the U.S. Trustee. Follow-up action by the U.S. Trustee can, in turn, ensure that the court is presented with all arguments, including ones relating to the "all-in" parties' circumvention of the Bankruptcy Code.[86] Indeed, as discussed in the sections that follow, the guardian trustee's independence is precisely what permits it to operate as an effective watchdog of the bankruptcy process.

In turn, the U.S. Trustee exemplifies how a guardian trustee can operate in the U.S. litigation system.[87] Perhaps due to the U.S. Trustee's relative obscurity, few efforts have been made to explore how the watchdog model might be drawn upon in other settings. The next part focuses on how policymakers might build on the U.S. Trustee model in an effort to improve both civil and criminal decisionmaking processes.

II. DESIGNING THE GUARDIAN TRUSTEE

The preceding part presented the guardian trustee as a watchdog of at-risk systems through the lens of bankruptcy and a focus on the U.S. Trustee. In later parts, this Article will evaluate when a guardian trustee should be deployed and identify specific instances where a newly created guardian trustee could successfully mitigate structural integrity threats.[88] But effectively incorporating guardian trustees into new environments first requires a thoughtful approach to how a guardian trustee should function, how it should be structured, and what

86. Efficient circumvention of bankruptcy rules occurs when the party who would normally challenge a particular action is offered enough money that it is worth it to the party to go along with the course of action (even against its interests). For example, bankruptcy dockets reveal many instances where the creditors' committee raises an objection to the sufficiency of information in a disclosure statement, but then immediately prior to a hearing will withdraw the objection after the debtor (or lenders) throw a pot of money at the pool of general unsecured creditors. The information in a disclosure statement is necessary for creditors to decide whether to vote in favor of a plan of reorganization, and any deficiencies in that document may unfairly harm unsecured creditors, the constituency the committee was created to represent. Even if the deficiencies remain, the members of a committee often decide that the guaranteed courtesy payment is worth taking and withdraw their objection.

87. Other similar entities can be found internationally, including the Israeli Official Receiver, the Canadian Office of the Supervision of Bankruptcy ("OSB"), and the Master of the High Court in South Africa. *See* Rafael Efrat, *The Political Economy of Consumer Bankruptcy in Israel*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 167, 178–79 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William C. Whitford eds., 2003) (explaining that the Official Receiver has "become the dominant actor in the Israeli bankruptcy scene"); Juanitta Calitz & Andre Boraine, *The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: A South African Perspective*, 2005 J. S. AFR. L. 728, 730–32 (2005) (describing the powers and authority of masters in South Africa); *Protecting the Public*, GOV'T CANADA, https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br03199.html [https://perma.cc/DA3H-YU7A] (last modified Dec. 2, 2015) (outlining the role of the OSB, including "intervening in court to protect the insolvency process").

88. *See infra* Section III.B.

powers it should hold. If any design element is poorly executed, the potential benefits of a guardian trustee could be quickly outweighed by the various challenges and costs associated with the trustee's implementation.

In short, to embrace the guardian trustee, we must properly design it to defend the integrity of the system it was created to guard. This part first identifies core characteristics of effective guardian trustees and elements to avoid, then addresses the structural orientation of a guardian trustee that best furthers its purpose, and finally outlines a proposed scope of powers and approach to implementation that creates an environment for success.

A. *Design Elements*

1. Useful Characteristics

Assuming it is beneficial in a given circumstance to put in place a guardian trustee, what are the characteristics and tools that position it to succeed at its purpose? This question has no single answer, as each situation may require modifications; however, certain core traits should be included when designing a guardian trustee.

a. Standing

The first characteristic of an effective guardian trustee is standing.[89] The guardian trustee is not a party, but it must have the opportunity to appear and be heard in the proceedings it monitors in order to serve its purpose. Without standing, the watchdog is toothless, as its challenges can only be raised with coordination of an existing party.[90] Because the guardian trustee may be the sole objector against all other parties, it must have the capacity to raise its challenges to discharge one of its core functions.[91] Standing should also extend to appeals, which provide a check on both the parties as well as the decisionmaker through judicial review.

b. Discovery Powers

Guardian trustees must also have the ability to investigate and develop facts about proceedings and the parties involved in them. One of the

89. A guardian trustee will not have standing in the strict constitutional sense. Instead, this Article discusses standing more generally as a protected participatory role within a given proceeding (or within the appeal thereof).

90. *See* William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1449 (2006) (explaining the inability of private monitors to effectively voice identified issues due to their lack of standing); *see also* Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 951 (1996) (highlighting the need for individuals serving as proposed checks at class action fairness hearings to be given "participatory rights," akin to standing, to be effective).

91. *See* Nagareda, *supra* note 90, at 951.

characteristics that triggers consideration of a guardian trustee involves the judges', and perhaps the parties', inability to adequately develop and identify key facts.[92] A dearth of factual understanding leads to mistaken assumptions and a failure to uncover abuses. If the guardian trustee can work only with already-disclosed information, it is more likely that threats to fairness will go unnoticed and the work of the guardian trustee will simply duplicate the work of the judge. The increased cost involved in permitting an additional entity to conduct discovery should be marginal; indeed, it will usually align closely with the information sought by the adverse party. Presumably, each party is interested in uncovering information about the underlying dispute and confirming that the legal process is proceeding fairly. For various reasons, including resource limitations and strategic considerations, the parties do not always effectively uncover such facts. The guardian trustee would use discovery to more effectively find this information.

c. Independence

The guardian trustee must be independent from both the parties and the decisionmaker. The U.S. Trustee is known for its independence from the influence of other parts of the executive branch, and even its mission statement identifies the "independent" quality of its efforts on behalf of all bankruptcy stakeholders.[93] The value of this independence is best revealed when it is called into question. In 2013, the Program came under scrutiny for using its discovery powers in a bankruptcy case to obtain information allegedly on behalf of the Consumer Financial Protection Board ("CFPB").[94] Both the court and the public reacted negatively to the U.S. Trustee's perceived efforts. As one former bankruptcy judge noted, "doing the bidding of another government agency would be inconsistent with the mission of the U.S. Trustee's role."[95] The legitimacy of a guardian trustee would be severely undermined if it were used by other entities to gather information. As such, an effective guardian trustee must maintain independence from influence and outside demands for cooperation.

One common criticism of entities designed to check systemic abuses is that their behavior is subject to influence, particularly in the form of financial

92. *See* Rapoport, *supra* note 31, at 286.

93. *See Strategic Plan & Mission*, U.S. DEP'T JUST., https://www.justice.gov/ust/strategic-plan-mission [https://perma.cc/LWL8-WK4H] (last updated May 8, 2015) ("The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.").

94. *See* Richard Pollock, *CFPB Threatens Independence of Bankruptcy Office*, WASH. EXAMINER (Sept. 9, 2013, 12:00 AM), https://www.washingtonexaminer.com/cfpb-threatens-independence-of-bankruptcy-office [https://perma.cc/P3JN-7297].

95. *Id.*

inducements.[96] Assuming an entity needs money to function, and that earning more money will inure to the benefit of the entity's representatives, the entity will be influenced to make decisions that increase its financial gain (even if those decisions deviate from the checks they were designed to provide). Financial influence comes from varied sources and may include the parties (through the prospect of settlement), the decisionmaker (through the award of fees[97]), or third parties that control the entity's funding.[98]

A guardian trustee should be fiscally independent, thereby avoiding the influence of those holding the purse strings. The Program offers an excellent example of how to design an entity that is sufficiently funded, while also independent from the influence of money. Congress established a fund for the Program, which generates money by automatically collecting court fees and accruing investment interest.[99] Congressional appropriation from the fund completely finances the operations of the Program.[100] Debtors, creditors, and bankruptcy practitioners know that the payment of fees is the price of doing business in bankruptcy.[101] Thus, the U.S. Trustee is never financially beholden to others. Different deployments of a guardian trustee could adapt different funding mechanisms,[102] but the core goal should be to ensure guaranteed

96. *See* Bruce L. Benson & John Baden, *The Political Economy of Governmental Corruption: The Logic of Underground Government*, 14 J. LEGAL STUD. 391, 397–98 (1985).

97. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 102–06 (2015) (describing the influence that multidistrict litigation transferee judges possess to approve, reduce, and otherwise impact fee payments).

98. Rubenstein, *supra* note 90, at 1452 (noting the problematic influence of financial issues to independent guardians).

99. 28 U.S.C. § 589a(b) (2018).

100. As an example, the Program requested more than $227 million for the 2020 fiscal year. *See* U.S. DEP'T OF JUSTICE, UNITED STATES TRUSTEE PROGRAM FY 2020 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 14, https://www.justice.gov/jmd/page/file/1144191/download [https://perma.cc/QHW2-JCUQ]. From 1989 until 2016, the appropriation came directly from the United States Trustee System Fund. In 2016, Congress shifted that structure to instead pull money from the fund to the General Fund of the Treasury to the Program. *Id.* at 9. Currently, the issue of quarterly fees is controversial due to a 2018 change in fee calculation that expanded potential costs for Chapter 11 debtors. *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, 131 Stat. 1224; Justin Paget & Nathan Krame, *The Divide Between Courts on Ch. 11 Trustee Fees*, LAW360 (April 23, 2020), https://www.law360.com/articles/1266541/the-divide-between-courts-on-ch-11-trustee-fees [https://perma.cc/87M5-4ZQ9] (describing ongoing legal challenges to the constitutionality of increased fees). The current structure may change in light of these challenges.

101. Debtors pay a filing fee according to a statutory scheme. *See Bankruptcy Court Miscellaneous Fee Schedule*, U.S. CTS., https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule [https://perma.cc/HV2R-9NA6]. Chapter 11 debtors also pay quarterly fees during the duration of a bankruptcy case that range from $325 up to $250,000, based on the company's disbursements. *See Chapter 11 Quarterly Fees*, U.S. DEP'T JUST., https://www.justice.gov/ust/chapter-11-quarterly-fees [https://perma.cc/CD72-6485].

102. For example, imposing different filing and quarterly fees in aggregate litigation makes intuitive sense but may not be feasible (and may even be harmful) in the context of criminal proceedings. This does not defeat the need for independence, but only requires additional innovation to discover ways to best distribute the cost of a guardian trustee within the system it benefits.

funding of sufficient resources to effectively oversee and evaluate both cases and the actions of parties appearing therein.

d. Uniformity

To be effective, a guardian trustee should take a uniform approach to the task of maintaining system integrity, one that works to the benefit of all stakeholders. This includes the selection of what issues to raise, how to pursue challenges, and how to approach its work as a general matter. Not only does the U.S. Constitution require such uniformity in administrating the bankruptcy program,[103] but this uniformity is also necessary for protecting the legitimacy of the trustee. In particular, if guardian trustees operate differently across jurisdictions, parties are likely to engage in forum selection to avoid (or seek out) the entity that best suits their needs.[104]

Imposing a uniform approach will be more successful when the guardian trustee is organized at a national, rather than local, level. For this reason, the structural orientation of a guardian trustee within a system can greatly impact how well it accomplishes the uniformity goal. If, for example, the Judicial Conference of the United States oversees certain guardian trustees, it must be careful how many decisions are delegated to the individual circuit or district to avoid local differences.

2. Elements to Avoid

a. Incentive Problems

The thoughtful design of a guardian trustee should avoid the influence of financial incentives. A guardian trustee should be motivated to defend the system, including the stakeholders that are at risk, when the rules and procedures of the system are circumvented or ignored. The independence required for the guardian trustee's actions would be impossible if its funding depended on outcomes. Entities that completely rely on the resolution of their cases for funding are incentivized to pursue different approaches than those for

103. U.S. CONST. art. I, § 8, cl. 4 (explaining that Congress has the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"). Prior to the passage of several amendments standardizing the programs, nonuniform differences between Bankruptcy Administrators and the U.S. Trustees led to a period of constitutional challenges and tension. *See, e.g.*, St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1535 (9th Cir. 1994) (holding that the disparity in fees imposed under the U.S. Trustee system was unconstitutional); Schulman, *supra* note 75, at 92–94.

104. In many contexts, a litigant has the ability to choose where to file her claim. For example, current venue rules permit a debtor company to file for bankruptcy where it is domiciled or has its principal place of business, or the place where a debtor affiliate is able to file for bankruptcy. 28 U.S.C. § 1408 (2018). This is why General Motors, a company based in Detroit, was able to file in New York where it has an affiliate dealership. *See* Bill Vlasic & Nick Bunkley, *Obama Is Upbeat for G.M.'s Future*, N.Y. TIMES (June 1, 2009), https://www.nytimes.com/2009/06/02/business/02auto.html [https://perma.cc/Z6TX-UGRL (dark archive)].

whom money is no object.[105] On the other end of the spectrum, complete independence from payments through the court system leads to entities that must rely on donations, which may influence the amount of resources they have to oversee a system or even influence which issues they decide to challenge.[106] Between those extremes lies a reasonable solution: automatic funding through fees. As discussed above, the Program is self-funded through various fees from bankruptcy cases and investment interest.[107] This money does not depend on outcomes or shifting Congressional appropriation, but is instead generated by the parties who benefit from the system.

b. Agency Problems

Guardian trustees are, by design, not involved in a case to advocate for or defend a particular interest or constituency. Their mission may align with one party or another on a given issue, but above all they are guardians of the system. While "defense of the system" makes sense in the abstract, in practice it is important to clarify whether the guardian trustee actually does, or does not, represent specific interests. Agency law concepts are best suited to assist with this task because they provide a useful framework for discussing the authority and influence that flow between two parties. By looking at potential principal-agent relationships[108] of a guardian trustee and identifying which principals may influence its decisionmaking in undesirable ways, it becomes possible to design and structure the guardian trustee to avoid such influences.

First, a guardian trustee's authority will be undermined if it is an agent of the decisionmaker. If the parties perceive that the guardian trustee is aligned with the court, they may act in an effort to garner favoritism or influence the court through its agent. This was the case when the pre-1986 bankruptcy referee carried out both judicial and administrative functions, which the parties attempted to influence and which developed into a threat to the system's legitimacy.[109] There, the parties positioned themselves to curry favor with the entity, thereby delegitimizing its independence. A guardian trustee should not have the decisionmaker of the case as its principal. Although in many (and hopefully all) instances both the arbiter and the guardian trustee would advocate for the integrity of the system in which they operate, the arbiter may be subject

105. Rubenstein, *supra* note 90, at 1450 (describing the financial incentives of private objectors and how those incentives "encourage them to pursue the least problematic settlements and to do so gingerly").

106. *Id.* at 1451.

107. 28 U.S.C. § 589a(b) (2018).

108. RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 1.01 (AM. LAW INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act.").

109. *See supra* text accompanying notes 21–24.

to other incentives or may itself have inferior access to information due to the parties' alignment on problematic issues.

Second, a guardian trustee loses effectiveness if it advocates for changes to the system on behalf of its principal. When a guardian trustee becomes an advocate for new rules, structures, or policies, it loses the neutral connotation of its actions and the core of its role: protecting the existing system. If a guardian trustee is the agent of the executive, the policy preferences of that branch may influence its decisions and actions. To some degree such influence seems reasonable, especially if the position falls within the bounds of existing law and rules. But a strong principal may direct the guardian trustee to use its powers to advocate for policy objectives beyond the current requirements of law or statute.

To be sure, within any system there are elements that in practice may or may not reflect what Congress intended, but which are technically legal until either the statute is changed or binding precedent from the judicial branch changes the status quo. However, before such changes occur, it is unclear whether a guardian trustee would (or should) be motivated to challenge undesirable elements. Stated another way, if the guardian trustee becomes an advocate for changes to the system, it would likely be influenced to do so by its principal and would no longer simply be guarding the integrity of the existing system.

This concern has come into play with the Program. The Executive Office of the United States Trustees may receive guidance from the Attorney General's office on specific issues or litigation positions. The U.S. Trustee may then act upon those issues—for example, by filing an objection against a legal action on the basis that it should not be legal, or advocating for a position on an open question of law.[110] One recent instance of this principal-driven advocacy was the U.S. Trustees' position on structured dismissals prior to the issuance of the Supreme Court's opinion in *Czyzewski v. Jevic Holding Corporation*.[111] The *Jevic* case strictly limited structured dismissals—a tool by which parties to a bankruptcy negotiate and settle various claims, but then effectuate the terms of that settlement by dismissing the case instead of attempting to confirm a plan of reorganization.[112] One of the problems with a structured dismissal is that the mandatory priority rules of the plan confirmation process do not expressly

110. The Program's website touts its advocacy efforts and indicates coordination with the Department of Justice to determine which issues to address. *See Significant Pleadings and Briefs*, U.S. DEP'T JUST., https://www.justice.gov/ust/significant-pleadings-and-briefs [https://perma.cc/7QBM-H7ZY] (last updated May 8, 2015) (listing cases and identifying "the legal positions taken by the U.S. Trustee Program and the Department of Justice in areas that relate to new or novel issues under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 or long-standing areas of concern to the Program"). Such actions give the appearance of influence by the U.S. Trustee's principal.

111. 137 S. Ct. 973 (2017).

112. *Id.* at 979.

apply.[113] As a result, parties, including those in *Jevic*, negotiate payments to key constituencies that circumvent the priority scheme.[114] Leading up to the decision in *Jevic*, the U.S. Trustee would object to any form of structured dismissal, even those that honored the priority scheme.[115] The U.S. Trustee's perspective on issues, such as structured dismissals, may be valuable as courts across the country evaluate and decide open questions of bankruptcy law. The Program has sufficient expertise with current bankruptcy issues that it would make a strong and learned advocate. And, to be clear, many practitioners and scholars can agree with the positions they choose to advocate.[116] But whether an entity can be effective or knowledgeable is separate and apart from whether the entity should be taking advocacy positions at all. A guardian trustee should be designed to avoid the influence of principals that would encourage it to advocate for changes to the law.[117]

B. *Structural Orientation*

The next element to address when designing the guardian trustee is where and how it should be oriented within existing systems. As discussed previously, the situation of a guardian trustee can impact the perception of the trustee's independence, either from the arbiter or from another principal (such as the executive branch).[118]

For example, the Program could be subject to criticism relating to separation-of-powers concerns. The judicial branch administers and oversees

113. *Id.* at 980 ("The Code does not explicitly state what priority rules—if any—apply to a distribution in [a structured dismissal]"). *Compare* 11 U.S.C. §§ 1129(a)(7), (b)(2) (2018) (imposing the absolute priority rule in a plan confirmation), *with id.* § 1112(b) (contemplating dismissal but not mentioning the absolute priority rule).

114. *Jevic*, 137 S. Ct. at 981.

115. *See, e.g.*, Brief for the United States as Amicus Curiae at 1–2, *Jevic*, 137 S. Ct. 973 (No. 15-649) (arguing against structured dismissals on behalf of the U.S. Trustees). The Supreme Court did not extend its holding to all structured dismissals, but instead "express[ed] no view about the legality of structured dismissals in general." *Jevic*, 137 S. Ct. at 985. It remains unseen whether the U.S. Trustee will continue its position of objecting to the structured dismissal in any form, but recent cases suggest that even structured dismissals that comply with priority provisions may face challenges by the U.S. Trustee. *See* Matt Chiappardi, *U.S. Trustee Blasts Sungevity's Structured Dismissal Bid*, LAW360 (Aug. 4, 2017, 5:45 P.M.), https://www.law360.com/articles/951591/us-trustee-blasts-sungevity-s-structured-dismissal-bid [https://perma.cc/SJQ5-X837 (dark archive)] (explaining the U.S. Trustee's objection to a proposed structured dismissal because it included releases that would be granted without approval of creditors).

116. Brief for Amici Curiae Law Professors in Support of Petitioners at 12, *Jevic*, 137 S. Ct. 973 (No. 15-649) (supporting the U.S. Trustee's position in *Jevic*).

117. Other avenues may exist for the U.S. Trustee to advance policy changes, for example by collecting data on problematic issues that can be used to further their perspective in Congress or among commentators. While such examples of "passive" advocacy may raise concerns about the independence of a trustee, they are far less problematic than direct advocacy in the very case where a guardian trustee appears.

118. *See supra* Section II.A.1.c.

bankruptcy cases, and giving power to an executive branch trustee raises, at least in perception, questions about whether the policies and preferences of the executive are influencing what should otherwise be the trustee's independent function to ensure bankruptcy law compliance.[119] As the Bankruptcy Administrator Program in Alabama and North Carolina makes clear, a guardian trustee can be implemented effectively outside of the executive branch.[120] So long as the guardian trustee is insulated from the influence of judges hearing and deciding the cases in which the trustee appears, parties can avoid the distrust felt toward the bankruptcy referee.

To best address concerns relating to separation of powers and influence by the arbiter, it makes the most sense to create a guardian trustee through an agency that operates within the same branch of government as the arbiter, just like the example of bankruptcy administrators in the judicial branch. This permits the guardian trustee to avoid separation-of-powers concerns that might arise from outside influence from other branches of government. Next, the guardian trustee must be insulated from the arbiter in a way that permits it to act with true independence. Finally, any details relating to the guardian trustee's duties and powers should be implemented nationwide, without regional differences, to avoid the parties' ability to use forum selection to avoid oversight.

C. *Scope of Power and Implementation*

The guardian trustee is foreign in non-bankruptcy contexts, and scholars and stakeholders may have concerns about unleashing a new entity into already complicated litigation environments. A guardian trustee in its worst form could pander to particular categories of stakeholders, overzealously fight over every small nuance in a way that derails the process,[121] or even damage a system by advocating for a separate agenda. Each of these scenarios is possible and can only be remedied by careful design that implements safeguards. The statute or

119. The concern about influence from the executive branch is not merely theoretical. In 2007, a committee of the House of Representatives took testimony on whether the U.S. Trustees improperly attacked debtors for minor errors. *See United States Trustee Program: Watch Dog or Attack Dog?*, *supra* note 83, at 1–2. Judge Cristol noted that the U.S Trustee focused on debtor abuse while overlooking creditor abuses—an imbalance that did not appear in states with Bankruptcy Administrators. *See id.* at 173. Judge Cristol attributed the difference to "politicized input from Washington." *Id.*

120. Of course, if trustees are created to assist with proceedings organized by administrative agencies, it makes the most sense to position them within the structure of the executive branch to resolve many of the same separation-of-powers issues.

121. The concern relating to overzealous representation is conceptually sound but practically unlikely. A guardian trustee will have limited resources, and in all likelihood will be unable to sustain the pernicious, knee-jerk objection patterns that cause concern. Additionally, arbiters will react negatively to unfounded objections, therein providing a second check. A guardian trustee will have a vested interest in protecting and cultivating its reputation before the arbiter—an interest that weighs against abuse of its authority.

rules establishing a guardian trustee must be drafted in a way that sets forth the scope of its power, outlines the ways in which that power can be asserted, and further directs the overseeing body to develop a set of clear policies and practices to reduce the risk of overreaching. This is particularly true in instances where existing systemic problems relate, at least in part, to the overconcentration of power in a single stakeholder. In such contexts, the protective measures outlined above are necessary to prevent a guardian trustee from using its delegated power to upset the balance and exert too much influence on the process, replicating the initial problem instead of solving it.

An added benefit of establishing a guardian trustee, instead of an adjunct of the court, is that the court gives no deference to a guardian trustee. The objection waged by a guardian trustee will carry weight simply by nature of the expertise the entity develops in at-risk systems. However, the ultimate decisionmaker retains full authority to accept or reject the objection (just as it would with an objection raised by a party). In practice, the U.S. Trustee's objections are frequently overruled.[122] Although courts consider its viewpoints, there is no pattern of strict adherence or rubber-stamping the position asserted by the office. The same can be true of guardian trustees.

Careful design offers one check against problematic guardian trustees, but until the entity is tested there is no certainty about its effectiveness. To further remedy many of the concerns identified above relating to implementation, adoption of the guardian trustee in other contexts should be incremental. What works in bankruptcy will certainly need to be modified for the specific contours of other litigation environments. For this reason, stakeholders and the public are more likely to develop faith in, and enthusiasm for, a guardian trustee after the concept has been proven through experimentation. As explained in Section I.A, the Program was gradually expanded after the initial pilot program provided a remedy to many of the public perception problems that plagued the pre-Bankruptcy Code process.[123] Other guardian trustees should be similarly piloted, both to create buy-in through proof of concept, and to ensure that the device is a good fit.

While a certain environment may exhibit all of the characteristics that suggest the potential benefit of a guardian trustee, a confluence of factors inherent in that environment may render the trustee useless, or even counterproductive. Particularities in the practitioner bar; the established power allocation among parties; and even distinctions in case speed, cost, and magnitude are just a few of the variables that could lead to failure of a guardian

122. *See, e.g.*, Irve J. Goldman, *United States Trustee Rebuked by New York Bankruptcy Judge for Objecting to Retention of Nine West Interim CEO*, JD SUPRA (July 11, 2018), https://www.jdsupra.com/legalnews/united-states-trustee-rebuked-by-new-61878/ [https://perma.cc/JS9W-TVCL].

123. *See supra* text accompanying notes 23–24.

trustee. But such failures are not without gain. By evaluating why a guardian trustee was ineffective, legislators, scholars, and stakeholders may gain understanding about what steps have a better chance of success. In other words, if the guardian trustee is not the answer, a failed pilot program experiment will nonetheless offer useful information about the specific problems possessed by the at-risk system and how to approach them.

III. DEPLOYING THE GUARDIAN TRUSTEE

Earlier discussion shows that a guardian trustee offers significant benefits in the context of bankruptcy. Part of this mechanism's success is due to a mix of circumstances built into the bankruptcy system. This part begins the work of deploying the trustee by highlighting common elements that threaten the sound operation of other systems, which suggests that a guardian trustee could offer comparable benefits. If overused, the guardian trustee would rightly be viewed as burdensome, costly, and ineffective. To avoid this problem, the guardian trustee must be used only in appropriate circumstances.

This part next identifies aggregate litigation, and in particular class action settlements, as one decisionmaking process that would benefit from the addition of a guardian trustee. Class actions share many key characteristics with the distressed bankruptcy system described in Part I, including concerns about judicial oversight and growing challenges with negative public perception. This part highlights these characteristics and offers a blueprint for structuring a guardian trustee in the class action context.

Finally, after taking into account the potential challenges that may arise when creating new guardian trustees, this part identifies potential alternative solutions and evaluates whether and when such alternatives may be superior to a guardian trustee.

A. *Identifying At-Risk Systems*

Only some systems will benefit from the addition of a guardian trustee. Identifying those systems requires consideration of the characteristics a particular environment should have to invite the use of a guardian trustee. The system must be at-risk in ways that could be remedied by a neutral guardian, and the risk must be substantial enough to justify the cost and imposition of a guardian trustee.

The first characteristic is the arbiter's inability to identify structural threats. Perhaps the arbiter has insufficient access to information. This problem could arise because of either the large volume of information that is relevant to disputed matters or the parties' ability to keep secret the self-serving aspects of their actions. Additionally, the arbiter may have insufficient resources to process and identify the problematic elements of the parties' behavior. The

arbiter may be subject to significant time constraints that do not permit extended analysis, as is the case in a rapid-fire bankruptcy proceeding,[124] or the arbiter may have a demanding caseload that prevents significant focus on threats that are not raised by the parties. Finally, the arbiter may be incentivized to favor a certain result, either through personal preferences and biases[125] or because of external pressures.[126] The guardian trustee's primary power is to bring areas of concern to the ultimate decisionmaker's attention through selective challenges, particularly in instances where the parties are silent.

The second core characteristic is the likelihood that purportedly adverse interests will align in a way that undermines, rather than advances, the goals of the system. Most systems depend on the adversarial nature of the parties to bring to light key issues and problems arising in a proceeding.[127] Sometimes, however, absent stakeholders should have a voice in the process, and the third-

124. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 865–66, 871–72 (2014) (describing the breakneck speed of many corporate bankruptcy filings and identifying a way to protect value while permitting space to evaluate the best path forward for a debtor corporation).

125. *See, e.g.*, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* AM. BAR ASS'N, ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah E. Redfield ed., 2017); Stephen Choi & Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges*, J. LEGAL STUD. 87, 92–93 (2008); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (outlining various forms of bias, including hindsight and egocentric biases); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 858–63 (2008).

126. This can include system-based motivations, such as funding for the courts. For example, in the context of a consumer debtor's decision to file for Chapter 7 versus Chapter 13 bankruptcy, often the complete discharge offered under Chapter 7 is a more viable fit for individuals who do not have sufficient resources to continue carrying their debts and do not have a pressing need to keep their house or automobile (key features for a Chapter 13 case). *See* WARREN ET AL., *supra* note 16, at 206–07. But these individuals may not have enough money to pay their attorney's fees upfront, as is required in Chapter 7 cases. *See How Much Does It Cost To File Bankruptcy?*, NAT'L BANKR. F. (Apr. 2, 2020), https://www.natlbankruptcy.com/how-much-does-it-cost-to-file-bankruptcy-2/ [https://perma.cc/ZA2K-NUVW]. As a result, the debtors file for Chapter 13 for the sole purpose of financing their professional fees (such instances are commonly called "fee-only" Chapter 13 cases). *See* Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1069 (2017) (explaining the fee-only Chapter 13 case and its particular problems). Courts have expressed concerns about whether this use of Chapter 13 is appropriate. *See In re* Brown, 742 F.3d 1309, 1319 (11th Cir. 2014) (affirming decision that fee-only Chapter 13 case was not filed in "good faith" as required by 11 U.S.C. § 1325(a)(3) (2018)). In other instances, courts reach a different result and approve of fee-only Chapter 13 filings. *See In re* Wark, 542 B.R. 522, 527–28 (Bankr. D. Kan. 2015) (declining the U.S. Trustee's challenge to the propriety of a debtor filing a fee-only Chapter 13 when they are eligible and better suited for Chapter 7). The *Wark* Court noted the very issue that may influence courts to favor Chapter 13 in such circumstances: an *in forma pauperis* waiver is available in Chapter 7 cases to excuse payment of filing fees, but no such waiver is available in Chapter 13 cases. *Id.* at 534 n.43. Even if the incentive does not directly benefit an individual arbiter, but instead the arbiter's broader entity, it may be enough to alter otherwise rational behavior and impact litigant outcomes in an undesirable manner.

127. Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1008 (1990) ("[T]oday our system of justice is founded on the presumption that the truth is more likely to emerge from the contest between zealous advocates.").

party trustee can serve a critical role by ensuring that additional perspectives and separate interests of those non-participant stakeholders are taken into account. In some instances, real-world complexities lead the parties, and perhaps even the decisionmaker, to act in ways that depart from promoting the purposes of the system in which the dispute arises.[128]

Settlements illustrate this problem. Resolution of disputes by agreement occurs in all litigation contexts, and usually the decision to settle reflects the parties' understanding that the benefit of the agreed resolution outweighs the costs and uncertainty involved with continuing a proceeding.[129] Arbiters generally favor settlement, as it avoids the need to direct large amounts of time and energy to addressing each issue each case presents in a world marked by congested dockets. However, settlements can be problematic when they are high stakes, involve many parties (including absent constituencies), and are required to comply with specialized legal mandates.[130] If all parties agree to a particular settlement that violates these requirements, only an arbiter can cast it aside for that reason. As shown above, the arbiter may be unable (or unwilling) to identify and prevent such abuse.[131] A guardian trustee adds a check on the parties, including the arbiter, by reviewing the settlement in a focused way that protects the integrity of the system. This same logic may well apply outside the context of settlements, including overseeing discovery and policing ethical violations by counsel.

The key point is that some decisionmaking systems present distinctive risks of malfunction. There is no singular indication of such systems, and various elements can lead to their weaknesses. Red flags include the presence of complex procedural rules, ambiguous statutory guidance, known loopholes, and malleable standards of judicial review. If abuse occurs with high regularity, it is likely that the system is inherently at-risk. Additionally, a system that receives significant focus from scholars and commentators regarding such red flags may well qualify.

128. While in most instances this alignment is due to a shared interest in avoiding the limitations, it is also possible that one party may not agree with the action but is hesitant to challenge it. Regulated entities, for example, may be adverse to the agency that controls their ability to do business (perhaps through licensure or other grants of authority). Faced with concerns about whether their behavior during the proceeding will impact future opportunities, regulated entities may strategically choose to forego valid objections. Much like the U.S. Trustee takes the role of "bad cop" when other stakeholders are focused on settlement negotiations, the guardian trustee can assume the task of highlighting abuses without recourse.

129. *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 629–32 (2006).

130. One example includes the Bankruptcy Code's priority scheme and absolute priority rule. *See supra* text accompanying notes 34–35.

131. *See supra* notes 124–26 and accompanying text.

Finally, a guardian trustee should be considered under circumstances in which public trust in a system has eroded.[132] A combination of the above-listed factors can lead to erosion of public trust, especially in instances where individuals and companies are (or appear to be) stripped of their fundamental rights within the very system that was intended to protect those rights. The decay of public trust in a system is not easy to remedy. Even highly possible reforms to existing structures are unlikely to shift the momentum of public opinion until long after they are implemented. The addition of a guardian trustee can offer a significant perception boost due to the watchdog's core goal of ensuring fair treatment of all stakeholders, including the general public.

Each of the warning signs present in problematic systems may combine in varying degrees to render the systems at risk. No two systems possess the same blend of challenges, and the effort to identify a system that is sufficiently at-risk to consider addition of a guardian trustee is more of an art than a science. The next section undertakes that process by identifying particularly at-risk characteristics in the aggregate litigation context.

B. *Aggregate Litigation as an At-Risk System*

The most fruitful extension of the guardian trustee concept may well involve its application in the context of aggregate litigation.[133] By definition, aggregate litigation involves combining individual cases and claims within a single proceeding, much like bankruptcy.[134] The procedural devices that permit aggregation, including class actions under Federal Rule of Civil Procedure 23[135] and multidistrict litigation ("MDL") under 28 U.S.C. § 1407(a),[136] provide measurable benefits. Among other things, they facilitate the streamlined resolution of large numbers of cases and the pursuit of just claims that would be cost-prohibitive to bring on an individual basis. The structure of aggregate litigation devices mirrors the bankruptcy system, which also collects cases before a common arbiter and involves many individual claimants represented only collectively by attorneys that they did not individually select.[137]

Similar to the bankruptcy system that preceded the creation of the Program, aggregate litigation is an at-risk system. This form of litigation has

132. As used in this Article, "public trust" should be understood to broadly encompass the perspective of commentators, those who are or may become parties to a proceeding in the system, and the general population at large.

133. Scholars have extensively studied the challenges and concerns that exist in aggregate litigation, yet many of the same issues arise in other types of proceedings. For this reason, exploring the benefits of a guardian trustee in aggregate litigation can also be instructive in other contexts.

134. *See* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1275 n.2 (2012) [hereinafter Burch, *Financiers as Monitors*].

135. FED. R. CIV. P. 23.

136. 28 U.S.C. § 1407(a) (2018).

137. *See* McKenzie, *Bankruptcy Model*, *supra* note 14, at 964–65.

triggered widespread criticism based on the absence of adequate representation of class members, manipulation of outcomes by opportunistic lawyers, and divergent incentives among stakeholders which can lead to settlements not aligned with the best interests of many individual claimants.[138] The lessons from bankruptcy history may well suggest the wisdom of incorporating a guardian trustee in the aggregate litigation decisionmaking process.

1. Aggregate Litigation Devices

To evaluate parallels between bankruptcy and aggregate litigation, one must first understand the characteristics of each system. The next two subsections lay the foundation for broader analysis by introducing key features of the two primary aggregate litigation devices: class actions and multidistrict litigation.

a. Class Actions

The modern class action is the quintessential aggregation device of American litigation. Class actions permit litigants to share the costs and burdens of litigating their common claims, while also influencing and deterring the behavior of wrongdoers that could be obligated to pay significant sums as a class action defendant.[139] Rule 23 of the Federal Rules of Civil Procedure outlines the prerequisites that litigants must meet to certify a class.[140] Class actions have evolved in the years since they were written into Rule 23.[141]

Despite shifts in particular procedures, patterns, and practices, the core challenges inherent in class action litigation remain the same. Class actions are subject to collusion between fee-seeking class counsel and settling defendants, and may involve unfair settlements and processes (particularly as to absent class members), among other incentive issues.[142] For example, class counsel may be incentivized to urge acceptance of a defendant's settlement proposal that does

138. *See* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 863–64 (2016) (identifying systemic challenges of aggregate litigation).

139. *See* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1874–75 (2004) (outlining underlying benefits of aggregate devices).

140. FED. R. CIV. P. 23(a) (requiring a class to show numerosity, commonality, typicality, and adequacy of representation); FED. R. CIV. P. 23(b) (outlining three potential types of class actions that a putative class may satisfy). Additionally, courts have imposed the implied requirement that a definable claim exists, that representative members have standing, and that the claim is live. *See* Tom Murphy, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of* Byrd v. Aaron's Inc., 57 B.C. L. REV. E. SUPP. 34, 35 (2016).

141. *See* McKenzie, *Bankruptcy Model*, *supra* note 14, at 973–79 (describing the series of decisions that undermined class action utility and funneled litigants into quasi-class action devices).

142. *See* Burch, *Financiers as Monitors*, *supra* note 134, at 1283; Erichson, *supra* note 138, at 861 (discussing coupon settlements and cy pres remedies as specific instances of unjust settlement practices).

not provide maximum recovery to individual claimants, but does offer rich compensation for class counsel.[143] Recent developments in Supreme Court jurisprudence have severely limited the number of classes that are eligible for certification,[144] and the prevalent use of class action waivers in arbitration agreements has funneled many potential class actions away from the federal courts.[145] The class action device maintains much of its power, but the reach of that power has narrowed significantly. To fill the void, alternative forms of non-class aggregation have increased in popularity.[146]

b. Multidistrict Litigation

The Framers could not have contemplated the large-scale and multi-jurisdictional complex cases of modern American society. A price-fixing scandal at General Electric in the 1960s led to numerous civil and criminal proceedings.[147] Congress created the MDL statute to try to address some of the problems created by the "duplication of discovery and inconsistent verdicts" that came out of the GE litigation.[148] The legislation's objective was "to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions."[149] The Judicial Conference of the United States, under the direction of Chief Justice Earl Warren, established the Judicial Panel on Multidistrict Litigation ("JPML"), a special panel to handle the cases.[150]

The MDL statute, 28 U.S.C. § 1407, allows the JPML to override a plaintiff's choice of forum and consolidate similar cases in a single court when three factors are present: "(1) 'one or more common questions of fact are pending in different districts,' (2) a transfer would serve 'the convenience of parties and witnesses,' and (3) a transfer would 'promote the just and efficient conduct of [the actions].'"[151] Generally, the JPML will certify a group of cases

143. *See, e.g.*, McKenzie, *Bankruptcy Model*, *supra* note 14, at 971–73; Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1053–55 (1995) (describing conflicts between class action claimants and class counsel).

144. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–52 (2011) (imposing a more rigorous analysis on putative plaintiffs at the certification stage).

145. *See* Brian T. Fitzpatrick, *End of Class Actions?*, 57 ARIZ. L. REV. 156, 156 (2015).

146. McKenzie, *Bankruptcy Model*, *supra* note 14, at 979 (noting the shift toward nonclass aggregation due to limitations on class action certification).

147. *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621–22 tbls.1 & 3 (1964) (discussing the increase of complex cases and noting that more than 1800 civil damage actions had been filed in 31 different federal district courts).

148. Lori J. Parker, *Cause of Action Involving Claim Transferred to Multidistrict Litigation*, *in* 23 CAUSES OF ACTION 2D 185 (2003), Westlaw (database updated Mar. 2020).

149. H.R. REP. NO. 90-1130, at 2 (1968); *see also* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 49–50 (2007).

150. H.R. REP. NO. 90-1130, at 3.

151. Pinney v. Nokia, Inc., 402 F.3d 430, 451 (4th Cir. 2005) (quoting 28 U.S.C. § 1407(a) (2018)).

into an MDL when "civil actions involving one or more common questions of fact are pending in different districts,"[152] though a balance of factors ultimately guides the certification process.[153] Once certified, the JPML selects a transferee court for the MDL that will control all pretrial and discovery procedures.[154] Though cases originally filed in the MDL forum stay with the transferee court, the remaining cases are remanded to their original (transferor) courts if they are not settled or dismissed.[155]

Similar to class actions, MDLs have a number of elements that threaten structural integrity. First, MDLs breed posturing and gamesmanship among counsel who are vying to be selected for the lucrative position of leading representation of the transferred claimants before the transferee judge.[156] Second, even though MDLs are intended to resolve only pretrial issues, the reality is that only a small percentage of cases return to local courts for review on the merits.[157] The representatives resolve the remainder via private settlements, and counsel for both claimants and defendants are incentivized to reach an agreement.[158] Finally, review and approval of proposed attorney fees by the transferee court (an integral part of any MDL settlement) may be subject to the pressure of established precedent for resolving the litigation without transferring actions back to their original jurisdiction.[159]

2. The Guardian Trustee in Aggregate Litigation

Aggregate litigation exhibits each of the indicators of an at-risk system identified in Section III.A. For this reason, and because it so closely parallels the bankruptcy system, aggregate litigation is a paradigmatic system for implementation of a guardian trustee. First, because aggregate litigation cases

152. 28 U.S.C. § 1407(a).

153. It should be noted that the intended goals of the MDL process are frustrated when certification is not promptly administered. *See In re* Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991) (delaying certification of MDL despite thousands of cases filed nationwide resulted in inconsistent discovery and decisions); *see also* Parker, *supra* note 148, at 185 (discussing the same).

154. Though not discussed in this Article, the transferee court selection is often one of the most contentious legal battles in the MDL process. *See* Mark A. Chavez, *The MDL Process*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 2008 117, 124–25 (2008).

155. *Id.* at 135–36.

156. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 81–84 (2017) (outlining the process for selecting leadership in multidistrict litigation that strongly favors repeat counsel for both plaintiffs and defendants) [hereinafter Burch, *Monopolies*].

157. *See* Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 681 (2013) [hereinafter Burch, *Disaggregating*] (explaining that a "mere 3.425%" of multidistrict litigation cases are remanded to their transferor districts for trial).

158. *Id.* at 678.

159. Burch, *Monopolies*, *supra* note 156, at 86 (identifying concerns relating to judicial involvement in MDLs and suggesting adjustments that would transform judges from a contributor to unjust MDL practices to an effective check); McKenzie, *Bankruptcy Model*, *supra* note 14, at 984, 992 (describing fee pressure of settlement in the *Vioxx* case).

involve a variety of claims pending before a single court, and because many of the internal negotiations and strategy maneuvers will not involve the trial judge, judges lack the ability to identify and respond to key concerns.[160] Second, the incentives of various parties in aggregate litigation can align in a way that undermines the interests of absent parties.[161] Third, aggregate litigation systems have inherent features that invite abuse, including (among others) the selection and compensation of counsel, the presence of opt-out rules, and the process for court review of key case issues.[162] Finally, aggregate litigation devices face intense public perception threats that include ongoing calls for reform and improvement.[163]

Each of these features of aggregate litigation share similarities with the bankruptcy system, which has benefited from implementation of a guardian trustee. The addition of a guardian trustee in aggregate litigation would provide a check similar to what the U.S. Trustee offers in bankruptcy. Above all, when the parties' interests align and the decisionmaker lacks either the information or the incentives to identify problems, a guardian trustee may bring such challenges and concerns before the court.

Approval of class action settlements is among the most problematic features of the at-risk aggregate litigation system. While the court must approve any class action settlement,[164] commentators criticize both the ability and resources of an arbiter to oversee the settlement process effectively and the tendency of courts to approve settlements.[165] If, for example, a class action committee representing absent claimants decides that the benefit to accepting settlement outweighs the cost and uncertainty of further challenges (and, perhaps defense counsel has provided committee counsel with sufficient bonuses or benefits to encourage acceptance of an offer), then the arbiter may not be presented with sufficient information to identify whether the settlement should be approved.[166] This is particularly true when the arbiter is already incentivized by a crowded docket and internal pressure from the arbiter's own administrative entity to quickly resolve each case.

160. Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES L. 47, 50 (2018) [hereinafter Burch, *Objectors*] ("The bigger question is how we ensure that judges have the necessary information (and incentive) to monitor the attorneys and ensure that the settlement is fair when the adversarial system breaks down.").

161. *Id.* at 51 (noting the inability of the adversary system to highlight "scurrilous behavior" in class settlements due to the shared incentives on all sides to pursue approval).

162. *See supra* Sections III.B.1.a–b.

163. *See* McKenzie, *Bankruptcy Model*, *supra* note 14, at 963.

164. *See* FED. R. CIV. P. 23(e)(2) (requiring that a settlement be "fair, reasonable, and adequate"). Note that no associated provision vests MDL transferee courts with authority to approve settlement agreements.

165. *See* Burch, *Objectors*, *supra* note 160, at 48–49.

166. *See* Rubenstein, *supra* note 90, at 1440–51 (identifying agency problems in class actions and outlining insufficient efforts to mitigate such problems).

In the case of multidistrict litigation, many proposed settlements are rife with "ethically questionable means for achieving litigation closure," such as walk-away provisions for defendants or bonus payments for 100% settlement participation,[167] all of which manipulate attorney behavior in ways that may not align with their client's interests. Matters are further compounded by the fact that in aggregate litigation each individual claimant—commonly represented only collectively by the larger group's counsel—does not have the ability or financial incentive to monitor the case or counsel's actions. For these reasons, the next subsection addresses how the use of a guardian trustee might improve settlements in the aggregate litigation context.

3. Design and Structure of the "Aggregate Settlement Guardian"

As outlined above, the vast majority of aggregate litigation cases end in settlement, and the process for approving aggregate litigation settlements suffers from significant integrity and public perception threats. Bankruptcy cases also commonly involve settlements, and the U.S. Trustee plays an important role in checking the value and propriety of settlements within that system.[168] Similarly, a guardian trustee could mitigate many of the problematic elements of aggregate litigation settlements by highlighting collusion among the parties; pointing out the court's inattention to outcomes that circumvent the spirit, if not the letter, of the rules that bind settlement; and, above all, providing an independent voice to a process in which all current stakeholders may be beholden to other interests.

A newly created guardian trustee, named the "Aggregate Settlement Guardian," could be designed to accomplish the above stated goals in the settlement context. Congress could require that any party seeking approval of a settlement (or attorney's fees earned in connection with a settlement in an aggregate litigation case) must provide notice of the settlement and a certain amount of information about the case to the Aggregate Settlement Guardian's office. An Aggregate Settlement Guardian would be assigned to the case, and would have a limited period, perhaps thirty or sixty days, to evaluate the settlement.[169] If the Aggregate Settlement Guardian does not offer comments or objections to the settlement within that window, the parties would then be permitted to proceed before the court and seek approval of the settlement. Should the Aggregate Settlement Guardian see potential areas of concern, she could (1) ask the parties to provide more information (through her discovery powers) or (2) file an objection with the court seeking a hearing (through her

167. Burch, *Financiers as Monitors*, *supra* note 134, at 1283.

168. *See supra* Section I.C. *See generally* 8 NORTON BANKR. L. & PRAC. 3D § 167:1, Westlaw (database updated Apr. 2020) (describing the procedural process for approving settlements).

169. This concept exists in bankruptcy law where settlement proposals may be approved by the court after the parties have notice and an opportunity to object. *See* FED. R. BANKR. P. 9019(a).

ability to appear and be heard).[170] If the Aggregate Settlement Guardian objects to terms in the settlement, and the court approves the settlement over that objection, then she would be able to appeal the decision. The Aggregate Settlement Guardian's appeal would provide a second layer of oversight on the court.

To avoid principle-agent issues, the Aggregate Settlement Guardian could be part of a new "Office of Aggregate Litigation Oversight," housed within the Administrative Office of the United States Courts ("AO"), the administrative agency of the judicial branch.[171] In this way, the Aggregate Settlement Guardian would be insulated from the influence of the executive and legislative branches, but would also have sufficient distance from individual members of the judiciary. A panel of Aggregate Settlement Guardians should be selected by the Judicial Conference of the United States to serve for five-year terms, subject to removal by the Director of the AO. The Aggregate Settlement Guardians should be organized regionally, grouped and allocated to correspond with the percentage of aggregate litigation cases pending within the region.[172]

The Aggregate Settlement Guardian, as a hypothetical guardian trustee, would have a very limited zone of influence within the aggregate litigation system. This purposefully limited scope reflects a desire to impact the most problematic part of the at-risk system (settlement), without imposing significant costs, burdens, or delays on the parties or court. By starting with a narrow oversight function and evaluating costs versus impact, this new guardian trustee could be deployed in a way that introduces non-bankruptcy practitioners and commentators to the potential benefits of the device. Should the Aggregate Settlement Guardian be successful, its role could be expanded within aggregate litigation to reach other important case issues that may face similar challenges (such as discovery or other pre-trial issues in MDLs). Introducing the Aggregate Settlement Guardian would be a first step toward expanding the guardian trustee.

C. *Challenges and Alternative Solutions to the Guardian Trustee*

Although the previous section highlights the specific manner in which a guardian trustee could improve aggregate litigation, it does not eliminate the stark reality that the guardian trustee may have significant shortcomings. Plausible criticisms about the guardian trustee system include: (1) that it would

170. *See supra* Section II.A.1.

171. This is the same structural location of the Bankruptcy Administrator Program. *See supra* Section I.D.

172. While it would be possible to create separate panels for class actions and MDLs (the latter of which could be situated under the control of the JPML instead of the AO), there are significant benefits to having one centralized oversight entity that is able to develop aggregate litigation expertise and observe patterns and trends in the different devices.

increase costs and add the hassle of dealing with yet another voice in the litigation process, (2) that guardian trustees may lack true independence and instead contribute to the deterioration of at-risk systems, and (3) that guardian trustees may abuse their power and take too strong of a role in the established adversary system. While Part II establishes that careful design can ameliorate these concerns, there is no guarantee that any specific iteration of a guardian trustee will be perfectly deployed.

Recall that the guardian trustee is not the sole option to remedy systemic abuse. From an institutional design perspective, legislators should ask why a guardian trustee is superior to alternatives. Section III.A identifies characteristics that might invite use of a guardian trustee, including the decisionmaker's insufficient access to information, likelihood that the parties' interests will align to circumvent the system's intended protections, the existence of inherent tension points in a particular system, and erosion of public trust in the system's integrity. If these elements could be addressed by alternative solutions, the guardian trustee may not be necessary.

1. The Representative Trustee

First, the benefits of a third-party trustee may be most effectively and efficiently achieved by adding a representative trustee—that is, an entity that acts on behalf of a specific absent stakeholder. In some contexts, a representative trustee may solve systemic issues just as well as a guardian trustee, and without significantly modifying the litigation system's status quo. In a legal system premised on fairness and justice, considering the interests of unrepresented entities adds significant value. Legislators should take care to consider these interests, especially in complex proceedings. The representative trustee serves as a proxy for absent interests, balancing the perspectives that are presented to the decisionmaker. Different representative trustees may advocate for different interests in different ways, but their core function is to advocate for a specific stakeholder.

Congress and the courts have shown a willingness to provide advocates for specialized interests by expanding a proceeding to include a representative trustee. In class actions, intervenors raise objections on behalf of individual class members to challenge potentially unfair settlements, notwithstanding the fact that the class members are represented by class counsel who negotiated the settlement.[173] In the criminal context, crime victims have limited rights at varying levels of the state and federal systems to appear and be heard in the

173. *See, e.g.*, John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 FLA. ST. U. L. REV. 865, 885–87 (2012) (explaining the incentives that may lead to intervenors raising objections in the class action context).

prosecution of a criminal defendant.[174] Both the Supreme Court and federal appellate courts may appoint amici to argue for a particular perspective that neither party will take, but which the court views as important to consider.[175] In family law disputes, a guardian ad litem represents the best interests of a juvenile, even if the juvenile is not able to speak for herself.[176] The bankruptcy system also includes representative trustees.[177] For example, in medical center bankruptcies the interests of patients are represented by a patient care ombudsman,[178] and a future claims representative appears in mass tort bankruptcies on behalf of those who do not yet have claims.[179]

174. *See* Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164, 181 (2010) (describing crime victims' rights as an "important part" of an "effectively functioning criminal justice system").

175. *See, e.g.*, Reply Brief for Court-Appointed Amica Curiae on Jurisdiction, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 1143557.

176. *See* Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. WOMEN & L. 511, 514–15 (2013) (describing the role and statutory support for appointment of a guardian ad litem to specially represent children in legal proceedings impacting their rights). Interestingly, different states require the guardian ad litem to take different approaches to representing the interests of the minor. For example, some states permit the guardian ad litem to represent the subjective, voiced interests the minor raises, while in others the guardian ad litem is required to objectively view what is in the best interest of the minor without regard to his or her individual preferences. *See* Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing To Do*, 27 PACE L. REV. 869, 908–11 (2007) (outlining differences in guardian ad litem standards and noting that some jurisdictions require the same guardian to offer both perspectives). Under the latter, objective standard, the representative trustee may simultaneously advance both the juvenile's interests as well as those of the greater system, to the extent such interests align. In contrast, where the guardian ad litem is bound to advocate the subjective desires of the juvenile, the resulting positions may ultimately conflict with the juvenile system's established preference for acting in the best interest of the child.

177. Note that representative trustees in bankruptcy do not take the place of, or eliminate the need for, a guardian trustee (the U.S. Trustee). Similarly, the presence of representative trustees may be necessary in addition to guardian trustees in other contexts.

178. The patients under the debtor's care are not creditors, and without the addition of the representative trustee, decisions could be made in the course of the bankruptcy that could negatively impact the quality of patient care. *See* Nicholas A. Huckaby, *Toward a Workable Standard for Appointing a Patient Care Ombudsman: Proposed Changes for Applying § 333 of the Bankruptcy Code*, 48 U. TOL. L. REV. 367, 369 (2017).

179. When known damages arise due to a company's product or practice, the already-affected creditors can engage in the bankruptcy process. But often, many individuals have not yet experienced the harm that will likely follow months or years after the bankruptcy distributions have been made. The future claims representative appears in such cases to preserve value for individuals who are likely to develop claims in the future. *See, e.g.*, *In re* Johns-Manville Corp., 36 B.R. 743, 758 (Bankr. S.D.N.Y. 1984) (appointing future claims representative on behalf of asbestos victims without currently manifesting injuries); Mark D. Plevin, Leslie A. Epley & Clifton S. Elgarte, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 272 (2006); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 44 (2000). Concerns about representing the interests of future claimants are not limited to the bankruptcy context. *See, e.g.*, Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 588 (2006) (arguing that existing

As identified above, many examples of representative trustees already exist in the U.S. legal system, and scholars continue to advocate for the development of additional representative entities that give a voice to otherwise unrepresented constituents.[180] Because guardian and representative trustees can serve many of the same purposes, including providing an additional perspective to the decisionmaker and challenging unfair positions or abuses of the process, one might argue that increased reliance on representative trustees offers an easier solution than introducing a guardian trustee. Indeed, there is more precedent for the use of representative trustees, and the relative cost and effort involved in appointing or creating a representative trustee may be modest when compared to implementing a guardian trustee.

In many instances, however, the representative trustee is an imperfect substitute for the guardian trustee. Representative trustees' success as an alternative for independent oversight may be limited by incentives. Representative trustees do not serve as a check on the process when their constituency is incentivized to cease investigating and challenging the parties. In many cases, the representative and guardian trustees will both press the same issues that address systemic integrity concerns, and having the advocacy of a representative trustee may give the arbiter notice of potential abuses. At bottom, however, representative trustees are beholden to a particular constituency. If the incentives of that constituency happen to align with those of the party needing a check, the desired value of a trustee is lost. There will inevitably be instances in which representative trustees do not raise challenges to structural integrity threats because the representative trustee's stakeholder *benefits* from such threats.[181] Savvy parties to a dispute will identify the interest of a representative trustee, and create ways to align themselves with that interest or otherwise incentivize the trustee to set aside valid concerns. This happens with some regularity in bankruptcy, where a sufficient settlement

protections cannot adequately protect the interests of certain classes of claimants in mass aggregate proceedings). For example, the U.S. Court of Appeals for the Second Circuit recently unwound a class action settlement due to inadequate representation where the same class counsel represented both current and future claimants. *See In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 242 (2d Cir. 2016).

180. *See, e.g.*, Burch, *Financiers as Monitors*, *supra* note 134, at 1276–77 (describing the potential of third-party financiers to police settlements and mitigate other principal-agent problems); Burch, *Objectors*, *supra* note 160, at 49 (suggesting the use of public funds to subsidize the work of nonprofit objectors in class actions); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 950 (1998) ("It also may be desirable to appoint some form of independent representative for the claimants that is distinguished from counsel by a method of compensation that reduces the risk of conflicting interests.").

181. *See* Erichson, *supra* note 138, at 863 (outlining the various instances where defendants' and class action lawyers' interests align to create disempowering outcomes for claimants).

payment can silence legitimate challenges from a representative trustee.[182] Representative trustees may serve as a cure in some contexts, but their vulnerabilities prevent them from offering a full antidote to systemic threats.

2. Supplementing the Arbiter

In addition to representative trustees, certain problems that could be remedied by creation of a guardian trustee—including an arbiter's inferior access to information and its insufficient time and support to effectively evaluate problematic elements—might instead be solved by simply providing greater resources to the arbiter. This alternative would almost certainly cause less upheaval, require fewer changes to existing processes, and cost less money. Arbiters already have access to adjuncts in various contexts, such as special masters, amici, neutral experts, and magistrates.[183] Increased reliance on these and similar supplemental resources may help the arbiter uncover abuses that would otherwise go undiscovered, or challenge the parties in a way that may not have been possible absent the additional help. In many cases, supplemental resources may be enough to remedy at-risk systems.

But, as outlined above, arbiters may also suffer from the very same incentive problems that generate systemic integrity concerns. Increased support will not fix non-resource-based challenges, including the impact of various forms of bias and viewpoint-driven decisionmaking,[184] along with a potential predisposition to avoid work.[185] Such problems may persist, or even become more entrenched, if the arbiter receives additional resources.[186]

Supplemental resources cannot solve additional characteristics of at-risk systems. For example, resources will not fix a system that has procedures and standards—such as an overly generous standard of review—that do not require a decisionmaker to stop damaging behavior. In such instances, an arbiter will be able to hold onto his potential biases. The same is true if an arbiter is unlikely to receive complete information from the parties (even with greater resources)

182. *See, e.g.*, Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 747, 753 (2011) (explaining that self-interested creditors' committees can alter the course of a bankruptcy case and lead to results that do not maximize value).

183. *See* 28 U.S.C. § 631 (authorizing magistrate judges); FED. R. APP. P. 29 (outlining amicus guidelines); FED. R. CIV. P. 53(a) (providing for special masters); FED. R. EVID. 706 (permitting appointment of neutral experts).

184. *See infra* note 125 (collecting scholarship outlining biases in decisionmaking).

185. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2009) (outlining laziness and lack of productivity as a negative quality embodied by some judges).

186. *See, e.g.*, Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229, 250–52 (2015) (outlining potential for purportedly neutral cultural experts to simply echo the court's existing biases while cloaking those objections in a veil of objectivity).

due to rules that rely on the parties for disclosure.[187] Furthermore, if public perception of a system has eroded, it is difficult for the arbiter alone to recapture public trust by adding more resources.

Unlike an arbiter with supplemental resources, a guardian trustee is designed with a layer of independence from the existing process and a focus on representing all stakeholders, including the public. These traits permit the guardian trustee to effectively rebuild public trust in at-risk systems. Additionally, a guardian trustee's narrow focus on certain types of proceedings permits it to become a subject matter expert in the category of cases where it appears, thereby developing a base of knowledge to speak authoritatively about whether a particular case presents concerning problems.[188]

These challenges warrant careful analysis. Many situations that at first glance seem ripe for addition of a guardian trustee might, on closer review, be aptly fixed by adding a representative trustee or increasing the resources of the arbiter. Successfully identifying such instances limits the expansion of guardian trustees to situations where they offer the best available solution. With these limitations in mind, the next section offers two examples of at-risk systems in which the guardian trustee should be considered as a potential solution to a recognized system failure.

IV. EXPANDING THE GUARDIAN TRUSTEE

Once litigants, arbiters, and legislators recognize the potential benefits of the guardian trustee, the concept could be successfully implemented in a number of contexts beyond aggregate litigation. While concerns regarding aggregate litigation are among the most apparent and well-studied, the same issues arise in other types of proceedings. Certain administrative and criminal proceedings also exhibit the factors identified in Section III.A. In each of these contexts, the guardian trustee could appear in a proceeding to oversee and raise challenges to specific filings, motions, responses, or issues that the designing entity identifies as problematic.

A. *Administrative Proceedings*

Administrative agencies play a powerful role in the American legal system, offering regulations and guidance relating to the specific subject matter of their

187. *See infra* Section IV.B (discussing disclosure problems with *Brady* challenges).

188. An arbiter could hypothetically decide to create a dedicated "class settlement" special master or neutral expert that would develop expertise in evaluating and bringing to light problems in class actions. The question remains whether the public would buy into the idea and trust the independence of an entity that remains connected with, and arguably beholden to, the individual judge overseeing a proceeding.

delegated focus.[189] Most agencies are also tasked with enforcing the various regulations and enabling acts promulgated by Congress.[190] These enforcement actions take a number of forms, and may occur as adjudications either in federal court through agency lawsuits; within the agency's dedicated enforcement body; or in other, quasi-judicial forums with agency oversight.[191] Agency enforcement and adjudication are subject to some of the same challenges that plague the federal court system, in addition to other concerns that are specific to administrative agencies. Guardian trustees could be deployed in the administrative agency enforcement context where proceedings have insufficient procedures or inadequate protections in place to ensure fairness.[192]

Formal adjudication proceedings before an Administrative Law Judge ("ALJ") are one instance where a guardian trustee could benefit systemic integrity.[193] ALJs do not face the same appointment, removal, and tenure protections as Article III judges, and as a result they may be subject to constitutional challenges.[194] Furthermore, in recent years, the legitimacy of and policies surrounding ALJ enforcement proceedings have been the focus of great scrutiny. Agencies such as the SEC,[195] the Federal Energy Regulatory

189. J.R. Deshazo & Jody Freeman, *The Congressional Competition To Control Delegated Power*, 81 TEX. L. REV. 1443, 1456 (2003) (identifying Congress's ability to limit agency's action through "substantive standards or limits that the agency must implement").

190. *See* Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1131 (2016).

191. *Id.* at 1132.

192. The concept of implementing independent checks and oversight is familiar to administrative agencies, which are commonly subject to such review in the rulemaking portion of their delegated authority.

193. *See* Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797, 817–20 (2013) (outlining the due process challenges ALJs face and suggesting approaches to mitigate such concerns).

194. Note that an ALJ is materially different from an administrative judge ("AJ"). While both may be involved with hearing agency proceedings, ALJs are governed by the formal adjudication rules imposed by the Administrative Procedures Act ("APA"), 5 U.S.C. § 554(a) (2018), while AJs are mere agency employees, subject to none of the APA's protections or requirements. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1646–47 (2016) (outlining the distinctions between ALJs and AJs). Although proceedings overseen by AJs are potentially even more wrought with problems, *see id.* at 1648, and could likely also benefit from implementation of a guardian trustee, the tool would be better deployed in the more formal context of ALJ adjudication for a number of reasons. AJs have broader duties and more varied procedural standards than ALJs because they come from different agencies across the breadth of the executive branch and are not governed by a single, common statute. This would pose logistical challenges to guardian trustees, and it would be extremely difficult to develop guardian trustees with sufficient expertise with the substance and procedures of each individual agency's AJs to provide any value. In contrast, guardian trustees could more efficiently and effectively be implemented to oversee ALJ proceedings, despite small differences among agencies, because the APA provides the basic obligations by which ALJs must conduct proceedings.

195. *See, e.g.*, Barnett, *supra* note 194, at 1645–46 (outlining the controversy surrounding the SEC's preference for agency adjudication versus bringing a case in federal court). *But see* Urska Velikonja, *Are SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 319–21 (2017) (conducting an empirical study of SEC success rates and concluding that the media coverage of perceived forum selection is supported by inconclusive data).

Commission ("FERC"),[196] and the Federal Trade Commission ("FTC"),[197] among others, allegedly funnel cases into ALJ enforcement rather than Article III courts to obtain better outcomes. Critics emphasize that agency proceedings do not provide the same procedural protections put in place for court proceedings by the Federal Rules of Civil Procedure in federal court, and as a result defendants are disadvantaged when their case is tried through ALJ enforcement.[198] This is particularly true in light of questions about whether agency adjudication is impartial[199] and the separation-of-powers concerns that surround administrative agencies.[200]

Though some statistical data suggests the SEC's preference for ALJ enforcement actions may not alone negatively impact outcomes,[201] other research indicates that the SEC's leverage in choosing agency enforcement over federal court adjudication has increased the average settlement amount that

196. *See* Kenneth Irvin, Terence Healey & Christopher J. Polito, *"Basic Fairness" and the Future of FERC Enforcement Proceedings*, FORBES (May 4, 2017, 4:12 PM), https://www.forbes.com/sites/energysource/2017/05/04/basic-fairness-and-the-future-of-ferc-enforcement-proceedings/#3f307f889e2b [https://perma.cc/3MGK-ZN2A] ("FERC's enforcement proceedings thus far lack . . . meaningful judicial review, leaving energy companies to grapple with inconsistent, ambiguous FERC rulings that often appear to rubber stamp the allegations assembled by FERC's enforcement division.").

197. *See, e.g.*, Oral Argument at 23:28–24:20, LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018) (No. 16-16270) (questioning whether there was "collusion between [the reporting entity] and the government," and noting that "the aroma that comes out of the investigation in this case is that [the reporting entity] was shaking down private industry with the help of the FTC"), http://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=labMD&field_oral_argument_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D [https://perma.cc/3ADH-338X].

198. *See, e.g.*, Jodi L. Avergun et al., *Financial CHOICE Act Would Complicate the Choices in Bringing and Defending Against SEC Cases*, NAT'L L. REV. (June 13, 2017), https://www.natlawreview.com/article/financial-choice-act-would-complicate-choices-bringing-and-defending-against-sec [https://perma.cc/JW5N-NHN6] ("In an administrative proceeding, a respondent has no right of trial by jury, limited rights to discovery or to engage in motion practice (e.g., no depositions and limited subpoena rights), is not entitled to the benefit of the procedural protections conferred by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, is subject to an accelerated schedule for completion of trial, and is required to appeal to the SEC before having the right to appeal in federal court.").

199. Barnett, *supra* note 194, at 1648.

200. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy."); David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 183–89 (2015) (highlighting ongoing separation-of-powers threats in the administrative agency context).

201. *See* Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1178 (2016) ("[T]he data suggest that, in the aggregate, the Commission has no particular advantage or disadvantage in federal court or before an ALJ."); Velikonja, *supra* note 195, at 366; David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1189 (2016) ("[T]here is no statistically significant distinction between the rates of success.").

defendants pay and expanded the number of cases that the agency reviews.[202] In any event, public perception of these fora is so negative that legislators have interceded on behalf of constituents. On June 8, 2017, the House of Representatives passed the Financial CHOICE Act (the "CHOICE Act"), which is designed as a partial repeal of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.[203] Commentators have primarily focused on the CHOICE Act's many provisions that impact the financial regulation sector.[204] What is relevant for purposes of this paper, however, is a separate provision in the CHOICE Act that would require creation of an SEC "Enforcement Ombudsman" to act as an independent liaison between the SEC and any person who is subject to the agency's enforcement power.[205] Additionally, the CHOICE Act requires creation of an SEC committee that is designed to analyze the SEC's enforcement practices and make recommendations for reform.[206] Although the CHOICE Act (or similar legislation) may never become law, the attention it has directed to perceived injustices within the SEC (and other) agency enforcement processes indicates that the system is inherently at risk.

Agencies are exploring potential solutions. Some currently being implemented involve amending the SEC's procedures to more closely mirror federal court, or increasing scrutiny of how agencies decide which cases to bring in federal court versus before ALJs.[207] Such changes are not always possible, or may be insufficient to resolve concerns about the integrity of agency enforcement proceedings. The addition of a guardian trustee in certain circumstances could reduce public perception that the agency and the arbiter are aligned.[208] Both ALJs and litigants alike would benefit from selecting a

202. *See* Stephen Choi & Adam Prichard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. REG. 1, 32 (2017) ("We provide evidence that the complexity of cases, and thus the cost of litigating cases in administrative proceedings, increased after the enactment of Dodd-Frank.").

203. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (to be codified in scattered sections of 10, 12, and 15 U.S.C.); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.).

204. *See, e.g.*, John Crawford, *Lesson Unlearned?: Regulatory Reform and Financial Stability in the Trump Administration*, 117 COLUM. L. REV. F. 127, 128 (2017) (discussing provisions of the CHOICE Act that will "undermine the financial stability of the United States").

205. Financial CHOICE Act of 2017 § 818. The CHOICE Act makes similar revisions in the context of CFPB, allowing parties to terminate administrative proceedings and instead require CFPB to file their claims in federal district court and also making revisions to the process and procedures for challenging CFPB Civil Investigative Demands. *Id.* §§ 715–716.

206. *Id.* § 820.

207. Velikonja, *supra* note 195, at 319 (outlining changes undertaken by the SEC to address fairness challenges and to align agency proceedings more closely to those in federal court).

208. The CHOICE Act's creation of an Enforcement Ombudsman seems to mirror this goal by providing a neutral, independent entity. *See* Financial CHOICE Act of 2017 § 818. While the specific powers and role of the Enforcement Ombudsman are not fully defined, it is described more as a liaison

guardian trustee from an unrelated, neutral body.[209] ALJs would have the benefit of hearing objections that the defendant may be hesitant to raise (especially if the defendant is a regulated entity that will remain subject to the agency's authority). Defendants will have the benefit of an additional check on potential influences that an agency may have over the ALJ. Finally, the agency itself will benefit from the increased legitimacy and perception of impartiality that the guardian trustee brings to its proceedings.[210]

Another example of agency-related proceedings that may benefit from additional oversight from a guardian trustee involves quasi-judicial investigations and enforcement actions under Title IX.[211] Title IX addresses claims relating to sexual discrimination in federally funded education.[212] The Department of Education ("ED") enforces Title IX through its Office for Civil Rights ("OCR") division.[213] The ED issued a "Dear Colleague" letter in 2011 that interprets Title IX to require schools to investigate alleged sexual violence in a particular manner; failure to comply results in the end of federal funding.[214] Scholars highlight that this shift has resulted in the imposition of inquisition-like trials that remove many fundamental elements of due process,[215] as well as increased scrutiny and investigation of institutions receiving federal funding.[216]

between the SEC and parties subject to enforcement actions, rather than a true guardian trustee that appears and has standing to be heard within the administrative proceeding.

209. To avoid separation-of-powers concerns, the guardian trustee in this context should be structurally oriented within the executive branch but outside of (or carefully insulated within) the specific agency that is bringing the enforcement action. *See supra* Section II.B.

210. A guardian trustee may not be necessary or cost effective to implement in every action; however, certain categories of cases could automatically qualify. Alternatively, or in addition, the guardian trustee could be available only upon motion by the defendant or as ordered by the ALJ.

211. Title IX of the Educational Amendments of 1972, Pub. L. 92-318, title IX, § 901, 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681(a) (2018)).

212. *See* NORMA V. CANTU, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE (1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html [https://perma.cc/ZZ8R-QWCF].

213. *Id.*

214. *See* RUSSLYNN ALI, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/ZZ8R-QWCF]. On September 22, 2017, the Acting Assistant Secretary for Civil Rights of the U.S. Department of Education issued a letter withdrawing the Obama-era Dear Colleague letters referenced herein. *See* CANDICE JACKSON, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [cs://perma.cc/ZZ8R-QWCF]. It remains uncertain at this time how future proceedings will be impacted by this policy shift and handled by the ED.

215. *See, e.g.*, Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 901 (2016) (identifying the bureaucratic regime the ED imposed in sexual assault cases); Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 19 (2017) ("[I]n other words, the Special Examiner was simultaneously the investigator, the prosecutor, and the judge who determined guilt.").

216. Nathan P. Miller, Dear Colleagues: Examining the Impact of Title IX Regulation, Investigation, and Public Scrutiny on Higher Education Administrators 103 (2018) (unpublished Ph.D. dissertation, University of Pennsylvania), https://search.proquest.com/docview/2099202194 [https://perma.cc/2553-K4KY].

A guardian trustee could mitigate some of the growing concern relating to this process, both at the school investigation level for the individual parties, and also at the enforcement level against schools by navigating the compliance relationship between the ED and individual institutions.[217] In an evolving legal environment that faces criticism about process and procedure, adding the guardian trustee might provide participants with a welcome layer of neutrality and oversight.

B. *Criminal Proceedings*

A guardian trustee could also be designed to address systemic integrity concerns in certain types of criminal proceedings. Scholars have dedicated their careers to highlighting the incentive problems and rampant inequalities that lay at the heart of the criminal justice system.[218] While the addition of an independent voice cannot possibly solve the persistent and deeply entrenched challenges of that system, it could provide some benefit in specific instances. For example, in capital cases, where the stakes are particularly high, a guardian trustee could ensure that the substantive and procedural protections afforded to capital defendants are maintained.[219] If implemented correctly, the addition of a guardian trustee at the trial stage could reduce the number of constitutional violations that occur and even provide the added benefit of reducing post-conviction claims relating to constitutional deficiencies.

Similarly, a guardian trustee could be assigned to oversee the plea-bargaining process. Not unlike the settlement context described above, when the court is presented with a plea bargain it may not be provided with a complete perspective of the plea's reasonableness or whether the plea was

217. The Title IX context may pose structural and logistical challenges for implementation of a guardian trustee. However, each form of guardian trustee can be designed creatively to meet the specific requirements of the system. In this instance, the potential integrity concerns relate to public perception of quasi-judicial proceedings addressing alleged sexual assault, as well as agency enforcement action against educational entities that may be improperly imposed beyond the jurisdictional boundaries of the agency's delegated authority. A guardian trustee could be strategically deployed to address the trial-level concern by fielding and voicing complaints related to procedural fairness and providing a post-trial summary and evaluation to the OCR. The same guardian trustee could remain involved in a limited category of agency-level proceedings as the institution is investigated. Its presence could make sure that the ultimate decisionmaker receives complete information about the institution's handling of the incident and compliance with applicable guidelines.

218. *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051 (2016) (describing shortcomings in the American criminal justice system from an institutional design perspective).

219. *See* Jonathan F. Mitchell, *Capital Punishment and the Courts*, 130 HARV. L. REV. 269, 272 (2017) (identifying procedural and regulatory elements that increase arbitrary and concerning outcomes in capital cases).

negotiated fairly.[220] This problem is magnified by the likelihood of representation and information disparities between the prosecution and the defense.[221] If a guardian trustee had standing before the court about the substance or process of a particular plea bargain, the parties would be incentivized to act reasonably and the court would be given a more complete set of facts to evaluate.

A guardian trustee may also remedy chronic systemic abuse in the context of *Brady* claims addressing prosecutorial misconduct. In *Brady v. Maryland*,[222] the Supreme Court held that the Constitution requires prosecutors to turn over material, exculpatory evidence to the defendant prior to trial or sentencing.[223] In the decades since *Brady* imposed a fundamental disclosure requirement, scholars and practitioners have consistently highlighted that prosecutors continue to withhold *Brady* evidence.[224] One persistent problem involves identifying and challenging violations. While some jurisdictions have "open-file" discovery standards that allow defendants to know whether the prosecution disclosed sufficient evidence, in other jurisdictions the only option to challenge disclosures involves the court reviewing *in camera* whether a violation occurred.[225] Defense advocates claim that the existing disclosure and investigation system is inadequate, and severely disadvantages those seeking to raise a *Brady* claim.

Commentators advance a number of potential solutions, including increased penalties for prosecutors found to have committed *Brady* violations or introduction of increased monitoring within the prosecutor's office.[226] The problem with such solutions is that there is little evidentiary support for their

220. *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1063–65 (2016) (describing inherent inaccuracies in guilty pleas).

221. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 475 (2007) ("Lawyers carrying caseloads that far exceed national standards cannot adequately consult with their clients or provide sufficient investigation."); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631–32 (2013) (explaining the impact that limited public defender resources have on representation).

222. 373 U.S. 83 (1963).

223. *Id.* at 87.

224. Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 4 (2015) (outlining scholarly criticism of ways in which the *Brady* doctrine is unclear and does not adequately prevent prosecutorial efforts to withhold evidence).

225. *Id.* at 49. *But see* Ben Grunwald, *The Fragile Promise of Open Discovery*, 49 CONN. L. REV. 771, 824 (2017) (identifying little beneficial impact in states that implement open-file discovery). Members of the judiciary have also recognized disclosure challenges in the *Brady* context and suggest that the court is in the best position to remedy shortcomings. *See* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.").

226. *See, e.g.*, Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 48 n.13 (2014) (collecting proposed reform ideas). *But see* Connick v. Thompson, 563 U.S. 51, 54 (2011) (denying civil liability against prosecutors for failure to train in response to *Brady* violations).

effectiveness[227] and they do not, alone, remedy the erosion of public trust in the process. To date, penalties are not routinely enforced, and increased prosecutorial monitoring will provide relief only if there is trust that prosecutors are capable of policing their own behavior.[228] Similarly, *in camera* review by the arbiter is effective only to the extent the defense bar has faith in the adequacy of that review, and the court can be certain that the prosecution has provided it with all of the critical evidence.[229]

Enter the guardian trustee. A neutral watchdog could raise and investigate *Brady* claims by reviewing the disputed evidence, collecting information from both the defense and prosecution, and presenting a summary to the court on the record. The addition of a guardian trustee in this context reduces the administrative burden on the court, while also adding a layer of independence by minimizing the prosecutor's control over the disclosure process. Most importantly, a guardian trustee could provide much-needed independent oversight and increase the prosecutors' incentives to make sufficient disclosures upfront, thereby reducing the overall number of *Brady* violations that defendants must challenge.

As explored in Part II, guardian trustees benefit from having certain core characteristics and powers. And while these characteristics and powers are important to maintain, each form of guardian trustee may require specialized guidelines so as to fit within the system they are intended to protect. In the criminal context, for example, the role of the guardian trustee must be designed in a way that does not influence the jury by giving the impression that its opinions are the authority on what is "the law," similar to the arbiter. Juries may find the addition of a guardian trustee to be confusing, and as a result perhaps the role of the guardian trustee in criminal cases should be limited. One option is to permit only a "silent" role in the courtroom, by which the guardian trustee may submit written objections or motions to the parties and court for

227. *See, e.g.*, Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 572 (2011) ("Contrary to the Supreme Court's assumption . . . experience shows that prosecutors are not disciplined—either internally by their Offices or externally by court or bar disciplinary committees—for violating their *Brady* or other due process obligations during criminal proceedings."); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 285 (2004) ("All of these reforms and proposals, even if fully implemented (and funded where necessary) still would not remedy prosecutorial misconduct.").

228. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1069 (2014) (highlighting the likelihood that inexperienced prosecutors place undue focus on winning and are more adversarial and uncompromising than more experienced prosecutors, which may also make them less likely to comply with disclosure obligations).

229. Unfortunately, prosecutors have shown a willingness to withhold information from the court in addition to the defense. *See* Report to Court at 3–4, Texas v. Morton, No. 86-452-K26 (D. Tex. Dec. 19, 2011) (outlining the material evidence that the prosecutor withheld from both the defense and, more importantly, the trial court during *in camera* review for a *Brady* challenge).

consideration outside of the jury's presence. The purpose of the guardian trustee is to alert the parties and arbiter to circumvention of the system's rules and procedures, all of which could be established without taking an active role before the jury.

CONCLUSION

Requiring a guardian trustee to appear in every court proceeding would be unwanted and superfluous. When there is a risk that the purportedly adverse parties will take advantage of a system, however, and when the arbiter has insufficient information or incentive to successfully address such risks, the guardian trustee can add invaluable protection. The U.S. legal system already supports entities that are neither parties nor arbiters, including the trustees described herein and, specifically, the Program. The time has come to incorporate the guardian trustee concept into a broader discussion of institutional design tools. Although the guardian trustee may not be superior in all circumstances, it is a uniquely beneficial device if implemented appropriately. Designing, deploying, and ultimately embracing the guardian trustee role in additional contexts will maintain and potentially enhance stakeholders' trust in the integrity of at-risk systems.